FEBRUARY 2009, RELEASE ONE

GCP
THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

Abuse and Monopolization: Unilateral Conduct by Two Competition Authorities?

Gunnar Niels
Oxera

WWW.GLOBALCOMPETITIONPOLICY.ORG

Abuse and Monopolization: Unilateral Conduct by Two Competition Authorities?

Gunnar Niels*

I. INTRODUCTION

Within the space of a few months, two pre-eminent competition authorities issued widely publicized reports on unilateral conduct, one of the hotly debated topics in modern competition law. Both reports followed years of extensive review and consultation processes among practitioners and experts in each jurisdiction. Great expectations had been created. So, with these reports, have the two authorities laid down a marker for how unilateral conduct cases will be assessed in years to come?

Well, let's imagine we're in the year 2019. What would a competition practitioner at that point in time make of the Department of Justice's ("DOJ") report on single-firm conduct under Section 2 of the Sherman Act—published in September 2008—and of the European Commission's guidance on enforcement priorities in applying Article 82 EC Treaty, published in December 2008?[1] In this article I explore the answer to this question. I anticipate that, in short, the future reader will be confused by both reports because the

*Director, Oxera, Oxford. The views expressed in this article are those of the author alone.

[1]U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), *available at* www.usdoj.gov/atr/public/reports/236681.htm and EUROPEAN COMMISSION, GUIDANCE ON ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 EC TREATY TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS (December, 2008) [hereinafter *European Commission 2008*].

context in which they were produced is not made clear in either, but he or she will be even more confused by the European report than by the U.S. one.

II. UNILATERAL ACTION BY THE DOJ

The DOJ report will strike our reader in 2019 as thorough and well-structured. He or she may actually consider it quite a good read (without necessarily agreeing with all its conclusions). The report (p.1) makes clear: that there had been much scholarly debate on whether "certain potentially anti-competitive practices may be more prevalent, or at least more theoretically possible, than earlier scholarship had suggested;" that this was a topic previously address by the Antitrust Modernization Commission; and that the DOJ and the Federal Trade Commission ("FTC") embarked on a year-long series of joint hearings involving 29 panels and 119 witnesses—including U.S. and foreign antitrust officials, leading academic economists and legal scholars antitrust law practitioners, and representatives of the business community.

Each section of the report starts with a detailed overview of the relevant case law, followed by a description of recent and past scholarly thinking—from both the literature and the hearings—and of where that thinking may be at odds with the case law. The report then discusses the enforcement principles that have been suggested, specifying which are favored by the DOJ. The report goes systematically through all the issues arising in monopolization cases, starting with a section on the purpose of Section 2 and the principles that have guided the evolution of its enforcement, followed by sections on defining and identifying monopoly power (also covering market definition) and on

general standards for exclusionary conduct. It then has five sections on specific practices—predation, tying, bundled and loyalty discounts, refusal to deal, and exclusive dealing. Next is a section on monopolization remedies, an area that had previously received little attention (the report, at p.144, quotes one panelist: "Everybody likes to catch them, but nobody wants to clean them"). The report concludes with a policy section on international issues, in particular concerns raised by divergence in approaches to single-firm conduct across jurisdictions, and what to do about it.

Our competition practitioner of the future will also notice that the DOJ report makes much effort to formulate clear enforcement standards that provide legal certainty to businesses—for example, through safe harbors. The report suggests that a market-share-based safe harbor for monopoly power "warrants serious consideration by the courts," and states that no court has found monopoly power below 50 percent (p.24). It usefully sets out the pros and cons of various general standards for exclusionary conduct, expressing a preference for the "no-economic-sense test," the "equally efficient competitor test," and the "disproportionality test," while rejecting the "effects-balancing test" and the "profit-sacrifice test" (pp.36–47). As regards predation, the DOJ states that above-cost pricing should remain per se legal (p.60), that average avoidable cost ("AAC") is its preferred measure of cost (p.67), and that the recoupment standard "serves a valuable screening device to identify implausible predatory-pricing claims" (p.69). It proposes two safe harbors for bundled discounting—a "predation-based safe harbor" where bundle-to-bundle competition is reasonably possible, or otherwise a "discount-

allocation safe harbor" (pp.98–102). For exclusive dealing, there is a further proposed safe harbor where the arrangement forecloses less than 30 percent of existing customers or effective distribution (p.141).

