

How does Competition Law contribute to Consumer Welfare?

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MAMO TCV

A D V O C A T E S

Outline

- The Goal of Competition Law
- Fundamental Differences between Consumer Law and Competition Law
- Answering the question:
 - Consumer choice
 - Counterfactual scenario: what if we had no competition rules?
 - Direct and Indirect benefits
- How the consumer benefits from competition law in practice – case studies:
 - Direct Benefit,
 - Indirect Benefit.

The Goal of Competition Law

- “Antitrust policy cannot be made rational until we are able to give a firm answer to one question: what is the point of the law – what are its goals?” (Bork, R.H. (1978), *The Antitrust Paradox*)
- Bork’s thesis that ‘consumer welfare’ is the only proper goal of competition law was, and still is, very influential:
 - US Supreme Court antitrust decisions starting from *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) held (quoting Bork) that ‘Congress designed the Sherman Act as a “consumer welfare prescription.”’
 - Many competition law regimes have followed suit.

The Goal of EU Competition Law

- Since the early 2000s, the Commission has emphasized the ‘consumer welfare’ goal e.g. the Guidelines on the Application of article 101(3) TFEU (2004/C 101/08) state:
 - “The aim of the Community Competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources” (para. 33)
- The dicta of the Court of Justice (CJEU) have not been very consistent:
 - “... the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers” (Österreichische Postsparkasse AG et v Commission – Cases T-213/01 and T-214/01 – 07/06/2006)
 - “[Article 101 TFEU] aims to protect not only the interests of competitors or of consumers but also the structure of the market and, in so doing, competition as such” (GlaxoSmithKline v Commission – Case C-501/06 – 06/10/2009)

The Goal of Maltese Competition Law

- The Competition Act and the Consumer Affairs Act were conceived and born at the same time:
 - 1991 - Green paper 'Rights for Consumer'
 - 1993 - White paper 'Fair Trading, the next step forward ...' – it contained two draft Acts - the aim of the legislative reform was 'the protection of consumer welfare':
“One of the principal ways of protecting consumers is by encouraging and maintaining free and undistorted competition. Where competition is absent and freedom of choice cannot be exercised, consumer protection laws and remedies lose much of their value and significance”
 - 1994 – the Acts were passed in the same month (December)
 - 2011 – the Malta Competition and Consumer Affairs Authority Act brought about institutional integration:
 - Malta Competition and Consumer Affairs Authority is responsible for both competition and consumer policy;
 - The Competition and Consumer Appeals Tribunal has jurisdiction to hear appeals from decisions in both fields.

Consumer Law and Competition Law: Fundamental Differences

- Consumer law acts at the level of individual transactions, competition law at the level of markets.
- The concept ‘consumer’: for consumer law, it normally refers to the ultimate consumer; for competition law, it covers all direct and indirect users of a product.
- In competition law, it is not yet settled what ‘consumer welfare’ actually means:
 - Consumer welfare as total surplus or aggregate welfare (i.e. consumer surplus and producer surplus), or
 - Consumer welfare as consumer surplus (the difference between the amount that a consumer is willing to pay for a product and the actual price that she pays for that product)

Answering the Question

- Consumer law, self-evidently, aims at preventing and redressing consumer harm so, in view of the differences outlined above, how does competition law contribute to consumer welfare? It does so because:
 1. One of its principal aims is that of ensuring that consumers have choices;
 2. If we had no competition rules, consumers would have less choice and, as a result, price and quality of goods and services would be negatively affected;
 3. It prevents consumer harm frequently in an indirect way but sometimes directly.

