



**Welcome**

Erik van Dijk

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# Welcome

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# Update Dutch Competition Law

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## Developments in 2007

- EUR 10 million in fines
- Amended Dutch Competition Act in force as of 1 October 2007
- Publication of new Leniency Guidelines on 9 October 2007
- Publication of new Remedy Guideline
- New NMa Fining Code

# Amendments to Dutch Competition Act

## Concentrations

- The NMa may now prohibit a concentration if it has reason to believe that the concentration “*will significantly restrict actual competition on the Dutch market or a part thereof, especially as a result of the creation or strengthening of a dominant position*”
- The old test was “*the creation or strengthening of a dominant position*”
- Cooperative joint ventures will now also be investigated

# Amendments to Dutch Competition Act

## Concentrations (*continued*)

- Penalties have been increased for violations of the merger control regime: maximum fine for non-notification is now €450,000 or, if more, 10 % of the company's (group) turnover
- Merging parties may now already propose remedies during the first phase of the NMa merger investigation

# Amendments to Dutch Competition Act

Broader investigative powers:

- The NMa has broader investigative powers, most notably the power to inspect the private homes of companies' employees;
- Fines for individuals/management
- Commitments

# Amendments to Dutch Competition Act

## Fines for management

- NMa may now also fine natural persons for giving instructions or exercising de facto leadership with regard to an infringement of the Dutch Competition Act.
- Maximum fine is €450,000.
- Sanctions will only be imposed if the company is also being fined.



# Amendments to Dutch Competition Act

## Fines for management (*continued*)

- “Giving instructions” or “exercising de facto leadership”
- Companies are not allowed to pay fines for individuals.
- Individuals can now also apply for leniency.

# Amendments to Dutch Competition Act

## Commitments

- NMa may now accept remedies offered by companies during an investigation into infringements of the Competition Act and include these as part of a decision.
- In principle no fines will be imposed in such a case.
- Non-compliance with commitments can however result in a maximum fine of 10% of the company's worldwide turnover.

# Amendments to Dutch Competition Act

## Increase of fines

- Examples of conduct for which fines have been increased to €450,000 or, if more, 1% of the total annual turnover:
  - Non-cooperation
  - Seal breaking
  - Provision of inaccurate data in notification
- Examples of conduct for which fines have been increased to €450,000 or, if more, 10% of the total annual turnover:
  - Failure to comply with decision on commitments
  - Failure to notify concentration
  - Implementation of a concentration without a license

# New Leniency Guidelines

- Depending on the circumstances of the case and the evidence provided the leniency applicant can get leniency status A, B or C.
- Reductions on fines vary from total immunity to 10% fine reduction.

# New Leniency Guidelines

Category	Rank	Force been used vis-à-vis other companies?	Investigation already started by NMa?	Fine reduction
A	1st	no	no	100%
B	1st	no	yes	60-100%
C	2nd et seq or force	maybe	maybe	10-40%

# New Leniency Guidelines

Individuals can obtain leniency in three different ways:

- By individual application for leniency, separate from the undertaking;
- By application for leniency together with one or more natural persons employed by the same undertaking. The application should be done independent of the undertaking; or
- By application for leniency by the undertaking. The leniency application by the undertaking must include an application from the natural persons employed by the undertaking. The individual must declare that he or she wishes to be considered a leniency co-applicant with the undertaking and independently fulfil the conditions for leniency.

# New Leniency Guidelines

- In principle employee can apply for leniency without informing his employer.
- Relationship between the leniency guidelines and employment law.
- Arguably a duty of the employee to allow his employer to apply for leniency before doing so himself, by informing his employer of his involvement in illegal cartel agreements.

## New NMa fining Code

- The Fining Guidelines 2001 have been revoked and replaced by the NMa Fining Code 2007.
- The Fining Code sets out how the NMa exercises its powers and performs its tasks with regard to the imposition of fines.
- It also gives background on the factors that are being taken into account in determining the level of the fines imposed (e.g. seriousness and duration of the conduct, aggravating and mitigating circumstances)



## Priority areas in 2008

In its 2008 agenda de NMa has indicated that it will focus on the following sectors:

- Healthcare
- Financial services
- Food and agri-business
- Energy
- Postal services markets

ICT no longer specific priority of NMa

## New developments in 2008

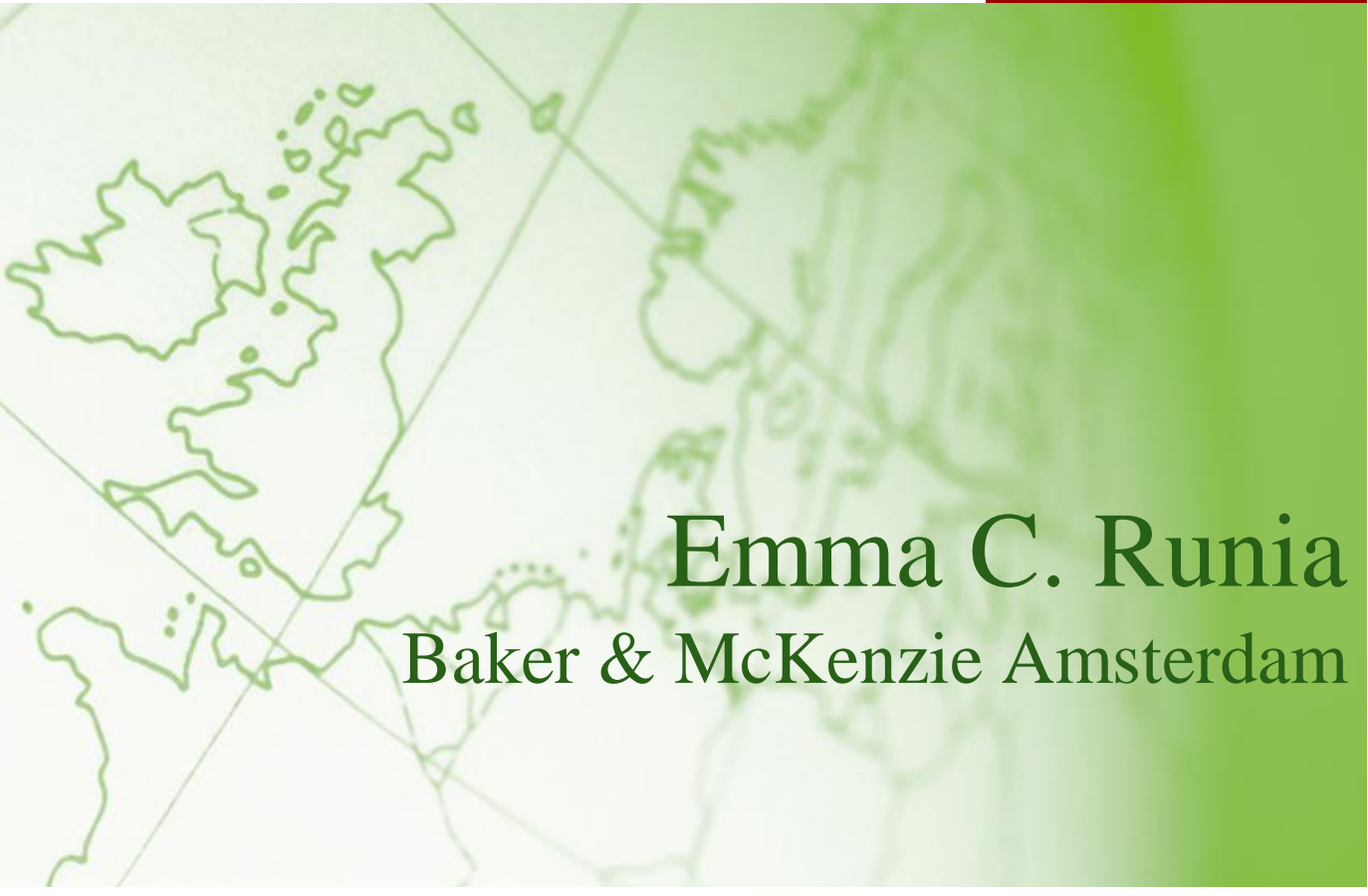
- NMa is planning to merge its Merger Control Department and Antitrust Department into a single new department.
- Aim is to further raise the level of transparency and improve accessibility
- More efficient way of gathering market knowledge
- NMa expects merger to be realised by mid-2008

