MODERNIZATION: THE "NEW MANTRA" OF TRANS-ATLANTIC COMPETITION LAW

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1.- I am about to introduce you to a brand-new mantra of Trans-Atlantic competition law: modernization.

Just one *caveat*, at the very beginning. In my opinion, this trendy label should not exert any fascination. Beyond being auto-referential, it simply admits no doubt. Even the most inflexible reactionary, let alone the melancholy *laudator temporis acti* (true praiser of the good old times past), would find it hard to oppose a proposal that, away from the traditional uncertainties of regulatory reforms, promises nothing less than rejuvenation, rationalization, simplification: the only way to dissent would be to warn against the risk that the reform faces unintended side-effects. Anything else boils down to crude misoneism.

However, like it or not, modernization is at work both in US and EU competition law: even this, after all, is a sign of convergence.

2.- In the US, modernization was officially launched with the 2002 Antitrust Modernization Commission Act. The immediate aftermath saw the creation of a bipartisan Commission composed by 12 members, whose main tasks are: "(1) to examine whether the need exists to modernize the antitrust laws […]; (2) to solicit views of all parties concerned with the operation of the antitrust laws; (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and (4) to prepare and submit to Congress and the President a report", by filing recommendations and suggestions on the initiatives that deserve being undertaken.

The first Commission meetings were held during last year and were meant to identify top priorities for future work. Scrolling through the agenda (civil and criminal procedure, immunities, regulated industries, IP, single-firm conduct, etc.), the project appears ambitious. But to start ambitious endeavors is the least: the real challenge is to achieve really meaningful results. This time, I would rather not bet on this.

3.- Europe is way ahead of the US. Indeed, modernization of competition law in the old continent already belongs to history. It was started with Regulation 1/2003, which entered into force in May, 2004. According to the official version, the design of the 1962 regulation implementing Articles 81 and 82 of the EC Treaty had been, perhaps, "adequate for a six-member community, in which the culture of competition had not yet fully developed", but the enlarged EU context of the new millennium called for a different, more sophisticated set of rules.

Before we move forward, let me clarify: Reg. 1/2003 represents a crucial step of a wider process in which the EC antitrust model renounces its identity, getting back to the archetypical anti-monopoly discipline. What a strange destiny for a piece of law that was explicitly crafted for the purpose of "modernizing" antitrust law!

A few details will help. *Prima facie*, the regulation hinges on two prominent pillars; but there is an additional one, almost kept in disguise.

First, Reg. 1/2003 purports the decentralization of the power (stated at Article 81.3 of the Treaty) to exempt restrictive agreements from the prohibition sanctioned by Article 81.1. This amounts to a devolution (so to say, in probation, since the Commission managed to preserve enduring control on national authorities, at least for the most delicate profiles). Originally, the system had been geared towards letting (also) peripheral enforcers detect and control anticompetitive agreements and abuses of dominance. But such a diffuse enforcement was Manichean; it did not allow for anything beyond the usual hermeneutical leeway in interpreting the black letters of a statute. If there was further margin for discretion, it was to be found in the strategic power of exemption: a power that --allegedly because of the infancy of EU competition policy (when, in the vision of apologists and hagiographers, the challenge was to foster a true antitrust culture)-- had been exclusively reserved to the Commission. This power is now being transferred to national authorities and judges.

Now, the second pillar: the demise of the ex-ante control on restrictive agreements. The Commission was adamant on this point. Already in the 1999 White Paper, Brussels trustbusters intimated that forty years of experience had paved the way for a new regime. Both operators and enforcers had enjoyed a long-lasting opportunity to digest the complexities of competition rules: as a consequence, the former could afford, and the latter could resist and abate, the risks of ex-post scrutiny. Is this picture really true? Doubts and suspicions

abound. As is widely acknowledged, there remain whole areas of community antitrust law that are still entangled in transition, and linger far away from any reassuring certainty; in other areas the balance allegedly struck is so obscure that one easily ends up regretting past uncertainties. Nevertheless, here we are: the old-fashioned, familiar pre-screening of anticompetitive agreements has been dropped and replaced by self-assessment in view of an ex post scrutiny.

