Types of abuses and anti-competitive agreements in regulated sectors

Zagreb – 16 March 2006

Tasneem Azad, DotEcon Ltd

Structure of presentation

- Abusive conduct:
  - Excessive pricing,
  - Predatory pricing,
  - Price discrimination,
  - Price and margin squeeze,
  - Discounts,
  - Refusal to supply,
  - Bundling, and
  - Cross-subsidy.
- Anti-competitive agreements
- Vertical restraints

Abusive conduct

- Abusive conduct generally falls into one or both of the following categories:
  - conduct which exploits customers or suppliers (for example, excessively high prices), or
  - conduct which amounts to exclusionary behaviour, because it removes or weakens competition from existing competitors, or establishes or strengthens entry barriers, thereby removing or weakening potential competition.
- In certain circumstances, Article 82 or corresponding domestic prohibitions may apply where an undertaking that is dominant in one market commits an abuse in a different but closely associated market (*Tetra Pak II*).

Excessive pricing

- The charging of excessive selling prices (or conversely, the extraction of unfair or excessively low buying prices). Excessive prices would have no reasonable relation to the economic value of the product supplied.
- **Tests**: An undertaking's prices in a particular market can be regarded as excessive if they allow the undertaking to sustain profits higher than it would expect to earn in a competitive market ('supra-normal profits'). Excessive prices will be abusive only if they have persisted in the absence of continuing successful innovation and/or without stimulating successful new entry or significant loss of market share.

•econ

Predatory pricing

- Predatory pricing is a strategy whereby an undertaking deliberately incurs short term losses so as to eliminate a competitor and be able to charge excessive prices in the future.
- Consumers may benefit in the short term from lower prices, but in the longer term weakened competition will lead to higher prices, reduced quality and reduced choice.
- **Tests**: can the undertaking recover long run incremental costs? is the undertaking's intention to eliminate a competitor? would it be feasible for the undertaking to recover its losses?

econ

Price discrimination

- An undertaking can be said to be discriminating when it applies dissimilar conditions to equivalent transactions.
- Price discrimination may be of concern if it is without objective justification, which is generally defined as bearing no or limited relation to the costs associated with the service to the customer.
- **Tests**: is the effect to exclude competitors from the market? is the undertaking (or group of undertakings) exploiting market power by charging excessively high prices to certain customers?

•econ

Price and margin squeeze

- Where a vertically integrated undertaking is dominant in an upstream market and supplies a key input to undertakings that compete with it in a downstream market, the undertaking could subject competitors to a price or margin squeeze by raising the cost of the key input and/or by lowering its prices in the downstream market.
- **Test**: would the dominant undertaking be profitable in the relevant downstream market if it had to pay the same input prices as its competitors? Cost allocation is critical to this test to ensure costs are not artificially allocated to upstream activities. Use of historic costs, LRIC etc.

•econ

Discounts

- Discounts are a form of price competition. However, where they do not reflect underlying cost differences they are a form of price discrimination. Examples include:
  - loyalty rebates, where the discount (or level) is dependant on the customer not taking supplies from competitors,
  - discounts which are calculated across a range of markets including those where the undertaking is dominant,
  - volume rebates that are calculated on the basis of total expenditure e.g. across competitive and regulated markets with discounts applied to spending in the competitive market; and
  - discounts which are targeted at a narrow group of customers, particularly when only to those who have the ability to switch to alternative suppliers.
- **Test**: As with price discrimination.

Refusal to supply

- A dominant undertaking's refusal to supply may be in breach of competition law if it cannot be objectively justified. Types include:
  - Discriminatory refusal,
  - Refusal to grant access for development of new services,
  - Withdrawal of access from an existing customer,
  - Refusal to supply information, and
  - Behaviour short of refusal to supply.
- **Test**: Assess objective justifications, for example, safety reasons, to protect network integrity, because of the lack of creditworthiness of the operator seeking access or because of a lack of capacity. Relevance of essential facility.

Bundling

- Bundling generally involves the tying of the supply of one product to the supply of other products. Types include:
  - Tying sales of competitive and non-competitive products, or
  - Physical bundling of products that could be supplied individually.
- **Test**: Need to balance any exclusionary effects against any countervailing benefits, such as lower prices resulting from the exploitation of economies of scope.

Cross subsidy

- A cross subsidy occurs where an undertaking uses revenues from one market to subsidise losses in another market.
- **Tests**: A cross-subsidy will normally be judged to occur where an undertaking's revenues from an activity (for example, a new service) may be expected to fail to cover the costs associated with that activity over its *economic lifetime*.
- A group of services may share common costs which, although the services are individually priced above LRIC, are not covered. A combinatorial test would establish whether the prices of services in groups that share common costs cover both the incremental and common costs of supplying those services.

econ

Anti-competitive agreements

- Agreements that can have an appreciable adverse effect on competition could include those that:
  - directly or indirectly fix purchase or selling prices or any other trading conditions,
  - limit or control production, markets, technical development or investment,
  - share markets or sources of supply,
  - apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or
  - make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Vertical restraints

- A vertical restraint is a provision in an agreement made between undertakings operating at different stages in the supply chain that restricts the commercial freedom of one or more of the parties.
- Vertical restraints may have pro-competitive effects and lead to efficiency benefits in cases where inter-brand competition is fierce. Intra-brand competition is important, but less so than inter-brand competition.
- Vertical restraints may have anti-competitive effects where inter-brand competition is weak and there are barriers to entry at either of the levels.

Thank you for your attention

Tasneem Azad,
DotEcon Ltd,
17 Welbeck Street,
London,
W1G 9XJ,
United Kingdom.

Tel: 0044 207 467 2079
Mob: 0044 789 987 5143
Fax: 0044 207 467 2080
Email: tasneem.azad@dotecon.com
Web: www.dotecon.com