

# **The trouble with the abuse of dominance**

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September 28<sup>th</sup>, 2018

Rotterdam (The Netherlands)

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# Province of unilateral behaviour

- Widespread consensus: both **monopolization** (and attempt to monopolize) in the US and **abuse of dominant position** in Europe, though (apparently) speaking different languages (attempt as incipency? monopolization prohibited, superdominance legitimate...), deal with the problematic evaluation of unilateral behavior.
- Doesn't help that much!

# Lack of a consolidated theory

- Convergence, if any, on lack of clarity, that has been, and keeps on being a long running problem in monopolization / abuse of dominance law.
- Part of the problem is the failure to develop a theory capable of application to the case-law.

# What we don't know

- Meaning of dominance
- Role of monopoly
- Relationship with market power
- Implications of abuse (Beyond some legitimate power? Outside normal competition? Disregarding competition on the merits?)

# What we are left with

- A lawless norm, framed by a fundamental warning:  
**Antitrust should not not impose sanctions for the very conduct it would encourage.**
- But how do we deal with it? Is Google's Android really bad?

# *The way we were:* a declining, yet luring bias

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- Many would have simply said, in the past: **big is bad!**
- Actually, this was the slogan underlying antitrust enforcement in the old, good days, starting with Senator Sherman's mistrust of the Robber Barons (till the "deconcentration policy" advocated by the influential Neal Report in the late sixties).

- Is the curse of bigness here again?
- With Lina Khan and the hipster (Woodstock, New Brandeis Movement, Barry Lynn's Open Markets Institute) antitrust people.



**New York Post** (Kevin Carty, 3 February 2018)  
*Tech giants are the robber barons of our time*

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# Looking forward: Toward a new equilibrium/synthesis?

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- This being the retrospective path, are we approaching some new equilibrium? Which one?
- Looking into the crystal ball: two grooves...
- Rescuing fairness
- Revamping the more economic approach

# One way: Rescue of fairness

- According to some commentators, through the concept of special responsibility, apparently focusing on the protection of smaller competitors, the process of modernization of competition law in the 2000s has added the protection of consumers.
- Exploitation of consumers became an important concern for EU competition law.
- Two pillars...

- Possibility to sanction ‘excessive prices’ by dominant undertakings in order to protect final consumers (particularly in socially sensitive economic sectors, such as pharmaceuticals; but see the *Qualcomm* saga, and the Brussels Commercial Court’s decision of 12 April 2018 in the *SABAM* case).
- Theoretically, also the imposition of unfair trading conditions may constitute an abuse of a dominant position: see BKA in the pending *Facebook* case.

# The (Italian) *Aspen* case

- Four oncological drugs (**Cosmos drugs**), developed in the '50-'60 and **not covered by patents**.
- In 2009, Aspen purchased the relevant trademarks and, later on, started a series of **initiatives to increase the prices** of the products concerned
- In September 2016, the ICA imposed a fine exceeding €5 million on Aspen for having imposed **excessive prices**.

# The (Italian) *Aspen* case

- According to the ICA, Aspen engaged in a **very aggressive negotiation strategy** *vis-à-vis* the Italian Medicines Agency (AIFA).
- This negotiation strategy resulted in **substantial price increases**, ranging from 300% to 1,500%.
- In line with *United Brands*, the ICA applied a **two-prong test**.
  - First, it considered the disproportion between prices and costs.
  - Second, the ICA verified whether the prices were unfair, taking into account a number of additional factors.

- The ICA established the **disproportion between prices and costs** on the basis of 2 parameters:
  1. The difference between prices and costs, measured through the gross contribution margin (revenues minus direct costs), which was sufficient to cover indirect costs before the change in prices, and further increased thereafter.
  2. The difference between revenues and a 'cost plus' benchmark, including (i) direct costs, (ii) the share of indirect costs (selling and distribution, administrative expenses, other operating expenses) allocated to the products concerned, and (iii) a profit margin (return on sales, or ROS, considered equal to 13% in light of the ROS of the two main generic firms): ranging from [100-150]% and [350-400]% of the cost plus.

- The CMA found (December 2016) that Pfizer, a multinational pharmaceutical company, and Flynn, a smaller pharmaceutical company, have each abused their respective dominant positions by imposing unfair prices for phenytoin sodium capsules manufactured by Pfizer. This resulted in the National Health Service ('NHS') being overcharged by tens of millions of pounds. The CMA imposed a financial penalty of £84.2 million on Pfizer and £5.2 million on Flynn and directed them to reduce their prices.
- On 7 June 2018 the decision has been annulled by the CAT: no comparison with prices of competing products, no attention to the value for patients...



# An American version. But not monopolization...

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- Echoed episodes, all of which correspond to the scheme of acquisition of a rights holder on a medicinal product, the price of which is immediately overwhelmed by an increase:
  - 5555% for the newly acquired Daraprim by Turing Pharmaceuticals, a start-up driven by a former hedge fund manager, Martin Shkreli;
  - 525% increase for Isuprel acquired by Valeant;
  - 597% for Vimovo, which entered the portfolio of Horizon Pharma in 2014, save a further 5% increase a year later.