## New trend: Pragmatic approach

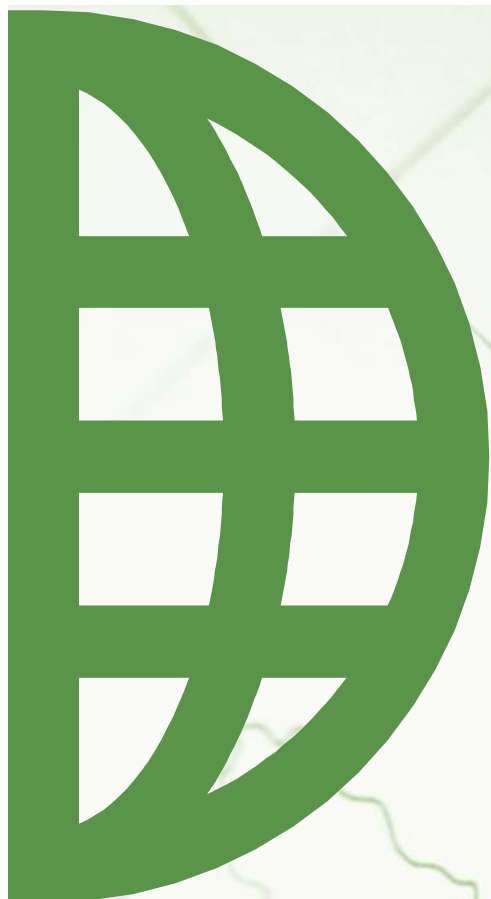
NMa's new approach seems to be a pragmatic one:

- Commitments
- “Behind the scenes” involvement: unofficial steering of conduct
- Remedies in 1st phase merger investigation
- Advocacy

Result: only limited fines are imposed.



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# Cartel Settlements

Kurt Haegeman

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# Key elements

- Confined to cartel cases
- Optional procedure
- Reduced fine in return for:
  - acknowledgment of liability
  - waiver of certain procedural rights
- Same discount for each company
- Available in addition to leniency
- Not a real ‘plea-bargain’

# Benefits for all

- For companies:
  - settlement discount
  - deterrence multiplier capped at 2x
  - ‘exit route’: resources and reputation
- For EC:
  - shorter SO and decision; less translations
  - no oral hearing
  - less litigation

# Settlement procedure

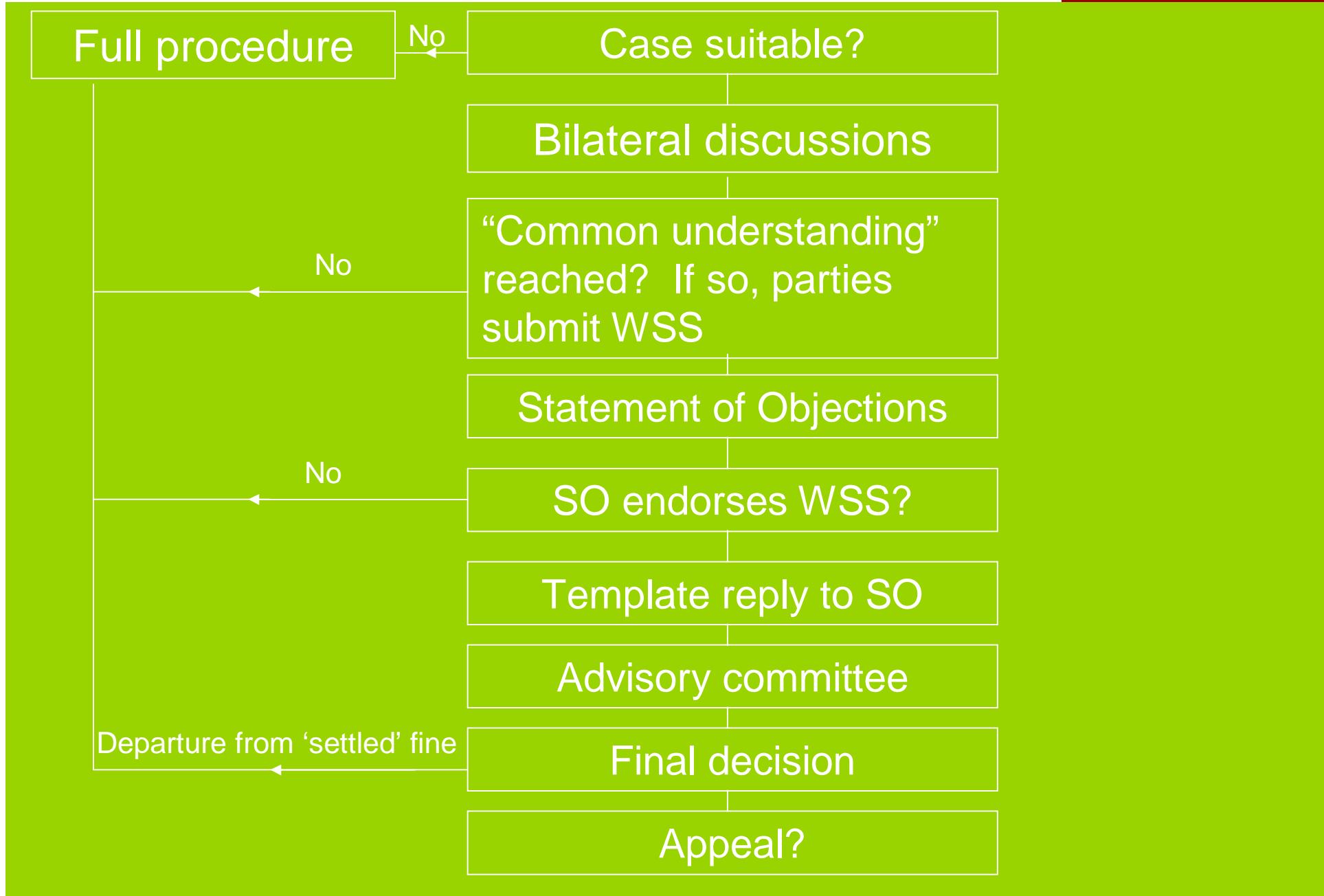
- **Step one:** investigative phase (dawn raids, leniency)
- **Step two:** EC considers whether case suitable for settlement
- **Step three:**
  - bilateral discussions between Commission and parties
  - disclosure of essential elements
- **Step four:** if “common understanding” reached, parties send a “written settlement submission” (WSS)



