

Towards an appropriate policy for excessive pricing

**NB The views
expressed here
are my own, and
not necessarily
those of the OFT**

**Amelia Fletcher
Chief Economist
Office of Fair Trading**

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Context

- **The draft guidelines on Article 82 may be extended to include exploitative abuse**
- **In the US excessive pricing is not an abuse**
- **Many commentators have argued for a similarly permissive approach in the EU**
- **[NB Important to distinguish exploitative abuse from ‘constructive refusal to supply’]**

Principle arguments for a permissive approach

- **Assessing excessive pricing is hard; setting clear rules for compliance is even harder**
- **Remedies for excessive pricing can equate to price regulation (either implicitly or explicitly)**
- **Price regulation can be distortive to competition, investment and R&D**
- **The problem will typically solve itself, since high profits encourage entry**

Assessing excessive pricing is hard

- **What should the benchmark be?**
- **Competitive price?**
 - **But what does this mean? Duopoly? Perfect competition? What about differing efficiencies?**
 - **How can it be calculated?**
- **If allow some margin above competitive price?**
 - **What magnitude?**

Assessing excessive pricing is hard

- **How should dynamic markets, where there is upfront investment for the future, be treated?**
 - Require high *ex post* margins to incentivise *ex ante* risky investments (eg in R&D)
- **How should Ramsey pricing arguments be treated?**
 - High margins on some activities may be required to cover fixed costs that are common across activities

Regulating prices can be distortive

- **Price regulation can:**
 - **Inhibit entry/expansion by competitors**
 - **Distort investment incentives**
 - **Distort incentives for marketing and R&D**
 - **Distort pricing incentives**
- ***Ex ante* self-regulation arguably even worse than *ex post* regulation**

Arguments for intervention

- **There is a clear potential for harm from excess pricing: arguably the whole point of competition policy is to prevent excessive pricing**
- **Competition and consumer law engage in ‘price regulation’ elsewhere, so nothing new**
- **Assessment problems over-stated**
- **Risks of regulation/self-regulation over-stated**
- **Price regulation is not the only possible remedy!**

The UK Napp case (2001)

- **A price is considered excessive if:**
 - above competitive market price; and
 - high profits will not stimulate successful new entry within a reasonable period.
- **OFT benchmarked against:**
 - *Price-cost margins:* across activities and competitors
 - *Prices:* across activities, competitors, countries, time
- **Argued patent period provides opportunity for recoupment of *ex ante* investment**

Remedy problems over-stated

- How much *ex ante* 'self-regulation' do we really expect to observe?
- Careful assessment should allow for concerns about risks of *ex post* expropriation
- Arguably 'light handed' approach better than detailed sector regulation:
 - Less burdensome
 - Harder to 'game play' against
 - Less risk of regulatory capture

Price regulation is not the only possible remedy

- **Exploitative abuse only occurs where there are barriers to entry or expansion, such as:**
 - Regulatory barriers to entry
 - High switching costs
 - Lack of shopping around by customers
 - Asymmetric information between firms and customers
- **Why not try to utilise Article 82 to address these causes, not the symptoms?**
 - Prevents recurrence
 - Consistent with advocacy role of competition policy

SME Banking (UK CC, 2002)

- **Excessive prices due to restricted competition:**
 - High concentration (4 banks = 90% of supply)
 - Reluctance of SMEs to switch banks
 - Need a current a/c to get a loan
- **Remedies aimed at encouraging competition:**
 - Making switching easier and quicker
 - Limiting bundling of services
 - Improving information and transparency
- **Transitional price regulation remedy only**

Extended Warranties (UK CC, 2003)

- **Excessive prices due to lack of competition:**
 - Consumers do not shop around for EW
 - EWs on offer at POS usually from single provider
 - Poor upfront price information on EW
- **Again, remedies aimed at activating competition**
 - Price of EW to be displayed alongside price of DEG
 - Quotations to be provided - valid for 30 days
 - Cancellation rights with full refund within 45 days
 - Information leaflet to be given before sale of EW
- **No price regulation remedy!**

Practicalities of alternative remedies

- **Legally possible to have alternative remedies in A82 cases (but must still prove guilt)**
- **Can have settlements, but this too involves an admission of liability**
- **Commitments possible, and do not necessarily require admission of liability**
- **Competition advocacy to Government may be appropriate if barriers due to public policy**

Possible drawbacks

- **Still need ‘threat’ of fining and *ex post* regulation to gain alternative remedies**
- **Not always possible to find ways to make the market work more effectively**
- **[No deterrence without fining]**
- **Issue of private action – but could risks associated with this be mitigated?**

Conclusions

- **Excessive pricing should be enforced**
- **But very carefully!**
 - Only where the high profits will not stimulate successful new entry within a reasonable period
 - Ensuring that dynamic incentives are not unduly harmed
- **Employing alternative remedies where possible**
 - **Attacking the cause, not the symptom**

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