

Single-Firm Conduct: A Discipline in Search of Itself

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1.- A comparative look at antitrust around the world – assuming the workability of a unitarian approach to a mosaic of 120 local disciplines, mostly tailored after the two prevailing models, US and EU, and yet capable of exhibiting, particularly at the enforcement level, remarkable discrepancies - reveals a host of unsettled issues. Margins for disagreement surface everywhere, though they do not precipitate serious conflict.

But the discipline of unilateral conduct tells a different story. Bluntly speaking, this antitrust province denounces widespread inconsistencies related to its conceptual foundations. Confronting the two pivotal models of competition law, we cannot but observe that the American side does not recognize exploitation as a form of abusive conduct for the dominant firm, whereas its European standing is, at best, gloomy; on the other hand, the features of exclusionary conduct are hotly contested. To say the least, the area is plagued by overwhelming confusion.

2.- Actually, both monopolization (and attempt to monopolize) in the US and abuse of dominant position in Europe deal with the problematic evaluation of unilateral behaviors. Lack of clarity has been, and keeps being, a long running problem in monopolization/abuse of dominance law. Part of the problem lies with the failure to develop a theory capable of rationalizing the case law, under the fundamental constraint that antitrust law should not impose sanctions for the very conduct it is supposed to encourage. Drawing the line (that is, distinguishing between welfare-reducing conduct and aggressively pro-competitive actions) is admittedly vexing. Just to cite the most blatant examples, low pricing, that benefits customers in the short run and stands as the very gist of a well-temperate competitive setting, may carry the risk of long-term exclusionary effects; whereas conduct exhibiting restrictive short-term effects may support long-term innovation or investment, that would improve consumer satisfaction. Monopolistic conduct is difficult to observe, define, and assess for a number of (obvious) reasons.

So far, the standard representation of a field fraught with severe analytical problems. But this kind of troubled overlapping is tainted by the remark that, much earlier in the course of the analysis –precisely at the level of preliminary taxonomy - the two models appear to part company. The European approach distinguishes between ‘exclusionary’ abuses (which refer, more or less, to practices of a dominant undertaking seeking to harm the competitive position of its competitors, with the problematic specifications that we will discuss in a while), and ‘exploitative’ abuses, which

can be defined as attempts by a dominant undertaking to use the opportunities provided by its market strength in order to harm customers *directly*. No surprise, one would comment, since exploitation is the straightest form of deploying monopoly power. Yet, exploitation, in the vein of excessive pricing, is no issue in the US antitrust environment.¹ In fact, *Trinko* (2005) states, *inter alia*, that “[t]he opportunity to charge monopoly prices, at least for a short period, is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct”.² This makes crystal clear that, in the US, setting a more-than-competitive price not only escapes prohibition, but is the award reserved for the winners of the struggle in the market arena.

2.1.- There is something paradoxical in the prevailing American attitude. After all, as perceptively noted by some commentators,³ exploitation of consumers is the textbook abuse by a monopolist or dominant firm. A part of the consumer surplus is redistributed to the monopolist as producer surplus. This is the so-called price effect: consumers pay too much. Moreover, there is a dead-weight loss which lowers the welfare of the concerned economy. This is the so-called allocation effect: consumers purchase less (and here lies the mythical deadweight loss triangle). Monopoly is contrasted precisely for these kinds of effect. And we can also anticipate that foreclosure abuses are prohibited just because they are conducive to monopoly, which in turn will elicit exploitation.

This being the original approach –“In the beginning there was Monopoly”- how can it be that, in the eyes of Justice Scalia and his fellow majority, the monopoly evils disappear from the scene and everything boils down to a gracious award for the winner of the competitive contest? The reasons offered for such a diverging attitude can be summarized as follows. First, the law does not condemn dominance in and of itself, since it may very well be the outcome of the superior capabilities of the emerging monopolist: who is expected to behave as a rational profit maximizer, implying that he will be obviously inclining to exploit the advantageous position he conquered outpacing his rivals. (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system”:

¹ The first formal announcement can be found in *United States v. Standard Oil*, 221 U.S. 1, 62 (1911), stressing “omission of any direct prohibition against monopoly in the concrete”. But this may be considered, as of now, a *locus classicus*: cf., e.g., E. T. SULLIVAN & J. L. HARRISON, *Understanding Antitrust and Its Economic Implications*, 5.a ed., New York, 2009, 277.