# Settlement procedure

- **Step five:** Statement of Objections - which may or may not correspond to WSS
- **Step six:** Consultation of Advisory Committee
- **Step seven:** adoption of final decision:
  - settlement discount of X %
  - deterrence multiplier capped at x2
- **Step eight:** Appeal to CFI?

# EC Settlements



# Potential pitfalls

- The discount: how much?
  - needs to be high enough to be interesting
  - Can't be too high: tantamount to coercion
- Commission discretion:
  - whether case suitable for discussions
  - pace of discussions and disclosure of evidence
  - whether SO/decision will reflect WSS
- No “everyone or no-one” policy, but what if only one or two defendants interested?
- Timing of settlement / “normal” decisions unclear: Concurrent? Settlement decisions first?

## Diluted rights of defence

- Standard of proof in cartel cases is “beyond any doubt”
- Very restricted access to file:
  - early disclosure of “main elements”
  - defendants can ask for more, but...
- Limited protection if breakdown in discussions
  - BUT: separate “settlements team”

# Discoverability

- WSS = a written confession
- Why not paperless?
  - same considerations as leniency
  - (informal) indications that Commission will accept oral confessions

# Is it worth it? A Balancing Act...

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• A reduced penalty</li><li>• Some ability to “plea bargain”</li><li>• Greater transparency before final Decision</li><li>• Expedited procedure</li><li>• Reputational advantages of accepting liability</li></ul>	<ul style="list-style-type: none"><li>• No guarantee that the Commission will settle (Commission discretion; dependence on other parties)</li><li>• “Pressure” of attractive settlement may mean you give away too much</li><li>• May accelerate follow-on damages action in EU and exposure in other jurisdictions, BUT perhaps less detail in settlement decisions</li></ul>



**Kurt Haegeman**

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# Private Anti-trust Enforcement

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# Coffee Break



**Economic approach to two-sided markets  
Dutch mergers of directory services and flower  
auctions**

**European Competition Law Update 2008  
Baker & McKenzie, ACC Europe  
Amsterdam, 29 May 2008**

**Edward Droste**



# Overview

- Relevant market
- Two-sided platforms
- Directory services
- Flower auctions
- Conclusion



# Relevant market

- Commission notice on definition of relevant market (1997):

“... The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behaviour and of preventing them from behaving independently of effective competitive pressure ...”



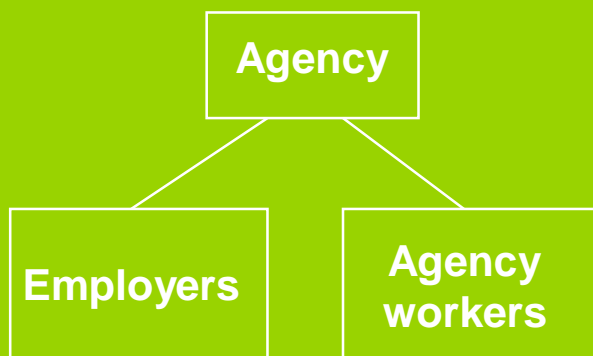
## SSNIP test / Hypothetical monopolist test

- Relevant market is defined by the smallest set of products and geographical areas that, if they were controlled by a monopolist, could profitably be increased in price by a small significant but non-transitory amount – often taken in practice at 5 or 10 percent for a year
- Substitution could either be on the demand side, through customers switching products, or on the supply side, through suppliers switching production processes

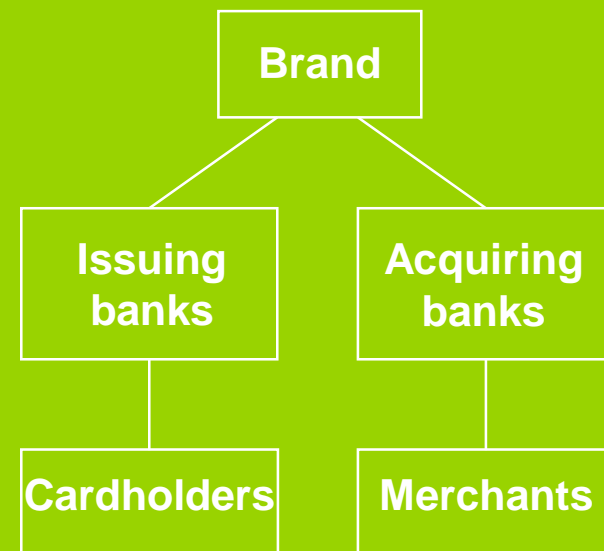


# Two examples of two-sided platforms

## Employment agencies



## Card payment systems



# Other examples and core functions of two-sided platforms

- Other examples
  - Newspapers
  - Internet search engines
  - Directory services
  - Magazines
  - Television networks
  - Auctions
  - Real estate agencies
  - Shopping malls
  - Hospitals
  - Dating agencies
  - Computer operating systems
  - Video game consoles
  - Word processors
- Core functions; Evans and Schmalensee (2007)
  - Audience builders to assemble eyeballs
  - Matchmakers to facilitate exchange
  - Cost sharers to increase efficiency