Consumer Choice

- The notion of ‘consumer choice’ lies at the basis of the inter-relationship between competition law and consumer law:
“the assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers” (National Soc’y of Prof Engineers v United States – 435 U.S.679 [1978])
- Competition means choice - choice favourably affects the elements of a ‘bargain’ - choices made by informed consumers drive the investment decisions of businesses.
- Competition law makes sure that consumers have choices while consumer law makes sure that consumers can exercise those choices in an effective way. (See: Averitt, N.W. & Lande, R.H. (1998) “Consumer Choice: The Practical Reason for both Antitrust and Consumer Protection Law”. Loyola Consumer Law Review, Vol. 10:1, pp. 44-63)

A Counterfactual Scenario

- What if we had no competition rules?
 - No rule against anti-competitive agreements: firms would be able to 'gang-up' and share markets, limit output and fix prices. The consumer would have less choice, there would be less innovation, higher prices and lower quality.
 - No rule against abuses of a dominant position: a firm with market power could play 'the bully' by (a) eliminating competition or preventing potential competition thus limiting consumer choice and (b) exploiting its power through excessive pricing and the imposition of unfair conditions.
 - No control of mergers: mergers could eliminate competition, create dominant firms and this could eventually lead to less consumer choice and higher prices.

Indirect and Direct Benefits to Consumers

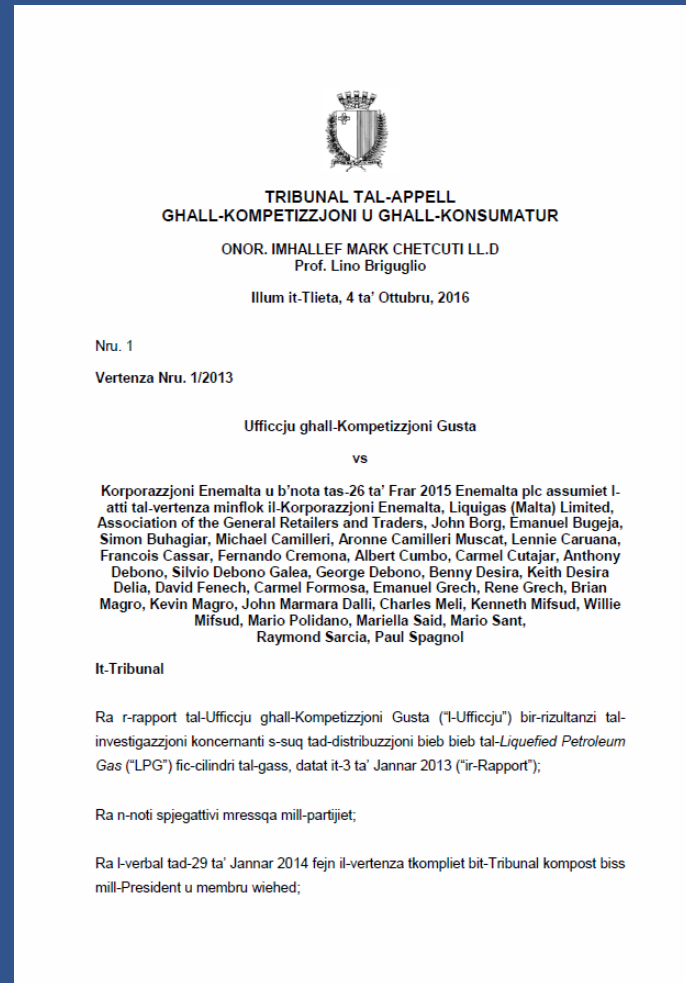
- Frequently competition law addresses consumer harm indirectly by making sure that there is effective competition and by stopping infringements higher up in the supply chain but it occasionally addresses direct consumer harm e.g. excessive pricing by a dominant firm
- Consumer harm is also addressed directly in the Damages Directive (Directive 2014/104/EU of 26 November 2014):
 - An indirect purchaser can claim compensation. An ‘indirect purchaser’ is a person who acquired products or services, not directly from an infringer, but from a direct purchaser or a subsequent purchaser.
 - A presumption that an overcharge was passed on to an indirect purchaser arises if it is shown that: (a) the defendant committed an infringement; (b) which resulted in an overcharge; and (c) the indirect purchaser purchased the relevant goods or services

How does the consumer benefit from competition law in practice?

