The United Brands excessive pricing case

An experiment in a time when antitrust was considered as an anti-inflation tool

Florence Competition Programme, 25 October 2019

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Historical background

- **1973 – First oil shock. Inflation. Role of competition policy to fight inflation (OECD study). Bundeskartellamt: Als ob Wettbewerb concept (comparable markets).**

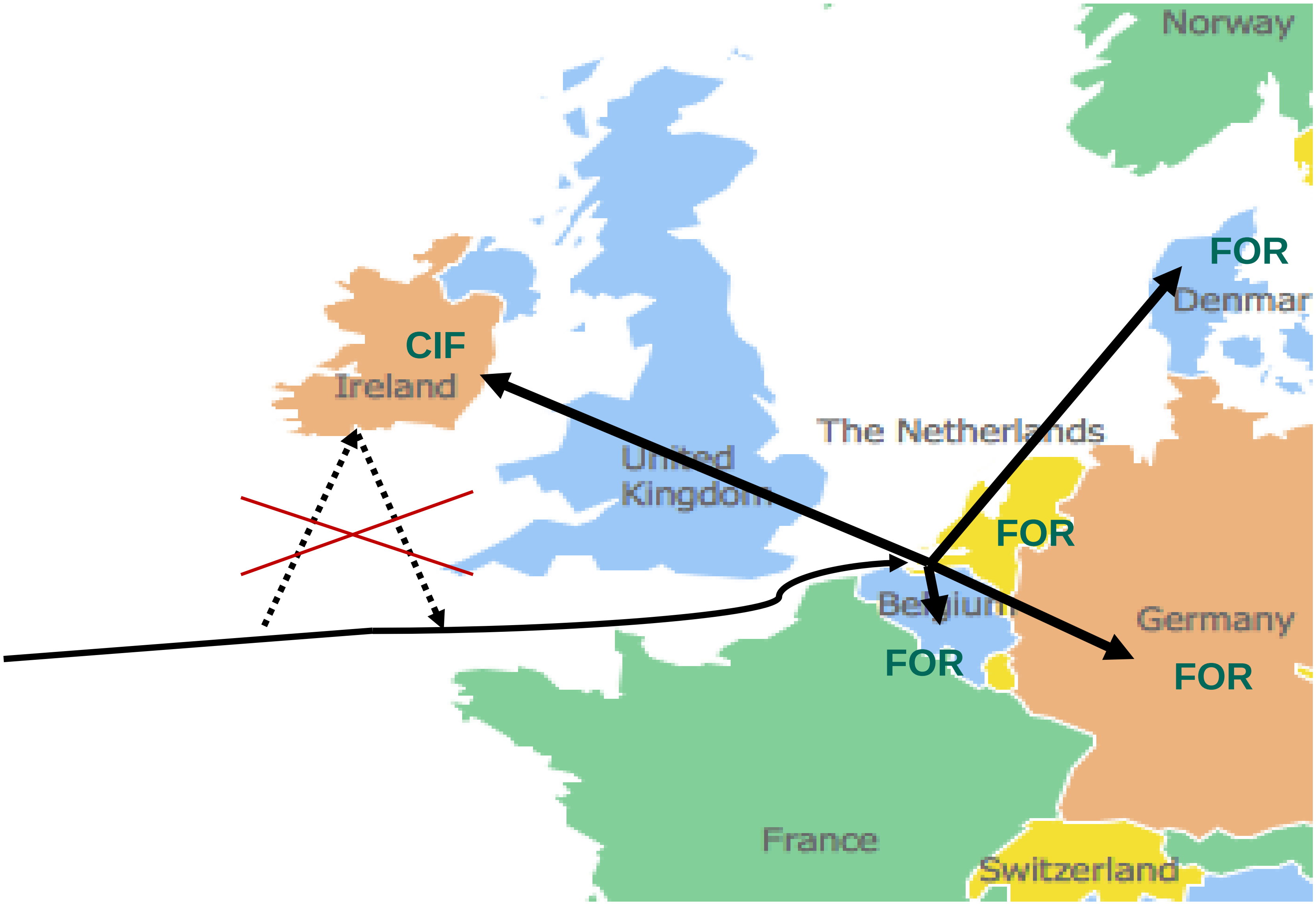
- **1974**

  - **January: United Brands (UBC) changes its marketing and distribution policy in the Irish market. Rapid increase in UBC's market share. Deliveries of bananas by road/ferry from Rotterdam (replacing Cork stop-off en route)**

