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ABSTRACT

"REBATES AND LOYALTY DISCOUNTS SCHEMES IN EU: TOWARDS A MORE ECONOMIC APPROACH?"

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REBATES AND LOYALTY DISCOUNTS SCHEMES IN EU: TOWARDS A MORE ECONOMIC APPROACH

Rebates, which consist in a lump sum discount to the customer at the end of a reference period, have been used for a long time in economic transactions. The ubiquitous use of rebates by many undertakings, both dominant and non dominant ones, gives an idea about the economic rationality of this practice. From an economic point of view, all different types of rebates have a common feature: they can be considered as a kind of price discrimination and, in common with this practice, they can have both a pro-competitive and an anticompetitive rationale and impact on the market.

Economics, in general, have a positive approach towards rebating practices: they can be an efficient way to make price competition; they can create efficiency gains for companies and increase welfare for consumers through lower prices and/or higher quantities.

However, the rebate schemes applied by dominant companies can be a cause of concern because of the risk of horizontal market foreclosure. In addition where rebates are applied by dominant companies in the intermediate markets, this can lead to the lessening of inter-brand competition at the downstream retail level. However, "*the potential for anticompetitive effects will depend upon the specific details of the programs and the market power of the firms involved."*[1]
For this reason is important to implement an economic approach in order to not the pro-competitive effects and efficiency gain linked to the rebates schemes.
This paper is aimed to assess the antitrust implication of rebates scheme on competition when they are applied by dominant firms, on the light of the approach designed by the Discussion Paper on the application of art 82("Discussion paper") and the main pronunciation of European courts, in order to evaluate how and if the economics of rebates are balanced whit the competition issue. In fact in Europe, according to Discussion paper and considering cases in EU countries, there is a tendency to consider rebates exclusionary only on the basis on their potential to exclude rivals, without considering the effective harm on competition that they produce. The paper is structured as follow: in the first section it analyzes the economics of rebates for the firms. In the second section it analyzes the antitrust implications that arise when the rebates are applied by a dominant firm. In the last section it analyzes the approach followed by court in some relevant cases in EU and the approach followed in US regarding the same issue.

[1] OECD Roundtable on Loyalty o Fidelity Discounts and Rebates (2002).

IL MARGIN SQUEEZE IN EUROPA DOPO TELIASONERA E TELEFONICA

The European Court of Justice Decisions in TeliaSonera and Telefonica cases represent a milestone in the interpretation of Margin squeeze cases in Europe and kind of breaking point from the approach followed in the US.

In particular, those court decisions have unplugged the margin squeeze cases from the refusal to deal type abuses and made it a specific kind of autonomous abuse of dominance that can be sanctioned according to the art. 102 of the TUFE.

As it was clear from the Telefonica and TeliaSonera cases the abuse of dominance is in the margin squeezing action undertaken by the in dominant operator independently from the fact that:

- The wholesale service is an essential input according to the conditions specified in the Bronner case. In TeliaSonera case the upstream service was provided by the incumbent on voluntary basis.
- The downstream service prices offered are predatory.

The abovementioned decisions are further important taking into account the relation between the ex-post competition rules and the ex-ante sector specific regulation where the dominant operator is subjected to the wholesale access obligations and to the price regulation by the national sector regulator.

In Deutsche Telekom case it is clarified that the imposition of ex-ante sector specific regulation does not exempt the dominant operator from the liabilities imposed according to the art. 102 of TUFE, where those obligations leave a margin of discretion to the dominant operator in the definition of the prices.

Those decisions further increase the distance between the EU and the US approach adopted in the margin squeeze cases: the US cases linkLine and Trinko has confined the margin squeeze as a subcategory of the refusal to deal, and ratifying the following necessary conditions in order to demonstrate the abuse:

- The imposition of a specific obligation to deal according to the art 2 of Sherman Act
- The downstream service prices offered are predatory.

If the dominant undertaking is subjected to an access obligation imposed by ex-ante regulator the margin squeeze would become a a matters of regulation and therefore, the competitors should refer to the sector regulator to ask for a price revision in a way to ensure them to replicate the incumbent's downstream offers.

