

### The Hague district court dismisses excessive pricing claim against former legal monopolist publisher (Stichting SDU Gedupeerden / SDU Uitgevers)

**Netherlands, Unilateral practices, Abuse of dominance, Excessive prices, Price fixing, Manufacturing**

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On 4 March 2015, the The Hague district court ruled on an excessive pricing claim brought against SDU, a former legal monopolist and a publisher of government and company information [1]. Applying the United Brands test, the district court finds that neither the price-cost limb nor the price comparison limb are satisfied and finds in favour of the defendant.

SDU is a former state-owned publisher, primarily active in the government sector. Between 1998 and 2010, SDU enjoyed a legal monopoly with respect to the supply of workbooks to cab drivers in the Netherlands. Taxi companies are obliged by law to register their working hours in workbooks and as a result of the legal monopoly could only purchase the work books from SDU.

After withdrawal of the legal monopoly in 2010 two competing suppliers of workbooks, UWT and KNV Taxi, entered the market. The workbooks manufactured by the entrants were up to 90% cheaper than SDU's average price during the monopoly period. Taxi companies filed a damages claim with the The Hague district court, alleging SDU abused its dominant position in breach of article 24 of the Dutch Competition Act. The latter is in all materials aspects identical to article 102 TFEU.

In assessing the plaintiffs' claims, the court relied on the two-stage United Brands test for excessive pricing, i.e.: (i) is the differential between price and cost excessive (price-cost test) and (ii) is the price excessive (or unfair) in itself or by comparison to competitor's products (price comparison test). As confirmed by the Netherlands Supreme Court [2] the plaintiff in competition cases must substantiate its claim by adducing relevant facts and circumstances. The plaintiff bears the burden of proof of showing that SDU abused its dominant position. Notably, while not reversing the burden of proof, the court finds that when the dominant position originates in a legal monopoly, the former monopolist must meet a higher threshold when contesting the facts stated by the plaintiff.

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The plaintiff based its allegations of excessive pricing on a number of circumstances: (i) SDU's margin on workbooks was twice as high as its average margin, (ii) SDU's margin was twelve times higher than the average margin in the graphic printing industry and (iii) SDU's price was eleven times higher than its competitors' post-monopoly.

In applying the price-cost comparison test, the court dismisses the plaintiff's arguments and finds that the margins achieved by SDU are not excessive. SDU's margin on workbooks in the relevant period ranged from 40 to 61%, comparable to similar SDU products. While this does not follow explicitly from the wording of the decision, one might assume that the latter products are not the subject of a legal monopoly. The court accepts SDU's position that it is a publisher, not a printing company, and that as a result (significantly lower) margins in the printing industry cannot be used as the relevant point of reference.

The plaintiff also failed to state facts supporting the conclusion that the price for workbooks in itself was excessive when compared to competitor's products (the price-comparison test). In addition to the cost of printing the workbooks, SDU had to invest significantly in product development before bringing the workbooks to market and agreed to maintain a minimum level of stock. SDU also bore the financial risk of reissues if amendments to the workbooks were required to prevent fraud. The court finds that since entrants did not have to incur these expenses, a (significant) price differential cannot therefor prima facie result in a finding of excessive pricing.

While the plaintiff was necessarily restricted in relying on certain comparators commonly applied in similar cases (such as past prices), it seemingly failed to base its allegations on a robust economic analysis of SDU's pricing model. At the same time, the district court's application of the United Brands test and its assessment of SDU's arguments are rather unconvincing. SDU's claim of having made significant product development investment (for a product that amounts to little more than a paper notebook), for example, appears to have been accepted without critical scrutiny.

The plaintiff's failure to substantiate its claims is a missed opportunity, given that dominance was a given and it did not have to carry out a full-fledged market definition. As it stands, the judgment merely provides another example of the high burden of proof placed on plaintiffs in the Netherlands.

[1] The Hague district court, judgment of 4 March 2015, case number C-09-454521 - HA ZA 13-1279, available through <http://uitspraken.rechtspraak.nl/in...>

[2] HR 21 December 2012, ECLI:NL:HR:2012:BX0345

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