But, as anticipated, there is also a third pillar: less visible, yet arguably crucial. It is hidden in Recital 9 of the Regulation: such recital specifies that Articles 81 and 82 "have as their objective the protection of competition on the market". The same principle has been buried here and there by the Commission, across the painstaking conundrum of notices and communications aimed at contrasting the centrifugal thrusts that will arguably follow from decentralization: in particular, in the Guidelines on the application of Article 81.3, the Commission almost moves to Chicago, stating that "the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources". Bluntly speaking: when it abdicated the direct control over the discretionary (thus, strategic) power of exemption, the Commission also decided to discard its original *multi-valued* view of competition law. As a result, antitrust enforcement in the EU today does no longer serve, at least avowedly, a plurality of goals, something it used to do (and proclaim) before the reform. I will revert to this point in a while.

As is easily seen, these three pillars of the modernization package are revolutionary enough to renege the peculiar features of EC competition law as an autochthonous model, eager to be transplanted across the world (just have a look at the Model Competition Act promoted by Unctad). What we are facing, then, is really an epochal change.

4.- In order to fully understand the direction of this change, let me make an Amarcord-type exercise, that is, get back to where we come from, to the picture we were accustomed to only a few years ago. I will just draw your attention on a couple of examples, two of the many that would deserve mention.

4.1.- The first example concerns the concentration of the power of exemption in the hands of the Commission. This entailed either rejecting *in toto* the "rule of reason" approach, or reducing its breadth to the four 'conditions' listed at Article 81.3. Add, further, that the mainstream construction of Article 81.1 had been inspired by the Freiburg (so called "ordoliberal") School credo, according

to which any limitation of business freedom, even though deriving from a routine contract, should be held as a virtual restriction of competition, and thus subject to prohibition unless exempted. The resulting discipline was, at least in principle, draconian; and, as a matter of fact, determined a massive resort to prior notifications of agreements (which actually did not deserve serious attention). The numbers, unsustainable, called for the introduction of block exemptions, i.e. quasi-regulatory initiatives aimed at avoiding that the *bureaux* at the DG 4 were literally submerged by paperwork. Such regulatory initiatives struck a balance, at once restating the formal prohibition and specifying, on a prejudicial basis, the exemption where applicable. The end of the story was overt hypocrisy. As naively observed by an astonished antitrust enforcer of a transition country, everything was prohibited ex ante, but almost everything was also permitted ex ante. There was no need, in Europe, to deal extensively with what you often call "problems of characterization". But the price to pay for this (only apparent) transparency was exceedingly high.

Sure, modernization does not shake all the foundations of this approach. To the contrary, the modernizing Commission reiterated, alongside with traditional statements about the orthodox way of construing Article 81 (above all, the view expressed in *Métropole Télévision v. Commission*), that its first paragraph only allows for evaluation of a given behaviour's anticompetitive effects, with no room for comparative assessment of net advantages arising from its implementation: a task which is then left to the strict canvass of the third paragraph.

But, since both stages of the analysis are now left in the hands of the same authority, the practical importance of the dichotomy (between the intransigent, full-fledged prohibition and the compromises of exemption) fades away: the contested conduct will then be challenged as anticompetitive whenever it appears, from the enforcer's viewpoint, as lacking the redeeming virtues needed to pass the overall scrutiny. Not yet a rule of reason, but an important step in that direction.

4.2.- Second, and striking, example. It deals with the most dramatic facet of the (axiologically) multi-dimensional nature attributed to EC competition law: the 'dogma' of integration.

