

SOME REMARKS ON PRICING ABUSES AND EXCLUSIONARY CONDUCT

Damien Neven/Hans Zenger¹

ABSTRACT: This article presents the approach of the Guidance paper on the Commission's priorities with respect to the enforcement of Art 102, with respect to pricing abuses. We relate this approach to the economic literature. We also discuss the evidence that can be used to validate possible theories of harm, and illustrate with recent cases like Intel.

SUMMARY: 1. Introduction. 2. The guidance paper on exclusionary conduct. 3. Some theories of exclusion. a. Naked exclusion. b. Multiproduct pricing, price discrimination, and leverage. c. Downstream competition. 4. Conclusion.

1. INTRODUCTION

Sophisticated forms of pricing conduct can sometimes lead to anticompetitive exclusion of efficient competitors. In particular, dominant firms may structure rebate schemes in such a way as to restrict the market access for smaller competitors, thereby leading to customer foreclosure. Such foreclosure can occur if the dominant firm's pricing schedule implicitly ties the "contestable" and "non-contestable" parts of consumers' demands to induce (quasi-) exclusivity.²

¹ The authors are, respectively, Professor of Economics at the Graduate Institute (Geneva) and Member of the Chief Economist Team at the Directorate-General for Competition of the European Commission. This article is based on a presentation the first author has given at the 2010 Lisbon Conference on Competition Law and Economics, at the time at which he was Chief Competition Economist at the Directorate-General for Competition of the European Commission. The views expressed in this paper are those of the authors and do not necessarily reflect the views of DG Competition or the European Commission.

² The "contestable" part of demand denotes those products or quantities for which a dominant firm faces competition from other suppliers, whereas the "non-contestable" part of demand denotes those products

This article discusses some of the economic forces underlying such potentially anticompetitive conduct.³ In Section 2, we describe the approach toward pricing abuses with exclusivity-inducing nature that is outlined in the Commission's Guidance Paper on exclusionary conduct.⁴ In Section 3 we relate this approach to recent theories of anticompetitive exclusion in the economic literature. Section 4, finally, links some of the key elements of these theories to the Commission's recent Intel decision⁵ and concludes.

2. THE GUIDANCE PAPER ON EXCLUSIONARY CONDUCT

The *Guidance Paper* generally takes the position that antitrust law should safeguard the competitive process rather than protect competitors.⁶ Obvious as it may seem, this is a significant policy shift against part of the case law which was mostly concerned with protecting less successful rivals. Unfortunately, such a focus tends to create rather than remove obstacles for pro-competitive conduct, because beating competitors on the market is exposed to the risk of antitrust prosecution.⁷

The *Guidance Paper* recognizes that unilateral conduct, such as low prices, loyalty rebates, rewards for exclusivity, bundling and others are often pro-competitive in nature, even if they lead to foreclosure of competitors. Indeed, the relevant question for analysing a particular type of conduct is not whether it makes life difficult for competitors, but whether consumers are harmed by it. Competition policy should ensure that dominant firms do not impair

or quantities which are essentially uncontested by competing suppliers (a reflection of the market power of the dominant firm).

3 While this article focuses on anticompetitive effects, it should be kept in mind that loyalty rebates and exclusivity agreements often (indeed, typically) have pro-competitive motivations in real world markets. This is evidenced by the fact that these practices are widespread in highly competitive markets, where anticompetitive exclusion cannot be a plausible motivation. If a competition authority has established harmful effects by verifying a particular theory of harm, a proper account of countervailing efficiencies should therefore be the next step in the investigation. See, for instance Klein & Lerner, 2007: 473 and Klein & Murphy, 2008: 433 (discussing efficiency motivations for exclusive dealing and related practices).

4 European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [hereinafter *Guidance Paper*].

5 Case COMP/37.990 Intel [2009].

6 "[T]he Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market." *Guidance Paper*, par. 6.

7 For instance, the rigid case law on loyalty rebates is almost certain to have impaired healthy rebate competition in the European Union.

effective competition by foreclosing rivals *in an anticompetitive way*, thereby having an adverse impact on consumer welfare. The relevant test for finding anticompetitive unilateral conduct is therefore (i) to show that the conduct is very likely to foreclose competitors (foreclosure) and (ii) that such foreclosure is likely to reduce consumer welfare relative to the counterfactual (consumer harm).

