Predatory pricing in the UK pre-Flybe

Al Mangan

EC: Some key principles

- **AKZO (ECJ)**
  - Price > ATC: no predation
  - AVC < Price < ATC: predation if part of a plan to eliminate a competitor (intent)
  - Price < AVC: presumption of abuse, rebuttable where objective justification

- **Tetra II (ECJ)**
  - Article 102 can apply to conduct found on an associated, non-dominated market and having effects on that associated market, if sufficiently "special circumstances"
  - On the facts, a recoupment requirement "would not be appropriate"

- **France Telecom (CFI, confirmed by ECJ)**
  - Dominant undertaking not entitled to align prices with competitors if below cost
  - Recoupment as a relevant factor but not a relevant condition (contrast AG Mazak)

- **Commission 2009 Guidance**
  - Enforcement priorities, not a statement of law
  - AVC replaced by AAC
  - ATC replaced by LRAIC
UK: OFT, Concurrent Regulators and the CAT (1 of 2)

- Napp Pharmaceuticals (CAT upholds OFT, infringement, January 2002)
- BT Wholesale DSL (CAT set aside DG Telco on predation, April 2003)
- Aberdeen Journals (CAT upholds OFT 2nd time, infringement, June 2003)
- First Edinburgh / Lothian (OFT, no infringement, April 2004)
- Nottingham Post (OFT, no grounds for action, July 2004)
- BT CPS (OFCOM, no infringement, July 2004)
- Mid Kent Water (OFWAT, no grounds for action, August 2004)
- United Utilities (OFWAT, no grounds for action, May 2005)
- Robert Wiseman (CAT, set aside OFT no infringement, September 2005)

UK: OFT, Concurrent Regulators and the CAT (2 of 2)

- Arriva (OFT, case closure, November 2005)
- BT cordless phones (OFCOM, no infringement, August 2006)
- EWS Railways (ORR, infringement, December 2006)
- BA/London-Edinburgh (OFT, case closure, March 2007)
- London Metal Exchange (OFT, case closure, April 2007)
- Proctor & Gamble (OFT, case closure, May 2008)
- Cardiff Bus (OFT, infringement, November 2008)
- BBC Digital Curriculum (OFT, case closure, May 2009)
- DB Schenker (ORR, no infringement, August 2010)
UK: Private actions, mergers, studies and investigations

- Chester City Council v Arriva [2007] EWHC 1373 (Ch)
- Completed acquisition by ICAP plc of EBS Group Limited (OFT, July 2006)
- Local Bus Services: Reference to the Competition Commission (OFT, January 2010) and ongoing CC Market Investigation
- Groceries Investigation (CC, April 2008): recoupment and the requirement of high barriers to entry or exit