Let me shortly explain. EC competition policy traditionally privileged, *inter alia,* the goal of fostering the creation of a single European market. In the Commission's view, efforts aimed at removing national barriers to the full deployment of the "four freedoms" could arguably be jeopardized by business

conducts aimed at partitioning national markets; the absence of specific rules led to a widespread consensus on the need to use competition discipline as a tool to inhibit private initiatives against the process of integration. This left community antitrust with a heavy legacy, which would have exerted a profound influence on its application over the subsequent decades.

4.2.1.- Since *Consten/Grundig*, distribution agreements (together with IP licensing agreements) were accused of compartmentalizing national markets and played the unfortunate role of "villains". Thus, while in the US the *GTE-Sylvania* decision exempted vertical agreements from the rigors of the *per se rule* – with the only exception of resale price maintenance, still considered to exhibit the stigmata of "tampering with price"--, in the old continent distribution agreements were becoming a seething frontier. For the sake of precision, I should specify that most, but not all distribution agreements were subject to blame. The mix-and-match of statutory law and judicial decision-making created an astonishing legal patchwork. For example, exclusivity in resale and supply was conceded a block exemption (through Reg. 67/67, and later Reg. 1983 and 1984/83); qualitatively selective distribution agreements fell outside the prohibition set at Article 81.1; whereas quantitatively selective distribution agreements underwent the most rigid repression by EU trustbusters; at the same time, franchise agreements –notoriously the "queen's favorite"– were first redeemed by the Court of Justice, then governed by an ex ante, *ad hoc,* permissive regulation (Reg. 4087/88). Those who objected that the picture was at best messy, pointing out, for instance, that the mustaches of the queen's favorite were overtly fake –in fact, the features of franchising agreements as specified by Reg. 4087/88 were so volatile, that the mere pre-requisite of *intuitus personae* could hardly justify such patent disparities of treatment *vis à vis* other, strikingly similar contractual agreements –, were usually answered that ultimately no real comparison with other antitrust systems was possible: community competition law was, in a word, *different*. Only later, as this apodictic answer became more and more embarassing, the EU institutions began to explain that the "difference" was both a matter of time (the infancy argument) and contingent need: arguments similar to those put forward in defense of the disasters of real socialism.

4.2.2.- Beyond the specifics of distributive agreements, the problem grew system-wide. The basic question becomes whether deeming a given conduct unlawful, because of its supposed inclination to hamper parallel trade, really belongs to the realm of competition policy (or, whether EC competition law

really fits the dogma of integration and, more generally, the plurality of goals it was traditionally provided with).

Some scattered remarks may assist a correct analysis. Firms may face different market contexts in different nations, which usually leads them to adopt different pricing strategies. This amounts to price discrimination, whose economic impact is controversial. Doomed to face the sword of antitrust whenever it results from a concerted practice or, most importantly, is implemented by a dominant firm, discrimination reigns as the supreme feature of competitive behavior. No one would ever dare to cry scandal if a seller applied different prices to different buyers with heterogeneous preferences and bargaining power; no one would ever question price differentiation for first- and last-row seats in a theater. But then, where is the line beyond which community competition law will check, because of the threat to the single market, otherwise pro-competitive conducts?

There's no easy answer. A true believer could argue that the kind of price discrimination challenged by the European antitrust enforcers is bad because – instead of simply capturing different elasticities of demand-- exploits local imbalances provoked by exogenous factors and strives to ride the *status quo*. But, as is easily seen, the first to disprove this redeeming distinction has been the Commission itself, which not only has always rejected any justification based on currency fluctuations, but, in scrutinizing the automotive industry – traditional target of concerned jeremiads for the persistence of high price differentials –, still nowadays insists, with tetragonal determination, in considering prices net of taxes. It has recently clarified that price differentials caused by different state regulations cannot be taken as sufficient basis for escaping judicial challenge, if firm conduct interferes with parallel trade. As a result, even though such a view entails ignoring the impact exerted by different levels of taxation, discrimination is repressed in bulk, with no chance for ... discriminations!