  - **February: Complaint by Danish distributor Olesen about UBC's termination of supply.**

  - **May: Complaint by Irish importers about UBC's "dumping" on the Irish market.**

- **1975**
  - **February: Eli Black, UBC's CEO, jumps from the 44th floor of the PanAm building in New York following allegations of bribery in Honduras.**
  - **March: Initiation of Commission proceeding against UBC for abuses of dominance.**
  - **December: Commission Decision finding UBC guilty of four abuses (refusal to supply, export ban (green banana clause), discriminatory and excessive pricing). Fine: 1 million ECU. UBC ordered to terminate the infringements.**
- **1976**
  - **March: UBC's appeal to ECJ.**
  - **April: ECJ suspends the order to terminate the pricing infringements.**
- **1978**
  - **February: ECJ judgment.**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Excessive pricing finding in Commission Decision

1. **Prices charged for bananas sold in Germany, Denmark, Netherlands and Belgium/Luxembourg are considerably higher, sometimes by 100%, than the prices charged to customers in Ireland and "accordingly produce a very substantial profit". This conclusion is reached "without analysing UBC's cost structure" on the basis of:**

   - **a comparison of UBC's FOR (free on rail) Rotterdam prices for bananas destined for Germany, Denmark, Netherlands and Belgium/Luxembourg with the prices for bananas destined for Ireland at delivered <u>Rotterdam</u> level (after deduction of transportation costs between Rotterdam and Dublin);**

   - **a statement made by UBC in a letter of 10 December 1974 to the Commission that the Irish prices generated a profit margin which was "considerably smaller" than in some other Member States.**

2. **Prices charged by UBC for Chiquita bananas are excessive in relation to the “economic value of the product supplied” as shown by a comparison with:**

   - **prices of unbranded bananas which are 40% lower “even though the quality of unbranded bananas is only slightly lower”. At the very most, only half of that difference is accounted for by difference in quality and costs of advertising.**

   - **prices of competitors in all Member States except Ireland, which are lower.**

3. **Conclusion: in order to terminate the abuse, it would be sufficient for UBC to reduce its prices to a level at least 15% below that currently charged to its customers in Denmark and Germany.**

UBC’s request for suspension to the ECJ

- UBC claimed that the Commission’s order to reduce UBC’s prices for Chiquita bananas is “unintelligible, contradictory and unworkable” in light of, inter alia, the fluctuating nature of banana prices which vary from week to week. The Commission responded that the Decision only provided an “indication” of what UBC is expected to do and agreed with UBC that the immediate implementation of the order might cause irreparable harm to UBC. Accordingly, the Commission did not oppose UBC’s request.
- The ECJ granted the request for suspension of the order with respect to pricing.

UBC’s arguments on the excessive pricing finding

- **Between 1956 and 1973 banana prices in real terms decreased by 50%.**
- **The Commission could not infer from the statement in the letter of 10 December 1974 that the Irish prices were profitable as UBC clarified in the administrative proceeding that it had incurred losses in 1974.**
- **The Commission was wrong to compare the FOR prices charged to customers in Germany, Denmark, Netherlands and Belgium/Luxembourg with the <u>CIF delivered Dublin prices netted back to Rotterdam</u> for the bananas sold to the Irish customers. The cost of transportation from Rotterdam to Dublin was incurred for the benefit of bananas sold in all markets, not just in Ireland, as this arrangement made it possible to avoid stopping the boat in Cork to unload the bananas destined for the Irish market, thus reducing the cost of transportation of the entire cargo from Central America to Rotterdam. The comparison should thus have been made with the <u>CIF delivered Dublin prices</u> as these were the substitutes for the former FOR Cork prices.**
- **The difference in price between branded and unbranded bananas is fully justified.**
- **The price difference between Chiquita and other branded bananas was only 7.4% on average.**