However, the reader in 2019 will not necessarily appreciate in full the circumstances in which the DOJ report was produced. He or she may perhaps find it curious that the DOJ published the report in its own name—unilaterally, as it were—whereas the hearings leading up to it had been held jointly with the FTC, and the two agencies had successfully produced joint documents in the past, such as the Horizontal Merger Guidelines.[2] But there is little in the report itself that would point to the imminent and unprecedented row between the two agencies that ensued after publication. For that, the reader needs to turn to other documents and press reports published at the time, or to antitrust history books describing events in 2008.

On the day of publication of the report, the FTC, specifically through three of its commissioners, distanced itself from the DOJ in no uncertain terms.[3] Apart from a few misgivings about the DOJ going solo and misrepresenting the FTC position, the commissioners criticize the DOJ's laissez-faire enforcement approach as erecting a "multi-layered protective screen for firms with monopoly or near-monopoly power," enabling these firms to engage in anti-competitive unilateral conduct "with impunity."[4]

---

[2]U.S. Department of Justice & Federal Trade Commission, 1992 Horizontal Merger Guidelines, (1992), revised Apr. 8, 1997.

[3]Federal Trade Commission, Statement of Commissioners Harbour, Leibowitz and Rosch on the issuance of the Section 2 report by the Department of Justice (Sept 2008), [hereinafter *FTC (2008)]*. A somewhat milder but still critical statement was issued on the same day by the FTC Chairman: W. Kovacic, Modern U.S. competition law and the treatment of dominant firms: Comments on the Department of Justice and Federal Trade Commission proceedings relating to Section 2 of the Sherman Act (Sept 2008).

[4]FTC (2008), op. cit., p. 10.

Other substantive criticisms are that the DOJ overstates the legal, economic, and academic consensus, that the "disproportionality test" is of the DOJ's "own making" and "ill-defined,"[5] and that the safe harbor approach is inferior to in-depth, context-specific assessments of the facts in each case. Thus, the legal clarity and certainty that the DOJ report had sought to achieve by itself in 2008 did not fully materialize. Indeed, our reader in 2019 knows that the debate continued well into the 2010s, with the two agencies sending mixed messages and the courts being confused about new and complex unilateral-conduct problems such as the pricing of access to intellectual property.

One area where our competition practitioner in 2019 might feel some sympathy with the FTC's position is that of unilateral refusals to deal with competitors. The DOJ report goes far in concluding that "antitrust liability for mere unilateral, unconditional refusals to deal with rivals should not play a meaningful role in Section 2 enforcement" (p. xi). The FTC commissioners argue that the issue of access to intellectual property rights ("IPR") is more problematic than suggested by the DOJ's conclusion. The same may hold for access to naturally monopolistic infrastructure, a not insignificant competition concern in network industries such as telecoms, energy, and rail. It's not that the DOJ dismisses these concerns. Rather, it follows the courts and some commentators in emphasizing that judges, juries, and antitrust enforcers are "poorly suited" to doing the job of regulators, setting access and charging conditions (p. 124). This comes across as an effort to pass the buck and keep antitrust pure—the DOJ quotes one commentator: "it cannot be sound antitrust law that, when Congress refuses or omits to regulate some

[5] *Ibid.*, p. 8.

aspect of a natural monopolist's behavior, the antitrust court will step in and, by decree, supply the missing regulatory regime."[6] This may be correct in the context of the U.S. legal framework, but from a policy perspective the ex ante regulations and ex post competition rules for natural monopoly are more closely related than the DOJ report would suggest. No wonder, then, that the reader in 2019 will think that, during the 2010s, European policymakers have made greater efforts than their American counterparts to take the "natural-monopoly bull" by the horns by seeking to utilize the interplay between regulation and competition policy in dealing with those problems.