Applications to the pharmaceutical sector are even more counter-intuitive. In that sector, price differentials emerge, since in many member states pharmaceutical firms are faced with state-owned buyers that act both as quasi-monopsonists and as regulators. Against this backdrop, can we really state that the current price, say, in Spain is the result of a proper interaction of demand and supply, as occurs, for example, in the UK? Not really. But the Commission doesn't care: abiding by the mystic of parallel trade, it implicitly suggests that the European price should be realigned with the Spanish one. It would probably be useless to highlight the punitive outcome of such an approach

(after all, this would amount to a parallel trade of state regulations!); similarly, it would be useless to recall that parallel exports only enrich parallel traders, with scant or no ultimate benefit for final consumers in any member state; it would be even more useless to invoke a Ramsey Pricing policy, which is often identified as the only feasible pricing strategy for an adequate remuneration of R&D investments (and since everybody knows how crucial and costly R&D investments are in the pharmaceutical sector, one would likely want to ask the Commission why many multinational firms have moved their headquarters outside Europe over the past decade). The Commission knows no *sliding scale,* no competitive justification for price-discriminating strategies or for adaptive behaviors that, at least in extreme cases, are the only way to ensure survival in the marketplace. So, either you are caught in the net of antitrust, or you die, or you simply don't invest.

4.2.3.- The European system begun to recover from its stubbornness (the difference story) only in the late nineties. At that time, the legal formalism that permeated it –offering the advantages of legal certainty (but also the disadvantages of poor quality of law)– showed signs of decline, as an anxious demand for a more economically oriented approach started to mount. Yes, the same economically sound approach that had been metabolized in other contexts, here for example.

Were I asked to trace the turning point, I would no doubt point to the *Adalat* case. In 1996, after a painstaking odyssey, the Commission adopted an elaborated decision, sanctioning the French and Spanish subsidiaries of a multinational pharmaceutical firm for their attempts to fight parallel trade. I will just recall that, between 1989 and 1993, the price of Adalat (a calcium antagonist) in France and Spain was much lower than in the UK. Those price differences of about 40% caused Spanish wholesalers (since 1989) and their French peers (since 1991) to export that medicinal product in large quantities to the United Kingdom. Bayer's subsidiaries, faced with massive flows of parallel trade from heavily regulated towards (more) liberalized countries, unilaterally changed their supply policy so as to fulfill orders from Spanish and French wholesalers only at the level of their previous habitual needs. Faced with the facts of the case, the Commission forced its traditional approach to the extreme limits, concluding that such behavior was not unilateral, and couching it in terms of anticompetitive agreement through the following sequence:

- request (by wholesalers);
- refusal to supply (by the pharmaceutical firm);

- failed attempt to circumvent the refusal;
- final surrender, with purchase of the available quantities (i.e., acquiescence to the new supply policy).

A few months later, however, the Court of First Instance suspended the decision, denying acquiescence and recalling that "the very concept of an agreement is based on a concurrence of wills between economic operators". This marked the beginning of a spectacular "arm wrestling", which ended only last year, when the Court of Justice declared that the obstruction of parallel trade was not the result of a meeting of the minds. In so doing, the Court not only frustrated the most blatant attempt to use antitrust law for the purpose of sustaining industrial policy in favor of parallel trade, seen as a panacea for the enduring absence of a European pharmaceutical market: it almost jettisoned four decades of past elaboration.

On its way, such a Copernican revolution was significantly supported by the enactment of Reg. 2790/99, which – besides eroding the discretionary power of exemption, by reducing the assessment under Article 81 to a single step – was the first (what a Christmas gift!) to clearly state that vertical agreements could be deemed anticompetitive only subject to a finding of their potential to harm, in economic terms, the competitive process.

Sure, the road is still long and winding, in this respect. But the conclusions of Advocate General Jacobs in *Syfait v. Glaxosmithkline* leave some margin for hope. The priority of the market integration goal keeps being a debatable question, at least for those who are not mesmerized by the laments of so crowded a community rearguard. But there stands another question: whether that goal should be pursued through competition policy. And the immediate answer, I would argue, is "no".

