Communiqué of 15 December 2017

ROME ANTITRUST FORUM

Summary of the fourth annual meeting

The Rome Antitrust Forum is an initiative co-organised by the Scuola Nazionale dell'Amministrazione (Rome) and the Law Department of the European University Institute (Florence). The purpose of the Forum is to bring together distinguished antitrust practitioners (both lawyers and economists), leading figures in antitrust enforcement from abroad and representatives of the Italian Competition Authority to discuss, on a non-attributable basis, the way in which the Italian system of antitrust enforcement operates. The Forum facilitates an exchange of views among participants in order to identify key challenges confronting antitrust enforcement in Italy. The Forum ends with some suggestions and recommendations which could lead to a more effective system of antitrust enforcement in Italy.

This year the Forum considered two issues: the role of commitment decisions in the practice of the Italian Authority and the challenges associated with the assessment of excessive prices as an abuse of a dominant position.

Below we set out some of the major questions that emerged from the discussions among the Forum participants. We conclude with some policy suggestions.

Commitment decisions: what is the practice of the Italian Competition Authority?

Pursuant to the Italian Competition Act (Article 14, Law No. 287/1990), as further elaborated by the Authority's 2012 Communication, commitments may be proposed by the undertakings concerned within three months from the formal opening of the investigation. This strict limit is meant to allow the Authority to save its scarce administrative resources, finding a solution short of a lengthy investigation. Resolving a case by way of commitments is also beneficial to firms, as it increases their legal certainty by shortening the procedure and spares them from a possible finding of infringement and from the associated stigma and reputational effects. However, this short deadline also has some drawbacks linked to the specificity of the Italian legal context. First of all, in contrast to EU practice, the opening of a procedure in Italy originates in a formal declaration by the Authority on the suspected infringements. Such a declaration precedes any dawn raid. Usually, dawn raids are conducted at the same time the parties are informed of the opening of a procedure. The three-month mandatory deadline for presenting commitments tends to reduce the incentives and opportunity of the Authority to immediately and carefully examine the evidence gathered in such a dawn raid. In the first three months of an investigation the Authority is much more inclined to dedicate its resources to identifying possible and suitable

remedies to address the suspected infringements, rather than examining the evidence collected in a dawn raid. Furthermore, while the parties can ask for a postponement of the three-month deadline (which is granted in many instances), the Authority is obliged to consider commitments whenever they arrive, and is not allowed to unilaterally postpone them. In order to rebalance this situation, a proposal was made in the course of the discussion to introduce a formal communication whereby the Authority informs the parties of its preliminary investigative findings and signals its readiness to consider commitments if the parties propose them.

In the Italian procedure parties are not allowed to independently appeal the Authority's decision to reject proposed commitments. This decision is only subject to judicial review together with the final decision finding an infringement. However, this limitation is questionable since, at that late stage, the fact that commitments were not accepted early in the procedure becomes irrelevant.

According to the Authority's 2012 communication, commitments may be rejected when the suspected infringement is clearly serious, or where the proposed commitments are submitted late or where they are inadequate to address the agency's concerns. Furthermore, a rejection is also possible when the Authority has a legitimate interest in adopting a decision on the case (e.g., where a new commercial practice emerges, where the sector is of great importance or where a precedent is needed). During the Forum discussion it was suggested that there may be a need to clarify where this interest lies, and to inform the affected parties accordingly in a decision containing the specific reasons for the rejection, so that the Courts may assess the matter in a timely manner.

Furthermore, in a multiparty setting, it is often not in the interest of the Authority to accept commitments from only a few of the parties involved, i.e., where the proceedings would continue vis-à-vis others that decide not to present any. However, since the Italian case law allows for such 'hybrid' cases, a communication by the Authority — suggesting for example that the agency would in principle not be willing to accept commitments unless they are offered by all parties concerned and explaining any exceptions to this general approach — could provide some needed clarification.

