

Unilateral behaviour in times of crisis

GCLC – Annual conference
Brussels, *8-9 November 2012*

Mario Todino

OUTLINE

1. ENFORCEMENT OF COMPETITION RULES ON UNILATERAL CONDUCTS IN TIMES OF CRISIS – STATE OF PLAY IN THE EU

- EU Commission and NCAs' recent practice in the field of unilateral conducts

2. COMPETITION ENFORCEMENT AND UNILATERAL CONDUCTS - IS THERE ROOM FOR A DIFFERENT APPROACH IN TIMES OF CRISIS?

- Unilateral conducts as opposed to State aid, anticompetitive agreements and anticompetitive mergers
- Unilateral conducts – Is there room for reviewing the assessment criteria in times of crisis?

3. SHIFTING OF ENFORCEMENT PRIORITIES

- Prioritizing exploitative abuses? Grounds for intervention and non intervention

4. REVIEW OF THE ENFORCERS' TOOLKIT

- Non mandatory deadlines and transparency obligations
- Commitment decisions
- Interim measures

UNILATERAL CONDUCTS IN THE EU IN TIMES OF CRISIS

STATE OF PLAY

- According to most commentators robust competition enforcement is especially needed in times of crisis
 - However the issue of how to enforce competition rules on unilateral behaviour in times of crisis is very little discussed

- **EU Commission's recent practice under Article 102 TFEU**
 - The Commissions' enforcement policy has not undergone any noticeable adjustment specifically due to the crisis
 - Effect-based approach
 - » Tangible foreclosure effects have to be demonstrated
 - Prominent role to economic analysis (as efficient competitor test)
 - No priority to exploitative abuses (except misuse of patents)
 - Increase of commitment decisions (see Google)

UNILATERAL CONDUCTS IN THE EU IN TIMES OF CRISIS

STATE OF PLAY (II)

▪ NCAs' recent practice in the field of unilateral conducts

- No *prima facie* visible signs of softer enforcement
- Some different patterns may be identified in comparison with the Commission's practice
- Some NCAs still prefer to follow the settled case law, thus adopting a more conservative approach, especially with respect to conducts such as rebates
 - » see Danish Competition Authority in *Tv 2*; French Competition Authority in *Michelin*;
Dutch Competition authority in *CRV holding*
- Exploitative abuses are to some extent actively pursued by some NCAs, notably in Germany
- Some NCAs have put greater emphasis on consumer protection and are actively pursuing cases of unfair commercial practices put in place by incumbent players, on the basis of rules on unfair commercial practices and/or ordinary competition rules (see Italy)

IS THERE ROOM FOR A DIFFERENT APPROACH IN TIMES OF CRISIS?

- **Unilateral conducts as opposed to State aid, anticompetitive agreements and anticompetitive mergers**
- Is there any area of competition law justifying a different approach in times of crisis?
 - *“Subsidies are rarely ideal: they are costly for the taxpayer, can prop-up less efficient firms, create dependency, and ultimately damage competitive incentives. Restrictions on competition are worse. In addition of higher consumer prices and the inefficiency, they are less transparent and can result in permanent changes to market structure” (J. Fingleton)*
 - State aid to an industry can also be justified in the name of compelling public interests, which may over-ride competition and consumer protection
 - State aid tends to be limited in duration, unlike anticompetitive mergers
 - In the field of State aid, an exit strategy could be properly devised so that, in the long run, there are no permanent damages to the competitive structure of the market

IS THERE ROOM FOR A DIFFERENT APPROACH IN TIMES OF CRISIS? (II)

- **No legitimate justification for a softer enforcement to cartels**
- **Unilateral conducts in times of crisis have much less been debated**
- **Inherent difficulty to prove an abusive behaviour**
 - the line between pro- and anti-competitive is not an easy one to draw
 - risk that the so-called “false positives” (*i.e.*, instances where competition authorities incorrectly conclude that a certain conduct is anti-competitive) regarding the rules relating to unilateral behaviour can lead to a chilling effect on competition
 - possible negative impact of public budget constraints on the enforcers’ human and budgetary resources



- **In times of crisis some prioritization would be sensible**

IS THERE ROOM FOR A DIFFERENT APPROACH IN TIMES OF CRISIS? (III)

- **Priority should be given to the prosecution of cartels**

- *“Enforcement of the law against naked price-fixing is relatively cheap and produces significant economic gains” (Herbert Hovenkamp)*

- **PLUS** prosecution of those unilateral conducts which more clearly result in consumer harm, because