The *Guidance Paper* emphasizes that vigorous price competition is generally beneficial for consumers. To distinguish whether some pricing conduct harms competitors because the dominant firm engages in foreclosure or whether the dominant firm is simply competing more efficiently, the *Guidance Paper* proposes applying the as-efficient-competitor-test (AECT). This test determines the effective price paid by customers for the part of their demand that is subject to competition (the “contestable share” of demand - as opposed to the “non-contestable share” of demand, which has to be sourced from the dominant firm due to its superior position in the market).⁸ This effective price of the contestable part of demand is then compared with the *dominant firms’* costs of supplying those units, to determine whether a hypothetical competitor that is equally efficient as the dominant firm would be in a position to match the effective price that prevails in the market.⁹

Failing the AECT does not imply an automatic presumption of harm: “if the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anti-competitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence.”¹⁰ Since effective prices can be below cost for a variety of pro-competitive reasons, it is important for a competition authority to establish and validate a concrete theory of harm even if the AECT was

8 To illustrate, consider the case of bundled discounts, where the dominant firm “ties” some competitively supplied product A with a monopoly product B through multiproduct rebates. The effective price of A can then be determined by calculating the incremental cost of purchasing A from the dominant undertaking given that product B has already been obtained. For instance, suppose the list prices of A and B are $P_A = €10$ and $P_B = €20$, and a 10% discount on all sales is granted if A and B are purchased together. Assume purchasers want to buy one unit of A and one unit of B each. The effective price of A is then €7 (the list price of €10 minus rebate savings of 10% · (€10 + €20) = €3 for buying A and B together).

9 See *Guidance Paper*, par. 26, for a discussion of the appropriate cost benchmark.

10 *Id.*, par. 27.

not passed.¹¹ However, failure of the AECT can be an important piece of evidence in proving a particular theory of harm. We will therefore now turn to a number of theories of harm regarding exclusivity-inducing pricing conduct that are discussed in the economic literature.

3. SOME THEORIES OF EXCLUSION

There are basically two sets of theories of harm regarding exclusivity-inducing pricing conduct: (i) theories involving a *profit sacrifice* (where the dominant firm wilfully forgoes current profits in order to harm competitors, with later recoupment), and (ii) theories involving *no profit sacrifice* (where the anticompetitive conduct is self-sustainable).

U.S. antitrust enforcement in the area of unilateral conduct has recently tended to focus on exclusionary conduct of the first type. Anticompetitive effects can then be shown by demonstrating that the dominant firm's behaviour could not have been profitable but for its tendency to exclude competitors.¹² The profit sacrifice test was embraced by the Supreme Court in *Aspen Skiing*, suggested by the Supreme Court in *Trinko*, and used by the agencies in many important enforcement actions, including *Dentsply* and *Microsoft*.¹³

A profit sacrifice occurs under predatory exclusion, where the predator wilfully sacrifices current profits to earn future monopoly rents by inducing purchasers to source an inefficiently large proportion of their requirements from the dominant firm through discounts, exclusive dealing clauses or

11 To provide an example of conduct which is pro-competitive although effective prices are below cost, consider a dominant producer A of mountain equipment. Suppose A provides large retroactive rebates in return for full exclusivity to a selected number of distributors (covering, say, 20% of the retail market). Suppose that these exclusivity-inducing contracts are offered to those retailers where A has installed expensive climbing installations, so consumers can try out A's products in-store. In such a scenario, A's pricing to 20% of the retailers is likely to fail the AECT (e.g., because A's products are a must-stock item). But since only a small number of distributors is affected, effective access of A's competitors to the market is not hampered. Indeed, consumers who prefer competing products can freely purchase them at most other retailers. To the contrary, the contractual arrangements in question are likely to benefit consumers by allowing the installation of beneficial trial equipment, on which competitors would free-ride absent the protection provided by the contractual arrangements.

12 The so called "but for" test or "no economic sense" test requires that exclusion is the only explanation for making the observed behavior profitable in the long term. A milder requirement can be imposed, namely that the observed behavior is not profit maximising in the short term. This alternative requirement is adopted as part of the predation standard put forward by the guidance paper. On the "but for" test, See Melamed, 2006: 375 and Werden, 2006: 413 (providing references to U.S. case law and a discussion).