² *Verizon Communication Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004).

³ See, e.g., P. AKMAN, *Exploitative Abuse in Article 82 EC: Back to Basics?*, CCP Working Paper 09-1, available at www.ssrn.com.

again the language in *Trinko*). This is why, according to the view we are examining, dominance law should downplay this scenario and seek to operate indirectly by addressing exclusionary or other illegal behavior that enables supra-competitive pricing.⁴

The argument is, indeed, rather opaque; nevertheless, it might mean that the virtuous monopolist should be permitted to exploit as he pleases, whereas the malicious one should be constrained in his ambitions. In fact, the now disqualified DoJ Report of 2008⁵ stresses the existence of a causal link between the conduct (improper means), contested in view of Section 2 of the Sherman Act, and some form of monopoly power. “Firms with ill-gotten monopoly power can inflict on consumers higher prices, reduced output, and poor quality of services”.⁶ But this way of reasoning does not avoid an internal contradiction: would firms, which became monopolists because of their skills, not be able to inflict analogue harms? There is no way out. If the proper goal of antitrust law is to preserve consumer welfare, one should conclude that consumers get harmed in both cases, regardless of whether the dominance was prompted by illegal tools or superior skill, luck and the like.

But the plausible core of the argument lies elsewhere, and is connected with the second reason for absolving exploitation: its contribution to incentivize fierce competition, leading to its end. Why should a firm bother to strive, invest, innovate and risk if, in the case it becomes the unchecked master of the market, it will be impeded from enjoying its win? Evans and Hylton,⁷ for instance, concede that “the proscribed and permitted activities are not consistent with the view that

⁴ Proceeding in this vein, the argument fades into the further claim about the standard redundancy of interventions aiming at contrasting a too high level of prices, since such an inconveniency is doomed to be corrected by the spontaneous reaction of the market forces, triggered by the appealing perspective of noticeable profits. But that “excessive prices are self-correcting, because they attract new entry” is a credo for true believers, convincingly disproved by A. EZRACHI and D. GILO, *Are Excessive Prices Really Self-Correcting?*, 5 *J. Competition Law and Economics* 249 (2009), suggesting that: (i) the entry decision does not depend on the pre-entry price, but on the expectations about the prevailing price level after entry.; (ii) the signaling virtues of the pre-entry price are, at best, ambiguous.

⁵ U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (October 2008). The announcement of the “withdrawal” of the document, no longer reflecting the views of the DoJ Antitrust Division (since inspired to “extreme caution” dictated by fear of “over-deterrence” and, accordingly, prone to create to many hurdles to government enforcement) was given in a speech of Assistant Attorney General Christine Varney on May 11, 2009. The new trend looks for “balanced analyses”, invoking the guidance –so to say!- of precedents like *Loraine Journal* (342 U.S. 143, 1951), *Aspen* (472 U.S. 585, 1985), and *Microsoft* (253 F.3d 34, D.C. Cir. 2001).

⁶ U.S. Department of Justice, *Competition and Monopoly* cit., 10.