5.- So, let me summarize briefly. EU modernization has been inflected in terms of convergence: accordingly, EU reforms enacted over the past two years achieve the two-fold objective of shrinking the overall, cumbersome bureaucratic features of the system, and expanding the role of economics in the interpretation and enforcement of competition law. This certainly contributed to reduce the gap with respect to the US system.

Specifically on the blossoming role of economic analysis, one might recall that until recently any economic-functionalist contamination was routinely rejected. Authoritative commentators notably refused to concede that the "Chicago mood", which takes allocative efficiency as a milestone, could exert any

influence on the "multi-valued tradition" of EU competition law, which, we were told, pursues other goals, such as market integration, maximization of the number of competitors, promotion of free entry into the market, protection of small and medium-sized enterprises, environmental protection, international competitiveness, social policy, consumer protection, development of innovation; the Treaty itself mandates the interaction between the different objectives, providing plenty of arguments to the advocates of multi-goal competition policy. But, here, modernization strikes again. The aforementioned communication on the application of Article 81.3 cools down any enthusiasm, by specifying that "goals pursued by other provisions of the Treaty can be taken into account to the extent that they can be subsumed under the four conditions of Article 81.3": thence – though in the cautious and bureaucratic jargon of the Commission – only marginally and secondarily.

Putting it plainly, it's definitely sterile to burden competition law with responsibilities and goals that don't belong to its DNA. I would rather suggest to stick with a more mundane and modest ambition: competition policy should care about removing obstacles artificially created by firms to the deployment of the virtues – whatever they are – of a potentially competitive market; and that, in doing it, competition law enforcers should act on the basis of sound economics. On this side, Chicago did not come in vain: since then, antitrust enforcement on both sides of the Atlantic has never been the same.

6.- Recent upheavals have not explicitly addressed the appraisal of dominance. Here, diverse approaches continue to co-exist, and the outcome is inevitably upsetting.

In the US, the offense of monopolization requires a finding of monopoly power, willfully achieved or preserved by means of behaviors –the famous "actions […] honestly industrial", but not "economically inevitable" evoked by judge Wyzansky – which have nothing to do either with competition on the merits, or with expansion "as a consequence of superior product, business acumen, or historic accident". In the EU, on the contrary, dominance must be preliminarily found; only its abuse will be repressed.

In other words, Section 2 of the Sherman Act assumes the existence of a causal link between the contested conduct and some form of monopoly power; whereas the EC rule ignores the process that led to the achievement of that power, and merely bans its abuse by the firm that achieved it (whether correctly or not, it apparently doesn't matter).

I will come back to this issue in a moment. Let me first underline that the US approach sometimes leads to challenging conducts that are not, in and of themselves, unlawful, provided that they can be characterized as predatory or exclusive, and thus adopted for the purpose of restricting competition; whereas the European dominant firm is endowed with special responsibility *vis à vis* its customers –one more time, we can feel the Freiburg influence, with the big firm obliged to behave "fairly"-- and cannot avail of conducts that are perfectly lawful and feasible for its non-dominant competitors. From this point of view, which anyway elicits well-grounded concerns, the two experiences almost mirror one another; profound differences remain as regards the activation threshold of the two disciplines. In Europe, absent formal indications, concerns start to arise as the market share approaches 40%; while the offense of monopolization requires a much higher market share, around 70% (under this level, the plaintiff is left with the much more stringent burden of proof required for a finding of attempt to monopolize).

