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**MONOPOLIZATION LAWS OF THE UNITED
STATES AND OF THE EUROPEAN UNION:
COMPARATIVE LEGAL AND ECONOMIC
ANALYSIS**

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Arguably, the monopoly phenomenon displays the entangled interaction between law and economics more than any other issues of antitrust-competition law. At first blush, monopoly can be described as a plausible occurrence of the firm's lifecycle, to which legal effects are unavoidably reconnected; a market is monopolized when one firm is the sole supplier of a good or of a service. With that affirmed, what are the consequences in the realm of law of a market shifting towards monopoly?

The negative incidents of monopoly that *ipso facto* substantiate antitrust intervention are similar in every legal system based on rule of law: the monopolist will raise the price for the product, being the sole supplier; the absence of competition will thwart technological innovation; last but not least, the monopolist will subtract "shares" of welfare from the aggregate welfare of the market to the detriment of consumers.

Yet, the justification for antitrust intervention generates some confusion if one ponders on the postulation that firms are profit maximizers and will inevitably tend to subtract market shares from their competitors, thereby causing an overall reduction of competition. Parallel to that, another element of confusion is the rethinking of the monopoly phenomenon in light of both network effects and economies of scale that consumers can benefit from. If network effects characterize a market, one product moves towards dominance because the convenience of it increases in accordance with the increase of the number of people using them. The firm would extract a lower price, or a "network" utility in accordance with the increase of the purchases of the good or service, on the one hand, and with the increase of the demand for these, on the other hand (economies of scale).

The laws of monopoly, in other terms, are to account of three conflicting forces: first, every capitalist market structure accepts the idea that a firm tends to eliminate competition in order to increase its efficiency; second, the attainment of monopoly justifies antitrust intervention in virtually every legal systems, on a more or less conservative basis: the traditional incidents of monopoly are almost universally perceived as evil; third, if the market is characterized by network effects and economies of scale, the attainment of a monopolistic position will not be inherently and aprioristically detrimental to purchasers.

It follows that antitrust intervention is always called to strike a balance between the interest of consumers in having a competitive price, the interest of competitors in having an open market, and

the interest of those efficient firms in competing aggressively and driving less efficient firms off competition.

Here lies the conceptual difficulty of disciplining monopoly, which is also inherently entrenched into one of the traditional open questions of capitalist economies: how can a legal order mediate between the need to incentivize private enterprise and the need to protect the market structure and consumers? Or, with respect to antitrust, at what point does a legal order need antitrust laws to discipline the unilateral practices of the firm?

It will be seen that case law has usually been oscillating in this subject matter, and has expanded and contracted its intervention, failing to identify monopolization standards unambiguously, unlike economic science. Both American and European jurisprudence have resorted to economic notions, where legal arguments proved unsuitable to elucidate all the determinants of this domain.

From a legal perspective, monopoly is a nuanced phenomenon, whose peculiarities are neither entirely encompassed in the shaping of statutory rules, nor in the judge-made law. Professor Sacco describes the difficulties of the law-making process based on incomplete information by using the figure of speech “synecdoque”, which conveys the idea that law is a complex evolutionary order and decision-makers only account for a small part of it, when they develop rules of universal application¹. Likewise, with regard to the monopoly phenomenon, the cognizance of its complexity is only partly conveyed in its regulation.

Moreover, the difficulties of determining the monopoly contours stem from the fact that several factors impact on it, from both an economic and a legal standpoint. Monopoly is first of all a market occurrence, whereby it is subject to the laws of demand and supply; monopoly is an antitrust concern, subject to both lawmakers’ and courts’ intervention; monopoly is also a political concern, subject to majoritarian or minoritarian biases typical of every political process. A meaningful depiction of this phenomenon cannot abstract from considering these three processes, their different impact, and their interaction. Therefore, the analysis of the monopoly phenomenon should never overlook at the three institutions that affect it, namely the market, the role of both courts and lawmakers, and the government action.

