



BritNed v. ABB – an outsider's view (behind a veil of ignorance)

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A sentence which raises numerous doubts

- ▶ The price theory this sentence is based upon
- ▶ The (apparently) limited awareness of the risks involved in using a firm's accounts and in playing with them
- ▶ The idea that if someone within the firm knows about the cartel his boss may be totally unaware of it
- ▶ Cartels are efficient, but if they do not pass these efficiencies on to customers, this leads to an "overcharge"
- ▶ The idea that a higher cost implies inefficiency

The price theory in the sentence

- ▶ According to the sentence prices are based on costs (the role of demand is too difficult to ascertain)
 - ▶ Direct costs
 - ▶ Common costs
- ▶ Prices are “too high” if the costs allocated to the project are “too high”
- ▶ Conclusions:
 - ▶ Common costs attributed to the project were determined by someone who had no idea of the cartel
 - ▶ However, if the cartel is “efficient”, this should be passed on to the client
 - ▶ Direct costs were inflated by inefficiency

Which data shall we use?

- Costs: Proxies v. accounting data (Non manipulability v. accuracy)
- The trust in accounting data is such that it survived a lot...
 - “Mr Biro did not base his analysis on the gross margins as reported by ABB but calculated his own” excluding items considered not directly linked to the project
 - The margins were “consolidated margins” putting together the margins of different business units of ABB
 - These manipulations were accepted with very little analysis of the accounting changes introduced by ABB's expert
- Lesson? Official accounts are relied upon unless someone proves they are forged – a worrying asymmetry
- Between trust and blind faith...

Common costs and the chain of corporate control

- ▶ As the contract tender and negotiation involved specific individuals, the decision looked for a proof of whether the key people knew about the cartel. Finding:
 - ▶ Mr Jonsson (head of HV power cables unit) knew about the cartel,
 - ▶ Mr Leupp (his boss – head of Power Systems division) denied he knew anything about it – and he was believed. The conclusion is that his bidding behaviour was assumed to be fair and competitive (p.442)
 - ▶ Impact in terms of whether the common costs allocated to the project was inflated or not
- ▶ Very interesting analysis of the chain of control - not ready to accept the idea that cartels are built “bottom up” with no definite responsibility of the company as such

Common costs and the efficiency of cartels

- ▶ Cartels generate an efficiency as they save firms the effort to bid for projects which are “for someone else”.
 - ▶ Therefore, rather than leading to higher prices, on average cartels lead to lower costs
- ▶ However, if in a specific transaction (BritNed) these costs are not passed on to customers, this represents an (illegal) overcharge (**worth 5,5 Million €**)
- ▶ This makes (some) sense only if a firm had a duty to price at efficient cost
- ▶ In what sense would this represent a “damage” for the buyer?

Direct costs and cartel inefficiency

- ▶ ABB used more copper than some of its competitors; the difference in cost is 15% of the copper component
 - ▶ This has been indicated as “inefficiency” (**worth 7,5 Million €**)
- ▶ ABB used more copper in order to provide a higher quality service and reduce opex
 - ▶ The cables operate at lower temperature and generate lower losses – an issue which the decision never mentions
- ▶ But inefficiency might exist (in general) – how does one measure it?
- ▶ Maybe ready to accept the argument if one proves that the opex reduction is not sufficient to justify the increase in capex – no trace of such analysis

Lessons? A cynical view

- ▶ To a lawyer, accounting data may seem very reliable unless you prove otherwise
- ▶ “If a man with a pistol gun meets a man with a rifle, the man with the pistol is a dead man” (*For a fistful of dollars*)
 - ▶ Simpler straightforward arguments may be more effective than complex (and well done) econometric analyses
- ▶ How can we expect a lawyer to discriminate between good and bad econometric analysis?
 - ▶ Possibly if the Court had appointed an external expert the debate would have been different, and economic analysis would have a better chance