

# **Opening Speech**

## **to the International Conference on the Recent Developments on Antitrust Policy and the Enforcement of Art. 82**

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It is really a pleasure to be here at the Italian Antitrust Authority to discuss about recent developments in the debate on abuse of dominance and the enforcement of the Article 82 of the European Union. First, because the Italian Authority is an important source of activity, policy and debate in the field. Second because we are about to discuss of a new approach of the European Commission to exclusionary strategies that is aimed at protecting consumer welfare and the Italian Authority is and has been an important institution in the front lines in the battle to defend the interest of consumers in the market field. Not only through the normal antitrust activity but also with a wide control on the competitive process and on the effective reduction of prices and rents in favor of consumers, with a continuous promotion of the process of liberalization and with a strong pressure against monopolistic rents and barriers to entry, and in favor of business creation aimed at the strengthening of competition.

Let me enter in the core of our conference on the recent developments on the enforcement of Article 82. Last December the Commission published its long-awaited Communication entitled “Guidance on the Commission’s Enforcement Priorities in Applying Article 82 to Abusive Exclusionary Conduct”. This document contains the general principles that will guide the Commission in deciding which cases to pursue and it also contains some more detailed indications on how the Commission will approach specific types of conduct, including exclusive dealing, bundling, predation and refusal to supply. The recent debate on antitrust policy in Europe has been largely based on this document and a lot of our discussion today will be about its content. Therefore, I would like to introduce the topics of our conference with some general remarks on it and with some open questions that I will leave to the speakers.

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Let me start by saying that in the Commission's Communication, I welcome very much the adoption of an effect-based approach that is aimed at maximizing consumer welfare. According to the text, "the Commission will focus on those types of conduct that are most harmful to consumers" (# 5) and it will be "mindful that what really matters is to protect 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" (# 6). The primacy of consumers' interests is something on which, I believe, most of us agree, even if what is difficult is how to give a content to this principle.

There is another aspect that I appreciate a lot in this document. As an economist working mainly on the role of entry in determining endogenous market structures and how this affects the behavior of market leaders, I welcome the emphasis given to the role of entry in determining whether a dominant position exists or not. The ideal industrial policy defending the interest of consumers should really be aimed at reducing entry obstacles and insuring freedom of entry in all markets so as to turn antitrust intervention into a marginal or residual necessity. The key element in the Commission's definition of dominance is the extent to which the firm can behave independently of its competitors, customers and consumers, which relates to the degree of competitive constraints exerted on this firm 1) by the supply of actual competitors, 2) by the threat of expansion of competitors and by the potential entrants and 3) by the bargaining power of customers.<sup>1</sup> Therefore, entry plays a crucial role and dominance is incompatible with the presence of a threat of endogenous entry. In particular, the Communication notices that a leader "can be deterred from increasing prices if expansion or entry is likely, timely and sufficient" (# 16). However, I think it is also important to recognize that the same expansion or entry can induce the leader to decrease its prices below those of the rivals, or to adopt other aggressive strategies, without any anti-competitive purpose, as modern economic theory has made clear.

Beyond these general points, let me focus on some critical remarks to stimulate the following discussion. Unfortunately, I have a strong concern on the way the positive premises of the document are carried through its details. A first concern is about the defense of consumers, which is strongly emphasized in the introduction, but not as much in the rest of the document. Most of its focus is on the foreclosure of competitors and not on the relation between this and the harm to consumers. If it is clear to all of us that defending consumers is different from defending competitors, we may regret that the Guidance document devotes a great deal of attention to establishing where competition is foreclosed, but not so much to establishing where consumers are penalised as a result, which is what should matter. In other words, I wonder if the treatment of foreclosure and of the efficiencies under the guidelines is consistent with the overall objective of EU antitrust law to maximize consumer welfare?

A second related concern is about the nature of the foreclosure effects under the "effects-based" approach promoted by the Commission. The guidelines indicate that a key element of the abuse prohibited by Article 82 is anti-competitive foreclosure, defined as "a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking" (# 19) which is likely to profitably increase its prices with harm for the consumers. It is not entirely clear which facts are going to prove foreclosure and which not. For instance, take a situation in which some competitors of the dominant firm increase their market share to a significant extent: would the Commission regard this as an

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<sup>1</sup> A dominant firm enjoys substantial market power over a period of time (two years). High market shares are only a first indication of dominance, while low market shares (below 40 %) are a good proxy for the absence of substantial market power.

effect proving that the dominant company's practice is not abusive? And if not, then how is the Commission defining foreclosure under the "effects-based" approach? This is an issue that still needs more clarification.

