

Vertically related markets
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October 2019

**TRAINING OF NATIONAL JUDGES IN EU
COMPETITION LAW**
Training seminar on underlying economic
principles and concepts of competition law



Facultad de Derecho
Universidad Zaragoza

Topic: “Vertically related markets”

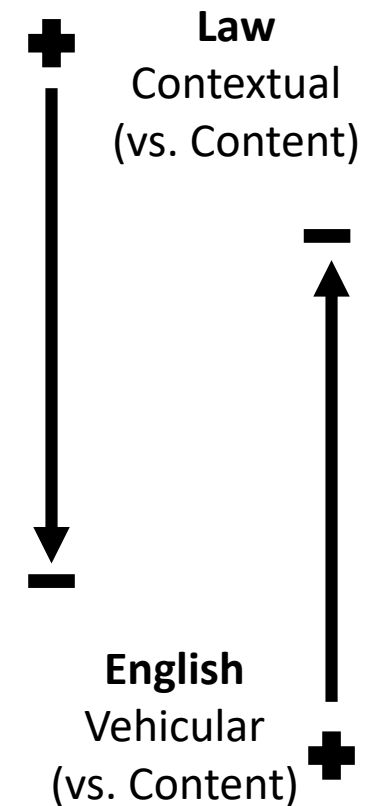
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Law School, University of Valencia, October 20th, 2018

Preliminary Remarks

- Law and English as Foreign Language: Methodologies

- EFL – English as Foreign Language
- ESP – English for Specific Purposes
- CLIL – Content and Language (English) Integrated Learning
- EMI – English as a Medium for Instruction



Summary

- Connecting to the Commission Notice (1997) on the definition of the relevant market for the purposes of Community competition law
- Judgment of the General Court 15 December 2010 in Case T-427/08, *CEAHR v European Commission (I)*
 - Origin: APPLICATION for annulment of Commission Decision C(2008) 3600 of 10 July 2008 rejecting the complaint lodged by the Confédération européenne des associations d’horlogers-réparateurs (CEAHR) in Case COMP/E-I/39097
- “After-history” of the case: Judgment of the General Court 23 October 2017 in Case T-712/14 *CEAHR v European Commission (II)*

Commission Notice (1997) on Definition of Relevant Market

- Product market definition (Nos. 15-19 and 25-17) → (demand) substitution

“56. There are certain areas where the application of the principles above has to be undertaken with care. This is the case when considering **primary and secondary markets**, [...]. The method of defining markets in these cases is the same, i.e. assessing the responses of customers based on their purchasing decisions to relative price changes, *but taking into account as well, constraints on substitution imposed by conditions in the connected markets*. A narrow definition of market for secondary products, for instance, spare parts, may result when compatibility with the primary product is important. *Problems of finding compatible secondary products together with the existence of high prices and a long lifetime of the primary products* may render relative price increases of secondary products profitable. A different market definition may result if significant substitution between secondary products is possible or if the characteristics of the primary products make quick and direct consumer responses to relative price increases of the secondary products feasible”.

2010: Case T-427/08, CEHR v European Commission (I)

- Facts of the case and forms of order sought by the parties
- Law issues of the case - Overview
 - In depth, definition of the relevant market where vertical related market: after-markets
 - Size of the relevant market(s)
 - Product dimension and definition of the relevant market
 - Description of the product dimension of the relevant market: “luxury/prestige watches” vs. “watches worth repairing”
 - When after-markets are separate relevant markets of the principal relevant market
 - » Assessment of after-market for spare parts
 - » Assessment of the after-market for repair and maintenance services

Facts

- CEAHR lodged a complaint with the European Commission against the Swiss watch manufacturers
- Existence of an anticompetitive agreement or concerted practice (Art. 101(1) → Abuse of dominant position (Art. 102) = Refusal to continue to supply spare parts to members of CEAHR
- European Commission rejected the complaint because of insufficient Community interest → 4 Reasons:

Facts

1. Complaint concerns a market (segment) of limited size → limited economic importance
2. No evidence of anticompetitive agreement or concerted practice + selective distribution systems coverage by BERVA
3. **The two after-markets (spare parts // repair and maintenance services) do not constitute distinct (relevant) markets than the primary market → no abuse of dominant position → primary market highly competitive**
4. Opportunity reasons + Decentralisation of enforcement possible

Law issues - Overview

Applicant: five pleas in support of its action

1. First plea:
 - a. An erroneous assessment of the existence of a Community interest and
 - b. Illegalities in relation to the finding that the size of the market to which the complaint relates, and thus its economic importance, are limited.
2. Second plea: An erroneous definition of the relevant market.
3. Third plea: an infringement of Article 81 EC (Art. 101 TFEU).
4. Fourth plea: an infringement of Article 82 EC (art. 102 TFEU).
5. Fifth plea: A misuse of powers because of:
 - a. an over-late reliance on the lack of Community interest,
 - b. a distortion of the content of the complaint and
 - c. a lack of objectivity in the Commission's investigation.

Law issues - Overview

Court: reorganises the five pleas of applicant as follows:

1. (First Plea, b.) Size of the market to which the complaint relates and its economic importance.
 2. (Second plea) The definition of relevant market.
 3. (Third plea) Infringement of Article 81 EC (Art. 101 TFEU).
 4. (Fourth plea) Infringement of Article 82 EC (art. 102 TFEU).
 5. (First Plea, a.) The assessment of the existence of a Community interest.
- **Not dealt** with (Fifth plea): Misuse of powers by the European Commission

Size of the relevant market(s)

- Issue: Exercise of Discretion by the European Commission: limits (28)
- European Commission: Limited size and economic importance of the market: After-markets only a insignificant part of the primary market (24-25)
- May be... BUT European Commission
 - Has a duty to give reasons
 - Shall take into account al relevant matter of law and of fact – included the ones brought by CEAHR to its attention

Size of the relevant market(s)

- And... the European Commission failed (49)
 - To take into account the geographical aspect of the definition of the relevant market (30-34)
 - To ground the assertion of the limited size of the market to which the complain relates (35-48)
 - Identity of the market
 - Figures or estimates relating the size of the market: “matryoshka doll” estimation (40)
 - No justification of such a lack of evidence: difficulties in obtaining information, combination with primary market, no need because primary market is competitive

Product dimension and definition of the relevant market

- Again, exercise of discretion by the European Commission: only limited review, but reviewed, by Courts (65-66)
- Definition of relevant market (67-69):
 - product market: interchangeability or substitutability → demand substitution → range of products viewed as substitutes by consumers → Nos. 17 and 56 of the Commission Notice

Product dimension and definition of the relevant market

- Issue: does the European Commission failed to define the relevant market properly because...? (72)
 - wrongly substitution of “luxury/prestige watches” for “watches worth repairing”
 - wrongly consideration that the watch repair and maintenance services market and ‘the spare parts market’ did not constitute separate markets
 - spare parts which are specific to a given brand are not substitutable, with the result that every producer holds a monopoly in respect of the specific spare parts which it produces

Product dimension and definition of the relevant market

- Description of the product dimension of the relevant market: “luxury/prestige watches” vs. “watches worth repairing” (73-75) → NOT FAILED
 - Relevant market wrong defined because of substituting “luxury/prestige watches” (European Commission) for “watches worth repairing” (applicant): artificial modification of the scope of the complaint
 - Not the case: European Commission take price into account: cost between EUR 1,500 and EUR 4,000 matches both: luxury/prestige watches = watches worth repairing

Product dimension and definition of the relevant market

- When after-markets are separate relevant markets of the principal relevant market
 - Assessment of after-market for spare parts → FAILED
 - Assessment of the after-market for repair and maintenance services