- they take place in key sectors of the European economy,
- and/or clearly constitute an abuse, i.e.
 - » **market shares** are particularly high,
 - » the existence of **high barriers to entry** is particularly evident,
 - » the conduct obviously **lack any business justification**

IS THERE ROOM FOR A DIFFERENT APPROACH IN TIMES OF CRISIS? (IV)

- **Is there room for reviewing the assessment criteria when dealing with exclusionary conducts?**
- During a recession exclusionary conducts may be more easily put in place
 - **Profitability of predation** may be increased, as the probability of success is higher
 - Those firms that usually do not benefit from favourable access to credit may find, in a crisis, even **more financial difficulties**
 - **Signals in the market place may be blurred**, e.g. exit might be deemed the result of normal market conditions, whereas it actually stems from exclusionary practices
- **In a deteriorated competitive landscape:**
 - incumbent firms tend to **increase** their market **power**
 - competitors may become **less efficient**
 - competitive **constraints** may be **weaker**

IS THERE ROOM FOR A DIFFERENT APPROACH IN TIMES OF CRISIS? (V)

- **Is there room for reviewing the assessment criteria? (II)**
- *“Basic economics does not change during a recession”, nor do “the ultimate goals of the antitrust laws (...) C. Shapiro*
- YET Financial distress at the industry or company level should be relevant to antitrust analysis
 - Antitrust enforcement should take into account the **real-world economic conditions**
 - The **effect-based** analysis recently embraced by the Commission in its *Guidance*, centred upon a sound price test, coupled with an attentive analysis of the real market conditions, makes sure that each **assessment takes account of the specific features of the economic context** in which the practice under scrutiny takes place

SHIFTING OF ENFORCEMENT PRIORITIES

- **Most competition authorities are reluctant to prosecute exploitative conducts by dominant firms**

- **BUT** there might be sensible public policy grounds for competition authorities to intervene against exploitative conducts, and in particular excessive prices, in times of crisis:
 - Competition authorities might feel the need to **protect** overall consumers' **purchasing power**
 - at a time of public anger over high prices, competition authorities might feel **compelled to take action**

SHIFTING OF ENFORCEMENT PRIORITIES (II)

- However **several objections** against investigations on excessive prices are frequently raised to justify a cautious approach
 - **Interference** with the proper functioning of a **free market economy**, for in due time any (temporary) market failure may well be addressed by market forces
 - Potential side effect of intervention against excessive prices, i.e. **chilling effect on innovation**
 - **Investigative problems**: to prove excessive prices it should be demonstrated that an exorbitant profit margin is being earned by the dominant firm
 - » A profit margin can be regarded as exorbitant only relating to a “**fair**” profit margin, i.e. sensible **benchmarks** should be identified
 - By imposing caps on prices, competition authorities rather **encroach** upon the prerogatives of sector-specific **regulators**
 - » NCAs lack the necessary amount of information about the market, as well as the sector specific knowledge
 - in most sectors where excessive price abuses might have a relevant impact on consumers (public utilities) **sector-specific authorities are already in place**

SHIFTING OF ENFORCEMENT PRIORITIES (III)

- An increase in the number of investigations for excessive prices can also cause a further **contamination** between the enforcement of **competition law**, on the one hand, and the enforcement of **consumer protection law**
 - NCAs may be tempted to pursue cases of **unfair commercial practices** put in place by incumbent players on the **basis of ordinary competition rules**
 - The dividing line between antitrust enforcement and consumer protection might become blurred, with the former turning into **consumerism**

SHIFTING OF ENFORCEMENT PRIORITIES (IV)

▪ **Exploitative abuses - Grounds for intervention**

- There are in particular three instances where it is widely recognised that antitrust intervention against excessive prices could be justified:
 - If there are high and non-transitory **entry barriers** resulting in a dominant position
 - The dominant position is due to current/past **exclusive/special rights** or to previously unprosecuted exclusionary anticompetitive practices
 - **Lack of a sector-specific regulator** with jurisdiction to set prices

REVIEW OF THE ENFORCERS' TOOLKIT

- **Should the tools typically employed by competition agencies for enforcement purposes be reviewed in times of crisis?**
- **Timeliness** of the public enforcers' interventions
 - In times of crisis, where anticompetitive practices may add an unbearable additional cost over consumers' stretched budgets, **competition agencies** should **timely intervene to remove** those practices tangibly harming consumer welfare
- Timeliness of intervention depends on at least two factors,
 - the **resources** available to a competition agency
 - and the **procedural rules** governing antitrust investigations
- Commission's antitrust proceedings have often been criticised for their **excessive length**
 - Average duration of a Commission's investigation for abuse of dominance cases is about four to six years