ECJ Judgment

ABSENCE OF REASONABLE RELATION OF A PRICE TO THE ECONOMIC VALUE OF THE PRODUCT <u>MAY</u> BE DETERMINED BY CONSIDERING THE DIFFERENCE BETWEEN COSTS AND PRICE

250. … charging a price which is excessive because it has <u>no reasonable relation to the economic value of the product</u> supplied would be…an abuse.

251. This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the <u>profit margin</u>; however the Commission has not done this since it has not analysed UBC's costs structure.

252. The questions therefore to be determined are <u>whether the difference between the costs actually incurred and the price actually charged is excessive,</u> and, if the answer to this question is in the affirmative, <u>whether a price has been imposed which is either unfair in itself or when compared to competing products</u>.

253. <u>Other ways may be devised</u> — and economic theorists have not failed to think up several — of selecting the rules for determining whether the price of a product is unfair.

THE COMMISSION DID NOT ADEQUATELY ANALYZE UBC' COSTS

256. <u>The Commission was at least under a duty to require UBC to produce particulars of all the constituent elements of its production costs</u>.

259. The foundation of …[the Commission's] argument has been the applicant's letter of 10 December 1974 which acknowledged that the margin allowed by the sale of bananas to Irish ripeners was much smaller than in some other Member States and it concluded from this that the amount by which the actual prices f.o.r. Bremerhaven and Rotterdam exceed the delivered Rotterdam prices for bananas to be sold to Irish customers c.i.f. Dublin must represent a profit of the same order of magnitude.

260. Having found that the prices charged to ripeners of the other Member States were considerably higher, sometimes by as much as 100%, than the prices charged to customers in Ireland it concluded that UBC was making a very substantial profit.

261. Nevertheless <u>the Commission has not taken into account in its reasoning several of UBC's letters in which were enclosed a confidential document retracting what is said in its letter of 10 December 1974 and pointing out that the prices charged in Ireland had produced a loss</u>.

265. UBC's retractation, which the Commission has not effectively refuted, establishes beyond doubt that <u>the basis for the calculation adopted by the latter to prove that UBC's prices are excessive is open to criticism…</u>

DOUBT MUST BENEFIT UBC CONSIDERING THAT:

1. PRICES OF BANANAS HAVE NOT RISEN FOR 20 YEARS, AND
2. THE DIFFERENCE WITH COMPETITORS' PRICES IS ONLY 7%

…and on this particular point there is doubt which must benefit the applicant, especially as <u>for nearly 20 years banana prices, in real terms, have not risen</u> on the relevant market.

266. Although it is also true that <u>the price of Chiquita bananas and those of its principal competitors</u> is different, <u>that difference is about 7%</u>, a percentage which has not been challenged and which cannot automatically be regarded as excessive and consequently unfair.

267. In these circumstances it appears that the Commission has not adduced adequate legal proof of the facts and evaluations which formed the foundation of its finding that UBC had infringed Article 86 of the Treaty by directly and indirectly imposing unfair selling prices for bananas.

Final Commission's comment on antitrust as an anti-inflation tool

Commission's Fifth Report on Competition Policy (April 1976), Point 3:

« As regards competition policy's potential as a means of fighting inflation, the Commission has already stated its views several times. It has no doubt that competition policy is an essential part of the armoury to be deployed against inflation, but there are limits to its effectivenes. For instance, measures to halt the abuse of dominant position cannot be converted into systematic monitoring of prices. In proceedings against abuse consisting of charging excessively high prices, it is difficult to tell whether in any given case an abusive price has been set for there is no objective way of establishing exactly which prices cover costs plus a reasonable profit margin ».