⁷ D. S. EVANS and K. N. HYLTON, *The Lawful Acquisition and Exercise of Monopoly Power and Its Implications for the Objectives of Antitrust*, 2008, available at www.ssrn.com.

the antitrust laws are seeking to maximize static consumer or social welfare in a relevant antitrust market ... greater market power results in consumers paying higher prices, obtaining less output, and receiving less consumer surplus than they would with lesser market power”; and they admit that “greater market power also results in lower social surplus since the exercise of market power results in units of output not being produced for which the value of the output to consumers is greater than the cost to society of producing that output”. But they do not object to antitrust laws that “provide businesses with wide latitude for acquiring and exercising significant market power” (put in other words: if dominance is permitted, as it is, the dominator should be free to behave rationally, that is, maximizing his profits). How reconcile this apparent contrast? It is suggested that monopoly can, and should, be seen as part of a dynamic process of competition, though Schumpeter’s “gale of creative destruction” is, to say the least, uncommon in the American setting and quite at odds with the approach, mainly geared to short-termism, underlying the prevailing view of the consumer harm test.⁸ At any rate, I contend that the emphasis on innovation (and on virtual conflict among IPRs and antitrust enforcement) is a metonymic exercise of specialization, which obfuscates the picture. Couched in more general terms, my claim is that a firm which was until yesterday the best contender and behaved exemplarily, nowadays finds itself on the top and alone (a contingency which was not necessarily within the expectations, since an as-efficient rival would have still been there) and reneges the virtues practiced so far. The discontinuity is obvious, so that trading ex-ante incentives with ex-post exploitation, never handed down as a deserved trophy for a contest that did not require a winner, would produce, at best, unintended consequences.

2.2.- Actually, additional arguments are being deployed for mistrusting the exploitation perspective. But they do not longer belong to the American side of the story, which precludes the conclusion that the inconveniency regards exclusively the overseas experience.

It is true, in fact, that Article 82 (a) of the EC Treaty forbids the imposition of unfair purchase or selling prices or other unfair trading conditions; but it is no less evident that the case law has greatly emphasized exclusionary effects, with exploitative effects appearing to be little more than a sideshow. Thus, it comes to the surprise of no one that: (i), when the ongoing review of Article 82 was launched, Commissioner Neelie Kroes could confidently comment that the enforcement policy should give priority to the so-called exclusionary abuses, “since exclusion is

⁸ Further, even more compelling, hesitations stem from the impracticability, denounced already by Demsetz and as of now still unsolved, of *tradeoffs* between non-homogeneous value dimensions: cf., recently, J. D. WRIGHT, *Antitrust, Multi-Dimensional Competition, and Innovation: Do We Have an Antitrust-Relevant Theory of Competition Now?*, 2009, available at www.ssrn.com.

often at the basis of later exploitation of consumers”;⁹ and (ii) the ensuing *Guidance Paper* devoted the issue one short paragraph (No. 7), stating that Article 81(a) is, to be sure, still in force and would be applied when necessary. But, on its face, it does not belong to the priorities of the Commission.

In fact, though not banned as in the US, exploitation does not fare very well in Europe either. Beyond the first impression, and taking account of the fact that excessive pricing exploitation has been recognized only in the presence of special circumstances (de facto monopoly, impediments to the internal market, and threat to liberalization programs: only four cases concluded with condemnation), it has been submitted that the US and EU perspectives on the issue do not necessarily appear far apart.¹⁰ There is widespread consensus on the idea that competition law should not intervene where the market can be expected to self-correct exploitation of contingent, short-term disequilibria; and the European side accepts, no less than the transatlantic counterpart, that an economic rationale for price regulation exists only where non-transitory barriers (such as a government monopoly) exclude competition in the long term. At the end of the day, it is hinted that the difference might boil down to different allocation of competences (implying, however, that the EU Commission is reluctantly vested with some regulatory power).

The prevailing distaste (“benign neglect”,¹¹ that translates into “the lesser, the better”) for an approach which rings of regulation is supported by most scholars active in the field. However, beyond the ideological bias against a creeping, yet unacceptable, form of regulation, the concrete reasons for leaving the exploitative abuse in an almost forgotten corner can be grouped, according to a keen commentator,¹² around four clusters: I) measurement issues, II) market dynamics, III) multi-sided markets, and IV) remedies. Taken together, these problems should explain why we would be better advised to quit any attempt to re-animate an almost agonizing statutory ban.