In the realm of law, the discipline of monopoly is first of all a regulatory framework against those market failures that undermine the efficiency of the overall market structure; second, monopoly laws are a tool available to courts to police the

¹ P.G. Monateri and R. Sacco, *Legal Formants*, in P. Newman, (ed.), *The New Palgrave Dictionary of economics and the Law*, Vol. 2 London: MacMillan, (1998), p. 531

contrasting interest of parties; third, monopoly laws are the product of all the interests and the values that are represented in the political process, which, by definition, is free in its ends.

B) Demarcating the scope – Comparative, legal and economic analysis

The first pillar on which the present essay stands is the comparative analysis. What it seeks to compare is how two legal systems deal with the liability of a firm for monopolizing a market. Accordingly, the main question of the dissertation is: how do the selected legal systems react when a firm that uses its market power to monopolize the market in which it operates?

The legal systems selected are the United States, and its discipline of monopoly pursuant to § 2 of the Sherman Act, and the European Union, and its discipline of the abuse of dominant position pursuant to article 102 of the Treaty on the Functioning of the European Union.

Preliminarily, it is to be affirmed that the choice of analyzing the two systems is not coincidental, as their peculiarities will permit to treat these as models symbolizing the two most typically recognized legal families of comparative science, the Common Law family, as regards the United States, and the Civil Law family, as regards the European Union. In that respect, good comparative law should not only assert the differences and similarities between legal systems, but should also be able to trace concrete models within the legal rules analyzed. Indeed, the mere juxtaposition of rules would be an incomplete endeavor².

In both Common and Civil law, liberal thinking found a way into the law of abusive unilateral conduct of the firm, especially with respect to the individual right of the entrepreneur to determine its own future by freely made decisions and to determine its own success based on his market performance. As it will be seen, however, some great differences exist mainly between the common law and the civil law understanding of the limits of the firm's freedom to exercise its market power, which find their justification in the different policy concerns characterizing the models at stake.

The Common law tradition puts more emphasis on parties protecting their own interests and takes party inequalities lesser into account. It is therefore more individualistic and more concerned with the promotion of efficiency and the enhancement of the nation's wealth. In this light, it is peculiar of the Common law tradition the adherence of the American law of monopolization to economic principles, first and foremost the

² R. Sacco, *One Hundred Years of Comparative Law*, 75 Tulane Law Review 1159 (2000)

concept of efficiency, and the refusal of dogmatic and moral notions, such as the concern for fairness in transactions.

The Civil law tradition, on the other hand, is more dogmatic and has infused the law of abusive dominance with moral elements in which it finds its rethorical justification, such as a general concern for the fairness of transaction and for the promotion of a social market economy. Further, it will be seen how deeply the concern for the fostering of the Internal Market affects the molding of the European discipline, producing significant divergences compared to the American law of monopolization.

From a comparative standpoint, notwithstanding the lack of a structural and literal equivalent to the American notion of monopolization in the European discipline, it will prove fruitful to look at the selected legal systems as to find functionally equivalent objects, rather than structural ones. Thus, the research will have a functional, problem-solving attitude, whose departing point will be the situation in which a firm has abused its high market power to drive one or more competitors off the market. In that respect, the disciplines of monopolization and of abuse of dominant positions are juxtaposable in terms of functional equivalence, since neither sanctions the static attainment of monopoly, but the dynamic abuse of the monopolistic position with a view to dampening competition on a market, to the detriment of both competitors and consumers.

Consequently, to quote Professor Rodolfo Sacco, "to see the law as a whole one must find a suitable place for the laws, definitions, reason, principle and so on"³ and being able to map them in a proper and clear way. The functional equivalence will lead to an understanding of law not based on the mere analysis of the legal rules, but based on the description of the movements of law. The purpose of the comparison will not be "to identify the 'better rule', but solely to highlight the itineraries law follows overtime and in different legal cultures and environments without forcing a specific one"⁴.