A third issue is about the Commission's standard of undistorted competition. As regards pricing abuses, the Commission says it will apply the "as efficient competitor" test: "the Commission will normally intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking" (# 22).<sup>2</sup> However, the document introduces several exceptions to this principle (for instance, a dynamic view for which less efficient competitors may become as efficient in the future through network or learning effects), and the test does not apply to non-pricing abuses. This means that companies are left without a clear standard.

As a last issue on which I have some remarks, let me say that I welcome the confirmation in the Guidance document that a conduct that may seem *prima facie* to be abusive may be justified by objective necessity or efficiencies that will benefit consumers. A dominant firm may justify a conduct leading to foreclosure on the ground that efficiencies are sufficient to guarantee that consumers are not penalized. The burden of proof is on the dominant firm, that has to show, with a sufficient degree of probability and on the basis of verifiable evidence, that the efficiencies are the result of the conduct, that this is indispensable (there is no less anticompetitive way) to produce the same efficiencies, and that these efficiencies more than compensate the negative effects on competition and consumer welfare.

Now, while the consideration of efficiencies generated by a conduct is extremely important to re-direct antitrust policy toward the maximization of consumer welfare, in my view the Commission's Communication appears to adopt a too vague approach and to make it hard, if not impossible, for dominant companies actually to avail themselves of the efficiencies defence. The main reason is that their verification appears to be postponed after the establishment of an anti-competitive foreclosure that harms consumers, and not during the decision on whether the same foreclosure harms consumers. Moreover, there appears to be a bias against the possibility that efficiencies can occur: they are explicitly considered "unlikely" (# 73) for predation, and their treatment in the document is marginal.

Notice that, to assert a successful efficiency defense under the proposed framework, dominant firms will be required to show that there are no other less anticompetitive alternatives to achieve the claimed efficiencies. This condition means that liability could be imposed even on a conduct whose efficiency is larger than its adverse effects on competitors simply because there exist alternatives that would have penalized rivals less. I doubt that such a rule would have any economic justification. Anyway, does the current rule mean that an efficiency defense must be rejected if the conduct creates more efficiency gains than other conducts, but is more restrictive on the competitors? In other words, is it the size of the efficiencies that matters or what matters is the amount of restrictions imposed on competition to obtain those efficiencies? Here again we have this interaction between foreclosure and harm of consumers that needs further clarification. Imagine the dominant company trying to manage these various imponderables – it is much easier just to forego the conduct and, possibly, deprive consumers of an important benefit. Is that what competition policy is supposed to do?

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<sup>2</sup> Pricing is presumed unlawful when below the Average Avoidable Cost, which includes also some fixed costs of production, contrary to the more standard Average Variable Cost.

Last, it is not clear why to exclude the possibility of an efficiency defense (and with it the possibility to enhance consumer welfare) is to be off-limits for an entire class of companies, as the Commission's document makes clear when it states that an "exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains" (# 29). It is positive that the Commission eliminated the reference to firms with a market share above 75 % which appeared in an earlier document, but still, in my view, efficiencies should be assessed in the same manner in all cases, regardless of the defendant's market share: firms that generate pro-competitive efficiencies that benefit consumers should not be penalized, regardless of the level of market share or potential impact on less efficient competitors.

As a concluding remark I would like to point out that the new guidelines do not seem to reduce the amount of uncertainty that is associated with move toward the rule of reason approach, a move which I consider positive if everyone understands the principles that will guide case selection and competition enforcement. To provide an example that is related to one of the topics we will cover today, the potential conflicts between Intellectual Property Rights protection (aimed at fostering innovation), and antitrust policy (able to force compulsory licensing of IPRs) are still present. More in general, this kind of uncertainty can be a source of inefficiency and distorted behavior, especially when decision rules are imperfect and subject to errors.<sup>3</sup> Moreover, antitrust uncertainty on exclusionary strategies may deter genuinely competitive or innovative strategies to be adopted by leading firms, and therefore it can exert negative consequences on consumer welfare. It is not clear how the new approach addresses this problem.

Thank you.

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<sup>3</sup> The lack of legal certainty is particularly regrettable in a context of increasing punitive fines and important efforts by the Commission to increase the scope for private enforcement to complement public enforcement of EU competition law.