Little to say on cluster I). Assessing the fairness of prices is inherently more difficult than measuring costs, which is, if not a necessary step in the process, the usual benchmark. Prices, induced by the equilibrium between demand and supply, are not genuinely unfair even when they do not conform to some appropriate level of mark-up on underlying costs. But daunting as it may

⁹ N. KROES, *Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of Art. 82*, speech delivered at the Fordham Corporate Law Institute on September 23, 2005.

¹⁰ Cf., also for further references, H. SCHWEITZER, *Parallels and Differences in the Attitude towards Single-Firm Conduct: What Are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC*, EUI Working Papers, Law 2007/32.

¹¹ R. O'DONOGHUE and J. A. PADILLA, *The Law and Economics of Article 82CE*, Oxford., 2006, 608.

¹² B. LYONS, *The Paradox of the Exclusion of Exploitative Abuse*, CCP Working Paper 08-1.

be, this difficulty should not be exaggerated. Reckoning the overcharge imposed by a cartel is a routine task for devising damages in actions promoted by the victims of illegal conduct. Not even the most resilient opponent of private enforcement in antitrust would argue that damages are to be denied just because it is difficult to quantify them.

The second point is largely overlapping with the Austrian variation already touched upon with regard to the US debate and the choice not to tackle exploitation. There must be incentives for innovation, and opportunities for investments. But the intangibility of huge monopoly profits grossly oversteps the mark.

As to multi-side markets, it is probably sound to convene, with George Priest,¹³ that the existence of network effects requires a change in many of the basic operative presumptions of antitrust law, leading to a new conceptualization of key enforcement problems. Whenever these characteristics surface, we should be prepared to challenge our tenets. But, though important, network effects are not ever present and do not dominate the field.

Thus, the crux of the matter should be with cluster IV). For unfair prices seem to postulate a remedy which is largely regulatory in nature and is supposed to go beyond the expertise and capabilities of an antitrust authority (“a generalist competition agency – it has been argued- is unlikely to have the skills and resources to do an effective job, it would do more harm than good by setting inappropriate prices, either too low or too high, and encourage regulated firms to waste resources trying to manipulate a weak regulator”).¹⁴ A compromise, which is being advanced in the recent literature,¹⁵ is that exploitation is provoked by exclusion, mainly *sub specie* of entry barriers, either structural or accrued over time for want of a timely check to exclusionary practices: get rid of them, of the accumulation of their effects, and exploitation will fade away. True as it may be, this view implies that, whenever it is not possible to tackle exclusion directly, exploitation will stand (and should be reproached). Moreover, even if one wonders about which remedy would turn out to

¹³ G. L. PRIEST, *Rethinking Antitrust Law in an Age of Network Industries*, John M. Olin Center for Studies in Law, Economics, and Public Policy, Research Paper No. 352 (2008).

¹⁴ LYONS, cit.

¹⁵ “Gap cases”, and the necessity of closing previous loopholes, are emphasized by L.-H. RÖLLER, *Exploitative Abuses*, in C. D. Ehlerman e M. Marquis (eds.), *European Competition Annual 2007: A Reformed Approach to Article 82 CE*, Oxford, 2008, who pursues the coherence of an enforcement based on the exclusive repression of exclusionary practices.

be more effective, this does not undermine the case for inflicting a dissuasive sanction, possibly coupled with proper damages. Some deterrence would probably be attained anyway.

Criticisms do abound. Yet, none seems cogent. The ban of exploitation lacks justification.

3.- Summing up, on this count. Exploitation has never established itself in the American scenario, and plays almost no role in Europe – just a potential threat, which is evoked from time to time as an almost remote Armageddon. This practical emasculation of the relevant discipline (thus divested of what O’Donogue and Padilla deem to be its very core)¹⁶ makes, in my opinion, little sense either in economic or legal terms, and leaves the overall conceptual picture in a state of complete disarray (though mostly ignored, when not discarded with the intimation that “a revival of exploitation abuses in European competition law ... is both unlikely and undesirable”).¹⁷ Its implications contribute, as will be seen in a while, to further dismembering any attempt to come to grips with some sort of coherent enforcement.