Unfolding the legal formants that shape the laws of monopolization and of abusive dominance can best convey the itineraries that the two legal models follow⁵; it will be argued that the legislative formant plays a marginal role in both models, since both § 2 of the Sherman Act and Article 102 TFEU are broad invitations to courts to elaborate a law of unilateral abusive practices. Parallel to that, the judicial formant plays a pivotal role

³ R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. Law 1, 27 (1991)

⁴ G. Comandè, *Legal Comparison and Measures: It is Logic to Go Beyond Numerical Comparative Law*, forthcoming, p. 3

⁵ R. Sacco, *Legal Formants: A dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1, (1991)

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in both models, to the extent that the role of judge-made law is significantly more prominent than the statutory law one, in a manner that is more familiar to the Common law tradition. Last but not least, the impact of the doctrinal formant is particularly evident with regard to the role of economic analysis of law in the definition of legal standard.

It will be seen, for instance, that the American shaping of the law of predation is mostly based on the cost-based school that Harvard Professors Areeda and Turner have developed, which has also had significant resonance in the European Union. Similarly, the influence of the Chicago School of law and economics and of the Harvard School, both in the US and the EU, and of the Freiburg Ordoliberal School, in the EU only, signifies how manifestly the legal question at stake is affected by scholarship. In accordance with the different degree of impact of the three formants, this essay will focus more on the judicial and scholarly notions of monopolization and of abusive dominance, and less on the statutory laws, owing to the scarcity of legislative sources.

The second pillar of the essay is the inclusion of some straightforward economic analysis of law in the description of the models. When it comes to both monopoly and abusive dominance, the synecdoque implied in the complexity of the facts that both statutory and judge-made law intend to regulate, and that scholarship intends to survey, in all likelihood will not be resolved by this dissertation; at any rate, a larger picture of the phenomenon will be captured by conjoining the legal comparative analysis with the inputs of economic analysis of law. Throughout the essay, the description of the legal disciplines of monopoly will be accompanied by inquiries into the economic thinking of the offense of monopolization and of abuse of dominant position, mainly by referring to the Chicago School of law and economics, the Harvard structure-conduct-performance School, and the Freiburg ordoliberal School.

Economic analysis of both monopolization and abusive dominance will have a positive slant, not a normative, nor functional one⁶. Positive economic analysis of law departs from the claim that efficiency shapes the legal rules and institutions, and wealth maximization is the sole policy for the development of law. Thus, efficient rules are those that maximize the society's aggregate wealth, on the account of the notion of allocative efficiency: a rule is efficient when no one can be made better off without making anyone worse off. Positive analysis lends itself to

⁶ For a more detailed description of the three approaches of economic analysis of law, see F. Parisi & B. Lippi, *Quantitative Methods in Comparative Law*, Minnesota Legal Studies Research Paper No. 12-20 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049907

evaluate the efficacy of judicial outcomes with regard to parties and to provide comparable data.

Normative analysis identifies and selects policy goals through economic analysis and provides a prescriptive statement as to what the law should be. The normative school postulates that market failures require legal intervention and that economic analysis is the best method for identifying market failures and selecting a law to remedy the resulting harms. The three most common goals of policymakers and economists are wealth, utility, and happiness.

The functional approach looks at individuals' revealed preferences as the fundamental criterion as how society chooses legal remedies. When rational individuals have a choice between two legal remedies, they will choose the one they can extract the most benefit from. Functionalists are less inclined in measuring the aggregate wealth of society, but attempt to identify and create legal rules based on individual choice, given that the choice is marketable, meaning that the legal order will not impede transactions and the preference revelation.

Within the confines of the present essay, the economic analysis of law will be positive, i.e. it will only proffer an empiric-quantitative framework to employ in the description of the phenomenon, in addition to the legal argument. The fact that the two models choose different solutions for the same legal questions indicates that there is no single better rule. Hence, the inputs of economics applied to comparative analysis can provide better insight of the effects of alternative legal rules. In other terms, the comparative analysis will borrow the conceptual apparatus and empirical methods of economics with a view to gaining a better knowledge of the legal question at stake, without attempting to either prescribe what goals law should achieve, or to make the normative claim that individuals' choices should be incorporated into the legal regulation of the phenomenon.