III. THE EUROPEAN COMMISSION'S ATTEMPT AT REFORM

So what about the European Commission's 2008 report on abuse of dominance under Article 82 of the EC Treaty? What immediately strikes the reader about the report is its title. This is presented not as a guideline or guidance document on how to apply Article 82, but rather as a document purporting to set out the Commission's "enforcement priorities." But does it do what it says on the tin?

When a competition authority issues a document setting out enforcement priorities, one would expect that document to contain deliberations such as whether to prioritize cases in consumer markets (encouraging business-to-business disputes to be addressed through private actions before the courts), in larger markets (such that the potential consumer welfare gains from intervention are greater), in areas where the authority believes that current case law is inadequate and hence requires a new test case, or in areas where deterrence can usefully be achieved by setting an enforcement example.

[6] RICHARD POSNER, ANTITRUST LAW, 2nd Ed (2001)

The Commission's guidance on enforcement priorities does not touch on any of these issues. Nor does it address one topic specific to Article 82 that was in particularly dire need of clarity in 2008—i.e., the question whether enforcement of Article 82 should also focus on excessive pricing and other exploitative conduct. Instead, the report title refers only to exclusionary conduct, and the reader is left wondering why.

The Commission report itself does little to explain the context in which it was produced. After a brief introduction there are eight pages on the general approach to Article 82, and a further 14 pages on specific types of abuse (which, it should be noted, broadly correspond to the types of conduct addressed in the DOJ report)—exclusive dealing, tying and bundling, predation, and refusal to supply and margin squeeze. After discussing the last type of conduct the report abruptly ends. Some of the detailed decision criteria set out for specific practices seem more in keeping with a formal guidelines document than enforcement priorities. For example, the proposed assessment of conditional rebates hinges on factors such as the "contestable portion" of the market, whether the effective price for this portion is above long-run incremental cost, below-average avoidable cost, or in between, and whether rivals have effective counterfactual strategies at their disposal (pp.14–15). These may all be relevant factors, but in order to assess them an authority basically has to carry out an investigation in full, at which stage the question whether such practices are an enforcement priority seems to have lost its relevance.

Instead, even more than in the case of the DOJ report, our reader in 2019 can

judge the significance of the Commission's 2008 report only by studying the context in which it was produced. The Commission had started a review of Article 82 in 2005, with the aim of introducing standards that focus on the economic effects of unilateral practices, not their form. Similar reforms had by then been implemented in EU merger control and in the approach to Article 81 EC Treaty, dealing with restrictive agreements. Starting from an "ordoliberal" tradition, EU competition law had always viewed a dominant firm with suspicion (rather than the admiration it more commonly receives in the United States), as the proverbial bull in a china shop that should be prevented from damaging its already fragile competitive environment.[7] This led to the legal principle that a dominant firm has a "special responsibility not to allow its conduct to impair genuine undistorted competition,"[8] and to a set of virtual per se prohibitions: firms found to be dominant would not be allowed to engage in practices such as tying, price discrimination, and offering loyalty rebates—a form-based, and rather interventionist approach. In December 2005 the Commission published a discussion paper on Article 82 in which it attempted to shift Article 82 policy towards an effects-based approach.[9] This generated widespread debate. The reform process got somewhat torn between, on one side, the existing case law—and indeed several rulings by the European courts *after* the publication of the discussion paper, such as *British Airways*,[10] which confirmed the form-

[7]*See* G. Niels & H. Jenkins, *Reform of Article 82: Where the link between dominance and effects breaks down*, 26 (11) EUR. COMPETITION L REV (2005).

[8]European Commission (2008), op. cit., p. 4.

[9]EUROPEAN COMMISSION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (December 2005) [hereinafter *European Commission (2005)]*

[10]European Court of Justice (2007), "*British Airways plc v Commission*," Judgment Case C-95/04 P, March 15th.

based approach—and, on the other side, commentators who considered that the Commission had not moved far enough in the direction of an effects-based approach.