In order to assess whether commitment decisions should have a bearing on follow-on damages actions, one should consider the following. Sometimes the firm tries to avoid a lengthy and costly procedure, knowing that the suspected infringement described in the Authority's decision opening the procedure is a correct description of the firm's behavior. In such instances, accepted commitments could in principle be deemed a prima facie indication of the infringement, should a damage action be brought as a follow-on case. In other cases, a risk-averse firm may propose commitments in order not to be found

responsible for an infringement that it does not believe it has committed. Given this ambiguity as to whether the conduct at issue was indeed anticompetitive, it would seem inappropriate for a court to regard the existence of a commitment decision of the Authority as an indication of an infringement. It is worth noting that, according to recent EU case law (Case C-547/16), a national court is required to regard a commitment decision of the European Commission as an 'indication' or as 'prima facie evidence' of the 'anticompetitive nature' of an agreement (or implicitly, in a unilateral conduct case, the anticompetitive nature of the conduct). The exact scope of this jurisprudence is not yet entirely clear. However, since, as already explained, the Italian Authority generally has not engaged in a thorough investigation when it adopts a commitment decision, and since its concerns therefore remain hypothetical at that stage, it is in any case highly doubtful that the above-mentioned case law is applicable in the specific context of commitment decisions adopted by the Italian Authority.

Exploitative abuses: the experience of the Italian Authority with excessive prices

According to economic theory, antitrust authorities should intervene against excessive prices in exceptional circumstances and in particular in the case of either: 1) hold up, i.e. when a dominant company exploits the sunk costs of its customers to the point that they are barely able to remain in the downstream market; or 2) standard essential patents, i.e. when patents are included in a standard and their holders commit to license on FRAND terms. This restraint in intervening against excessive prices has a number of justifications. In particular, intervening against excessive prices may dampen competition by reducing the expected returns from innovation and, as a result, restrain innovations from ever reaching the market. More fundamentally, however, it is unclear from an economic point of view what is an excessive or an 'unfair' price, and an interventionist approach is therefore prone to costly type I errors.

Since the prohibition against excessive prices is present in both the EU and domestic laws (albeit with slightly different standards of appreciation, i.e. 'fairness' in EU law and 'excessively burdensome' in Italian law), the possibility of enforcing it cannot be ruled out altogether. As a result, the Forum sought to identify the best ways to interpret the prohibition. First of all, the main conclusion of the Forum was that the best possible intervention against excessive prices is indirect. That is to say, it is best to address not high prices themselves but the conditions that enable them and cause their persistence. Only residually and very exceptionally should it be necessary to intervene directly against excessive prices.

The case law in this respect is not very helpful. The *United Brands* test established long ago by the Court of Justice is intended to determine whether a price is so high that it bears no

reasonable relation to the economic value of the product concerned. It is clearly a test about 'fairness' under Article 102 TFEU: when taken literally, the first step of the test is to ascertain whether the price is excessive in light of the cost of production. The ECJ however, even in subsequent judgments, never identified rigorously how to determine when a given price-cost margin is excessive or when a price is unreasonably high in light of a product's 'economic value'. It simply referred to some comparisons, with the price of competing products, with the price of the same product across Member States or with the price of the same product in the past.

The Israeli Antirust Authority in recent years has made an effort to introduce some rigour in the definition of what is a reasonable price. In particular, in 2014 it issued a communication suggesting that any price-cost margin above 20% could only be accepted as fair if it was supported by some reasonable justification, for example ex ante investment. This safe harbour margin was recently rescinded for a number of reasons: 1) it may represent a focal point for dominant companies which could in fact raise their margins to that level; 2) it may lead to unnecessary and inefficient increases in costs aimed at reducing margins so as to fit within the safe harbour; and 3) for multiproduct firms characterized by a high proportion of common costs, identifying such a margin may become ultra-difficult if not impossible. The same is true in the case of two-sided markets.

In the course of the discussion, the Forum was unable to find a consensual view on a rigorous standard that would clearly tell us when a price is excessive.

However, it was suggested that the Italian Authority could clarify the circumstances when the prohibition against excessive prices will not be used. A sensible list of such circumstances could consist of the following:

1) there are other indirect ways to discipline the dominant firm;
2) the market on which the dominant firm operates is not characterized by high barriers to entry;
3) the dominant firm is not a monopoly (or quasi-monopoly);
4) the market is supervised by a sectoral regulator, and there is no clear regulatory failure;
5) the market is two-sided;
6) the dominant firm is a multiproduct firm with substantial common costs;
7) the customers of the dominant firm do not incur high sunk costs.

