

PREFACE

The treatment of single firm conduct is probably the most controversial issue in current antitrust law. Competitive initiatives and exclusionary practices often take the same, or very similar, forms. This is particularly true for pricing abuses. Since low prices are the main virtue of a healthy and effective competitive process, antitrust authorities and courts face the difficult task of identifying anticompetitive conduct without chilling legitimate competitive initiatives. Improper antitrust intervention would soften the competitive pressure on the market to the detriment of consumers.

Discount policies lie at the heart of the debate on single firm conduct. Dominant firms may implement several discount schemes in order to attract customers or induce them to increase their purchases. Suppliers may grant discounts to customers, distributors or agents, provided that their purchases or sales of the relevant products achieve or exceed certain thresholds (quantity discounts or loyalty discounts). They may implement schemes of discounts granted to customers, distributors or agents, with respect to the purchase of one or more products, on condition that their purchases or sales of one or more additional products achieve or exceed certain thresholds during a given reference period (bundled discounts and rebates). Finally, dominant firms may grant substantial price discounts to a selected group of customers, which is particularly exposed to the competitive pressure of other firms (selective discounts).

In all these cases, dominant firms increase their sales at the expense of rivals. However, this is the very essence of competition. Indeed, above-cost discounts are commonly considered normal – and inherently pro-competitive – business practices. They may enliven competition and benefit consumers. Over-inclusive antitrust intervention against discount policies runs the risk of frustrating the very aims of competition rules.

On the other hand, some forms of discount schemes may give rise to significant competition concerns. In comparison with predatory pricing, discount schemes may be a more subtle and effective commercial tool to hinder competitors' access to the market. Established economic literature has explained that classic predatory pricing strategies are costly and difficult to sustain in the long term, as they may give rise to significant losses, not only for the victims, but also for the predator. Loyalty-inducing discount schemes may have exclusionary effects without implying any losses for the firm concerned. The structure and functioning of certain loyalty and bundled discount schemes may lead to the exclusion of equally efficient competitors even though the discounted price charged by the dominant firm is not below cost.

The dilemma is, then, how to distinguish legitimate price competition from exclusionary conduct. In the analysis of many discount policies, the EU institutions have traditionally focused on whether price reductions produced a loyalty-inducing effect and were justified by cost savings. However, encouraging customers' loyalty through lower prices may hardly be considered, in and of itself, an anticompetitive result. Furthermore, a rule requiring that discounts must be based on cost differences is ill-conceived and conflicts with business practice and economic analysis' insights. In most cases, discounts are not offered to reflect cost savings, but to gain more customers and increase sales. The fact that a dominant firm implements a discount scheme to increase its sales says nothing about the compatibility of the pricing strategy with competition rules.

In an attempt to modernize its enforcement practice, the European Commission issued the 2008 Guidance on exclusionary abuses, which introduced a complex and sophisticated standard for the assessment of loyalty-inducing discounts. The criteria set out by the

Commission Guidance represented a first step towards the introduction of a more economic approach, aimed at distinguishing anticompetitive discount schemes from legitimate price competition on the basis of the risk of exclusion of equally efficient competitors. However, the EU courts are still reluctant to depart from established case law, according to which discount schemes may be unlawful simply because of their tendency to induce loyalty and the lack of a cost justification. Although most antitrust scholars have criticized the traditional formalistic approach of the EU institutions, even in the academic literature there is no broad consensus on the identification of a sound and administrable legal test for the treatment of these practices. The positions range from per se legality of all above-cost discounts to the traditional quasi per se illegality approach to dominant firms' loyalty-inducing practices.

The controversial debate on the appropriate legal standard for the assessment of many discount schemes – in particular, loyalty and bundled discounts – echoes the difficulties encountered by courts, antitrust authorities and scholars in their ongoing attempt to develop a coherent theoretical framework to distinguish exclusionary conduct from legitimate competition. In Europe, the influence of the ordo-liberal economists of the Freiburg School and of the non-economic goals traditionally pursued by EU competition law has favored the emergence of a structuralist and form-based approach, which does not seem to reflect a coherent theoretical framework. The modernization process led to a significant injection of economic analysis insights and tools in the enforcement of rules on restrictive agreements and concentrations, but the principles established by the traditional formalistic approach of the EU institutions continue to influence the application of competition law to unilateral conduct. Even in the US, antitrust scholars and policy makers are still far from commonly accepted views on the appropriate standards for the assessment of unilateral exclusionary practices.

The law on unilateral conduct is currently in a state of transition. Competition policy and enforcement practice constantly change in an effort to adapt to the evolution of economic theory, business models, consumer behavior, economic realities and social and political conditions. The remarkable contrast between the EU and US systems in the treatment of some unilateral practices – such as, in particular, loyalty discounts, refusal to deal and price squeeze – testifies that, notwithstanding the efforts made by policy-makers and scholars in the last few years, the need to improve our theoretical framework and refine current standards and analytical tools is still particularly pressing.

This book is a very important and valuable contribution to the debate on the assessment of unilateral conduct and, in particular, discount policies. Gianluca Faella provides an extensive and detailed analysis of the legal and economic issues raised by the treatment of the discount policies that have been considered anticompetitive by the EU institutions. The comparative law and economics approach adopted by the book allows establishing a continuous and fruitful dialogue between different legal systems through the lens of economic analysis. The book discusses the business rationale of different discount policies and carries out an in-depth economic analysis of potential anticompetitive and positive effects of these practices. The comprehensive analysis of the evolution of case law and decision practice in the US and the EU, complemented by continuous references to the Italian experience, highlights the remarkable divergences that still characterize the enforcement of rules on unilateral conduct in this field. Gianluca Faella investigates the roots of such divergences and critically reviews the solutions adopted in different legal systems. His analysis leads to the identification and discussion of a theoretical framework for the assessment of discount policies, which is inspired by insights from economic

analysis, but takes realistically into account the limits of administrative and judicial systems and the need to ensure a sufficient degree of workability and legal certainty.

After the revision of the enforcement of Article 102 TFUE by the Commission, it is time also for the EU courts to critically review and carefully calibrate the analytical tools that should be used in the assessment of unilateral conduct and, in particular, pricing strategies. Erroneous convictions of aggressive pricing policies may be more harmful to competition and consumer welfare than the anticompetitive practices they aim to prevent. At the same time, we need to preserve an effective enforcement of competition rules against potentially effective exclusionary practices, to the benefit of consumers and the public interest in the maintenance of open and competitive markets. Experience with the use of more sophisticated analytical tools and the development of case law will allow courts and antitrust authorities to better distinguish legitimate price competition from anticompetitive conduct, while reducing administrability concerns.

Faella's smart contribution represents a remarkable step in the right direction.

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