# Economic features of two-sided platforms

- Cross-side network effects
  - The value that a customer on one side realises from the platform depends on the number of customers on the other side, and vice versa
  - Cross-side network effects usually positive
- The need to balance the demands of the two sides
  - Not only the price level matters, but also the price structure
- Chicken-and-egg problem
  - The two different customer groups must be served simultaneously





# Profit maximising for two-sided platforms

- Profit maximising needs to consider:
  - Demands of both sides
  - Interrelationships between these demands
  - Direct costs of each side
  - Shared platform costs
- Skewed pricing structures
  - The side that is needed more receives a price break; the side that gets the most value out of access to members of the other side bears more of the costs



# Relevant market with two-sided platforms

- Competitive constraints from cross-side network effects
  - A price increase on one side of a two-sided platform will result in a decrease in demand on that side and through the cross-side network effects also to a decrease in demand on the other side
- Competitive constraints on both sides of the platform matter to the analysis
  - Analysis of price on either side of a two-sided platform in isolation may yield a distorted picture
- A two-sided platform may face competition in different ways; Evans (2008)
  - Newspaper v. newspaper
  - Television network v. magazine
  - Shopping mall developer v. single store
  - Microsoft Office v. Google
  - Sony's media player v. Apple's iPod
  - American Express v. Visa



# Directory services

- European Directories / Truvo Nederland
  - Telefoongids
    - Directory listing of local businesses classified by products and services provided and A-Z listing of households and businesses including contact details within a specific region
    - Both in print and online
  - Gouden Gids
    - Classified directory and A-Z listing of businesses both in print and online
    - A-Z listing of households only online
  - Revenue comes from advertising
    - Being included in classified directories and A-Z listings is free of charge
    - Printed versions are distributed for free and online access is free of charge
- On 11 March 2008 the NMa decided that a license is required



# Two-sidedness in directory services

- Cross-side network effects
  - Consumers value directories for information and businesses value directories as a way to advertise to consumers
    - Rysman (2004) empirically finds cross-side network effects in the market for yellow pages in the US
  - Integrated revealed preferences model submitted by parties:
$$\begin{aligned} \text{advertising} &= f(\text{use}, \text{price}, \dots) \\ \text{use} &= g(\text{advertising}, \dots) \\ \text{price} &= h(\text{cost}, \text{advertising}, \dots) \end{aligned}$$
    - Endogeneity problem: exogenous (explanatory) variables “use” and “price” are dependent on endogenous (dependent) variable “advertising”
    - NMA: the applied instrumental variable method does not solve the problem
- Chicken-and-egg problem is barrier to entry
  - Sufficient consumers have to use a directory before businesses will be willing to advertise



# Relevant market in directory services

- In print v. online: has the increasing use of online directories (and advertising in online directories) influenced the use of printed directories (and advertising in printed directories)? NMa:
  - Revenue from advertising in printed directories stable over time
  - High margins on printed directories
  - Pricing of advertising in printed directories independent of use of online directories
- Online directory search v. online general search. NMa:
  - General search may differ in use; as choice for advertising may be influenced by use, substitution may be limited for advertisers
- National geographical market. NMa:
  - Target group, content, language and distribution



# Flower auctions

- Bloemenveiling Aalsmeer / FloraHolland
  - Core service is offering a trading platform
    - Auction bell
    - Intermediation
    - Invoicing and collecting of accounts only
  - Products
    - Cut flowers
    - Houseplants
    - Garden plants
  - Cooperatives looking after interests of members by promoting sale of flowers
  - Related services make up for almost half of revenue
    - Logistic services
    - Financial services
    - Information services
    - Quality control
- On 21 August 2007 the NMa granted a license



# Relevant market in flower auctions

- Distinguishing between trading mechanisms: are alternative trading mechanisms part of the relevant market?
  - Other flower auctions in the Netherlands or abroad
  - Internet auctions
  - Direct sale in the Netherlands or abroad
  - NMa: larger sellers and buyers, more international trade, more direct sale, increasing role of internet auctions
- Distinguishing between types of flowers. NMa:
  - Can be left aside
- Distinguishing between sellers and buyers. NMa:
  - Determining relevant product market based on joint analysis of sellers' side and buyers' side of the market
- Geographic market is at least the EU. NMa:
  - Sufficient international trade
  - Comparable price levels in the EU



# Two-sidedness in flower auctions

- Preferences of sellers and buyers
  - Survey on stated preferences

Ranking of choice criteria for trading mechanisms	
Sellers:	Buyers:
1. Price received for products	1. Quality of products supplied
2. Financial settlement (payment certainty)	2. Price paid for products
3. Costs of trading mechanism	3. Diversity of products supplied
4. Size of demand	4. Size of supply
5. Speed and ease of physical settlement	5. Costs of trading mechanism
6. Predictability price level	6. Speed and ease of physical settlement
7. Costs of related services	7. Predictability of price level





# Two-sidedness in flower auctions

- Can the parties profitably increase their price by 5%?
- Critical loss of 10.1%
- Stated behaviour of sellers and buyers
  - Conservatively estimated actual loss

Suppliers:		Buyers:	
5% increase in costs of trading mechanism	10.8%	5% increase in costs of trading mechanism	13.8%
5% decrease in price received	23.3%	5% increase in price paid	22.7%
5% decrease in demand	23.4%	5% decrease in supply	19.8%
5% increase in costs of related services	17.0%	Length of physical settlement increases by half a day	61.3%
Length of physical settlement increases by half a day	26.1%	Decrease in quality of products supplied	54.7%
No financial settlement (payment certainty)	59.9%	5% decrease in diversity of products supplied	25.2%