Product dimension and definition of the relevant market

- Assessment of after-market for spare parts
 - The spare parts market for primary products of a particular brand may not be a separate relevant market in two situations (79):
 - first, if it is possible for a consumer to switch to spare parts manufactured by another producer;
 - second, if it is possible for the consumer to switch to another primary product in order to avoid a price increase on the market for spare parts.
 - OK: consistent with case-law and Commission Notice: in the event of a moderate and permanent increase in the price of secondary products, a sufficient number of consumers would switch to other primary or secondary products, in order to render such an increase unprofitable → same relevant market. HOWEVER...
 - Issue: How does the Commission apply the test? **WRONGLY**

Product dimension and definition of the relevant market

- Assessment of after-market for spare parts (continue)
 - Possibility for the consumer to switch to spare parts manufactured by another producer (84-90) – not established: the Commission assumes in provisional position no substitutability and there is no evidence of substitutability → and even if..
 - Possibility for the consumer to avoid price increases for spare parts by switching to another primary product (91-108):
 - for consumers, relevant is the cost of after-sales services; Commission takes no into account that the cost of after-sales services over the life time of a watch is minor in comparison with the initial cost of a luxury/prestige watch itself, and that the consumer will consider such costs as a relatively minor element in the price of the overall package; existence of a market for second-hand watches cannot compensate for that omission in its assessment → purely theoretical possibility
 - Commission does not established that reason why it is necessary to treat the primary market and the after markets as a single unified market ('system market') is that price increases on the after markets cause a shift in demand to products from other manufacturers on the primary market, which would render such an increase unprofitable → mere possibility

Product dimension and definition of the relevant market

- When after-markets are separate relevant markets of the principal relevant market
 - Assessment of after-market for spare parts
 - Assessment of the after-market for repair and maintenance services → FAILED

Product dimension and definition of the relevant market

- Assessment of the after-market for repair and maintenance services
 - if certain economic operators are specialised and are active solely on the market linked to the primary market or on the after market → strong indication of the existence of a specific market
 - no case-law on definition of the relevant market in case of after-markets has been taken into account → no analysis seeking to determine whether consumers may avoid a price increase for repair and maintenance services by switching to primary products from other manufacturers has been done
 - It is assumed (and no evidence against is provided) that the cost of after-sales services was minor in comparison with the initial cost of the watch itself and that, ‘the consumer [would] not consider the cost of after-sales servicing as a criterion when choosing a watch’

Product dimension and definition of the relevant market

- When after-markets are separate relevant markets of the principal relevant market

120. “Since the Commission’s findings that the watch repair and maintenance services market and the market(s) for spare parts do not constitute relevant markets to be examined separately are vitiated by manifest errors of assessment,”

... Commission’s conclusions concerning the low probability of an infringement of Article 81 EC (142) and Article 82 EC (152) are vitiated, too

2017: Case T-712/14 CEAHR v European Commission (II)

- Origin: APPLICATION for annulment of Commission Decision C(2014) 5462 final of 29 July 2014 rejecting (again) the complaint lodged by CEAHR in Case AT.39097
- Geographic market: geographic scope of which covers the European Economic Area (EEA)
- Product market: Primary market (= market for the sale of “prestige watches” → watches sold at a price exceeding EUR 1,000) and secondary markets (= market for the supply of maintenance and repair services // market for the supply of spare parts) are separate and distinct markets → very limited substitutability services and parts not generally interchangeable across brands

2017: Case T-712/14 CEAHR v European Commission (II)

- Personal feeling: no worth for the European Commission to discuss the definition of the relevant market → there are (substantive) reasons to reject the complaint of the applicant
 - the selective repair systems and the refusal to supply spare parts are objectively justified, non-discriminatory and proportionate
 - It does not exist an abuse resulting from the refusal to continue to supply spare parts
 - there is no market power (monopoly position) of the Swiss watch manufacturers
 - there is no evidence of the likelihood that the refusal to supply spare parts was the result of an agreement or a concerted practice

Thank you very much for your attention!

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