In light with the claim that the scope of the comparison is not the identification of the better rule but the expansion of the knowledge of the institutions compared, the employment of some basic principles of law and economics, such as the study of the law of demand, the economic description of monopoly and dominance, and the concept of allocative efficiency as regards the profit maximization of the firm, will not seek to weigh the efficacy of the two legal disciplines or of the courts outcomes, but will be simply represent a framework to expand knowledge. In a Kelsian perspective, the economic analysis of monopolization and abusive dominance will simply better describe what the law is (*sein*) and not what the law should be (*sollen*)⁷.

⁷ H. Kelsen, *Lineamenti di Dottrina Pura del Diritto*, Torino, (2000)

In conclusion, economic analysis will serve to sharpen and refine the analytic tools of legal reasoning, on the one hand, and to put the comparative analysis in a quantitative context, which will enrich its overall epistemological purpose, on the other hand⁸. The descriptive part will be supplemented by some basic empirical-quantitative schemes of economics that should be read as the completion of the critical analysis of the economic, social and cultural contexts of the models under investigation⁹.

C) Structuring the work

The main analytical question above referred will be answered through four sub-questions: how do the selected systems narrow the relevant market for the purposes of the two disciplines? What is the relevant threshold of market shares that the firm is to hold to contravene the two provisions? What are the main types of abusive unilateral conducts? How do the selected systems deal with discriminatory abuses, in general, and with price discrimination, in particular?

The essay is divided into three parts, a descriptive part, a comparative and explanatory part, and a conclusion. The first part is divided into two chapters, which respectively analyze the law and economics of monopolization in the US, as under § 2 of the Sherman Act, and of the abuse of dominant position in the EU, as under article 102 TFEU. Both models will be scrutinized with respect to the normative origins of their statutory law, the relevant market for the reach of the law, the role of market shares and the interaction with the firm's conduct, the analysis of anticompetitive conduct in general, and the narrowing of the most recurrent forms of abusive behavior, in particular. With regard to the types of abuse, particular emphasis will have the discipline of predation, which stands as the archetypal anticompetitive practice of the firm with monopoly power, the hypothesis of monopoly refusal-to-deal and the impact of the so-called "essential facilities doctrine" on both models, the treatment of the so-called exploitative abuses, which characterize the European model but are not regulated in the US, and the regulation of discriminatory pricing abuses, which are encompassed in the European law of abusive dominance, while are recollected in the American discipline of price discrimination, which does not require a finding of monopoly for its application, pursuant to § 2(a) of the Robinson Patman Act.

⁸ U. Mattei, *Comparative Law and Economics*, Ann Arbor, University of Michigan Press, (1996)

⁹ The analysis of law in its social, economic, and cultural context has been described as critical comparative law. See E. Orücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, 4.1 Electronic Journal Of Comparative Law, (June 2000), available at <http://www.ejcl.org/41/art41-1.html>

Again, with respect to discriminatory price abuses, the functional approach will characterize the analysis, namely functionally equivalent provisions will be compared, rather than normatively homologous ones. Furthermore, it will be underscored that § 2 of the Sherman Act sanctions the attempt to monopolize in the same way as the actual monopolization, unlike article 102 TFEU, which only prohibits the actual abuse of dominant position, not also the attempt.

In the second part, a comparison between the two models will be drawn, together with a tentative economic, sociological and political explanation of why the same phenomenon is treated in a substantially different manner. As far as the comparison is concerned, attention will be paid to the elements of major divergence between the two models, in particular to the treatment of exploitation by the monopolist firm, the treatment of predation, and the treatment of the monopoly refusal-to-deal. Furthermore, an attempt will be made to recollect the two disciplines under the main doctrinal and judicial analytical tests, in order to better identify standards in the treatment of unilateral exclusionary abuses.