REGULATORY IMPACT ASSESSMENT IN TELECOMMUNICATION INDUSTRY

Regulatory Impact Assessment(hereinafter, "RIA") has gradually become a key economic tool used by governments to assure that regulations issued are effective and efficient, and are thus able to reach the objectives for which they have been issued at lowest possible cost. As observed by a number of international organizations and leading scholars, a careful and meaningful use of RIA makes it possible to avoid useless administrative burdens for businesses and public administrations; and to undertake policies that are capable of promoting economic growth, competitiveness and sustainable development[2].

According to the European Network for Better Regulation definition, Impact Assessment is:

- A systematic, mandatory, and consistent assessment of aspects of social, economic, or environmental impacts such as benefits and/or costs;
- affecting interests external to the government;
- of proposed regulations and other kinds of legal and policy instruments;

to i) inform policy decisions before a regulation, legal instrument, or policy is adopted; or ii) assess external impacts of regulatory and administrative practices; or iii) assess the accuracy of an earlier assessment[3].

The efficiency-oriented approach makes RIA very interesting from a law and economics perspective: RIA represents a pragmatic application of the law and economics theory, according to which a better understanding of the impact of the legal rules and of what kind of legislation is eligible to be issued can derive only by the application of economic concepts to ex ante assessment of the impact of legal rules. However, so far law and economics and RIA have mostly remained two

[2] See OECD, *Regulatory impact analysis : best practices in OECD countries*, Paris, 1997,Radaelli C., The diffusion of regulatory impact analysis – Best practice or lesson-drawing?, *European Journal of Political Research* **43**: 723–747, 2004 and Radaelli C. and De Francesco F, Regulatory Impact Assessment, political control and the regulatory State, paper delivered to the 4th general conference of the European consortium for political research, Pisa, Italy, 6-8 September 2007, Jacobs, S. H, *'Introduction', in OECD, (1997a), Regulatory Impact Analysis: Best Practice in OECD countries*, Paris, 1997, and Renda A., *Impact Assessment in UE, the State of the Art and the Art of the State*, Centre for European Policy study (CEPS), Brussels 2006

[3] ENBR Project, RIA Handbook, available at www.enbr.org

worlds apart. In the past few years, some authors have observed that RIA is a "missed opportunity" for law and economics, and the two fields of study should be integrated further[4].

In the course of this work I analyze in-depth the way in which RIA has been applied by the policy-makers, in order to understand if the tool was implemented without exceptions and what kind of results the use of RIA was able to achieve. In particular, I try to explain if the RIA model was applied in order to reach an "evidence based" way to adopt decisions by policy-makers, assuring the issuing of regulations able to catch all the possible impacts on the market on one hand, and the choose of the normative tools able to lead to the highest net benefit for the society as whole.

In order to reach this objectives, the works is divided in two main parts. The first part focuses on the development of the RIA around the world, from the US experience to the European model of "Integrated Impact Assessment", which captures the economic , social and environmental impacts of proposed new policies[5]. In the course of this overview I show the different features of the RIA models according to the different institutional contest in which they have emerged, in order to demonstrate how the same instrument was used to solve different kinds of institutional problem, other than the explicit objective to help the legislator to issue an efficient and effective regulation.

In the second part of the work I provide an empirical analysis of three policy initiatives undertaken by the European Commission the telecommunications sector. This cases are related to regulation of roaming charges, the decision whether to institute an European Regulator for electronic communications and the recent Commission Recommendation on the regulation of Next Generation Access Networks

With the empirical analysis of this three cases study I aim to understand whether the Impact Assessment (IA) was really used by the Commission to reach the objective of a "Better regulation" able to promote the European economic growth. In particular, I will analyze if in this three cases the technical nature of RIA tool was preserved, and whether the IA exercise helped the regulator in taking in account the impacts of all possible regulatory options and their associated impact.

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[4] See Renda A, *Law and Economics in the RIA world*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291032 and A. Ogus, *Regulatory Appraisal: A Neglected Opportunity for Law and Economics*, European Journal of Law and Economics, Volume 6, Number 1, July 1998 , pp. 53-68(16)

[5] See European Commission, *Communication on Impact Assessment*, May 2002