

Horizontal restraints - Cartels

CARTELS AND COMPETITION LAW

- Co-operation between independent companies
- Naked restraints vs other forms of cooperation
 - Joint production
 - Strategic alliances
 - Joint ventures
- Cartel: Acting as if in competition vis-à-vis the market, but agreed
- Many large-scale cartels uncovered
- Large fines: St Gobain 896 mill €

MAIN LEGAL ISSUES

- Substantive borderline between lawful independent behaviour and agreements
 - What contact may competitors lawfully have?
 - Is any contact prohibited, or requirement that harm is demonstrated?
- Procedural aspects – evidence required?
 - May parallel behaviour constitute sufficient evidence?
- Investigative power
 - Dawn-raids
- Sanctions
 - Contribution?
 - Personal liability
 - Leniency (amnesty)
 - Settlement procedure

”CLASSICAL CARTELS”

- Price fixing
 - Price fixing in any form is caught
- Buyers cartels
 - Contrast: Joint purchasing
- Horizontal market sharing
- Quotas and other restrictions on production
 - ”Crisis cartels” – case C-209/07 Competition Authority v Beef Industry Development Society
- Collusive tendering
- Exchange of information
- Agreements on terms and conditions

CO-OPERATION – ”CONSPIRACY”

- Agreements

- Complex cartels

- ”Concerted practices”:

- Two elements:

- Mental consensus
 - Based on contact

- Dyestuffs: [concerted practice amounts to]

"a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition"

CO-OPERATION – ”CONSPIRACY”

- Suiker Unie (40/73): [The Treaty prohibits]

"any direct or indirect contact between such operators, the object or 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"

WHEN IS THE CARTEL PROHIBITION INFRINGED?

- Concerted practice presupposes: *concertation, market conduct* and *causation between the two*
- But:
 - Uncertainty about competitors' strategy eliminated if revealed: presumption that knowledge impacts on competition – burden of proof shifts.
 - And: Exchange of information with anti-competitive object
 - Infringed when exchange has taken place, cf. Hüls
 - Hüls (C-199/92), para 162:

”the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market.”

JOINT LIABILITY – PARTICIPATION IN CARTELS

- Hüls had participated on a meeting, and

"since the Commission was able to establish that Hüls had participated in meetings between undertakings of a manifestly anti-competitive nature, it was for Hüls to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. ."

- Documentation that the undertaking has not shared its competitors' purpose
- Rule: "State that you will leave, and leave if the discussion does not cease"

THIRD PARTY "INFORMATION CENTRAL": CONTRIBUTION?

- Organic peroxides: AC Treuhand (Switzerland) as "secretariat"
- € 1000 fine (first time offence)
- Commission press release :
 - "the message is clear: organisers or facilitators of cartels, not just the cartel members, must fear that they will be found and heavy sanctions imposed from now on."
- Upheld by Court of First Instance (T-99/04, 8 July 2008)

ATTEMPT – AN EXAMPLE

- *Crandall*: "I think it's dumb as hell for Christ's sake, all right, to sit here and pound the **** out of each other and neither one of us making a **** dime!"
- *Putnam*: Well...
- *Crandall*: I mean, you know, goddam, what the hell is the point of it?
- ...
- *Putnam*: Do you have a suggestion for me?
- *Crandall*: Yes, I have a suggestion for you. Raise your goddam fares 20 percent. I'll raise mine the next morning.
- *Putnam*: Robert, we...
- *Crandall*: You'll make more money and I will, too.
- *Putnam*: We can't talk about pricing!
- *Crandall*: Oh ****, Howard. We can talk about any goddam thing we want to talk about".