This is the context in which the long-awaited guidance on enforcement priorities was published in December 2008. As we saw earlier, the report is perhaps less ambitious than expected—many had hoped for formal guidelines, not guidance, let alone guidance on "enforcement priorities." Nonetheless, the Commission has not changed its basic premise in the 2005 document that an effects-based test is the right way forward, and in some places it has subtly moved further in the direction of an effects-based approach—something that future readers, including our practitioner in 2019, can appreciate only if they are familiar with both documents. The 2008 guidance reiterates the following basic principles that the Commission had already begun to formulate in 2005, at which time they represented quite significant departures from the form-based approach:

- the objective of Article 82 enforcement is to protect an effective competitive process, not competitors (p.5);
- the degree of dominance matters when assessing the effects of practices (p. 7);
- the degree and likelihood of foreclosure of competitors matters when assessing the effects of practices (p.9); and
- the as-efficient competitor test is useful for price-based exclusionary conduct (pp.10–11).

In other places the Commission goes a step further towards an effects-based, and possibly less interventionist, analysis than in the 2005 discussion paper. This seems to

indicate that it has taken account of (some of) the comments made during the public debates (unlike the DOJ, the Commission does not say much about how the debates influenced its thinking). Thus, for example, in the discussion on conditional rebates (pp.14–16) the 2008 report highlights the importance of having to demonstrate that there is a "non-contestable" part of the market for which rivals of the dominant firm cannot compete (in the 2005 discussion paper the mere existence of dominance was taken to imply that part of the market was "non-contestable[11]), and that AAC is the cost floor for the "effective price" of the incremental range for which a rival competes with the dominant firm (in the 2005 discussion paper this was average total cost, implying a lower threshold for intervention). Likewise, the section on predation (pp.21–22) places greater emphasis on the likely effect on competitors and consumers in the longer term—the report doesn't quite mention the word "recoupment," but it represents a shift with respect to the 2005 discussion paper, which explicitly rejected the recoupment test in line with the (as yet—see below) current case law on predatory pricing.[12]

IV. UNILATERAL MOVES TO WHERE?

Our reader in 2019 will be aware that, historically, the U.S. approach to unilateral conduct had been at the non-interventionist end of the spectrum—mainly driven by a greater degree of confidence in market forces and less faith in the abilities of courts and government—with EU competition law at the other extreme. Placing the two reports in this historical context, the reader would observe that the DOJ report endorses the laissez–

[11]European Commission (2005), op. cit., p. 44.

[12]European Commission (2005), op. cit., p. 35.

faire approach, while the European Commission moves somewhat in the direction of a more effects-based (and less interventionist) approach.

However, again, the reports by themselves do not provide the full picture on where policy towards unilateral conduct will be heading on either side of the Atlantic. If our competition practitioner in 2019 were to read the above-mentioned FTC response in conjunction with the DOJ report, he or she would get the impression that in 2008 the FTC actually positioned itself very close to the European Commission on the spectrum. Indeed, it seemed to almost reach out to the European Commission and other foreign agencies to side with it against the DOJ, stating that it would "look around the world for additional perspectives on dominant firm conduct."[13]

Hence, to come back to our original question, the DOJ and European Commission reports are not quite the markers for future policy they were perhaps intended to be. Over the next years, the debate on abuse of dominance and monopolization will continue. U.S. antitrust now seems unlikely to follow the laissez-faire line set out by the DOJ, as the FTC line appears to be seen more sympathetically by the new U.S. administration. EU competition policy, meanwhile, may move steadily closer to an effects-based approach and closer to the United States on the intervention spectrum. The European Commission's moves to reform Article 82 policy in 2005–2008 have played a significant role in making this change, even if its final output (the guidance on enforcement priorities) does less so. The real step change may come when the European courts move away from their previous form-based judgments, a process that seems to have begun in September 2008

[13]FTC (2008), op. cit., p. 11.

with the Advocate General's opinion in the *France Telecom* appeal before the European Court of Justice—which went against the Commission and the Court of First Instance in stressing the relevance of proving recoupment in predation cases.[14] In all, it seems that policy reform processes, such as those carried out by the European Commission and DOJ, will eventually bear fruit, even if not always in the ways and at the speed initially intended.

[14] *France Télécom SA v Commission, Opinion Of Advocate General Mazák*, Case C-202/07 P, European Court of Justice, para. 69 (Sept 2008).