

FTC/DOJ Workshop On Conditional Pricing Practices

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The Current State of the Law in the EU

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Contextual remarks

- Enforcement in the EU is mainly agency-led.
- EU Commission sits at “apex” with 28 national competition authorities (NCA) also applying Art. 102/equivalent national laws
- Private litigation with single damages also a feature but much less than in the US
- Dominance is a prior condition: no attempt offence or offence of creating dominance where none existed before. Dominance based on lasting market power & barriers to entry, but presumptions begin to arise at 50%+ market share
- Agency enforcement focused on strong levels of dominance
- Sophistication in approach varies considerably among NCAs & courts

Conditional Rebates (1)

- Rebates in return for exclusive or *de facto* exclusive dealing are akin to *per se* illegal:
 - In *Intel* the General Court (GC) held that issues of the size of the rebate, coverage, and duration were irrelevant and that not even a potential foreclosure effect had to be demonstrated by the agency or plaintiff
 - *De facto* conditionality may be inferred from impression created by dominant firm and/or customer perception of *quid pro quo* (*Intel*)
- Standardised volume rebates are presumed legal, on the basis that they likely reflect efficiencies

Conditional Rebates (2)

- For rebates that do not involve an exclusive/*de facto* exclusive dealing commitment but involve a mechanism with a “*fidelity-building effect*” (e.g., rebate systems depending on the attainment of individual sales objectives, year-on-year sales increases), it is necessary to consider “*all the circumstances:*”
 - Includes the criteria and rules governing the grant of the rebate, an assessment of whether it removes/restricts buyers’ freedom of choice, or bar competitors from the market.
 - In practice, consideration of “*all the circumstances*” tends to be quite superficial (e.g., *Tomra*)

Conditional Rebates (3)

- EU Commission Guidance Paper proposes a price/cost test to determine “effective price” over “contestable share (“AEC test”). If below AAC, anticompetitive foreclosure likely. If above LRAIC anticompetitive foreclosure presumed not to be present. Version of test applied in *Intel* by EU Commission
- On appeal, GC held that AEC test was neither necessary nor dispositive (if passed), and in particular that anticompetitive foreclosure could be present even if the price/cost test is passed (on the basis that the AEC test shows impossibility to match, not absence of foreclosure effect)

Conditional Rebates (4)

- There is some scope in theory for an efficiency defence
- But in practice the existence of dominance precludes it because one of conditions is no elimination of competition
- In addition, the fact that one does not need a theory of harm for certain forms of rebate makes the theory of offsetting benefit very hard to apply
- Fact that there is no actual EU decision or judgment accepting efficiency defence for rebates speaks for itself!

Unconditional price cuts

- Prices below AAV/AVC are presumed unlawful but that presumption may be rebutted (probably exceptionally)
- Prices above AAV/AVC but below LRAIC/ATC are unlawful where there is a “plan” to eliminate a competitor:
 - Intent should be reasonably specific and held among decision-makers who matter (*Wanadoo*)
- Prices above LRAIC/ATC are presumed to be lawful absent exceptional circumstances, such as price-cutting by a collectively dominant oligopoly against a new entrant maverick (*CEWAL*)

Some Personal Reflections

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Some personal reflections (1)

- Largely formalistic approach in the law in the EU is not logical since a “fidelity rebate” can easily be formulated in such a way that it is effectively the same as an exclusive conditional rebate
- The *per se* approach to certain forms of rebates seems at odds with the notion – accepted by the EU Courts – that rebates can be efficient. Equally at odds with move towards effects-based analysis for antitrust law generally
- While the law is formalistic, it is at least clear (although in many respects not clearly correct). This at least helps with business certainty

Some personal reflections (2)

- Scope for type 1 errors based on the EU approach seems very significant since the formalistic legal approach will in practice bite in counselling terms at 40%+ market shares
- Economics of unconditional rebates lags considerably behind the prevalent use of such practices in business. Whether the law should wait for a counsel of perfection in economics is debateable
- Common sense needs to be employed in dealing with some economics. Even if (i) some buyers may ask for a deal that is bad for them or for buyers generally, (ii) short duration rebates can be harmful, (iii) a rebate may not necessarily be a “discount,” the law needs administrability and not to put possibility theorems/reasonable possibilities at forefront of the law

Some personal reflections (3)

- AEC test proposed under the EU Commission Guidance paper has a sound theoretical basis, but is hard to apply, prone to error, and not generally useful for *ex ante* decision-making
 - Deciding whether a market has contestable/non-contestable segments, if so, how big they are, the effective price, calculation which costs are avoidable or not under the AAC, the temporal dimension etc do not involve a single “right” answer. (In *Intel*, 150 pages were devoted to this issue alone.) They are questions of judgment, and moreover questions of judgment not grounded in routine business practice
 - Exercise is closer to *ex ante* regulation involving price caps than *ex post* competition law
 - Very hard to get the data in most jurisdictions

Some personal reflections (4)

- Most markets I have observed with conditional rebates involve the dominant firm's rivals having similar schemes. This ought to show that the rebates have some positive value not (only) linked with exclusion
- Buyers are often sophisticated and treat rebate schemes offered by different firms as a sort of *à la carte* menu depending on their requirements at a given point in time. This dynamic aspect of rebates is often ignored in the analysis
- Rule of reason approach similar to that used in the *Poste Norway* case (similar to *Meritor*) seems best test overall
- If the data are available, and are not prone to a large risk of error depending on the variables selected, AEC may be useful, albeit perhaps more as a safe harbour than an offensive pass/fail test