# Two-sidedness in flower auctions

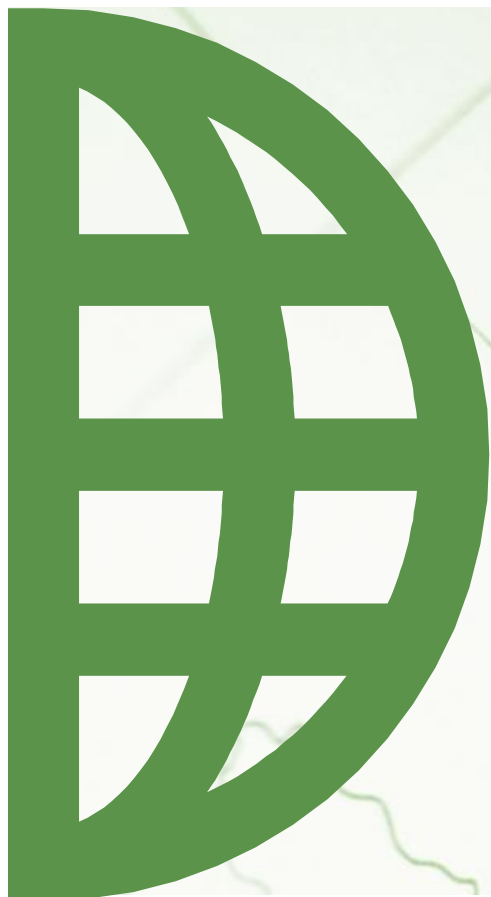
- Partial “model” of cross-side network effects with current market outcome as starting point
  - Sellers’ side:  
$$\text{supply} = f(\text{demand}, \text{price}, \text{costs of trading}, \dots)$$
  - Buyers’ side:  
$$\text{demand} = g(\text{supply}, \text{price}, \text{costs of trading}, \dots)$$
- “Endogeneity problem”: exogenous (explanatory) variable “demand” is dependent on endogenous (dependent) variable “supply” and vice versa
  - Estimated actual losses cannot be used to determine cross-side network effects



## Conclusion

- Two-sided platforms are characterised by specific economics, mainly as a result of cross-sided network effects
- Cross-sided network effects can have a significant impact on the relevant market
- Methods to determine the size of cross-sided network effects should be applied carefully





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# Abuse of Dominance - Article 82 Update

Martin Commons  
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# Covering

- Quick recap
- Guidelines and “reform” – where are we?
- *Microsoft*
- Current EU cases
- The Netherlands

# Article 82 – Quick recap

- Dominance
  - Market shares >40% possible, >50% presumed
  - Competitors' size, barriers for new entrants
- Abuse
  - Exclusionary, e.g. bundling, loyalty rebates
  - Exploitative, e.g. excessive pricing
- Need for reform
  - Case law driven by subjective ideas of fairness and exploitation, not economics
  - Emerging thinking that abuse must be judged by effects, not form.

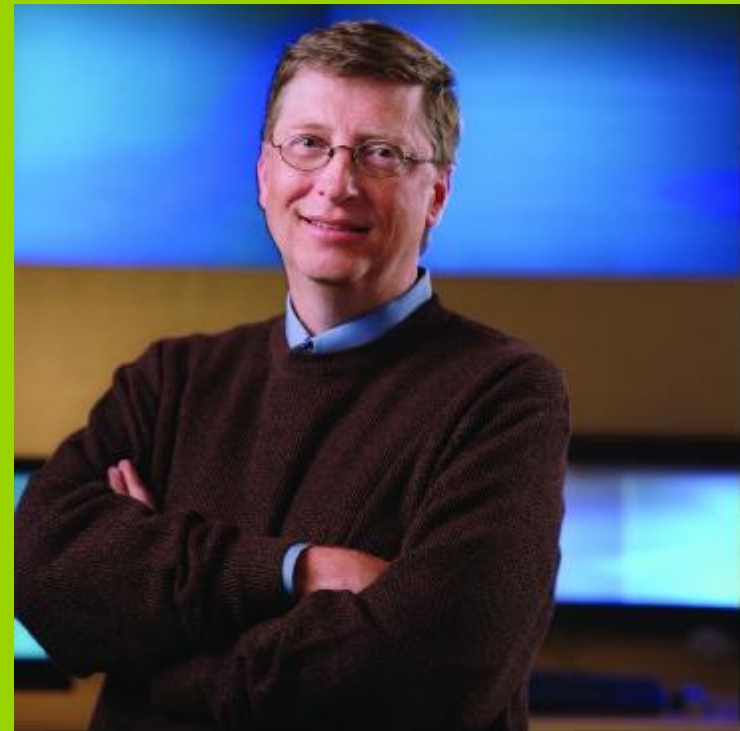
## Guidelines – Where are we?

- *Discussion Paper* – December 2005
- No firm promise about formal guidelines
- Deals only with exclusionary behaviour, not exploitative
- Guidelines partly applied in cases by the Commission (*Tomra*) and European Courts (*BA/Virgin*)
- Commission suggests future cases will themselves provide the guidance



# Microsoft

- Decision - March 2004 – EUR497m fine
- CFI judgment September 2007
  - Largely upheld the decision
  - Not appealed to ECJ
- Ongoing debate re: compliance
  - Compliance only achieved in October 2007
  - Further “final” fine - EUR899m - for failure to comply (February 2008)



# Refusal to Supply (Not IP)

- **Existing Customer:**
  - presumed anticompetitive if DomCo present downstream and terminates one of “few” competitors
  - lawful if termination of one of many competitors and DomCo not present downstream
  - justified if DomCo can show benefits of vertical integration
- **New Customer – further criteria**
  - “essential facility”
  - also anticompetitive if stifles emergence of new product
  - justified during investment period, if investment would not otherwise have been made
- For IP, Discussion Paper superseded by *Microsoft*

# *Microsoft* – Refusal to Supply

- Refusal to license is an abuse by a dominant company only in “exceptional circumstances”
- **BUT** “exceptional circumstances” substantially easier to prove?
  - indispensability of information – partial interface and reverse engineering were not sufficient substitutes;
  - “Tends to eliminate” competition – likely or “liable to” exit or be marginalised, not actual exit;
  - the existence of a “new” product – but “new product” can also be the same product with “new features”
  - a lack of objective justification – no evidence mandatory interface licensing would harm innovation incentives

# Tying

- Tying and bundling rarely permitted
- Price bundling can reflect savings or benefits
- Technical integration innovation



# Discussion Paper

- Tying - Must buy Y with dominant product X
  - <33% of customers buy both products?
  - competitors access similar bundles
  - importance of tied customers, network effects
- Price bundling – discount for bundle
  - each product price less bundled discount > cost
- Technical tying
  - integration leads to market shift so that demand for independent products withers
  - justify tie by efficiency benefits of integration

