

An economic approach to exclusionary rebates?

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Pricing practices as exclusionary abuses?

- dominance is legal, only its abuse violates Article 102
 - pricing agreements between undertakings and their customers are often complex
 - from an economic perspective, there is no indication that linear pricing leads to a more efficient or fair outcome than non-linear pricing or two-part tariffs
 - would it be more efficient or fair that large buyers pay a larger proportion of fixed costs?
- but complex pricing practices may also have anticompetitive effects
 - *this presentation ignores conducts which are directly exploitative*
 - complex pricing practices can have foreclosure effects similar to exclusive purchasing obligations
 - ie, raise barriers to entry and/or expansion
 - when they involve companies with some degree of market power
 - conditional rebates can have such effects without necessarily entailing a sacrifice for the dominant undertaking

A theory of harm

- Chicago School economists emphasise the efficiency effects of exclusive dealing contracts and downplay the risk of foreclosure
 - would a rational buyer be willing to accept a contract which obliges her to buy from an inefficient incumbent if a more efficient competitor is willing to enter the industry?
 - but contracts can act as barriers to entry
 - when contracting with the incumbent, a buyer reduces the size of a potential entrant's market, thereby reducing the probability of entry
 - coordination failure: if all the buyers sign the exclusive contract, no one has an incentive to deviate
 - by refusing to sign, a single buyer would not trigger entry and would have to buy the good from the incumbent anyway, at a higher price
 - conditional rebates can act as a “bribe” to customers of the potential entrant

Form-based or effect-based approach?

- one cannot presume that complex pricing agreements restrict or distort competition
 - anticompetitive foreclosure requires that access to and/or expansion on the market is hampered, in such way that consumers are harmed
 - assess the actual or likely future situation in the relevant market relative to an appropriate counterfactual: as-efficient-competitor test
- form-based approach to complex pricing agreements risks giving rise to
 - over-enforcement—categories of pricing agreements deemed illegal are not available for dominant undertakings
 - under-enforcement—dominant undertakings can replicate the effects of illegal pricing agreements using legal ones, or by tying the components physically
- in sum, giving primacy to form over substance risks that enforcement decision will lack economic logic and remain easy to circumvent

A variety of rebate schemes

- rebates are conditional when the unit price decreases if the purchases over a defined reference period exceed a certain threshold
 - retroactive rebates are granted on all purchases
 - incremental rebates apply only to purchases made in excess of those required to achieve the threshold
 - rebate schemes can be targeted at individual demand of customers (individualized rebates) or apply to all customers (generalized rebates)
- rebate schemes are more likely to foreclose *equally efficient competitors* and thereby give rise to competition concerns
 - when they cover a substantial portion of the overall demand
 - when entry is hampered by economies scale/scope and/or network effects
 - when they target customer groups that are particularly important for entry or expansion of competitors

A variety of rebate schemes

- anticompetitive foreclosure of actual or potential competitors is more likely when the rebate scheme has a significant loyalty enhancing effect, that is when
 - rebates are granted by a dominant undertaking
 - part of the demand of the dominant company is non-contestable
 - rebates are retroactive, as opposed to incremental
 - thresholds for rebates are individualized, as opposed to standardized
 - rebates are higher as a percentage of the total price

ECJ: counterfactual is as efficient competitor

- prevent foreclosure of competitors which are *as efficient* as the dominant undertaking
 - ECJ in Post Danmark (§25-6)
 - Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. [...] In order to determine whether a dominant undertaking has abused its dominant position by its pricing practices, it is necessary to [...] examine whether those practices tend to remove or restrict the buyer's freedom as regards choice of sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition

ECJ: low prices are not enough...

- price lower than the average total costs is insufficient to amount to an exclusionary abuse
 - ECJ in Post Danmark (§44)
 - the answer to be given to the questions referred is that Article 82 EC must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests.

ECJ: prices below variable costs should be abusive

- price lower than the average total costs is insufficient
 - ECJ in Post Danmark (§26-27)
 - In *AKZO v Commission*, in which the issue was to determine whether an undertaking had practised predatory pricing, the Court held, in the first place, at paragraph 71, that prices below the average of 'variable' costs (those that vary depending on the quantities produced) must, in principle, be regarded as abusive, inasmuch as, in charging those prices, a dominant undertaking is deemed to pursue no economic purpose other than that of driving out its competitors. In the second place, it held, at paragraph 72, that prices below average total costs, but above average variable costs, must be regarded as abusive if they are part of a plan for eliminating a competitor. Thus, in order to assess the lawfulness of a low-price policy practised by a dominant undertaking, the Court has made use of criteria based on comparisons of the prices concerned and certain costs incurred by the dominant undertaking, as well as on the latter's strategy

bpost

- bpost is the Belgian incumbent postal operator
 - bpost had different types of rebates schemes, which can be grouped into two categories
 - operational rebates reward customers that prepare the mail appropriately (< 10%)
 - more significant (up to more than 40%) volume rebates reward customers that send significant volumes of mail
 - bpost introduced a new volume rebate scheme in 2010
 - the new scheme differs from the previous one, because rebates are granted directly to the sender
 - as a corollary, intermediaries are not eligible for rebates anymore
 - intermediaries have filed a complaint against bpost

bpost

- the case is pending before the Belgian Competition Council
 - in his report, the Competition Prosecutor considers that the new rebate scheme constitutes an abuse of dominant position
 - according to the report, some intermediaries (aggregators) have grown through an arbitrage policy
 - grouping small customers to reach larger volumes, and significant volume rebates
 - some of these intermediaries are connected with incumbent operators in neighboring countries and are potential entrants on the Belgian market for postal services (ladder of investment)
 - according to the report of the Competition Prosecutor, the new rebate scheme is likely to foreclose potential entry on the Belgian market for postal services