Economic Developments in European Competition Policy,
CRA Conference, Brussels, December 3, 2008

On the priorities for enforcement of Art. 82

Damien Neven, Chief Economist*
DG COMP, European Commission

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

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 necessities and efficiencies
- 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 and entry of potential competitors
  - By the bargaining strength of customers
- High market share are only a first indication
- Low market share (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 actual or likely future situation in the relevant market relative to an appropriate counterfactual
- The conditions of entry, the existence of scale/scope economies, network effects, the counterstrategies of competitors, ...
- As efficient competitor test as a useful benchmark (when assessing price conduct) – taking a dynamic view of the constraint exercised by seemingly less efficient competitor

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
- Efficiencies likely to be realised as a result of the conduct
- Conduct is indispensable (i.e. it is a more effective, less anticompetitive way of achieving efficiencies)
- Exclusionary conduct which maintains a position approaching that of a monopoly can normally not be justified
- Burden of proof to show efficiencies on the dominant firm
- The Commission makes the ultimate assessment of whether, considering the efficiencies, the behavior is likely to lead to consumer harm

Exclusive dealing

- In principle, individual buyers will benefit. But there may be spillovers, in particular when buyers are fragmented.
- Particular concern when
  - An important competitive constraint is exercised by competitors who are not present (or cannot compete for the full supply of the customers) when the obligations are concluded.
  - There exists asymmetries that favor an incumbent over potential entrants
- Efficiencies in terms of savings in transactions costs or the provision of incentives to undertake relationship specific investments.

Exclusive dealing

- Conditional rebates can foreclose competitors even when in the absence of sacrifice
- Can the rebate hinder entry or expansion of as efficient competitors.
  - Compare the required share (the share that competitors need to obtain in order ensure that the effective price is above average avoidable cost) with the contestable share
  - If the effective price over the contestable share is below AAC, the rebate is capable of foreclosing
  - If the effective price is in between AAC and LRAIC, additional evidence is required to conclude that (as efficient) competitors (in a dynamic sense) would be prevented from expanding or entering

Tying and bundling

- Ubiquitous business practice
- Distinct products (customers would purchase the tying product without the tied product from the same supplier)
- Restaurant in the island paradigm (but differentiation among restaurants is common and economies of scale are not)
- Tying complements in order to make entry in the tying market more difficult
- Multiproduct rebates – incremental price above the long run incremental cost of including the product in the bundle
- Competition among bundles

Predation

- Sacrifice
  - Pricing below AAC
  - Net revenues lower than what could have been achieved in a reasonable counterfactual
- Anticompetitive foreclosure
- Foreclosure
  - Reputation
  - Access to finance and manipulation of information
- Anticompetitive : customers can 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
- Input need to be objectively necessary to compete effectively in the downstream market. When there is not actual or potential substitute to the input (and replication would not be undertaken to a sufficient degree)
- Elimination of effective competition – likelihood is greater if the products downstream are closer substitutes, no capacity constraint
- 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 is necessary to give the dominant firm incentives to develop its input or develop new product downstream .
- Overall, balance of incentive to invest
- When regulation imposes an obligation to supply, or when the position of the dominant firm upstream has the granted by exclusive rights, no effects on incentives ex post or ex ante
- In those circumstances, the usual conditions (likely anti-competitive foreclosure) will apply

Conclusion

- Enforcement aimed at prohibiting conduct that undermines the competitive process vs conduct that is harmful to consumers
- Over-enforcement, administrability and form
- Effects based analysis should not be caricatured
- Allocation of the burden of proof
- Disproportionality test (anti-competitive effects substantially disproportionate to any associated pro-competitive effects, emphasis on type I errors) vs anti-competitive foreclosure and efficiencies.
- Dominance presumption (never below 50 %, vs soft safe harbour at 40 %)

Conclusion

- Recoupment vs consumer harm
- Loyalty discounts – predation vs exclusive dealing
- Refusal to deal – minimum role vs stricter conditions
- Exclusive dealing – safe harbor in market coverage