Case studies from decided cases

Direct benefit to consumers

Direct Benefit to Consumers from Prohibiting Anti-Competitive Agreements



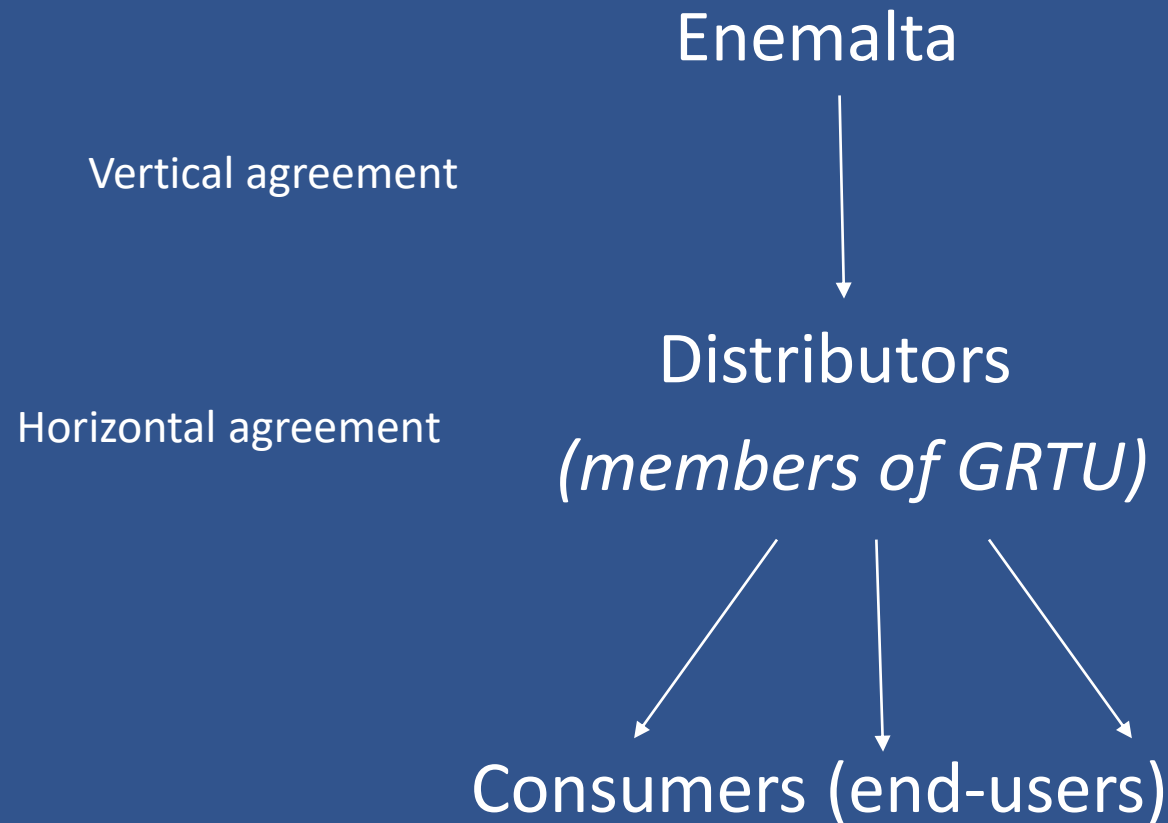
Facts

- Standard agreement between Enemalta (at the time, the only supplier of LPG in cylinders, as well as the sectoral regulator) and each individual distributor (or his predecessor)
 - Malta & Gozo were divided in territories
 - A territory was allocated to each distributor
- At issue was exclusive distribution and absolute territorial protection granted by virtue of the agreement



- OFC Report concluded there was a breach of Article 5(1) CA and Article 101(1) TFEU
- Defences:
 - Enemalta: the agreement was based on established practices, and legal and social necessities; as from 2009, it was no longer the regulator
 - Liquigas: agreed with the conclusions of the OFC, except that it was never part of this agreement
 - Distributors (majority): agreement was a license; it was necessary for vulnerable consumers, to ensure they were served (gas cylinders delivered right to your door); maximum price was established by the MRA
 - Other distributors (minority): disassociated themselves from GRTU
 - GRTU: protecting the interests of its members

Findings of the Appeals Tribunal



- Granting exclusive right to distribute LPG in cylinders in a particular territory (absolute territorial protection)

- Distributors honoured each others' territory
- Physically blocked Liquigas trucks

- Press releases, directives

When and How Does the Consumer Benefit?

