

The concept of administered prices and its application in competition law

Oles Andriychuk

Senior Lecturer in Law, University of Strathclyde,

Co-Director, Strathclyde Centre for Internet Law and Policy

Member, SCALES – Strathclyde Centre for Antitrust Law and Empirical Study

Definition

Administered (regulated) prices are requirements imposed on undertakings by governments or other public authorities. Such practices are usually driven by the intentions of regulators to remedy/prevent market failures and similar situations, which are likely to lead to undesirable macroeconomic and non-economic consequences. The prices prescribed imperatively by the public authorities, obscure microeconomic analysis as they are driven by the incentives, which are hard to internalise into equilibrium modelling. The instances of administered prices are common and hardly avoidable as they are usually legally valid and have strong societal legitimacy appeal. For competition law, administered prices are the exogenous factors, which are capable of changing the outcomes of the assessment of anticompetitive practices.

Commentary

Administered (regulated) prices are prices for goods and services imposed on undertakings by public authorities. Also, the term may refer to prices in oligopolistic markets not responding to short-run fluctuations – unlike genuinely market prices, which react to changes in demand and supply. In this sense, administered prices may (but do not necessarily have to) be seen as the instances requiring antitrust intervention. In the latter sense, the prices are imposed by oligopolies, not by public authorities. This line of reasoning is not considered in the present analysis.

One of the foundational assumptions in theories measuring the performance of economic competition is that prices for products and services are defined by internal market processes. Such a freedom of exchange is an essential condition, which allows making substantiated conclusions about the objective economic benefits of the transactions. The price, defined by the market supply and demand forces, is one of the central parameters of competition law, economics and policy. Clearly, no agreement and no transaction in the markets are driven

and defined by the autonomous wills of the private agents exclusively. Numerous external constraints and factors always have some impact on the purity of the modelling. As long as these constraints to the freedom of exchange are minor, contextual and indirect, the prices are yet assumed to be free, and the external impact is internalised into the equation, allowing a meaningful assumption of the accuracy of the equilibrium analysis. The situation becomes fundamentally different if prices for specific products and services become regulated by the government. Such practices are systemic in the countries with planned economy. These societies do not rely on competition as the main driving force of growth, innovation and income generation. Instead, the main coordination and distribution function is assigned to the public authorities. Economic competition is seen in such countries as either suboptimal or harmful outright, and as such not requiring any particular measuring. These jurisdictions are excluded from the present analysis. The discussion of the administrated prices is important only for countries, in which such situation is not a rule but an exception from the ordinary approach to pricing. It is particularly relevant for the countries with hybrid elements of planned and market economy as such administered pricing may be used by the governments of these countries as the main mechanism of dirigistic interventions.

To a different extent, all economies have either specific situations or entire sectors, requiring an administration of prices by public authorities. This could be a prescription to keep a minimum price, prohibiting going below (as would be the case in instances of protecting small and medium size producers in the markets dominated by much bigger companies capable to decrease price without operating at a loss). In other situations, the regulators may, on the contrary, require keeping a maximum price, prohibiting going above (as would be the case with some natural monopolies, essential food supply or for example opportunistic price gouging during major societal turbulences). Unlike the previous scenario, capping the prices to an imposed maximum is a measure envisaged to benefit primarily not competitors but consumers. Formally, instances of both minimum and maximum price administration allow the markets to compete on price within the permitted parameters (selling at higher price in cases of minimum price requirements or at lower in cases of maximum price requirements). There are also situations when price is set in absolute terms, allowing no deviation from the prescribed nominal. This could be the case with assigning the price for a specific pharmaceutical product or any other product or service in specific cases of public interest. On the temporal dimension the measures of administrating prices may vary from being ad hoc to permanent.

The phenomenon of *administered prices* is different from a phonetically similar practice of *price maintenance*. The former concerns situations when prices are imposed on the market players by public authorities, while the latter is related to the same cap established by the market players themselves and imposed by a stronger market player on its economically weaker counteragents. The former is an external factor, which may be taken into consideration during competition law analysis. The latter constitutes one of the central economic problems addressed by competition law. Similarly, *administrated prices* are different from the practice of *price fixing*, which constitutes a substance of anticompetitive agreement between market players, and alongside *price maintenance* is one of the most common instances of infringing the provisions of competition law. *Price maintenance* takes place vertically between producers and distributors. *Price fixing* takes place horizontally, between competitors. At the level of unilateral conduct, various forms of price discrimination constitute the core of all of price-abusive practices.

Administered prices are common in the EU Member States, and not so much in the US. In the context of the EU, the phenomenon has also an important implication on establishing and functioning of the Internal Market (ANODE, 2016), as it may hinder market integration as well as have direct impact on EU trade with third countries. Another layer of complexity is added by the instances of practicing price administration by the EU itself (e.g. ‘Roaming Regulation’ or EU Common Agricultural Policy). Giving the strong interdependency between the goals of competition and market integration policies, the negative impact on the protection of either or both is often hard to distinguish.

If leading to or imposed in conjunction with an anticompetitive behaviour, administered prices usually serve as a circumstance mitigating the severity of competition infringement. The fact that the restriction is to a different degree linked with the state interference into the market process, may lead to the softening of the liability of the infringer. Particularly, if applied in conjunction with Art 4(3) TEU, imposing upon all EU Member States a duty of sincere cooperation. Depending on the level of autonomy, the undertaking is left with under a specific administered pricing order, the liability may shift from the undertaking to the Member State (*Van Eycke v ASPA*, 1988): the bigger the autonomy and the room for manoeuvre are left for the undertaking, the higher its liability would be; the stricter the public imperative, the softer the liability (*API and Others*, 2014).

Legislation

- Consolidated version of the Treaty on European Union, OJ C 326, 2012.
- Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 2012.
- Regulation 717/2007 of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, OJ L171/32, 2007.
- Regulation 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, OJ L347/671, 2013.

Case References

- Case C-267/86 Van Eycke v ASPA ECLI:EU:C:1988:427.
- Opinion of Advocate General Poiares Maduro in Case C-58/08 Vodafone EU:C:2009:596.
- Cases C-184 to 187, 194, 195 & 208/13 API and Others ECLI:EU:C:2014:2147.
- Case C-33/14 Scotch Whisky Association and Others v Lord Advocate and Advocate General for Scotland, EU:C:2015:845.
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