4.- As a consequence of the above reluctance (or deliberate renunciation) to prohibit directly exploitative abuses, attention is totally absorbed by exclusionary behavior. But the frailty of the ensuing picture is waiting in the wings and will not be late in blurring the analysis.

Concerning the definition of exclusionary practices, let me be ‘fast and furious’. No business conduct can be proscribed simply because it aims to deter entry or force exit of rivals. Every firm would be willing to trash its competitors; if achieved on the merits, such an outcome is not objectionable. Accordingly, ‘exclusionary practices’ is a shorthand formula evoking conduct which hampers rivals in an anticompetitive way. From this standpoint, the legal concepts of monopolization in the US –which assumes the existence of a causal link between the contested conduct (improper means) and some form of monopoly power- and abuse of dominance in the EU may largely converge.

To be more precise, Section 2 of the Sherman Act has been historically construed as requiring monopoly power, willfully achieved or preserved by means of behaviors which do not pertain to competition on the merits, and thus forbidding all strategies that entail monopolization, and attempts to monopolize the market, including specific means that make it impossible for rivals to engage in fair competition (e.g., deceptive practices).¹⁸ But modern elaboration has consistently

¹⁶ O’DONOGHUE and PADILLA, cit., 637.

¹⁷ SCHWEITZER, cit.

¹⁸ See, M.S. STUCKE, *How Do (and Should) Competition Authorities Treat a Dominant Firm’s Deception*, 2009, available at www.ssrn.com.

held that monopolistic conduct corresponds to acts that: (1) are reasonably capable of creating, enlarging or prolonging monopoly power by illegally impairing the opportunities of rivals; and either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them.¹⁹ And, at first glance, this approach is wholly echoed by the ‘anticompetitive foreclosure’ language of the *Guidance Paper*.

The last statement, however, might prove wishful thinking. At a closer inspection, the avowed commitment to protect consumers’ interests reveals an astonishing loophole. The Commission’s framing of anticompetitive foreclosure hinges on a three-pronged finding: (i) foreclosure, (ii) anti-competitiveness, and (iii) harm to consumers. Whilst the first and the third factors are aptly identified, item (ii) is left almost undefined or, according to another interpretation, completely absorbed by the prerequisite of harm to consumers.

Both options are unfortunate. regarding the former, shutting eyes on the traditionally perplexing question about what is bad and what is not, succeeds, at most, in delaying the difficulties, at the price of rendering them more inextricable. That the conduct of the dominant firm creates opportunities “to profitably increase price to the detriment of consumers” does not help make it clear whether, for instance, aggressive initiatives driving rivals out of business should be deemed anticompetitive, simply because of the “special responsibility” preventing it from undertaking conduct allowed to its competitors. Even the introduction of successful (and not readily replicable) innovation by the dominant firm might be suspicious (which is not the case). Lest this kind of reverse discrimination, once passively received but nowadays hotly contested, conquer new luster, one should specify that the conduct triggering the alteration of the market must be contrary to some set of the received rules of the game.

But beware! If, in order to by-pass the problem of indefiniteness, we re-focus (as we were accustomed to doing in the past) on the stigma of anticompetitiveness, a new/old risk materializes: that of endorsing a disguised form of unfair competition devoted exclusively to Big Brothers, but inspired to the common goal of protecting competitors instead of competition. Condemnation might ensue even though, for want of causation, the monopolist’s conduct – say, deceit, in the form of product disparagement, concededly immoral- does not impair competition.

¹⁹ The “standard reference”, by P. E. AREEDA and D.F. TURNER, *Antitrust Law*, vol. III, Boston , 1978, 78, is echoed by *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 and note 32 (1985).

