RECENT TRENDS IN ANTITRUST ENFORCEMENT

Mario Siragusa1, 2

Keywords: Signalling, Power cables case, Intel decision, abuse of rights, Motorola case

Abstract: This article intends to discuss a selection of the most relevant features of the most recent trends in antitrust enforcement. Firstly, anticompetitive signalling will be addressed; its assessment depends on the kind of information provided. Where such information is of public knowledge or is very well known by the market participants, signalling should not be deemed as anticompetitive. Secondly, the Power Cable case has raised for the first time various problematic issues, such as the possibility to impose parental liability on a purely financial investor, even where the presumed direct infringer would have been able to pay the fine. This appears to be irreconcilable with the objectives for which the case law on parental liability has been elaborated. Thirdly, as to the concept of restriction of competition by object, it is argued that the Intel case does not disavow the principles established in Cartes Bancaires. Indeed, the finding of a violation and the different methodology applied in the first case are only due to its specific factual circumstances. Finally, the nouvelle vague of the case law on the anticompetitive abuse of rights has led to two opposite approaches, one at the EU and the other at the Italian level. The first one, based on the finding of objective circumstances, is perfectly consistent with existing EU case law, while the second, exclusively focused on the exclusionary intent, seems to be in sharp contrast with it. The hope is that the Court of Justice will intervene to resolve this contradiction.

1. ANTICOMPETITIVE SIGNALLING

The first topic that I want to cover is anticompetitive signalling, i.e., the range of practices by which, normally through public disclosure instead of direct communications, competitors exchange commercially sensitive information or reveal the course of conduct that they intend to adopt on the market. Such practices lead to a complete transparency of the market and to the coordination of commercial conducts, and thus hinder competition. While the concept of signalling has recently emerged in a new trend of case law, it is equally true that cases raising similar issues were already brought to the attention of antitrust courts and authorities in the past.3

In the context of the assessment of signalling under a competition law perspective, I think that it is important to distinguish the kind of information which is publicly disclosed by the firms. In particular, it is critical to verify if such

---

1 Lawyer.


3 The anticompetitive effects of signaling indeed are also very well known in the antitrust literature: see, among many others, Blechman, Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N.Y. L. SCH. L. REV. 881, 1979.
information is clearly known to everybody. In this respect, an example could be given by the fact that a certain industry suffers from over-capacity: indeed, probably every company operating in that specific industry would be perfectly aware of such a structural and general feature. This aspect bears decisive importance, as I find it difficult to conceive that public declarations by companies’ representatives on issues which are very well known to the industry itself – or are of public knowledge – could be considered as anticompetitive signalling. Obviously, the situation would be different where the information provided is specific to the situation of one particular company and that concerns commercial data. Indeed, it is clear that such information should be considered as confidential, or, at least, sensitive from an antitrust standpoint. It is very well possible that a public declaration including such kinds of information could be relied upon by antitrust authorities for building an allegation of anticompetitive concerted practice.

Lastly on this point, I believe that the effect perspective is more appropriate than the object one in assessing whether these types of behaviour can be considered a restriction of competition. Therefore, it would be in any case important to ascertain whether the information that was provided was such as to influence the behaviour of the other market participants and, in particular, if these companies adopted parallel conduct in the market.

2. THE POWER CABLE CASE

Now I would like to spend some words on a very interesting case currently pending before the General Court, the Power Cables case, which resulted in the assessment, for the first time, of the antitrust parental liability of an investment bank like Goldman Sachs.

This case has raised a number of important issues, primarily because it held that an investment bank which was only temporarily in control of the entity that had participated in the cartel could be deemed to be liable for the cartel activity by the means of the parental liability. Second, the fact that the judgment extended the solidarity obligation to that specific type of parental relationship – which had nothing to do with a traditional industrial/operational ownership but was of a merely financial nature – has far reaching implications for the investment banking community. Indeed, the participants in this sector will now have to figure out how to

---


5 Goldman Sachs acquired all shares of the company which had allegedly participated in the cartel in 2005, but then progressively reduced its shareholding until liquidating it completely in 2010. Pending the presumed cartel, Goldman Sachs did not hold more than 50% of the shares of the company. In 2009, when the cartel was considered to be over, Goldman Sachs controlled only 26% of the shares of the company at issue. In any event, Goldman Sachs never controlled the majority of members on the board of the company.
shield themselves against this additional (and, until now, unforeseen) kind of liability. The problematic issues raised by this case are so important that it is doubtful that the Commission had considered fully the substantial implications of its decision.