Are these only differences in numbers and figures? Not really. The relatively low market power needed to activate scrutiny in the EU is justified, in pragmatic terms, because Article 82 is the only available tool for controlling single-firm conduct. This (together with the attempt to overcome the statutory indifference for the process of achieving dominance) leads enforcers to detect dominance in cases where no economic evidence of dominance is found. But what really matters, from my standpoint, is that it testifies of a more general *impasse*: the same stressed by the aforementioned US Antitrust Modernization Commission in addressing the uncertain standard for appraising single-firm conduct (such as tying, exclusive dealing, bounded pricing, vertical practices): "[…] the lack of clarity in this area means that business must make decisions either to forego practices that would improve their competitive standing (and benefit consumers) or to engage in conduct that might embroil them in years of costly litigation".

6.1.- Here comes, as a *by-product* of confused attitudes (though in a different setting from the one previously analyzed), still another drive toward the spiritualization of the concept of agreement.

Let's start from tying practices. Away from cases where the refusal to sell one product if the buyer does not accept to purchase another is implemented by a dominant firm or is concerted between a number of market players, the US case-law –though sometimes drowned in a sea of misunderstanding– prohibits single-firm *tie-ins* as potentially unlawful under Sec. 1 of the Sherman Act whenever the agreement, considered as a precondition of the ban, was specified

in the sale contract. But look: the parties do not share a common anticompetitive project; indeed, the firm with market power exerts coercion on its counterparty, blackmailing her into agreeing to the contract. The weaker party could never profit from such contractual restraint (if not in terms incompatible with the idea of conspiracy and thus perfectly lawful, for example by obtaining a substantial discount on the tying or on the tied product). The situation, in other words, fits better the idea of unilateral exploitation, by a clever operator, of a pure "victim"; and is quite far from a concerted behavior aimed at restricting competition. No other justification is given for this, but an overly pragmatic one: any alternative solution would eventually exempt the practice from antitrust condemnation. Put differently, we need an agreement to implement the prohibition, so we find one, whatever it is. No matter if the conduct was in fact unilateral. As I told you, the agreement is being willfully spiritualized.

EU antitrust apparently stands clear from such a nightmare. But nightmares come in other forms: one of these is resale price maintenance. In theory, although this is often a bogus, RPM can be found to result from a cartel of producers; or from a cartel amongst retailers. In either case, RPM would be subject to standard antitrust enforcement. But what happens when RPM is used by a single firm, especially when such firm has no significant market power?

Here we end up again in the gray area. I don't wish to recall the never-ending debate on the prohibition of RPM, but will limit myself to remind that concerted vertical RPM is subject, in the US, to a *per se* rule. Its fortune is equally sad in the EU, where such clauses are indeed included in the black list of hardcore restrictions, and as such cannot find shelter in the 30% market share cap introduced by Reg. 2790/99, which provides a safe harbor for vertical agreements, nor can apply for the immunity awarded to agreements below the *de minimis* thresholds of 15% and 5% as set by the Commission's notice on agreements of minor importance.

Of course, this extreme disfavor towards RPM must be viewed in light of the prohibition set at Article 81.1, which requires, by definition, an anticompetitive agreement. But once again, what are the contours of this alleged agreement? If we assume, as is often proposed, that RPM benefits all resellers, then we get back to the cartel hypothesis and to its inherent difficulties; such view falls short of explaining why the producer would obstinately insist in punishing a counterparty –the "price cutter"– which should, on the contrary, qualify as its most-favored reseller. In order to understand what's going on, we may need a better theory, something in the vein of Telser's framing of vertical intra-brand

restraints, with its emphasis on free riding, pre-sale services and quality certification. One thing is certain: under this approach, the anticompetitive agreement scenario plunges into crisis; whereas the single-firm overview gains credibility. To come back to the US experience, the Supreme Court, although quite unwilling to overrule on this issue, at least cared about neutralizing its most dramatic effects, by aggravating, in *Monsanto v. Spray-Rite Service*, the burden of proof for the plaintiff and consequently concluding that "unwilling compliance with a unilaterally announced policy does not constitute concerted action".