- On January 31 2018 the Danish Competition Council found that Swedish pharmaceutical distributor CD Pharma AB had abused its dominant position in Denmark by charging excessive prices (i.e. a price increase of 2,000%).
- CD Pharma is a pharmaceutical company that distributes Syntocinon, a labour inducing drug. Amgros I/S is the purchaser of medicine for Danish public hospitals.
- In this case, a parallel importer, Orifarm A/S, won a contract to supply Syntocinon to Amgros from April 1 2014 to March 31 2015. However, just before the contract was due to start, Orifarm announced that it would be unable to fulfil its terms.
- According to the decision, Amgros had therefore been forced to buy from CD Pharma, the only alternative supplier in Denmark. Around that time, CD Pharma had raised the price of Syntocinon from Dkr45 to Dkr945 per package, corresponding to a price increase of approximately 2,000%. The price was lowered to Dkr225 per package in October 2014. Orifarm had won the contract by offering a price of Dkr43 per package, but it was able to deliver only 30% to 40% of the contract. CD Pharma delivered the rest.

- The Bundeskartellamt is about to conclude an investigation initiated, in early 2016, against Facebook: the hypothetical offence is an abuse of dominant position consisting in the imposition of general contractual conditions in contrast to the discipline on the protection of personal data.
- Beyond the problematic nexus «privacy-antitrust», the traditionally neglected clause of art. 102 TFEU is thus revisited in an unusual perspective, not only because it does not deal with price, but since it re-proposes, via a trajectory that goes through the abuse of economic dependence and the content control of contractual conditions (with its obvious implications in consumer law), an old-fashioned interpretation of the phenomenon of adhesion contracts.

# Unchartered area

- The Bundeskartellamt is taking a relatively unexplored path of competition law. There have been indeed only very few cases dealing with unfair trading conditions as the basis of an art. 102 TFEU violation.
- However, the fact that art. 102 TFEU in its reference to ‘unfair trading conditions’ is a rather rarely used provision does not mean that this is a dead part of EU antitrust law.
- To the contrary, by linking the general clause of ‘unfair trading conditions’ to data protection law breaches, the German antitrust authority would envisage a novel type of anti-competitive conduct in the digital environment, where the collection of personal data is not only the source of market power but also, if unlawful, the means of distorting it.

# Summing up: Exploitative behaviour

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- As far as Europe is concerned, exploitation, consisting of imposing 'excessive' prices/unfair contractual conditions, is there, in letter a) of art. 102.
- It represents the most direct form of exerting monopoly power. From this standpoint, cartel and monopolistic overcharge would basically express the same logic.

- Hovenkamp:  
A fair reading of the legislative history of the Sherman Act suggests that it was dominated by two concerns. One is high prices and the other is protection of smaller competitors from what was regarded as the emerging threat of large businesses, or trusts. Neither of these concerns strongly suggests a general welfare approach. The concern with higher prices is at least consistent with a consumer welfare concern.
- **The goal of the antitrust laws should be to enable markets to produce the highest output of the highest quality goods and services consistent with competition. Along with this will come lower prices.**

- Regarding exclusionary practices, carried out by an incumbent with the aim of deterring entry or forcing the exit of rivals, it should be clear that this is not enough to proscribe a conduct, since every firm would be willing to get rid of its rivals. If achieved on the merits, such an outcome is unobjectionable.
- This implies that ‘exclusionary practices’ is a shorthand formula evoking conduct which **forecloses rivals in an anticompetitive way**, “thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice” (EU guidance paper).

# A controversial junction: the *Intel* case. *Sui generis* abuses?

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- The *Intel* case (2009) led to the certification of new abuses (by effect?), under the opaque, and relatively unprecedented, label of “naked restrictions” (relating to “payments by Intel in order for the OEM... to delay, cancel or in some other way restrict the commercialization of specific AMD-based products”), constituting “recourse to methods different from those governing normal competition”.
- Possible sequel: *Lundbeck* (2013, following *Actavis*). New occurrences, the *AstraZeneca* case (2012), a handful of Italian cases (among which particular attention should be reserved to the *Pfizer* case (2014)), and also the *Facebook* proceeding by the Bundeskartellamt.
- Overlapping abuse of right theory and/or unfair competition? (look, e.g., at new art. 12 of the Chinese anti-unfair competition law.)



# No more formalistic taxonomies

- *Intel* had been regarded as a plea of an European enforcement untamed and far away from the Chicago approach.
- It could be that, in the meantime, a push towards a ‘more economic’ approach, at least to a certain extent, has come of age, even though being contrasted or diluted by (above all) judicial resilience.
- Be that as it may, one thing is patent, and should attract adhesion: formalistic taxonomies do not obtain any longer and cannot be resorted to as a tool for preserving ‘the way we were’.

# Last gasp... which rescue?

- The trouble might be not so much with dominance and its abuse...

but with antitrust itself.

# Thank you for your kind attention

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