# *Microsoft: Technical Tying of PC Operating System and Windows Media Player*

## Dominant supplier - illegal tie:

- (i) Ties a separate product – court excluded evidence that there was no standalone demand for Windows without WMP;
- (ii) Does not allow standalone purchase;
- (iii) Practice excludes competitors from tied market – free download or retail sales of rival media players no substitute for tying to the OS (iTunes success via alternative channels not considered);
- (iv) No objective justification
  - Microsoft’s evidence of integration benefits (faster running, text to voice conversion) insufficient
  - “Windows standardisation” not a cognisable benefit
  - No examination of the costs to Microsoft of continuing to sell an obsolete product (OS without WMP)

# Current Cases



# EU - Current cases (1)

Commission focus on:

- key sectors (high tech and telecom) and key types of abuse:
  - licensing of IPR (interoperability)
  - rebates to force competitors out of market
  - margin squeeze
  - tying
- which may seriously damage consumer welfare (in terms of price, choice and innovation)
- novelty?



## EU - Current Cases (2)

### *Intel*

- SO issued in July 2007
- Accused of three abuses of its dominant position in the Computer Processing Units (CPU) market, aimed at excluding competitor AMD:
  - Giving substantial rebates to various OEMs on condition that they obtain all / most of their CPU requirements from Intel
  - Making payments to induce OEMs to delay or cancel the launch of a product line which incorporates a CPU produced by AMD.
  - Offering CPUs on average below cost when bidding against AMD-based products for contracts with strategic customers

## EU - Current Cases (3)

### *Intel (cont.)*

- In February 2008, the Commission raided Intel, CPU manufacturers and computer retailers in Europe, on basis of alleged Article 82 violations, and also Article 81.
- Despite intense lobbying from AMD, US authorities have not taken on the case
- Privately litigated in Taiwan and Japan

## EU - Current Cases (5)

- *Rambus*
  - SO issued July 2007
  - Patent Ambush
  - Allegations that Rambus has charged unreasonable royalties for DRAMs subsequent to a patent ambush
  - Commission claims that Rambus should have revealed the fact they had the patent
  - FTC has also investigated, issued opinion 5 Feb 2008

## EU - Current Cases (6)

- *Alcan*
  - Statement of Objections issued February 2008
  - Aluminium producer, active in e.g. mining, refining and manufacturing of aluminium products.
  - The Commission alleges that Alcan has abused its dominance by tying its dominant aluminium smelting technology with handling equipment sold by Alcan's subsidiary ECL.
  - Alcan's contracts for the sale of its aluminium smelting technology requires the purchasers also to buy ECL's handling equipment for aluminium smelters, which prevents Alcan's customers from using smelting equipment from other suppliers.

## EU – other current Article 82 cases

- *Qualcomm*
  - Proceedings opened in October 2007
  - Complaints by mobile phone companies
  - Standards for 3G Networks – IPR licensing
- *Microsoft II*
  - Proceedings initiated in December 2007
  - Tying / Refusal to supply interoperability information

## Three points to take away

1. *Microsoft* judgment suggests a “plaintiff friendly” approach to Art. 82 assessment, at least in relation to tying
2. Litigation and national level enforcement likely to increase in importance
3. Don’t expect definitive Commission guidance anytime soon!



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**All other EC Development in brief**

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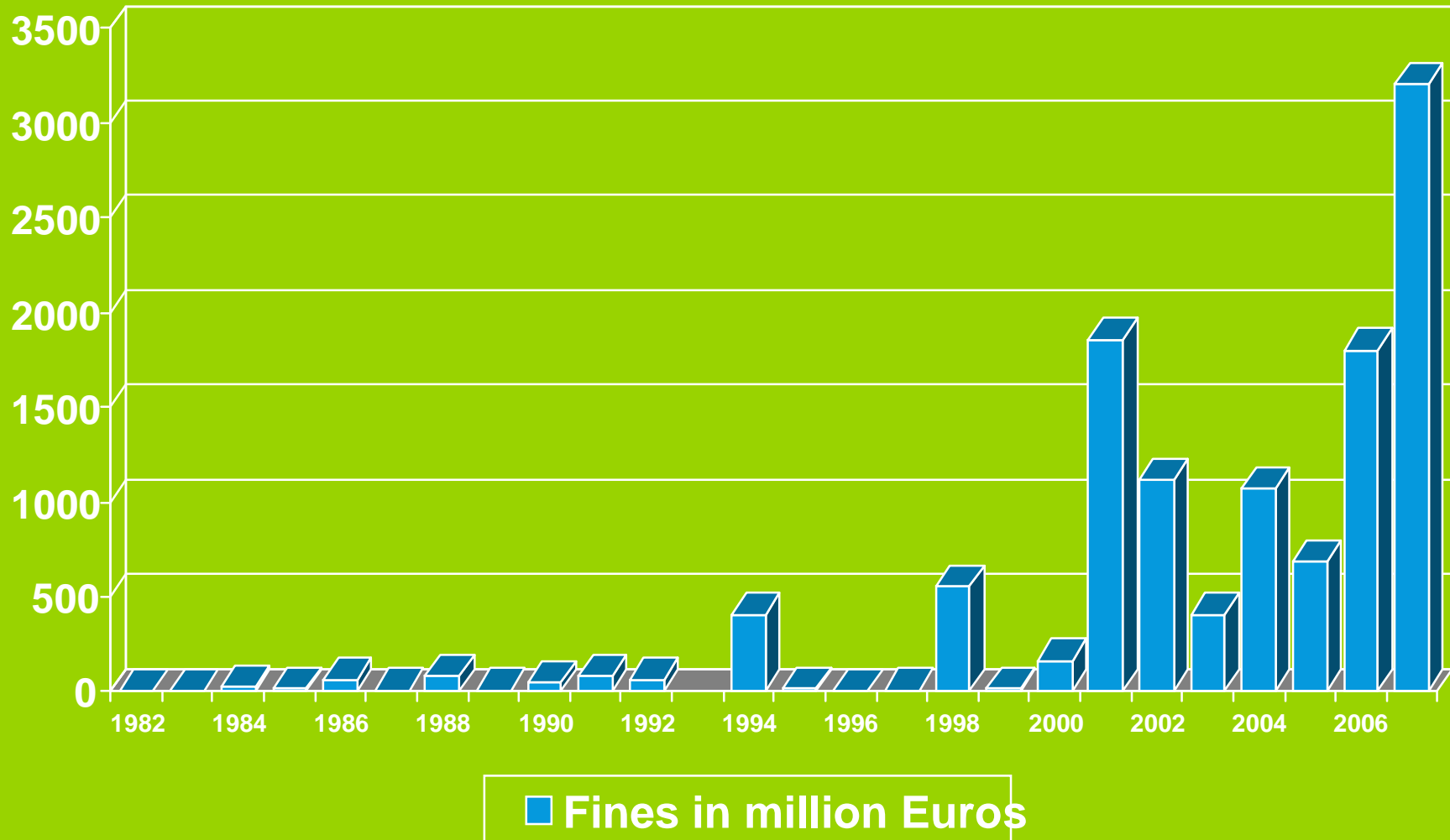


# Most Significant Trends and Developments

- 82 Reform
- Economic Approach
- Cartel Settlements
- Civil Actions for Damages
- Legislative Changes in NL

What Else?