13 Melamed, 2006: 390.

other unilateral conduct. However, as noted above, harm to consumers and competition is generally not restricted to situations where the dominant firm must incur a profit sacrifice.¹⁴ There are several forms of exclusionary conduct that do not involve an (immediate) loss of profits and nonetheless lead to the harmful exclusion of efficient competitors.¹⁵ In what follows, we discuss a number of those theories of harm.

A. Naked Exclusion

Even though it was not the first theory of exclusion that overcame the Chicago critique in the economics literature, the theory of “naked exclusion” by Eric B. Rasmusen, J. Mark Ramseyer, and John S. Wiley, Jr. has attracted a particularly high level of attention among economists and spawned a large follow-on literature.¹⁶

Central to Rasmusen *et al.*'s argument are the existence of economies of scale in the market where exclusion takes place, and the exploitation of externalities between purchasers by the dominant firm. In their model, entry of a more efficient competitor can be deterred by an incumbent if he signs exclusive contracts with a sufficiently large number of buyers. Indeed, due to the existence of economies of scale, an entrant would need access to a sufficiently large proportion of potential purchasers to be able to operate efficiently. If too many buyers are locked-in through long-term contracts, welfare-enhancing entry is foreclosed.

While purchasers *overall* would always benefit from such entry (and hence should not sign exclusivity clauses with the less efficient incumbent), *individual* purchasers are subject to a divide-and-conquer strategy by the incumbent. If the incumbent manages to “bribe” a sufficient number of purchasers into long-term contracts (e.g. through a well-designed loyalty rebate), he can charge monopoly prices to the remaining purchasers after entry is foreclosed. Anticipating this course of events, any individual purchaser would like to be among the group of buyers that receive a bribe for signing an exclusive contract. The incumbent effectively plays purchasers off against each other,

¹⁴ See Salop, 2006: 311 and Jacobsen & Sher, 2006: 779. Note, however, that more sophisticated variants of the profit sacrifice test do not limit antitrust liability to predatory conduct, as discussed by Melamed: 2006 and Werden: 2006.

¹⁵ See *generally* Krattenmaker & Salop, 1986: 209.

¹⁶ Rasmusen, 1991; Ramseyer & Wiley, 1991: 1137.

with the result that individual exclusive contracts are signed even though it is not in the collective interest of purchasers that entry is foreclosed.

If there are sufficiently many buyers that can be played off against each other, the actual “bribe” that has to be paid to purchasers for exclusivity may be fairly small. But irrespective of the level of the discount granted, no profit sacrifice has to be undertaken by the incumbent to foreclose entry.¹⁷ In fact, as Ilya Segal and Michael D. Whinston have shown, the incumbent can secure almost the entire monopoly profit through the use of exclusive contracts, if there are sufficiently many buyers that can be played off against each other.¹⁸

Rasmusen *et al.*'s theory applies depending on a number of assumptions that may or may not hold in a given market. In particular, the efficient competitor is a potential entrant in the model and hence cannot negotiate around the inefficiency by making better offers to purchasers. If an efficient competitor is already in the market, it is more difficult to foreclose him without predatory profit sacrifice, because the competitor can then make counteroffers to undermine the divide-and-conquer strategy of the incumbent.¹⁹ Moreover, in the case of entry deterrence, it is also clear that exclusionary contracts have to be quite long to deter efficient entry. If an entrant is genuinely more efficient, exclusive contracts in the order of a couple of months are certainly not capable of deterring such entry, because the prospect of future profits will endow the entrant with some patience.²⁰

While application of the “naked exclusion” theory of harm should therefore be applied with attention to detail as regards the market realities in a particular industry, it generally provides important insights into the mechanisms of anticompetitive exclusion. In particular, it emphasizes the key roles of economies of scale (foreclosing part of the market so competitors

17 There is, of course, a profit sacrifice relative to the monopoly price (the “bribe” paid to those purchasers that accept exclusivity). However, there is no profit sacrifice relative to the absence of the conduct in question (exclusive dealing), because the monopoly price minus a small bribe is still larger than marginal cost (the price the incumbent would be forced to set if exclusive dealing were prohibited and entry could not be foreclosed).