REVIEW OF THE ENFORCERS' TOOLKIT (II)

- **Excessive length** of Commission's antitrust investigations is due to several factors
 - **Complexity of cross-border** investigations and the multi-linguistic regime
 - **Absence of any deadline** within which the investigation must be completed
 - Opacity of proceedings for investigations under Article 101-102 TFEU
 - » The Commission's antitrust proceedings involve two separate stages:
 - First a fact-finding investigation;
 - then a decision-making phase. Only at this stage the Commission typically takes the step of formally initiating proceedings, which therefore tend to coincide with the date of the issuance of the statement of objections

REVIEW OF THE ENFORCERS' TOOLKIT (III)

- **Absence of deadlines**, coupled with the possibility to conduct an investigation before opening a formal proceeding, result in the **Commission's tendency to overly expand** the average time-span of its antitrust investigations
 - This may end-up frustrating the chief aim of antitrust enforcement, *i.e.* to intervene in a sufficiently timely way to effectively remove the market distortions to the benefit of society
- **Strong case** for advocating **more timely interventions** from the Commission
 - **A reform of the current Commission's procedural rules** could be envisaged with a view to introducing a higher level of transparency and accountability:
 - » e.g. issuing at the very early stage of the investigation (*i.e.* at the moment of the first inspections) a **publicly available reasoned decision** which formally initiates the investigation by
 - **stating the facts**,
 - identifying the **parties** to the investigation,
 - outlining the potential **theories of harm**,
 - setting a **tentative time period** within which the investigation has to be finished (see Italy and Spain as a model)

REVIEW OF THE ENFORCERS' TOOLKIT (IV)

- **Increase of commitment decisions**
- By adopting commitment decisions, the competition agencies may be able to rapidly remove certain (alleged) anticompetitive conducts, while at same time achieving administrative savings
- BUT these decisions entail some **negative side effects**
 - Wide discretionary power enjoyed by competition agencies in this area, as commitment decisions are **hardly ever subject to judicial review**
 - NCAs tend to take a “**regulatory**” **stance**, and seek remedies that go beyond the scope of the alleged competition problems, in an attempt to re-shape the market-place
 - The **perimeter** of cases eligible for commitments might progressively be **expanded**, thereby jeopardising the deterrent effect of fines

REVIEW OF THE ENFORCERS' TOOLKIT (V)

■ Increased use of Interim measures

- Virtually **never** applied by the **Commission**
 - » Requirements to meet are very strict
 - Most **NCA**s have also made a **very limited use** of the tool, with the notable exception of France and, to some extent, Italy (in UK a reform is under way to lower the threshold for granting interim measures)
 - **Fostering** the use of interim measures by the Commission would be practicable only to the extent that a **legislative reform, or a change of the case law** in point are contemplated
 - A more recurrent use of the interim measures would also be at **odds** with the **actual length of the Commission's antitrust proceedings**
- interim measures could be **better dealt with at the national level**
- NCA's antitrust proceedings tends to be shorter
 - Yet, national authorities should bear in mind that unilateral practices, in most cases, by their very nature do not lend themselves to summary assessments

CONCLUSIONS

- **What are the right competition enforcement priorities in times of crisis?**
 - In times of crisis every business suffers, hence **tolerance for mistakes by enforcement agencies is minimal**
 - Competition authorities have **limited resources**
 - there is a risk that the **over-enforcement** of rules relating to unilateral behaviour may lead to a **chilling effect on competition**
 - Best course of action for competition agencies would be focusing on most **blatant antitrust violations** which are likely to cause tangible prejudice to Society, namely cartels
 - **Blatant abuses** should also be prosecuted
 - Special attention should be given to the fact in a **deteriorated competitive landscape, incumbent firms tend to increase their market power**, while at the same time competitors may struggle to compete

CONCLUSIONS (II)

- **A shift towards exploitative** practices may be tempting given
 - an angry public opinion pushing for a more interventionist stance
 - a supposedly legitimate foundation in the fight to preserve the already stretched consumers' buying power,
- **BUT there are too many counter indications** actually suggesting the contrary
- A sound policy objective for competition agencies could be to achieve **more efficient and timely interventions** in difficult times via
 - **interim measures**
 - » This is a more realistic option for NCAs rather than the Commission
 - **Commitment decisions**
 - » Care should be taken though to avoid inflation which might bring about non negligible collateral damages.
 - **Most of all a procedural reform** designed to build-in more **transparency** and **accountability** in the current EU competition proceedings