More generally, there are reasons to believe that most vertical practices do not carry the features of restrictive agreement, which are needed for application of Sec. 1 of the Sherman Act and Article 81.1 EC Treaty. Another evidence of a such striking result is the opinion rendered by the EU Court of Justice in *Courage Ltd v. Crehan.* The issue at stake was whether a party to a contract, held liable to restrict or distort competition, could obtain compensation from the other party for the loss caused by the restriction or distortion of competition. The straightforward answer should have been negative, since, as all of you know, "nemo auditur suam turpitudinem allegans". Yet, the Court concluded that compensation could be awarded, provided that the plaintiff did not bear significant responsibility for the restriction or distortion of competition resulting from the contract. Quite a slippery path, indeed. But with a clear direction: the same taken, with somewhat greater systemic consistency, by those who acknowledge the absence of a restrictive agreement. Unfortunately, the price of such consistency is the inapplicability of the prohibition.

Well, this is a telling example of the identity crisis faced by contemporary antitrust. Because of the lighter burden of proof (in the US) or the lack of viable alternatives (in EU), the anxious need to contrast (allegedly dangerous) conducts adopted by non-dominant firms leads to the detection of anticompetitive agreements where there is no meeting of the minds. And this devious trend is doomed to grow, as almost all unilateral conducts – e.g. price squeeze, predatory pricing, etc. – might be seen as (at least) linked to an agreement. This explains many "tortured efforts to find 'agreement' where none may exist": with results that too often appear unconvincing, when not utterly paradoxical.

6.2.- In this respect, too, we can speak of a Trans-Atlantic convergence. This time, however, the US and EU systems do not converge on the actual remedies, but on the impossibility to devise a satisfactory solution.

A difference between the two sides of the Atlantic might be traced –if you really want to find one– to the different constructions of the offense of monopolization and of the abuse of dominance. The most ancient (and still most authoritative) interpretation of the former rests on the idea that no violation of Sec. 2 of the Sherman Act exists without a violation of Sec. 1. An apparently cryptic view, which, however, amounts to a fascinating simplification: in the beginning, there was monopoly, with its distortions, resulting in excess pricing to the disadvantage of consumers: distortions and excess pricing that antitrust is out to fight, even when they result from an agreement between producers. More clearly. Those who dominate the market –independently of how they achieved such privilege– have the opportunity to harm downstream players, by setting prices way above competitive levels. In fact, with stoic consistency, community competition law challenges this conduct, by sanctioning "unfair pricing" by dominant firms.

On the contrary, and against all premises, the same fascinating simplification did not find consensus in the US, where monopolists that adhere to the textbook stereotype (i.e., attempt to maximize profits, set prices where marginal costs equal marginal revenues) will never be caught in the net of antitrust scrutiny. A clear example of this attitude is provided by the famous, but rather schizophrenic *dicta* of Judge Learned Hand: on the one hand, he warned that "[m]any people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone"; on the other hand, he was also aware of the danger that a quick-and-easy condemnation of monopolists ends up eroding those same incentives that lead firms to attempt to take over the market, and warned that "the successful competitor, having been urged to compete, must not be turned upon when he wins". More recently, the tension reached the paroxysm in the *opinion* rendered by Justice Scalia in *Verizon v. Trinko.* There, had the Supreme Court simply observed that the hope of gaining a competitive advantage – thence, more profitable prices – stimulates innovation, that would have been no news. But Scalia intended something else: "The 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". In other words, not only monopoly is no evil; it is, rather, a fat prize waiting for a winner.

What's left with an antitrust imprisoned in such a paradox, far away from its elective purpose of checking monopoly power? I will let everyone answer the way he or she deems proper.

While I believe that, on this count, US antitrust deserves severe criticisms for want of consistency, nobody should overstate the candid coherence with which Article 82.a launches anathemas against unfair pricing by dominant firms, without withdrawing in face of the accusation of fostering *no-fault monopolization*. Quite often, confronted with the problem of deciding what price level is (un)fair, the wording of this rule tumbles down to a mere *flatus vocis,* a trace of regulatory yearning.

And impotence, at the very end, calls for inertia.