

LUISS GUIDO CARLI

DOTTORATO DI RICERCA IN DIRITTO ED ECONOMIA
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TESI FINALE

EXECUTIVE SUMMARY

Supervisor:
Prof. Roberto Pardolesi

Candidato:
Giovanni Formica

In coerenza con la scelta dei tre *working paper*, l'executive summary si compone degli abstract dei tre contributi presentati per la discussione

L'INDUSTRIA AEROPORTUALE ITALIANA TRA INCERTEZZE DEL PASSATO E SFIDE DEL FUTURO¹

GIOVANNI FORMICA

ABSTRACT

Il contributo analizza gli assetti strutturali e regolamentari dell'industria aeroportuale italiana da una duplice prospettiva, guardando, cioè, agli spazi per la diffusione della concorrenza e al grado d'incertezza regolatoria attualmente percepito dagli attori di mercato.

Con riferimento alla prima prospettiva d'analisi, si suggerisce che, a dispetto delle tradizionali conclusioni sul potere di mercato dei gestori, la concorrenza aeroportuale costituisce una peculiare caratteristica del nuovo contesto industriale di liberalizzazione dei cieli e crescente domanda di servizi di trasporto aereo. In particolare, l'effettivo livello di concorrenza (intra-modale e/o inter-modale) varia ampiamente in funzione delle caratteristiche strutturali e geografiche degli scali e dipende, poi, in misura cruciale dalla tipologia di rotta considerata.

L'articolo guarda anche alle specificità dell'attuale quadro regolatorio, allo scopo di mostrarne le ambiguità più evidenti e le conseguenze più immediate. Il contesto di incertezza normativa – nel quale si riflette l'inconsistenza temporale delle scelte statali, la sovrapposizione di regole e regolatori e l'assenza di una vera strategia di politica industriale – condiziona il senso stesso della scelta di regolare, perché legittima l'opportunismo degli operatori e non assicura adeguata trasparenza tariffaria.

Le più recenti iniziative normative (vedi delibera CIPE 38/07) sembrerebbero, però, raccogliere - almeno in parte - la sfida della chiarezza. Tuttavia, si lasciano pericolosamente irrisolti alcuni nodi cruciali, in primis quello istituzionale e dell'incentivo agli investimenti².

¹ Articolo pubblicato come Formica G. (2007), "L'industria aeroportuale italiana tra incertezze del passato e sfide del futuro", in *Mercato, Concorrenza, Regole*, n. 2, agosto 2007.

² Occorre osservare che, proprio in considerazione dell'"emergenza infrastrutturale", alcuni interventi frammentari - adottati dopo la pubblicazione del presente articolo - hanno recentemente contribuito a complicare il quadro e ad alimentare la storica assenza di trasparenza tariffaria. In più, il sistema normativo

Sul piano delle politiche, si suggerisce che la piena cognizione delle nuove dinamiche di mercato e delle distorsioni generate da scelte pubbliche incoerenti dovrebbe orientare il futuro sforzo riformatore. A tal proposito, l'articolo si conclude con un'analisi delle principali questioni aperte – a cominciare da quella annosa del design istituzionale – e con una prima riflessione su possibili risposte di policy.

LAW AND ECONOMICS OF BUNDLING BY NON-DOMINANT FIRMS³

GIOVANNI FORMICA

ABSTRACT

This paper discusses the law and economics of bundling in non-monopolistic settings. Notwithstanding uncritically accepted arguments from mainstream theories, it's proved that, under a large set of market circumstances, combined sales may be in the rational interest of multi-product firms facing specialist, yet imperfect competition by single-product suppliers of differentiated components. These conditions vary with the nature of demand interrelation among components, whether they consist in complementary (low differentiation, large bundle size, elastic demand) or independent goods/services (high brand fidelity).

The impact of such a practice on competition, both in a short-run and in a long-run perspective, is discussed in depth. We find that non-dominant bundling may harm social welfare and potentially activate a self-reinforcing process of market power achieving and rivals' foreclosure, even absent original (bundler's) dominance in any involved (component) market. Then, bundling results in limited consumer choice, high transportation costs (*i.e.*, low variety), less than socially desirable innovation, constraints to efficient entry and, eventually, growing concentration of markets over time.

While also taking into account the potential for efficiency defences (added value, quality improvements, cost savings), the paper suggests a case by case approach, to balance pro-competitive explanations against social welfare concerns. Therefore, "one size fits all" conclusions on legal standards, whether in a sense (*per se* prohibition) or another (*per se* legality), appear unadvisable.

³ Published paper: Formica G. (2008), "Law and Economics of Bundling by Non-Dominant Firms" in German Working Papers in Law and Economics, volume 2008, n. 16, Berkeley University Press.

These findings contrast the general run in competition law and economics scholarship. In this vein, in the second part of the work, insights from formal economic models are compared with actual legal practices, apparently influenced and stuck with the traditional view about non-profitability and ultimate irrationality of non-dominant bundling.

However, one should carefully distinguish between emphatically settled legal doctrines and *de facto* judicial approaches. Various documented attempts to generously find dominance both in US jurisprudence and in EC competition practice and other systemic inconsistencies authorize a common interpretation: in legal proceedings, dominance is considered as a purely formal, too rigid requirement, more than an economic precondition for exclusionary purposes. In effect, a strict dominance-test has imposed straining and incongruence in the application of competition rules on both sides of the Atlantic, as regards the definition of relevant markets, of dominance (Europe) or sufficient economic power (US), and even with respect to the interpretation of the very notion of market power. This proves a certain intolerance towards too rigid criteria, thus indirectly confirming the soundness of our main (economic) contentions.

Supported by the analysis of underlying economics and by contradictoriness in actual legal practice, the work ends up with some modest proposals for better informed competition policies. In particular, it's invoked for more explicit acknowledgement that the dominance-screening may be unreasonable under certain conditions.

