

EU 競争法：差別対価・略奪的廉売に係る
市場支配的地位濫用規制の考え方の状況

1. 総論 — 市場支配的事業者の特別の責任の考え方

EU 競争法上、差別対価や略奪的廉売の事案は EU 機能条約 102 条の市場支配的地位の濫用として規制されるところ、EU の判例法上、市場支配的地位濫用の基本的な考え方として、(市場支配的な地位にあることそれ自体が違法になるものではないが、) 市場支配的な地位を有する事業者には、自身の行為によって市場における競争を害することとならないようにする特別の責任 (“a special responsibility not to allow its conduct to impair genuine undistorted competition on the [...] market”) があるものとされている¹。

欧州委員会が市場支配的地位の濫用に関しての執行方針を示した Guidance Paper (2009 年)²においても、この考え方が採用されている。

参考：Guidance Paper 抜粋

“1. Article 82 of the Treaty establishing the European Community [...] prohibits abuses of a dominant position. In accordance with the case-law, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits. However, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market. Article 82 is the legal basis for a crucial component of competition policy and its effective enforcement helps markets to work better for the benefit of businesses and consumers. This is particularly important in the context of the wider objective of achieving an integrated internal market.”

¹ Case 322/81 *Nederlandsche Banden Industrie Michelin (Michelin I) v Commission* [1983] ECR 3461 等。

² Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty [now 102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/2.

2. 略奪的廉売・差別対価にかかる考え方の状況

市場支配的事業者による略奪的廉売ないし差別対価に関しては、AKZO 事件の欧州司法裁判所の判決³を基礎とした判例法が形成されている。これによれば、

- (i) 平均可変費用未満の価格設定は、それが競争者の排除のための行為であれば濫用に当たるところ、競争者を排除して後に独占的地位を利用した値上げを行うこと以外にそのような価格設定をする理由は見いだせないとの考え方であり、平均可変費用未満の価格設定は濫用に当たるとの推定則が定立されている。
- (ii) 平均可変費用を上回るものの平均総費用を下回る価格設定についても、同等に効率的な事業者が排除されうることから、それが競争者を排除する計画の一部として行われている場合には濫用に当たるとの考え方が示されている。

(なお、差別対価行為が問題とされた後の事例の欧州司法裁判所決定⁴において、平均総費用を上回る価格設定が違法となることはないとの考え方が示されている。)

参考：AKZO 事件判決抜粋

“71. Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.

³ Case 62/86 *AKZO Chemie v Commission* [1991] ECR, I-3359.

⁴ Case C-209/10, *Post Danmark A/S v Konkurrenceradet* EU:C2012:172

72. Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.”

前記の欧州委員会の **Guidance Paper** においても、上記の判例法の考え方と基本的に同様、(i)濫用と推定される水準、及び(ii)競争者を排除する計画の一部として行われた場合には濫用とされる水準の二段階の判断枠組みが採用されている。

なお、基準としては、**Guidance Paper** については(i)について平均可変費用に代えて平均回避可能費用が、(ii)については平均総費用に代えて平均長期増分費用が用いられている。

EU 競争法：差別対価・略奪的廉売に係る
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| | EU の裁判所での判例法 AKZO 事件 (1991 年) など | 欧州委員会による執行方針の Guidance Paper (2009 年) |
|---------------------------------|-------------------------------------|---|
| 濫用と推定される価格基準 | 平均可変費用未満 | 平均回避可能費用未満 |
| 他者排除の計画の一部として行われた場合には濫用に当たる価格基準 | 平均可変費用を上回るが 平均総費用未満 (*) | 平均回避可能費用を上回るが 平均長期増分費用未満 |

(*) 平均総費用を上回る価格設定は適法 (Post Danmark 事件⁵ (2012 年))

⁵ Case C-209/10, Post Danmark A/S v Konkurrenceradet EU:C2012:172

費用関係の用語の定義等

- 平均可変費用 AVC(Average Variable Cost)

可変費用を生産量で除算したもの。生産量一単位当たりの可変費用。

- 平均回避可能費用 AAC(Average Avoidable Cost)

一定数量の追加生産を行わなかったとした場合に回避できた費用を追加生産量で除算したもの⁶⁷。追加生産量一単位当たりの回避可能費用。

- 平均総費用 ATC(Average Total Cost)

総費用（可変費用＋固定費用）を生産量で除算したもの。生産量一単位当たりの総費用。

- 平均長期増分費用 LRAIC(Long-Run Average Incremental Cost)

会社が特定の製品を生産する際に生ずる追加費用（可変費用及び固定費用）の、当該追加生産数当たりの平均⁸。

⁶ 「廉売行為者が廉売対象商品の追加供給をやめた場合に生じなくなる廉売対象商品固有の固定費用及び可変費用を合算した費用を追加供給量で除することによって得られる廉売対象商品一単位当たりの費用をいう。」（不当廉売ガイドライン）

⁷ “Average avoidable cost is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct. In most cases, AAC and the average variable cost (AVC) will be the same, as it is often only variable costs that can be avoided.”（前注 2 の欧州委員会の Guidance Paper の脚注より。）

⁸ “Long-run average incremental cost is the average of all the (variable and fixed) costs that a company incurs to produce a particular product.”（前注 2 の欧州委員会の Guidance Paper の脚注より。）

参考：Guidance Paper 抜粋

“23. [...] Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.

[...]

25. In order to determine whether even a hypothetical competitor as efficient as the dominant undertaking would be likely to be foreclosed by the conduct in question, the Commission will examine economic data relating to cost and sales prices, and in particular whether the dominant undertaking is engaging in below-cost pricing. This will require that sufficiently reliable data be available.

[...]

26. The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC). Failure to cover AAC indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. LRAIC is usually above AAC because, in contrast to AAC (which only includes fixed costs if incurred during the period under examination), LRAIC includes product specific fixed costs made before the period in which allegedly abusive conduct took place. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market.”

“64. Conduct will be viewed by the Commission as entailing a sacrifice if, by charging a lower price for all or a particular part of its output over the relevant time period, or by expanding its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided. The Commission will take AAC as the appropriate starting point for assessing whether the dominant undertaking incurred or is incurring avoidable losses. If a dominant undertaking charges a price below AAC for all or part of its output, it is not recovering the costs that could have been avoided by not producing that output: it is incurring a loss that could have been avoided. Pricing below AAC will thus in most cases be viewed by the Commission as a clear indication of sacrifice

65. However, the concept of sacrifice does not only include pricing below AAC. In order to show a predatory strategy, the Commission may also investigate whether the allegedly predatory conduct led in the short term to net revenues lower than could have been expected from a reasonable alternative conduct, that is to say, whether the dominant undertaking incurred a loss that it could have avoided (3). The Commission will not compare the actual conduct with hypothetical or theoretical alternatives that might have been more profitable. Only economically rational and practicable alternatives will be considered which, taking into account the market conditions and business realities facing the dominant undertaking, can realistically be expected to be more profitable.”