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On the priorities for enforcement of Article 82

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*The views expressed are those of the author and do not necessarily reflect those of DG COMP or the European Commission

Introduction



- Commission's Communication is continuation of work done earlier in other areas: Guidelines on vertical restraints, on technology transfer, on Article 81(3), on horizontal and on non- horizontal mergers
- The fragmented and sometimes rather form-based case law meant there was a good reason also in the area of Article 82 to publish a more systematic and transparent approach, to clarify policy and facilitate a consistent approach throughout EU
- The final text of the Communication can be found in all Union languages at:
<http://ec.europa.eu/competition/antitrust/art82/index.html>

Introduction



- Guidance on enforcement priorities
- Not meant to be a statement of the law
- Focus on single dominance and exclusionary conduct
- General approach
 - Safeguarding the competitive process and not the protection of competitors
 - Effects on consumers
 - Objective necessity and efficiency defence
- To ensure that dominant firms do not impair effective competition by foreclosing rivals in an anti-competitive way thereby having an adverse impact on consumer welfare

Dominance and market power



- The extent to which a firm can behave independently of its competitor relates to degree of competitive constraints exerted on this firm
- A dominant firm enjoys substantial market power over a period of time (two years)
- Competitive constraints :
 - Imposed by actual competitors
 - By the threat of expansion of actual competitors and entry of potential competitors
 - By the bargaining strength of customers
- High market shares are only a first indication
- Low market shares (below 40 %) are a good proxy for the absence of substantial market power

Anticompetitive foreclosure



- No particular test applied across all practices
- Anticompetitive foreclosure
 - Foreclosure : access to market is hampered or eliminated
 - Anticompetitive : in such way that consumers are harmed
- Assess the current or likely future situation in the relevant market relative to an appropriate counterfactual
- Produce a convincing story of harm with the general factors in §20 - such as the conditions of entry, the existence of scale/scope economies, network effects, the counterstrategies of competitors and customers, market coverage, actual effects and intent ...- and the more specific factors mentioned in the conduct specific sections
- Small place for "hardcore" conduct (§22)

As efficient competitor test



- As efficient competitor test useful indicator whether price conduct is capable to harm consumers
- Depending on the available data, to be applied for all pricing conduct: rebates, mixed bundling, predation, margin squeeze (see the different sections for details)
- In general consumers unlikely to be harmed if the conduct is only capable to exclude less efficient firms: soft safe harbour for pricing above LRAIC
- However, taking a dynamic view of the constraint exercised by seemingly less efficient competitor
- Tests only for capability to harm consumers: result to be integrated in general assessment of anticompetitive foreclosure

Objective necessity and efficiencies



- A dominant firm may justify conduct leading to anticompetitive foreclosure on the ground that efficiencies are sufficient to guarantee that consumers are not harmed
- The burden of proof is on the dominant firm to show that:
 - the efficiencies are the a result of the conduct;
 - the conduct is indispensable: there is no less anticompetitive way;
 - the efficiencies outweigh the negative effects for consumers;
 - the conduct does not eliminate effective competition: exclusionary conduct which maintains or creates a position approaching that of a monopoly can normally not be justified on the basis of efficiencies
- The Commission makes the ultimate assessment of whether, considering the efficiencies, the behaviour is likely to lead to consumer harm

Exclusive dealing



- In principle, individual buyers will benefit. But the benefit may be very small and there may be spillovers, in particular when buyers are fragmented.
- Particular concern when
 - an important competitive constraint is exercised by competitors who are not yet present or cannot compete for the full supply of the customers when the obligations are concluded;
 - there exist asymmetries that favour the dominant firm over rivals and potential entrants – the dominant firm is an unavoidable trading partner for at least part of demand;
 - switching is hampered due to the duration of the obligations
- Efficiencies in terms of savings in transactions costs or the provision of incentives to undertake relationship specific investments.

Conditional rebates



- Conditional rebates: foreclosure possible without sacrifice; low marginal price while high average price
- Can the rebate hinder entry or expansion of as efficient competitors.
 - Can rivals compete for the whole customer or is the dominant firm an unavoidable trading partner: in the latter case rebates can make it very unattractive to switch small amounts of demand;
 - Calculate the effective price over that part of demand for which rivals can compete and customers are willing to switch (the relevant range) and compare it to the relevant cost benchmark
 - If customers have to forego a high rebate while switching a small amount, the effective price will be low
 - If the effective price is below AAC the rebate is capable of foreclosing as efficient rivals, while such is unlikely above LRAIC
 - If the effective price is in between AAC and LRAIC, the Commission will investigate whether and to what extent rivals have effective counterstrategies at their disposal

Tying and bundling



- Contractual tying, pure and mixed bundling, technological tying
- Commission to establish that:
 - Dominance in the tying market (not necessarily in the tied market)
 - Concerns distinct products: customers would purchase the tying product without buying the tied product from the same supplier
 - It leads to anticompetitive foreclosure:
 - Harm in the tied market: restaurant in the island paradigm
 - Harm in the tying market: tying complements in order to make entry in the tying market more difficult
 - Harm in both markets: avoid substitution and raise prices
- Multiproduct rebates: is the incremental price above the long run incremental cost of including the product in the bundle?
- Competition among bundles?

Predation



- Incur loss/forego profits to foreclose and strengthen/maintain market power, thereby causing consumer harm
- Sacrifice
 - Pricing below AAC
 - Net revenues lower than what could have been achieved in a reasonable counterfactual (but P still below LRAIC)
- Anticompetitive foreclosure:
 - How can it lead to foreclosure:
 - Reputation
 - Access to finance and manipulation of information
 - Anticompetitive : customers likely to be harmed if the dominant undertaking can expect that its market power is enhanced, i.e. if there is a benefit from the sacrifice; not a spreadsheet exercise

Refusal to supply and margin squeeze



- General concern about incentives to invest in tangible and intangible assets – a specific framework
- Focus on input foreclosure
- Charging a price which prevents an efficient competitor from competing downstream is like a refusal to supply
- Cumulative conditions for intervention
- Input needs to be objectively necessary to compete effectively in the downstream market: there is no actual or potential substitute to the input and replication would not be undertaken to a sufficient degree
- Elimination of effective competition: immediately or over time
- Consumer harm : a dynamic perspective. Do the negative consequences of the refusal to supply outweigh the negative consequences of imposing an obligation to supply

Refusal to supply and margin squeeze



- Consumer harm may arise if refusal to supply prevents competitors from bringing new products or stifles innovation
- Efficiencies : the refusal to supply may be necessary to give the dominant firm incentives to develop its input or develop new product downstream
- Overall, balance of incentives to invest
- However, when it is manifestly clear that there can be no negative effects on the incentives to invest, for instance where regulation imposes an obligation to supply or where the upstream position of the dominant firm was financed by state aid, the usual test of likely anti-competitive foreclosure applies

Conclusion



- Balanced effects-based approach to avoid over- and under-enforcement
- Comparison with US difficult to make because of ongoing debate in US
- Withdrawn DoJ Report:
 - Concern of over-enforcement (private litigation culture?)
 - Safe harbour below 50% market share
 - Disproportionality test instead of balancing test
 - Most pricing conduct assessed as predatory pricing