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Price discrimination and exclusionary abuses of dominance: A call for effects-based enforcement

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It is often said, with good statistical records, that opinions of the Advocate Generals are to a large extent endorsed by the European Court of Justice ("ECJ"). If so, the opinion recently handed down by AG Mengozzi on May 24, 2011 – if and once ultimately upheld by the ECJ – would represent a fundamental step in the (r)evolution of EU antitrust law on abusive exclusionary conducts. As a matter of fact, AG Mengozzi tackles the highly debated (and actually seldom addressed) issue of the standard according to which selective prices applied by dominant companies may be said to run afoul Art. 102.

Unfortunately not yet available in English, the opinion has been probably misperceived by some of the preliminary comments published in the aftermath of its publication. Indeed, the AG reaches extremely interesting conclusions, with potentially far reaching implications. At risk of being tediously scholastic, a cursory look at facts first.

The case arises in 2003-2004 out of a dispute between Danish Post ("DP") and FK, the two main (and essentially sole) competitors active in the distribution of bulk mail (e.g. advertising sent by businesses to consumers' homes) in Denmark. More in details, PD was primarily active in the weekly delivery of bulk mail, whereas FK was a major player in the delivery of such mail during weekends (Fridays and Saturdays). At that time, Directive 97/67 had not been fully implemented in Denmark and, as a consequence, PD enjoyed a monopoly on the distribution of certain regular mail, while bulk mail delivery was instead open to full competition. In light of its historic monopoly on mail delivery, PD was able to use its established mail distribution network so as to compete on both the liberalized and regulated markets, allegedly enjoying a dominant position on each of them.

In the 2003 round of yearly negotiations with bulk mail clients, PD managed to take away from FK three key clients (large supermarket chains which used post services for the delivery of their bulk mail and did so especially on Fridays and Saturdays), offering them special selective prices which undercut FK's offers and which were not available to PD's regular customers. FK complained, *inter alia*, that PD's prices were both selective and predatory, that PD was cross-subsidizing the liberalized market and that, as a result, PD abused of its dominant position. PD defended its commercial policy claiming that the bulk mail market had to be singled out in two segments (weekly and weekend delivery) and that, at any rate, its pricing was aimed at nothing more than simply trying to penetrate the weekend segment dominated by FK, lacking any exclusionary intent.

During the Danish antitrust and appellate proceedings, the following elements were established (and were therefore taken as res judicata by the AG in the opinion):

– DP was indeed dominant (and AG Mengozzi incidentally seems to cast doubts thereupon, given that PD's market share was slightly above 43% at the time of the alleged abuse while FK had a share close to 40%);

– in submitting its selective offers to FK's top clients, DP achieved no real economy of scale. Prices selectively offered were not the result of lower costs inured to the benefit of DP as a result of, e.g., higher sales, reduction of transaction costs or the like;

– DP's selective prices to FK's top clients (at least as regards the largest of them) were proven to be above average variable costs (AVC) but below average total costs (ATC);

– the predatory claim was rejected, as DP's exclusionary intent was not proven to exist.

The case comes to the ECJ from a referral lodged by a Danish court. The question posed deals on whether, lacking proof of DP's exclusionary intent (since, as just said, Danish judges could not find proof thereof), selective prices which were above AVC but below ATC could be held to infringe Art. 102.

Let's look at how arguments were exposed before the ECJ.

According to DP, predatory pricing should follow the *Akzo* test, so that price discrimination by a dominant firm should not be abusive if below ATC but above AVC, absent intent.

The Commission takes a totally different view and – using a language that reminds the pre-Guidance paper era – claims that, regardless of the level of costs, intent is not required for the finding of an abuse in relation to selective prices if such prices cannot be explained in light of any real economic justification or economies of scale.

AG Mengozzi strikes the balance in between, endorsing an effects-based approach. His opinion is rich of extremely interesting statements, including many relevant obiter dicta (sometimes the tasty dish is a side order!). The pillar of the entire argument is in my opinion to be found in paragraphs 57 and 90, where he dwells on dominant companies' right to compete on prices and on price competition being not only lawful but, save for certain exceptions, recommended also from dominant companies. It is clear that AG Mengozzi wants to depart from the 'quasi-per se' approach that sometimes EU Courts have had in relation to dominant companies' pricing policies (e.g. *Tomra*). And this, by itself, is a very powerful statement, if endorsed by the ECJ.

Further to this basic tenet, AG Mengozzi unfolds his reasoning as follow:

1. as a rule of thumb, *selective pricing is legal under Art. 102*. Price competition is usually perfectly lawful and beneficial. Dominant companies must be thus allowed to offer selective prices to clients. AG Mengozzi distinguishes the present case from those precedents (*Akzo*, *Irish Sugar*, *Compagnie Maritime Belge*) which are often referred to when supporting the view that selective prices infringe Article 102, given that such precedents relied on exceptional factual scenarios (e.g., unlike the case at stake, selective prices were in those cases also predatory and intent was clearly demonstrated);

2. albeit solely in footnote 28 (but a slight reference is also in para. 73), he then adds that the meeting competition defence should be available to dominant companies. This is certainly a less innovative statement but a reassuring one at times where, as explained, the Commission seemed to have take a rather stricter view;

3. buying some of DP's arguments, and similarly to predation, the assessment of whether or not selective prices are exclusionary pursuant to Article 102 should be based on a cost analysis. While the concepts of "incremental costs" should be better substituted for that of "variable costs" (nothing new here too after *Deutsche Post* of *France Telecom*), AG Mengozzi considers ATC as being a fundamental proxy to that effect;

4. unless exceptional circumstances are given, selective prices which are set above average total costs (ATC) as well as average incremental costs (AIC), are not abusive in nature, given that an "as-efficient-competitor" should be able to replicate such pricing;

5. yet, the AG prefers not to fully embrace the *Akzo* rule developed in relation to predatory conducts (i.e. prices > AIC but < ATC needs proof of exclusionary intent for a finding of abuse), coming to the conclusion that selective prices which are below ATC but above AIC may still theoretically infringe Art. 102 even if no exclusionary intent is proven to exist. In particular, where a company is present (as the case for DP) in two markets, one which is still under a regulatory monopoly (regular mail) the other which is liberalised, finding of an abuse may exist even if no intent is proven if and to the extent actual or potential exclusionary effects are shown as a result of cross-subsidies between the two activities.

Said in other terms, AG Mengozzi takes an intermediate approach whereby intent is not decisive if prices are above ATC but, at the same time, refuses to embrace the Commission's straightjacket standard pursuant to which selective prices are abusive unless the dominant company is able to prove that price discrimination is justified by economies of scale (which, in and by itself, risks making the entire question moot, given that true price discrimination occurs only when different prices are applied to equal buyers, the principle of equality implying that no discrimination exists when different situations are treated in a different manner).

After all, an opinion which may shed some light as to the enforcement of the rules on dominance not only in relation to selective pricing (the core case brought before the ECJ) but, more in general, on certain key guidelines which should lead national antitrust agencies and the Commission in applying Art. 102.

See you most likely after the summer – once the ECJ ruling shall have been handed down – for the last episode!

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“>Dominance
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