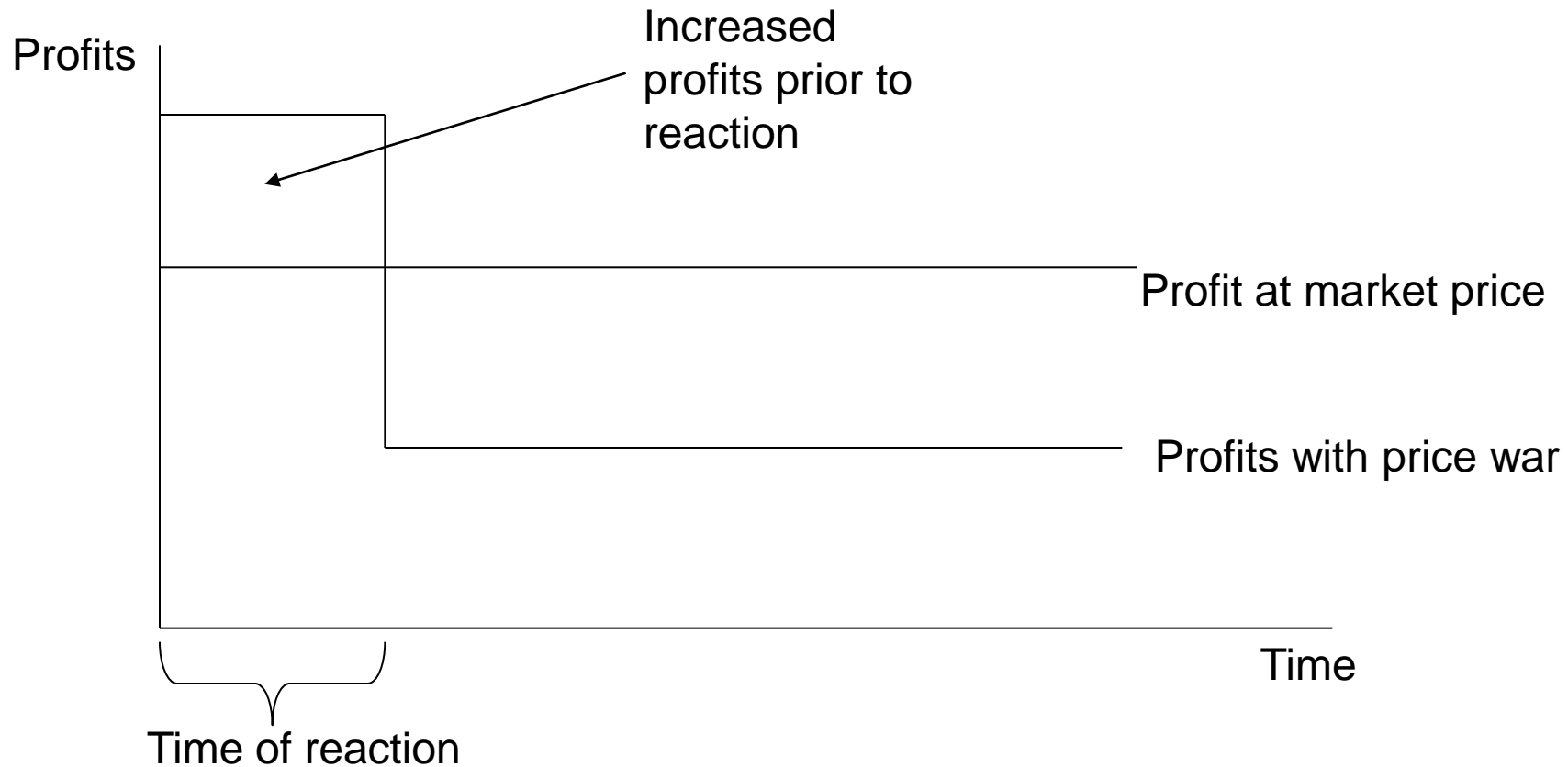
EXCHANGE OF INFORMATION

- Information on future conduct always a problem: Hüls (C-199/92 para 160:
 - "although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or 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, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question..."
- Historical information: Case by case analysis
- "Facilitating practise"

EXCHANGE OF INFORMATION – HISTORICAL DATA

- The problem: Increased transparency in concentrated markets
- Oligopolies:
 - Transparent
 - Relatively few competitors
 - Stability
 - Barriers to entry
 - Long-term profit strategy
 - Homogenous products
 - Fierce competition/risk of price war
- Increased transparency: Shorter trigger time

TIME OF REACTION



UK TRACTORS: ARTIFICIAL TRANSPARENCY

- The case: Exchange of historical data in a concentrated market
- Two-step analysis:
 - Market structure
 - Nature of information
- Result: Knowledge on competitors' sales would reduce the “remaining competition” i.e. reduce time of reaction
- The point: Existing transparency made the market vulnerable to artificial increased transparency
- Requirement: Potential impact

ELEMENTS OF THE ANALYSIS

- Historical/future information
- Nature of information: Price part. harmful
- Degree of concentration & remaining competition
- Outdated? + one year old
- Aggregated?
- Available to anybody, also customers??
- Rule of thumb:
 - Information more than one year old
 - Aggregated information

PROOF

- Burden of proof on the Commission
- Standard of proof
- Woodpulp (C-89/85):
 - Para 71
 - ” parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct “
 - Para 70: Required
 - ”a firm, precise and consistent body of evidence of prior concertation a firm, precise and consistent body of evidence of prior concertation”

COOPERATION AGREEMENTS - EXAMPLES

- Joint ventures
 - Full function joint ventures
- Research and development agreements
- Production agreements
- Purchasing agreements
- Commercialisation agreements
- Standardisation agreements