- Agreement between all retail distributors (as well as agreement between only supplier and all retail distributors)
- Consumers given no choice who to buy from
- As a result the distributor could reduce level of service with no repercussions
- In other markets, a distributor can also raise prices, again with no repercussions
- Consumers have to buy product being offered by the distributor (problematic in a market where there are two or more suppliers)
- Situation today: since the start of this case, the regulator (MRA/REWS) has issued other authorisations for LPG distributors. Distributors can enter the 'territories'. Suppliers are free to supply customers directly.

Direct Benefit to Consumers from Prohibiting Abuse of a Dominant Position

Commission for Fair Trading

Measure number 4/2006: *Fl-atti tar-rikors tad-Direttur ta' l-Ufficċju tal-Kompetizzjoni Ġusta dwar ħtieġa ta' miżuri interim fil-konfront ta' Melita Cable plc fuq talba ta' l-istess direttur ai terimini ta' l-artikolu 15 ta' l-Att dwar il-Kompetizzjoni*

19 May 2006

Facts

- Request by Director (Competition) for the Commission for Fair Trading to issue an interim measure (Competition Act pre-2011)
- Melita Cable plc was the incumbent (previous statutory monopoly) for cable television
- Melita Cable plc blocked local transmissions of World Cup matches, UEFA Champions League matches, Formula One races and Six Nations' Cup, including on free-to-air channels
 - Occurred after entry of competitor in the market, which had previously had the exclusive rights to transmit Serie A matches, prohibiting Melita Cable plc from transmitting these matches
- Numerous complaints received by the Office for Fair Competition
- Interim measure was issued

The Conduct in Question

- Although not couched in such terms, this could be considered as a case of exploitative pricing, as Melita Cable plc's own customers, consumers who had a TV aerial, and consumers who had a subscription with its competitor, could only watch these sporting events if they paid Melita Cable plc for the privilege, notwithstanding that these events would be available on channels which are provided through these various services
 - Consumers in essence paying twice
- Melita Cable plc could set any price it wanted for the transmission of these sporting events
- Possibly, the act of 'blocking' in itself could be seen as an abuse

When and How Does the Consumer Benefit?

- Conduct directed towards end-users (consumers) directly (retail level)
- Direct effect generally felt with exploitative abuse (e.g. exploitative pricing, discriminatory pricing, unfair trading conditions) which is carried out at retail level
 - Such conduct could also be carried out at wholesale level, where indirect effect would be felt
 - Other types of abuse may even be beneficial to consumers (in the short term) e.g. predatory pricing, margin squeeze
- Generally, the effect of such conduct is high prices
- In *Melita Cable*, consumers were given no choice who to acquire the service from, even though it was available for free or from competitors

Indirect benefit to consumers

Indirect Benefit to Consumers from Prohibiting Anti-Competitive Agreements



TRIBUNAL TAL-APPELL
GHALL-KOMPETIZZJONI U GHALL-KONSUMATUR

ONOR. IMHALLEF MARK CHETCUTI LL.D
Prof. Lino Briguglio

Illum it-Tlieta, 21 ta' Frar, 2017

Numru 1

Rikors Nru. 2/2010

A.A.J.E. Abela Brothers Partnership, Mario Axiq,
Carmelo Bros Partnership, N. & C. Camilleri Partnership,
Carmelo Fenech, John Fenech, Lajmic Burdnara Partnership,
Carmelo Gatt, G.S.L. Grech Brothers Partnership, Philip Meli,
Aaron Mizzi, John Mizzi, G. & A. Refalo Partnership,
Nazzareno Sammut & Sons Partnership, Victor Vella,
E. & S. Zahra Brothers Partnership, Alex Zammit,
V. Zammit & Sons Partnership, T. & R. Zammit Partnership u
C. & F. Abela Partnership, kollettivament maghrufa taht l-isem
"Burdnara Bulk Cargo Group" u Central Cement Limited (C6108)

vs

L-Ufficju għall-Kompetizzjoni
wara l-ilment ta' Carmelo Meli Limited

It-Tribunal

Ra l-ilment ta' Carmelo Meli Limited tas-6 ta' Marzu 2007 imressaq quddiem l-Ufficju tal-Kummerc Gust ("l-Ilment") (a fol. 31 *et seq.*);