18 Segal & Whinston, 2000: 304.

19 Innes & Sexton, 1994: 566. But *see also* Farrell, 2005: 465.

20 Note that in the case of the exclusion of existing competitors, the length of the contract is often less of an issue. If a credible theory of harm can be built that proves the anticompetitive nature of the conduct, then a perpetuated short-term contract that implements this theory of harm often has the same effect as an otherwise identical long-term contract. For instance, predatory pricing can in principle be effective both with long-term contracts and with short term contracts.

cannot operate on an efficient scale) and of exploiting externalities between purchasers (playing off buyers against each other to allow exclusion without profit sacrifice).

B. Multiproduct pricing, price discrimination, and leverage

A second set of papers has emphasized the importance of market power of the dominant firm for exclusionary conduct. This strand of the literature has argued that antitrust market power may sometimes give rise to monopoly leverage from a customer's non-contestable share of demand to his contestable share of demand.

While strong market power of the incumbent is also a prerequisite in the "naked exclusion" theories, it is only implicit there. Later papers have outlined in a more detailed fashion the central role that market power plays for exclusion. Patrick Greenlee and David Reitman, for instance, show how leverage from a monopolized product A to a competitive product B can occur.²¹ If the A monopolist prices its A and B products independently to maximize profits, he earns monopoly profits in A and a competitive return in B. Starting from this counterfactual, the dominant firm can increase its profits by introducing a bundled rebate that links the purchases of A and B from the perspective of consumers. Indeed, it is profitable to tie the two products through a suitable rebate scheme, decrease the price of the A product and increase the price of the B product correspondingly.

As pre-tying prices were profit-maximizing, the decrease in price of the A product has only a very small negative effect on the dominant firm's profits (a so-called "second order effect"). This is because at the profit-maximizing price of product A, the benefit of slightly reducing the price (higher demand) and the costs of slightly reducing the price (lower per unit margins) exactly offset each other by construction.²² The foregone profit from a small reduction of the price of A below the monopoly level is therefore small. The corresponding increase in price of the B product in the bundle, however, has an appreciable positive effect on the dominant firm's profits (a so-called "first order effect"), because prices can be increased above the competitive

²¹ Greenlee & Reitman: 2006.

²² If the costs and benefits of reducing the price did not offset each other, then the price would not have been chosen optimally: If costs were above (below) benefits, profits could have been increased by increasing (decreasing) the price.

level without reducing demand (purchasers have to pay more for B, but they receive A at a correspondingly lower price).

The incumbent firm can thus increase the stand alone price for product A (beyond the monopoly price), offer a large rebate in case bundled sales and increase the price of product B much above the competitive level. In principle (assuming that he can commit to the stand alone price) the incumbent firm can leverage the entire rent that the consumers obtain at the monopoly price of product A.

It should be emphasized, however, that this profit-enhancing effect is usefully described as anticompetitive only in limited circumstances, even if the rebate scheme leads to foreclosure. Importantly, the tying of A and B does not occur for exclusionary purposes here, but to find a profit maximizing pricing balance between A and B that trades off lower prices in A for higher prices in B. That is, the practice is undertaken to *price discriminate* via multi-product pricing.²³ That is not to say that the presence of a competitor does not affect the design of the pricing scheme and bundled discount will be more attractive, the stronger is competition in product B, but the primary purpose of the pricing scheme is not to exclude competitors but rather to discriminate.

Such price discrimination is often beneficial for consumers.²⁴ Even if the dominant firm has monopoly power, price discrimination generally has ambiguous static welfare properties and increases dynamic incentives to invest. Moreover, in the presence of some competitors, price discrimination often intensifies competition.²⁵ Unless the tying of different products or of different portions of demand leads to a degree of foreclosure that is so pronounced that the competitive viability of rivals on the open B market is put at risk, one should be reluctant to outlaw such conduct. Having said this, if tying to price discriminate leads to a degree of foreclosure that significantly impairs the viability of as efficient competitors and that causes monopolization as a – possibly even unintended – by-product, then this would seem to be a source

²³ For similar forms of price discrimination in the single product context of exclusive dealing, *see for instance* Mathewson & Winter, 1987: 1057 and Zenger, 2010: 205.