When none of these characteristics is present, the Forum concluded that enforcement of the prohibition against excessive prices may be appropriate. In such instances a three-step analysis may be particularly effective. In particular, the Authority should: 1) determine a

point of reference such as a 'more competitive price', preferably through a comparison test but also possibly through a cost-based test; 2) determine whether the difference between the price charged and this 'more competitive price' is prima facie excessive; and, if so, 3) evaluate the dominant firm's claim that the price in the particular case was justified, for example because of the need to stimulate valuable and risky investment.

Recommendations

In brief, the recommendations by the Forum on commitments decisions and excessive prices are as follows:

(Commitment decisions)

- While the parties can ask for a postponement of the three-month deadline to propose commitments, the Authority is obliged to consider the commitments whenever they are proposed and is unable to unilaterally postpone them. To rebalance this asymmetry, the Authority could communicate to the parties its preliminary findings as enriched by the evidence gathered in the investigation, thus signalling its readiness to consider potential commitments, better coordinating the Italian procedure with the EU practice.
- A rejection of a commitment proposal is possible when the suspected infringement is clearly serious, or where the proposed commitments are blatantly late or inadequate to address the Authority's concerns. Furthermore, a rejection is also possible when the Authority has a legitimate interest in adopting a decision (e.g., in light of a new commercial practice, the importance of the sector, the need to establish a precedent, etc.). In order to increase the accountability of the Authority, it would be appropriate to clarify, in the decision rejecting the commitments, where this interest lies and how it applies to the specificities of the case, so that the Courts are able to exercise their review of the matter in a timely manner.
- In a multiparty setting, it is often not in the interest of the Authority to accept commitments from one party while continuing the proceedings vis-à-vis other parties that did not present any. The Italian case law, however, allows for such practices. A communication by the Authority – suggesting for example that the agency would in principle not be willing to accept commitments unless they are offered by all parties concerned and explaining any exceptions to this general approach – could provide some needed clarification.
- Proposing commitments may indicate either the intention to avoid the finding of a violation that the firm knows it has committed, or the desire to

avoid the risk of being found guilty of a violation the firm does not believe it has committed. Due to this uncertainty about the presence of anticompetitive conduct, it would seem better not to place any prima facie evidentiary value on commitment decisions of the Authority in a follow-on action.

(Excessive prices)

- The best possible intervention against excessive prices is *indirect* intervention: i.e., enforcement and/or advocacy actions should be taken to eliminate or rectify the conditions that cause such prices. Only residually and very exceptionally should it be necessary to intervene directly against excessive prices.
- In its case law, the ECJ did not aim to identify an economic standard for what is excessive but was simply trying to identify an unfair price (prices unreasonably higher than costs). This fairness standard lacks an economic foundation.
- In Israel, an effort was made to identify a rebuttable presumption of fairness based on the price-cost margin. The Forum, while appreciating the objective pursued by the Israeli Authority, believes that there are too many drawbacks associated with such a solution. It does not recommend that the Italian Authority move in that direction.
- The Forum suggests that the Authority could clarify qualitatively the circumstances when the prohibition against excessive prices will not be used. In particular, enforcement of the prohibition is likely to be inappropriate when one or more of the following characteristics are present:
    - there are other indirect ways to discipline the dominant firm;
    - the market on which the dominant firm operates is not characterized by high barriers to entry;
    - the dominant firm is not a monopoly (or quasi-monopoly);
    - the market is supervised by a sectoral regulator, and there is no clear regulatory failure;
    - the market is two-sided;
    - the dominant firm is a multiproduct firm with substantial common costs;
    - the customers of the dominant firm do not incur high sunk costs.
- Should none of the latter characteristics be present, a three-step analysis can help the Authority to determine whether a price is excessive. Specifically, the Authority should: 1) determine a point of reference such as a 'more

competitive price', preferably through a comparison test but also possibly through a cost-based test; 2) determine whether the difference between the price charged and this 'more competitive price' is prima facie excessive; and, if so, 3) evaluate the dominant firm's claim that the price in the particular case was justified, for example because of the need to stimulate valuable and risky investment.