This risk – and thus we come to the latter interpretation we were alluding to - is exorcized by the requirement of harm to consumers, charged with the task of separating the wheat from the chaff (foreclosure, by whatever means, is illegal only when it hurts consumers). Or so it should be, since § 21 hints at special cases – conduct which can only impair competition, without creating any efficiency: i.e., when the dominant undertaking prevents its customers from testing rivals' products, or finances the former in order to delay the commercialization of such products (look at the *Intel* case). In such situations, the Commission warns, consumer harm can simply be inferred: a proposal which comes close to stating that prejudice for consumers will be presumed, whether it exists or not (which drives us back to an unfair-competition-like stance).

In this vein, in fact, a still more general risk appears to lie in ambush: that harm to consumers could be given, despite the verbal prominence, only lip-service, consisting in taking it for granted, whenever the competitive process is somehow distorted (vaporware might be a typical example, since the bogus announcements will hamper competitors' inroad into the market, without *necessarily* implying material prejudice for consumers). Actually, Article 82 EC is primarily applied with the aim of preserving open market structures; and preserving an open market structure may, or may not, maximize consumer welfare. Likelihood of harm becomes the magic formula. And if likelihood is easily conceded whenever some kind of remote threat to the competitive process can be conceived of in the long run, as it seems to be the case in Europe, the ever-present temptation to turn the dominance law in a tool protecting self-serving operators comes again to the forefront. Note, moreover, that such an approach, pushed to its extreme coherence, would lead to the unintended but logical consequence that every kind of competitive efforts, in so far as they curb rivals and prompt monopolistic success (with cogent likelihood of price increase), should be condemned - unless, it goes without saying, one adheres to the *Trinko* rationale.

All in all, among manifold difficulties that postulate further refinements, anticompetitive foreclosure as an antitrust abuse is defensible only if unequivocally based on proof of material damages to consumers; it must provoke, or unequivocally threaten, exploitation. The three factors mentioned by the Commission collapse into a single plot: firms with monopoly or near-monopoly power are likely to injure consumers by improperly preventing rivals (or would-be rivals) from constraining the exercise of that power.

5.- Thus, we come to a rather puzzling conclusion. In order to gain a distinctive antitrust role, different from the coverage of contract and unfair competition laws, the exclusionary abuse requires exploitation. But exploitation, in itself, is either dropped or ignored by the antitrust enforcement.

The logical short circuit could not be any worse.²⁰ This is why I believe that, despite its sophistication, the discipline of unilateral conduct is in desperate need of being rebuilt from scratch.

As a first step out of this conundrum and a modest proposal for revamping the exhausted notion of antitrust injury, it might be argued that pure exploitation should be found abusive, whenever it constitutes more than a contract law problem. On the contrary, pure exclusion, without exploitation, should not be found abusive, in order to avoid protecting competitors rather than competition. As forcefully argued by the Advocate General Mazák in his *Conclusions* about the *Wanadoo* appeal (2008), if the predator's possibility of recouping losses through supra-competitive pricing is ruled out, there should be, in principle, no antitrust intervention, since consumers suffer no harm.

Accordingly, exploitation should be used as the test of anticompetitive *effects* on the market.²¹ This would ultimately imply, Occam's razor in the hand, that there is only one type of abuse. Keep it simple.

²⁰ The paradox becomes, at times, involuntarily grotesque. In re-shaping specularly the usual approach to the less intuitive monopsony frame (and thus reaffirming that “unilateral efforts by a monopsony to force prices downward traditionally do not violate the antitrust laws”, whereas, “when collusion is involved [...] Section 1 of the Sherman Act has been brought to bear”), R.D. BLAIR and J.L. HARRISON, *The Antitrust Response to Monopsony and Collusive Monopsony*, U. Fla. Levin College of Law, research Paper No. 2009-18, do not hesitate to intimate that “there is nothing to recommend collusive monopsony. The efforts of collusive monopsonists to obtain lower prices do not translate into lower prices for consumers, but only into higher profits for themselves”. Just a moment earlier, the single monopsonist had eschewed any reproach ...

²¹ See also, even in more radical guise, AKMAN, cit.