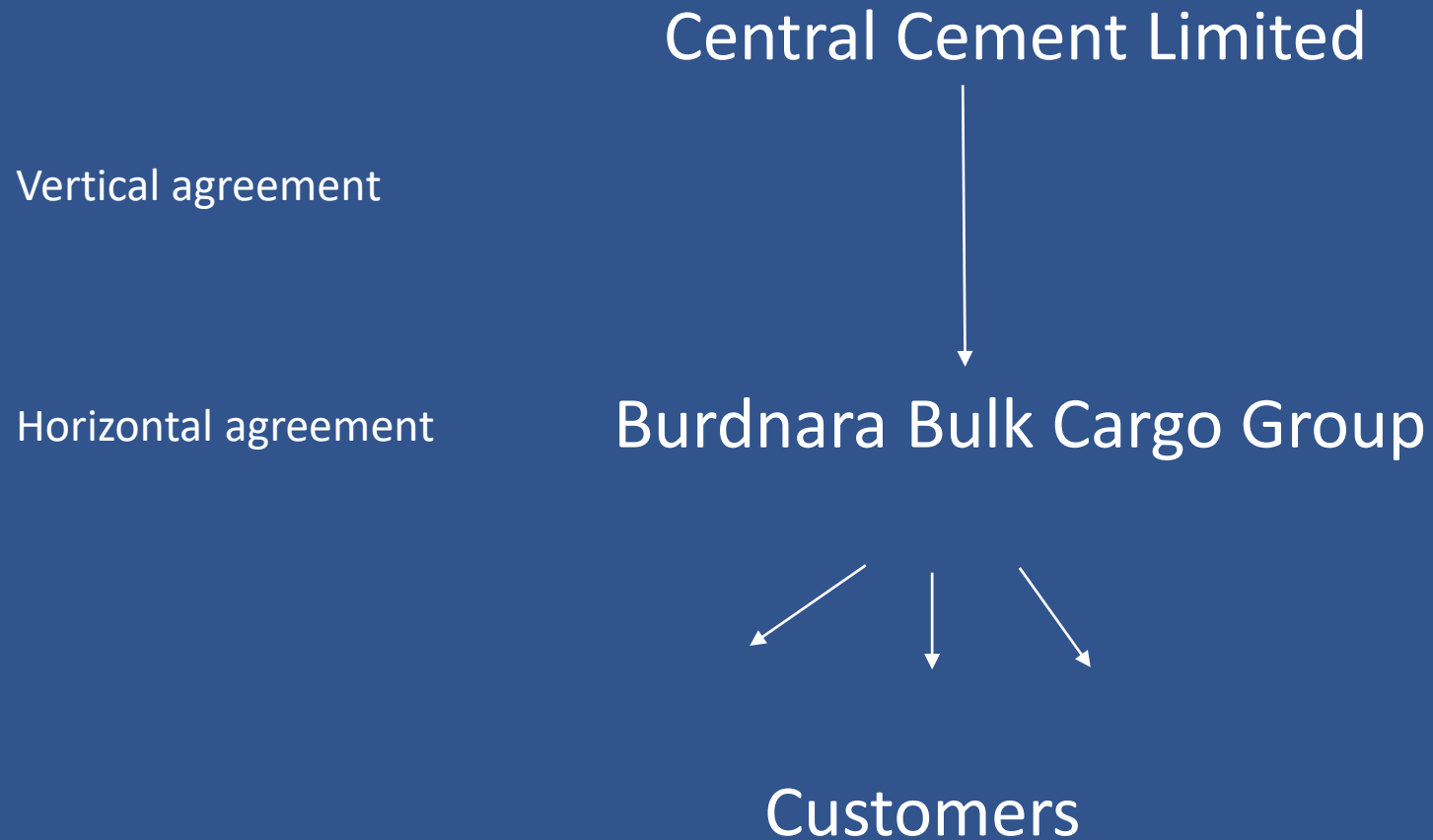
Ra d-decizjoni tad-Direttur tal-Ufficju għall-Kompetizzjoni Gusta ("l-Ufficju") tas-6 ta' Jannar 2010 ("id-Decizjoni") (a fol. 5 *et seq.*);