As a matter of legal standards, a modified *per se* legality -whereby non-dominant bundling should be considered lawful unless there is strong evidence of anticompetitive effects outweighing efficiencies- could guarantee against the risk of under-deterrence, while also respecting business freedom. Needless to say, a *feasibility test*, reflecting all conditions proved necessary for bundling rationality, should be preliminary performed, in order to optimize inquiry efforts.

The proposal is balanced and economics-grounded. Moreover, legal certainty and genuine competition would be preserved and, if any, enhanced against artificial interpretations and strained applications of existing rules, used by Courts just to bypass too rigid, formal standards of proof.

AWARDING PROVISION THROUGH COMPETITIVE TENDERING: LESSONS FOR AND FROM THE ITALIAN EXPERIENCE WITH LOCAL PUBLIC SERVICES

GIOVANNI FORMICA

ABSTRACT

The work starts from the most recent Italian reform for local public services, which will make tenders no longer facultative by 2012 (by 2015, for listed companies)⁴, at least in the event of no last-minute about-turns. In fact, the legislative novelty is just an excellent opportunity to address more general issues about franchise bidding, having no national specificities. Besides, through all pages, Italy is merely taken as emblematic of more general findings.

Firstly, the paper discusses potential benefits from competitive tendering (hereinafter CT), hence its desirability as a policy option. It's shown that, in a context of asymmetric information, competition "for the market" is expected to improve allocative efficiency (*i.e.*, it allows for higher probability to select the most efficient potential provider), to drive down subsidies and tariffs (*i.e.*, it assures better "rent extraction") and incentivize efficiency-enhancing efforts (*e.g.*, by awarding fixed-price contracts).

The working mechanism is not dissimilar from that of ordinary competition "within the market": the risk of being surpassed by rivals (hence, to lose money) has the potential to induce bidders to a truth-revealing attitude, fair price (and subsidy) requests/bids and a continuous commitment to improve oneself. Moreover, franchise bidding is often a first step towards privatization: a wind of beneficial changes and refreshments in sectors - as local services - historically dominated by public patronage and widespread inefficiencies.

A very basic condition for successful tenders is an high number of sellers, bidding *on equal foot* and acting non-collusively. At the limit, as the number of independent bidders becomes

⁴ Article 23bis of the Law 133/08, as modified by article 15 of the Legislative Decree 135/09, requires tenders (either for the whole service or for the selection of private partners) as the ordinary way to award local public services "with economic significance", such as urban transportation, water, refuse collection, etc.

sufficiently high, tenders achieve the first-best and resemble perfect competition “within the market”, as in the Walrasian analogy of competitive markets as auctions.

Unfortunately, real-life circumstances are often foreign to the stylized world depicted in formal models. Consistently, the paper discusses in depth those numerous reasons why tenders may fail, from a twofold perspective, both theoretical and empirical. The economic theory – in particular, insights from auction, public choice and contract theory – are extensively relied upon, in order to reveal most of these implementation risks, then confirmed on the basis of the disposable empirical evidence.

As a matter of synthesis, “bidding parity” (*i.e.* all parties, including the incumbent, are allowed to bid on equal foot) is often a little more than an aspiration. In case of corruption, favouritism or incumbency (information) advantage, it’s illusory to expect actual benefits from competition, as the rules of the game are somewhat *biased* in favour of *special* competitors, saved from disciplining market forces.

Other practical flaws are also relevant. For instance, collusion may be an issue, as it can invalidate the truth-telling mechanism through which tenders achieve their desirable outcomes. Then, contract incompleteness and improper enforcement of tendered schemes may make awarding agencies subjected to risks associated with renegotiation and opportunism (*e.g.*, hold-up and strategic bidding): initial gains may prove only apparent, once taking into account the possibility for ex post generous (for franchisees) adjustments. Finally, tenders may also be prone to quality deterioration and under-investment problems, at least when auction rules do not provide for suitable controlling devices.

All these potential flaws are confirmed empirically, through recent failure stories. In particular, the Italian (and not only) past experience with CT, although limited by a certain political disfavour towards liberalization, is taken as representative of most of such risks. To quote some examples, Italian past tenders for water services have been conditioned by limited participation, due to improper auction design (*e.g.*, too ambitious and poorly remunerative ATO plans). CT for urban transportation has often been led by the desire to perpetuate the incumbency, also through generous allowance for bidding consortia. In gas distribution, franchise fees and local finances have been (in average) the main concerns, with dangerous (*e.g.*, for safety) neglecting of qualitative aspects and dynamic incentives to invest.

In effect, appreciable successes are also not infrequent, as the tender for additional transportation services held in Rome in 2000 or that for the integrated water service in the

ATO-Frosinone. Both are indirect confirmations that franchise bidding is *per se* a powerful disciplining device, yet that an improper use could be flawed and counter-productive.

Overall, the work should suggest that proper tender design is crucial to final success, but also that implementation is a non-trivial challenge, firstly because optimal choices vary with the context and the service nature. In this vein, the paper tries to provide with a toolbox and general guidelines, hopefully useful to both practitioners and theoreticians interested in efficient ways to organize local services.

The main contention is that successful tenders require both suitable framing conditions (independent institutional setting, vertical separation of infrastructures) and proper auction rules. Each specific design feature (*e.g.*, participation prerequisites, object, awarding rule, etc.) is separately analysed in the paper, as to provide the reader with some *prima facie* advices.

Consistently, an important lesson for Italian policy-makers is inferred, namely the need to complete the reform path with institutional changes, in the sense to allow for more independent regulatory and awarding roles in local public industries. The time is ripe for the courage of a radical reform, often promised, yet never actually realized.