# Record Fines in 2007 (1)



## Record Fines in 2007 (2)

- Over €3,3 billion by EC alone
- 5 companies fined €992 million for cartels in the installation and maintenance of elevators and escalators in 4 countries
- Higher fines expected as a result of EC's new Fining Guidelines

# EC Sector Inquiries (1)

1/2007- Final Report on Retail Banking Sector

- Indications of large variations in merchant and interchange fees for payment cards
- Indications of barriers to entry in the market for payment systems and credit registers
- Indications of obstacles to customer mobility and product tying

## EC Sector Inquiries (2)

9/2007- Final Report on Business Insurance Sector

- Longstanding and widespread industry practices involving alignment of premiums in co- and reinsurance sector, which may lead to higher prices for large risk commercial insurance
- Networks of long term contracts in Austria, which may lead to foreclosure
- Concerns about transparency of remuneration and conflicts of interest in insurance brokerages, which may inflate price and reduce choice

## EC Sector Inquiries (3)

1/2008 – Launch of Inquiry into Pharmaceuticals Sector

- Indications that fewer new medicines are being brought to market
- Indications that entry of generic medicines are delayed
- Indications that artificial barriers to entry are created (e.g. misuse of patent right or vexatious litigation)

Final Report expected in March 2009 (Interim Report in Autumn 2008)

# Legal Privilege

9/2007 – CFI Judgement in AKZO Nobel v. Commission

- CFI rejects arguments that legal privilege should be extended to cover in-house communications
- CFI extends the categories of privileged material to cover internal documents prepared **exclusively** for seeking advice from and external lawyer (although Akzo failed to prove that its documents had this exclusive purpose)
- CFI clarifies the procedure to be adopted if there is a dispute with the Commission (e.g. in a dawn raid scenario) over whether a particular document attracts privilege.



## 9/2007 – CFI in Microsoft v. Commission

CFI upholds Commission decision

- Refusal to licence test more complainant friendly (old IMS test eroded; “new features” rather than “new products”)
- Technical tying, Commission must show anticompetitive effects to prove abuse

## 4/2008 – Consultation on Insurance Block Exemption Regulation

- BER expires on 2010
- Exempts agreements on joint calculations, tables and studies, standard policy conditions and models on profit, common coverage of certain types of risks (pools), security devices / safety equipment
- Deadline for submission of comments on 17 July 2008

# Merger Control (1)

## ‘Gun Jumping’

- Suspension obligation under ECMR, fine of up to 10% of turnover for non-compliance (article 14 (2) ECMR)
- Ineos/Kerling, both active in production of S PVC, notified in 7/2007
- Unannounced inspections by EC in 12/2007 pending Phase II review
- Investigation both violation of suspension obligations and breach of Article 81 (information exchange)
- Phase II clearance on 30 January 2008, EC stated gun jumping case closed

# Merger Control (2)

## Schneider v. Commission, damages claim under Article 288

- Dispute about Commission decision to block Schneider/Legrand transaction (10/2001, note: Schneider already acquired 98% through public bid)
- Commission decision annulled by CFI due to breach of procedural rights (10/2002)
- Schneider brings damages claim in excess of €1,5 billion (Article 288 requires unlawful conduct; fact of damages; causal link)
- 7/2007 – damages awarded to Schneider for breach of rights of defense: expenses related to additional Commission procedure, reduction in divestment price to postponement of closing, all other claims rejected for lack of causal link
- No damages awarded relating to flaws in substantive assessment; express recognition of margin of discretion
- Appeal by Commission to ECJ

## Merger Control (3)

- Commission Jurisdictional Notice
- Notice on Non-Horizontal Mergers
- Draft Remedies Notice

# Verticals

- Verticals Block Exemption Regulation due to expire in 2010

# International Co-operation

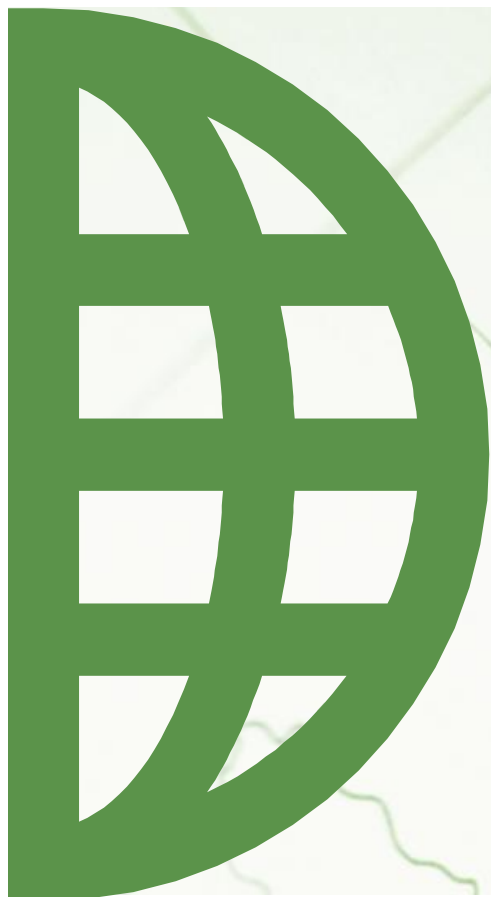
## Marine Hose Pipe Investigation – May 2007

- European Commission raids producers in France, Italy and the UK
- UK competition authority launches parallel criminal investigation including a home search
- US authorities simultaneously arrest 8 executives from France, Italy, Japan and the UK in the US from a conference