Facts

- Central Cement Limited: only importer of grey cement
- Burdnara Bulk Cargo Group: transport and distribution of bulk and bagged grey cement
 - Stevedores were guaranteed work – on roster
 - Set prices
 - Representative took orders and ensures payment for stevedores
- Agreement in place for a long time
- Complainant was refused access to the Group and was refused supplies by Central Cement
- Pending proceedings the complainant was introduced into the Group
- Other importers were stopped by the Group from having their own distribution system; clients were stopped from transporting cement directly from Central Cement

- OFC had found for the complainant; Central Cement and the Group requested review of the decision (Competition Act pre-2011)
- The Group argued the agreement was justified on the basis of Article 5(3); including that the consumer benefitted
- They also argued that Council Regulation 1017/68 and Council Regulation 169/2009 applied analogously when interpreting Maltese law
- Central Cement argued that the conduct was unilateral conduct imposed upon it

Findings of the Appeals Tribunal



- Exclusive supply arrangement
- Central Cement gave its consent when it refused to engage third parties who were not members of the Group

- Agreement not justified on Article 5(3) CA as no evidence brought forward that the agreement did not lessen competition
- Regulations apply for Article 101 TFEU; carrying capacity of the Group represented practically the whole market for transport and distribution of grey cement in Malta and Gozo

When and How Does the Consumer Benefit?

- Agreement at wholesale/distribution level – no direct link to consumers
- However, the effects of anti-competitive agreements at higher levels of the distribution chain may be passed-on to consumers
- For instance, since all grey cement was being distributed by the Group, they could set a monopoly price for cement. Their customers could, rather than absorb the higher price, increase the price charged to their customers and so on. This means higher prices for end-users (consumers).
- Higher prices can be absorbed by customers; they may be completely passed on; or the level of pass-on would be driven by the degree of market power held by the seller.
- Bad service (living the quiet life) may also affect end-users (consumers) e.g. untimely delivery of cement
- Indirect effects are more difficult to gauge than direct effects, since the latter are more tangible for consumers

Indirect Benefit to Consumers from Prohibiting Abuse of a Dominant Position

Commission for Fair Trading

Complaint number 4/2005: *Austria Tabak (Malta) Limited vs Central Cigarette Company Limited*

19 October 2009

Facts

- Austria Tabak (Malta) Limited complained about practices undertaken by Central Cigarette Company Limited (“CCCL”)
- CCCL found to have 82% of the market for the sale of cigarettes through vending machines in the St Julian’s/Paceville area
- OFC found that CCCL had bound certain outlets in the relevant market to exclusively stock and sell its cigarettes in breach of Article 5(1) CA; and had offered an advance payment to outlets, calculated on sales from the vending machines, or a commission for cigarettes sold through the vending machines in breach of article 9(1) CA
- OFC ordered that 15% of the machines be freely accessible to other brands
- There were other allegations made by complainant

Findings of the Commission for Fair Trading

CFT confirmed OFC decision, and noted that these practices 'tikkawża dannu ċar u demonstrabbli kemm lill-konsumatur (tas-sigaretti) li ma jsibx x'jixtri ħlief prodotti tagħha, u lill-kompetituri diretti, b'has-soċjeta' lanjanti, li ma jithallewx jippenetraw is-suq de quo u allura ma jkunux jistgħu jbiegħu l-prodotti tagħhom'

Central Cigarettes Company Limited



When and How Does the Consumer Benefit?

- Generally, effect for consumers is lack of choice, increased prices (pass-on)
- Consumers may even benefit in the short term in the case of certain abuses e.g. predatory pricing or margin squeeze but would be harmed in the long-term once dominant undertaking's competitors are eliminated (no consumer choice; prices may increase)
- Abuse of dominance (especially if exclusionary) rarely effects end-users (consumers) directly

Conclusions

- The consumer in most cases is only the indirect beneficiary of the application of competition law
- The consumer benefits directly in the case of anti-competitive agreements or abuse of dominance which is carried out directly at retail level
- Effective application of competition law should lead to:
 - Lower prices for consumers: either by prohibiting exploitative/discriminatory pricing practices (direct), or by eliminating the need for pass-on (indirect)
 - More consumer choice: by ensuring that competitors of the undertakings acting in an anti-competitive manner are not foreclosed from the market



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