Parallel Behaviour under EU Antitrust Law

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General Principles

Parallel Pricing on the German Gas Station Market

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General Principles

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits:

- agreements between undertakings, decisions by associations of undertakings and concerted practices
- which may affect trade between Member States and
- which have as their object or effect the prevention, restriction or distortion of competition within the Common Market
General Principles

What is an „Agreement“?

- „It is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way“ (*PVC II*)
- „An agreement can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market“ (*Vitamins*)
General Principles

What is a „Concerted Practice“?

- „a form of coordination which [...] knowingly substitutes practical coordination for the risks of competition“ (*ICI-Dyestuffs*)
- „any direct or indirect contact between such operators, the object of effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market“ (*Suiker Unie v Commission*)
General Principles

■ Unilateral conduct

„A distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within [Article 81(1)] of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article.“ (General Court, Bayer/Adalat, confirmed by the ECJ, 2004)
Conclusion

- Parallel behaviour is not sufficient, in itself, to establish the existence of an agreement/concerted practice
- “[…] parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although Article [101] of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.” (Ahlström, 1993)
General Principles

■ US Antitrust Law

○ Similar position in the US

○ “While a showing of parallel business behaviour is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establish[ing] agreement or […] itself constitut[ing] a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful […]. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behaviour: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.“ (Bell Atlantic v Twombley 2007)
General Principles

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- Sector inquiry into the fuel sector by the German Federal Cartel Office (FCO)
- Market structure
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- FCO’s findings (1)
  - Oligopoly between BP (Aral), ConocoPhillipps (Jet), ExxonMobil (Esso), Shell and Total
  - Account for approx. 65% of fuel sales in Germany
  - Very transparent market structure
    - prices can be easily observed by all market participants
    - prompt reaction to any changes
    - many contractual links between competitors making it difficult for oligopoly members to break away
Parallel Pricing on the German Gas Station Market

FCO’s findings (2)

- No agreements or concerted practices
- The very transparent market structure enables uniform price setting
  - price setting patterns accepted by all market participants
  - „the market structures are such that agreements are not necessarily required as there is, so to speak, an implicit understanding between the companies. This leads to excessive prices.“ (Andreas Mundt, the President of the FCO)
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- Merger control
  - Total/Ostdeutsches Tankstellengeschäft OMV, April 2009: Prohibition by the FCO, overruled by the Higher Regional Court in Düsseldorf
  - Shell/Lomo, May 2009: clearance under conditions
  - Shell/Edeka: clearance after warning notice and a refiling by the parties in amended form

- Art. 102 TFEU, sections 19, 20 of the German Act against Restraints of Competition
  - price squeeze
  - bundling

- Regulatory measures?
Thank you for your attention!

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