²⁴ *See, for instance*, Mathewson & Winter, 1997: 566.

²⁵ *See, for instance*, Corts, 1998: 306 (discussing the case of third-degree price discrimination), Marvel & Yang, 2008: 1090 (discussing the case of quantity rebates), Thisse & Vives, 1988: 122 (discussing spatial price discrimination), Klein & Wiley, 2003: 599 (discussing tying to price discriminate).

of consumer harm even if such outcome was not primarily intended by the dominant firm.

C. Downstream competition

Finally, we want to turn to a theory of harm advanced in a more recent set of papers that emphasizes the importance of downstream competition of purchasers.²⁶ This is a useful focus, because antitrust investigations of exclusionary conduct rarely relate to final good (retail) markets. Typically, foreclosure rather occurs at some intermediate level of the production chain, where quantity discounts, exclusive dealing provisions and other contractual restraints can be more immediately applied. For instance, in *Intel*, the dominant company applied loyalty rebates to OEMs (computer manufacturers) who competed with each other on the downstream PC market, using Intel- or AMD-based hardware.²⁷

What the papers focussing on downstream competition show is that the competition between purchasers may be favourable for an upstream dominant undertaking. First, strong competition will imply that the upstream firm does not suffer from double marginalisation and hence, can appropriate much rent that he can possibly share with downstream buyers to induce them to accept exclusive contracts. Second, strong competition downstream will also ensure that whatever advantage the entrant can offer will be dissipated and hence the entrant is not in favourable position. In addition, a dominant upstream undertaking can play-off purchasers in a particular effective way. Since downstream firms need cheap inputs to succeed in the downstream competition, they are dependent on the goodwill of the dominant firm not to disadvantage them. The threat of being disadvantaged relative to their competitors if they reject exclusivity offers from the dominant firm upstream can then lead purchasers to succumb to exclusivity with the dominant firm, to the detriment of efficient upstream entrants, who are foreclosed from the market.²⁸

²⁶ See, for instance, Simpson & Wickelgren, 2007: 1305 and Abito & Wright, 2008: 227.

²⁷ Case COMP/37.990 Intel [2009].

²⁸ Note, however, that if the downstream market is very competitive and if the dominant firm's product is not an essential input for a number of downstream firms, then downstream competition may actually help an upstream entrant to avoid foreclosure by a dominant incumbent. Under these circumstances, having access to a few downstream distributors may be sufficient for an entrant to place its products

4. CONCLUSION

In this paper we have sketched a number of prominent theories of harm for exclusivity-inducing pricing abuses. These theories emphasize the importance of concrete factual evidence for finding exclusionary unilateral conduct to be abusive. First, as emphasized by the literature on “naked exclusion,” exclusive dealing and related practices tend to be more harmful in situations where economies of scale play an important role. With scale economies, foreclosure can hamper smaller competitors by increasing their costs of distribution and stopping them from developing into the competitive force they would otherwise have become.²⁹

Second, as emphasized by the literature on leverage, exclusionary practices tend to be more harmful in situations where the dominant firm’s primary product (or non-contestable share of demand) is truly indispensable for purchasers.

Finally, as emphasized by the literature on downstream competition, the ability of the dominant firm to play purchasers off against each other (and thereby exploit contracting externalities) may be particularly pronounced if competition between purchasers can be used by the dominant firm to achieve its divisive goals.

All three components appear to have played a role in the computer chip markets investigated in the Commission’s recent *Intel* decision. In particular, Intel had strong market power vis-à-vis its purchasers (original equipment manufacturers such as HP or Dell). Economies of scale in production and R&D are undoubtedly substantial. And finally, downstream competition between OEMs implied that the commercial success of each OEM to a significant degree depended on Intel’s goodwill not to disadvantage the OEM with respect to its competitors.

on the market. Anticompetitive foreclosure can then not be effective even if a large part of the market is covered by exclusivity agreements. See Fumagalli & Motta, 2006: 785.

²⁹ While this article has focussed on exclusive dealing and related rebates practices, scale economies are also important in tying cases. See, *in particular*, Whinston, 1990: 837 and Carlton & Waldman, 2002: 194.

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