In addition, another interesting aspect of the Power Cables case is that the solidarity obligation of the parent company was applied in a situation where the alleged participant to the cartel was perfectly able to pay the fine imposed on it. Moreover, the alleged cartel member has gone over time through different kinds of controls exercised by a number of different parents. Is it really reasonable to apply the parental liability theory to a situation like the one just described? I believe that, in this respect, the Commission’s decision is not in line with the aim pursued through the development of the parental liability theory.

3. Restriction of Competition by Object

It is also worthwhile to spend a few words on the concept of the restriction of competition by object. I definitely agree that Cartes Bancaires represents a clear turning point on the matter. Indeed, I don’t see how, following Cartes Bancaires, the extension of the concept of restriction by object can be developed further, also considering that there are, at the moment, various pending cases that will be reviewed under the light shed by such judgment. Therefore, I expect that the Court of Justice and the Commission, from now on, will take a much more restrictive approach to this definition, and I hope that the same will happen at the level of the national authorities, which have so far joined in the trend of interpreting the concept of restriction by object expansively even when applying national law.

After all, this trend was clearly in conflict with the purpose of the modernization of the competition system and with Regulation 1/2003, which was based on a strengthening of

---


7 With respect to the underlying rationale of the parental liability theory, see, on this point (and with specific respect to the Power Cables case) Odudu and Bailey, The single economic entity doctrine in EU competition law, Common Market Law Review, 2014, Vol. 51, Issue 6, pp. 1721-1758.


the effect analysis.\textsuperscript{10} The Court’s decision in \textit{Cartes Bancaires} thus had the merit of resolving this clear contradiction while better aligning the antitrust system with the underlying rationale of the modernization process.

According to some scholars, however, the precedential value of the conclusion reached by the Court in \textit{Cartes Bancaires} has been undermined by the \textit{Intel} decision,\textsuperscript{11} because this latter should be considered in contrast with the reduction of the scope of the concept of restriction by object operated in \textit{Cartes Bancaires}. These commentators based their conclusions mainly on the fact that the General Court has adopted in \textit{Intel} a different approach than that followed by the Court of Justice in \textit{Cartes Bancaires}. However, in my opinion there is no real difference between these two cases.

This is because the outcome reached by the General Court in \textit{Intel} depends on the fact that the assessment was only focused on the exclusivity obligation and, moreover, was based on the peculiar factual situation of the case.

Indeed, in the relevant section of its decision, the Court does not limit itself to stating that the case concerned a market in which the competition was already limited by the presence of a dominant company, but, significantly, it added that Intel was an unavoidable trading partner. The Court came to this conclusion by making reference to the very large market share held by Intel, which amounted to super-dominance. Furthermore, the exclusive arrangement at issue in \textit{Intel} involved the supply of a component to be incorporated in the finished product manufactured by the customer of Intel. Therefore, that was not a case of exclusive distribution, but a case where, through the exclusivity arrangement, a portion of the market was completely foreclosed by the dominant company. This aspect is obviously crucial in understanding the Court’s decision.

In light of such considerations, I do not think that \textit{Intel} means that all exclusive arrangements entered into by a dominant company are to be considered as abusive. On the contrary, the implications that flow from the case are far more limited: this decision just means that an exclusive purchase agreement put in place by a super-dominant company which is an unavoidable trading partner can be considered to be abusive, and cannot fall within the scope of the \textit{de minimis} rule. I am aware that the exclusion of the \textit{de minimis} rule in \textit{Intel} has been criticised, but I believe that this outcome is (again) only due to the very specific factual circumstances of the case. After all, we already have a number of other decisions of the EU courts – such as the \textit{Tetrapak} case\textsuperscript{12} – where an exclusivity obligation has been considered to be abusive only because it concerned a good (in the \textit{Tetrapak} case, a license over a specific technology) that was the only available


alternative to the product of the dominant firm. Not surprisingly, as in *Intel*, the assessment of the abusive nature of such a clause in *Tetrapak* depended again on the very specific facts of the case.