# ‘Hub and Spoke Cartels’

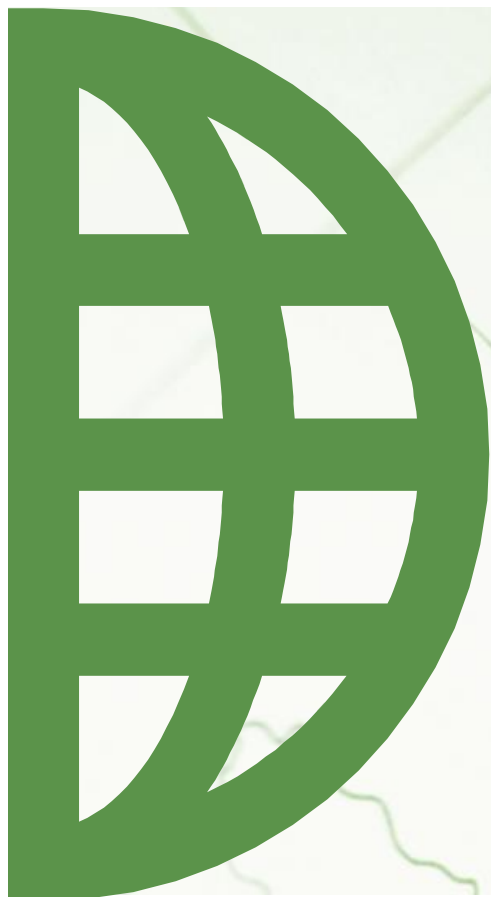
- UK, France, Belgium
- Netherlands?





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# Lunch Break



# Pricing Practices, Introduction

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# Agenda

- Presentation (30 minutes)
- Case Study (1 hour 15 minutes)
- Discussion/Q&A (15 minutes)

# Key Pricing Issues

- **All companies need to be aware of:**
  - Resale Price Maintenance
  - “Hub and Spoke” cartels
  - EU Single Market
- **Dominant companies (and those dealing with them) also need to look out for:**
  - Excessive / Discriminatory Pricing
  - Rebate Schemes

## RPM in Europe



- Suppliers **cannot** “impose” resale prices
- RPM can include:
  - Terminating distributor for discounting
  - Incentives/penalties linked to price (e.g. slower delivery, lower discounts, worse credit terms)
  - Monitoring resale prices (if combined with threats/warnings)
  - **Minimum Advertised Price** programmes
- Enforcement/priorities vary between Member States

## RPM in Europe

- Suppliers can
  - Recommend resale prices
  - Set a maximum resale price
  - Offer guidance/consulting on pricing policy (but can be risky – see *Volkswagen, Bayer*)
  - Customer/distributor must always be free, ultimately, to ignore advice/RRP



## Meanwhile, in the United States...

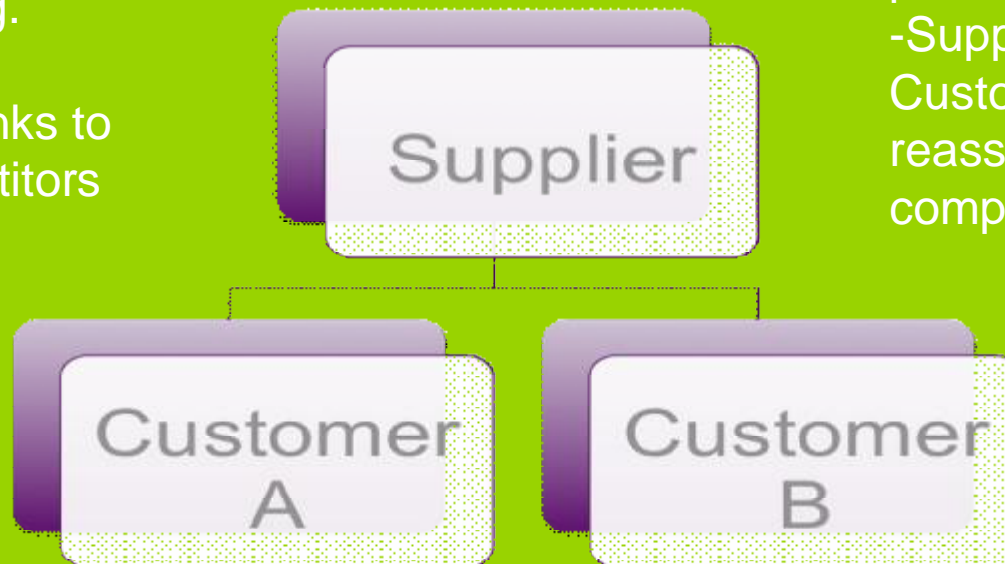


- *Leegin*: US Supreme Court overturns 96-year old rule that RPM is *per se* illegal
- **BUT:**
  - Serious concerns remain
  - Many states have RPM bans



# “Hub and Spoke” Cartels

Customer A gives supplier competitively sensitive info (e.g. future pricing intentions) and links to actions of competitors



Supplier:  
-acts on the info, e.g. passing it on; and/or  
-Supplier gives Customer A reassurance about competitor behaviour

No direct contact between customers

# “Hub and Spoke” Cartels



- **Example - Hasbro**
- **Suppliers** - avoid assurances to customers on behaviour of other customers
- **Responding to customer communications**
- **Customers** – be careful what you ask suppliers for!
- **Enforcement likely to increase**

## Rebates by dominant firms

- NB Relevant markets can be very narrow
- Rebates must not be “loyalty inducing”
- **Examples:**
  - Exclusivity / requirements rebates
  - Stretch rebates
  - Individualised volume targets
- **Standardised, objective volume rebates OK**

# Rebates by Dominant Firms



- Example – *British Airways*
- Emergence of a more effects based approach?
  - Commission policy
  - Court judgments (e.g. *Microsoft*)

# Other Article 82 Pricing Abuses

- Discrimination
  - Treating similar transactions in a dissimilar way
  - Applies to price and also terms & conditions
  - “*A negative effect...is unlikely unless competitors are foreclosed*” (Art. 82 Staff Working Paper, para. 140)
- Excessive Pricing

# CASE STUDY

## Key points to take away

- Beware varying approaches to RPM
- Be very careful when reacting to dealer complaints
- When complaining to suppliers about competitor pricing, be careful what you ask for!
- Are any of your businesses dominant? (if so, review rebate schemes carefully)
- Do you buy from a dominant firm?
- Train your staff – sales and procurement



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# Drinks

