

# Crisis Cartels: “Orderly” Downsizing and the Public Interest

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# Post-2008 Economic Crisis

- ▶ Record Unemployment
- ▶ Failing Businesses
- ▶ Austerity Measures
  
- ▶ Popular conscience: Some form of market failure, and in some views—the competition regime shares part of the blame



# Non-economic Concerns in 101

- ▶ Industrial/social restructuring may be possible through coordinated activity
- ▶ Yet such activity (apparently) precluded by 101(1)
- ▶ What of 101(3), and the role of social concerns?



# Three Cases

- ▶ Synthetic Fibres (Commission, 1984)
  - ▶ Stichting Baksteen (Commission, 1994)
  - ▶ UK Dairy Price Initiative (2002, OFT/CAT 2011–12)
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- ▶ Compare: BIDS (Ireland 2003–2011)



# Synthetic Fibres and Stichting Baksteen

- ▶ Industry-wide crisis
- ▶ Permanent shift in consumer demand (not driven by economic cycles)
- ▶ Overcapacity
- ▶ Agreements to coordinate reduction in capacity



# Orderly Restructuring Approved

- ▶ More efficient plants will remain open (SF ¶ 34, SB ¶ 26)
- ▶ Coordination in restructuring permits it to be done in “acceptable social conditions” (SF ¶ 37, SB ¶ 27)
- ▶ Consumers will benefit (in the long term) by re-emergence of a competitive industry (SF ¶ 36, SB ¶ 29)
- ▶ Residual competition (non-parties, and non-domestic) (SF ¶ 41, SB ¶ 29)

# UK Dairy Price Initiative

- ▶ Decrease in consumption of milk (1 – 2% annually since late 1960s)
- ▶ Production of milk twice level of domestic consumption (remainder processed—cheese, butter, powder, etc.)
- ▶ Change in distribution (1980 doorstep 90% of households; 2003 large chains 65% of households)



# UK Dairy Price Initiative

- ▶ Four processors supplying the chains
- ▶ Overcapacity in processing industry
- ▶ Transparency of farmgate (i.e. amount paid to farmer) prices
- ▶ Homogeneous product
- ▶ Retailer margins on milk increased since 1994



# UK Dairy Price Initiative

## Dairy (Farming) Industry

- ▶ Retailers to subsidize the industry
- ▶ Political lobbying, public relations campaign
- ▶ Blockades of processors' and supermarkets' depots



# UK Dairy Price Initiative

- ▶ Price Initiatives Implemented
- ▶ 2002 Cheese (£200/metric ton)
- ▶ 2003 Milk (2 p/litre)
  
- ▶ A–B–C/“Hub and Spoke” Cartel (Processors as intermediaries), with Robin Hood elements

# Justification before the OFT

- ▶ The motivation was to financially assist the dairy farmers and the participants did not profit from the coordinated activity;
- ▶ The agreement was a result of the pressure imposed by the farmers' groups; and,
- ▶ The activity had implicit, if not explicit, governmental support.

# Article 101(3)

- ▶ improve the production or distribution of goods or to promoting technical or economic progress;
- ▶ allowing consumers a fair share of the resulting benefit;
- ▶ do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and,
- ▶ do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

# The Two Worlds of the Commission

- ▶ Pre-1999
  - Little (Thin) economic reasoning re justification of benefits
  - Synthetic Fibres
  - Stichting Baksteen
  
- ▶ Post-1999 (The Economic Approach)
  - Guidelines, para 13:
  - The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers

# Verifiability of Benefits

- ▶ Guidelines, para 56:

In the case of claimed cost efficiencies the undertakings invoking the benefit of Article 81(3) must as accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. They must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise .

# “Fair Share”

- ▶ “Fair” as a normative, not an economic concept
- ▶ Compare John Rawls *A Theory of Justice* (HUP, 1971; revised 1999), e.g. pp 11, 118 – 123.

# Fairness in EU Competition Law

- ▶ In 101(3)
- ▶ Policy linking clauses of other parts of the Treaties

# Wider Values in 101(3)

## ▶ Fairness

- Crisis situations: Total welfare not just consumer welfare (Ioannis Kokkoris and Rodrigo Olivares-Caminal *Antitrust Law Amidst Financial Crises* (Cambridge: Cambridge University Press, 2010) p 403—based on Williamson’s insight)

# Wider Values in 101(3)

- ▶ Cross Market and Intergenerational Values
  - Commission and Cross Market analysis—Guidelines, para 43
  - Compare UK Government *Green Book* pp 91 – 100
  - Also see the OFT's Concerns (*Article 101(3)—A Discussion of Narrow versus Broad Definition of Benefits: Discussion Note for OFT Breakfast Roundtable* (2010))

# Wider Values in 101(3)

- ▶ Cost Internalization
- ▶ “Who benefits, pays”
  
- ▶ Similar to insight in fairness of internalizing full social costs of all good (e.g. in pollution control, product liability, etc.)

# Cost Internalization

- ▶ Present in Synthetic Fibres and Stichting Baksteen
- ▶ Customers of the industry pay social costs of the restructuring of the industry—not dumped on the social welfare system as a whole. (Plus controlled manner of restructuring allows for certainty of the outcomes, as opposed to the end of a war of attrition.)

# Cost Internalization

## ▶ Limits

- Overlap of past and future users of the product
- Requirement of internalizing as much of the costs as possible



# Non-Competition Considerations

TEU Article 3(3):

- ▶ The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

# But Competition Goals Cannot be Completely Discounted

- ▶ *Continental Can* para 24: “But if Article 3 (f) provides for the institution of a system ensuring that competition in the Common Market is not distorted, then it requires a fortiori that competition must not be eliminated”
- ▶ *Wouters* (Case C-303/99)
- ▶ These Pre-Lisbon Treaty cases

# Lisbon Treaty?

- ▶ President Sarkozy's remarks:

*Nous avons obtenu une reorientation majeure des objectifs de L'Union. La concurrence n'est plus un objectif de l'Union ou un fin en soi, mais un moyen au service du marché intérieur.*

# Institutional Considerations

- ▶ Who is to do the balancing?
- ▶ Competition Authorities?
- ▶ Member States' Governments

# *US v Topco Associates, Inc*

(1972) 405 US 596, 611-12, 92 S Ct 1126, 1135

If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision making. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

# Institutional Considerations

- ▶ **Competition Authorities**
  - Economics–focused
  - Some considerations not economic (“fairness”)
  - Limitations of economic analysis
- ▶ **Political Bodies**
  - Captured by rent–seeking interests
  - UK Dairy Initiative teaches this lesson

# Conclusion

- ▶ Wider-view of consumer and benefit
  - Some deference to economic thinking
- ▶ Giving something up
- ▶ Cost internalizing



Thank You