Therefore, I don’t think that the lesson coming from *Intel* is that any exclusive agreement entered into by a dominant firm should be considered objectionable under a competition law perspective. Following this reasoning, *Intel* should not be necessarily seen in contrast with the position taken by the Court of Justice in *Cartes Bancaires*. Indeed, the General Court in *Intel* had applied the notion of restriction by object to a very specific situation, characterised by a market structure that was particularly critical from a competition law standpoint. Thus, the *Intel* case cannot be understood as a disownment of the general approach taken by the Court in *Cartes Bancaires*, an approach that, in my view, the Court should continue to apply.

4. **ANTICOMPETITIVE ABUSE OF RIGHT**

Lastly, I would like to address a recent trend which is currently very important not only in Brussels or Luxembourg, but also in the Member States. This is a renewed approach to the definition of the concept of abuse of dominant position, which extends this concept to capture new and unforeseen forms of abusive conduct. By new forms of abusive conduct I mean conduct falling short of the traditional categories of abuse of dominant position that have been developed by the longstanding jurisprudence of the EU Courts and constantly applied by the Commission. I am referring in particular to conduct found unlawful in cases like *Astrazeneca*,13 *Rambus*14 and in the recent cases concerning injunctions on the basis of standards essential patents.15 Moreover, this kind of conduct includes the abusive exercise of litigation.16 In my opinion, this case law is slowly moving towards the identity between the concept of abuse of dominant position and that of abuse of right, a development that has already been completed by our Consiglio di Stato in the recent decisions *Pfizer*,17 *Coop Estense*18 and Saint Gobain.19

In this respect, a first observation worthy of mention is that the Commission and the Court of Justice are trying to elaborate this new trend of case law by relying and building on some of the very traditional patterns of the EU

---

16 For the most important example of such a case, see the decision of the Court of first instance, 17 July 1998, case T-111/96, *ITT Promedia*, ECR [1998], p. II-2937.
jurisprudence concerning the abuse of dominant position. Indeed, a closer look at the cases decided at the EU level reveals that, for instance, in the cases related to the abuse of standards essential patents the Commission based its reasoning on the notion of exceptional circumstances, elaborated by the EU Courts since Magill, Volvo and IMS.\textsuperscript{20} The very same principles developed by the Court of Justice in these cases have also been applied in Motorola. The Commission identified the “exceptional circumstances” allowing the characterisation of the conduct scrutinized as an abuse of dominant position by relying on two aspects. Firstly, the technology at issue has been included in the standard by a standard-setting organization. Secondly, the potential licensee has become dependent on that standard, which therefore should have been licensed to it on FRAND terms. Only under such exceptional circumstances could bringing an action of injunction to sanction a breach of the patent covering the technology or to prevent the use of such technology be considered as an abuse of dominant position.

Besides this aspect, such cases present another feature of interest. Indeed, in the opinion rendered by the Advocate General (“AG”) in the Huawei case\textsuperscript{21} – currently pending before the Court of Justice –, the AG stated that bringing an action of injunction against the breach of a certain patent is unfair and abusive conduct when the same plaintiff undertook a commitment to grant a license for this very same patent on FRAND terms. Therefore, it seems to me that what the AG is trying to do is not only keeping this new trend of cases in line with the traditional jurisprudence concerning IP rights (\textit{i.e.}, with the strand of traditional cases on the point), but also with the ITT Promedia concept that bringing an action may be considered as abusive when the legal basis to bring such an action is unreasonable.

In light of the just mentioned considerations, I think that, at the EU level, the development of this new trend of case law on abuse of rights/abuse of dominant position is coupled with a clear effort of consistency with the traditional case law on abuse of dominant position. In addition, such cases show that the Commission and the EU Courts are always trying to build on their reasoning on objective circumstances and to leave aside the intentions of the investigated party, considering these latter simply as an ancillary rather than fundamental element of their theories of harm.

I believe that this approach is highly commendable, and, therefore, I am very worried about the completely opposite view taken by the Italian case law, which is almost exclusively based on the subjective/intentional


element. The latter approach is at odds with the one followed by the EU case law: the idea that the quid plus which would make abusive the exercise of right could be the presence of exclusionary intent alone seems indeed to be in sharp contrast with the reliance at the EU level on objective circumstances. This approach is particularly worrisome when dealing with IP rights, since the very nature of such rights lies on the exclusivity granted to their owner, or, in other words, on the right to exclude third parties. The trend developed at the Italian level appears to me very dangerous from a legal certainty perspective, but I am confident that this trend will be – sooner or later – corrected by the Court of Justice.