As far as the explanation is concerned, from a rethorical and epistemological standpoint, it will be argued how the two models position themselves in the *continuum* between individualism and altruism, in accordance with the seminal taxonomy that Professor Duncan Kennedy elaborated with respect to substantive issues of private law. According to Kennedy, two opposite rethorical formal modes inform the adjudication of substantive issues of private law, ranging from an “individualistic” attitude, which favors self-reliance, namely the conviction that someone is entitled to enjoy the benefits of his effort without having to sacrifice them to the interest of others, as opposed to an “altruistic” attitude, which favors solidarity, even when this is exposed to the possibility of non-reciprocity, and enjoins individuals “to make sacrifices, to share, and to be merciful”¹⁰. The *continuum* theory will be applied to the main question of this essay, and it will be affirmed that the American model tends to have an individualistic attitude, namely to seek to freeze into the legal system the whole structure of *laissez faire*, whereas the European model is oriented towards altruism, preferring the application of standards of reasonable understanding, such as the preponderance of standard such as “competition on the merits”, or “special responsibility” of the firm not to distort the market openness, to which the enforcement of article 102 TFEU is informed.

¹⁰ D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1717 (1976).

Parallel to the analysis of the two rhetorical modes, an inquiry into the main policy concerns of the American and European systems will follow; it will be argued that the American discipline of monopoly is merely concerned with the protection of consumer welfare, namely the aggregate nation's wealth, whereas the European law of abusive dominance is characterized by both fairness and market integration concerns. In particular, the fostering of the Internal Market is one of the tenets of the *acquis communautaire* and a general policy principle of the EU treaties, which significantly weighs on the European discipline of competition; in that respect, the treatment of abusive dominance is not sheltered by its impact.

A second possible explanation for the different approaches to monopoly is economic and will rest on the dichotomy between consumerist and ordoliberal policies, the former characterizing the US approach, and the latter characterizing the EU approach. In particular, the law of monopolization tends to protect the efficiency of the market, whereas the law of abusive dominance tends to protect the openness of it.

The last possible sociological explanation for the different attitudes of the two models will be found in two different models of capitalism, the "Anglo-American" model, concerning the US, and the "Rhine" model, concerning the EU, according to the definition coined by Albert Michel in his 1991 book "Capitalism versus Capitalism"¹¹. The "Anglo-American" model is based on *laissez faire* capitalism, i.e. on the idea that free market is the most powerful driver of development, and that the government should abstain from regulating the economy. The Rhine model envisages the triumph of a social market economy, entailing minimum regulation of the market in a way to strike a balance between the rights of private capital and the long-term social needs of the economy.

In line with the claim that the monopoly phenomenon is multifaceted and characterized by legal, market and political stances, the epilogue of the essay will consist of an evaluation of the impact of the adjudicative (or judicial) process, the market process, and the political process, in an attempt to re-collect the two legal models into a general framework for legal analysis, which has been elaborated by Professor Neil Komesar in his seminal book "Imperfect Alternatives"¹², known as "comparative institutional analysis". In particular, an attempt will be made to make an institutional choice on which of the processes –or

¹¹ M. Albert, *Capitalism versus capitalism*, London, Whurr, Business Economics, 1993. In 1991, the book was firstly published in French, *Capitalisme contre capitalisme*, Paris, Editions du Seuil.

¹² N.K. Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, (1994)

institutions, as Komesar defines them- can best pursue the social policy goals embedded in turn in the American law of monopolization and the European law of abusive dominance.

METHODOLOGICAL PREMISES

A first basic premise to the present research is that it regards a traditional topic of antitrust law, or competition law –the terms are substantially synonymous– that is monopoly¹³. The present work aims to compare models, rather than institutions; more specifically, it aims to compare the two most influential models disciplining the opaque phenomenon of monopoly, namely the American and the European one. With regard to the US model, the concept of monopoly or monopolization will be analyzed, whereas with regard to the EU system and the concept of “abuse of dominant position” will be investigated.

The terms monopoly and monopolization must be used judiciously, since monopoly refers to a *status* already reached by a firm in an industry, whereas monopolization implies the positive action of jacking up a market through exercising power over price¹⁴. The analysis will show that the selected models do not censor the mere status of monopoly, but the conduct seeking to attain monopoly, with regard to the US model, and the abuse of the monopolistic position, with regard to both models.

However, if the reader were to consider the present work as a mere –yet useful– comparative endeavor, he would fail from grasping the central idea underlying it. In fact, a second epigrammatic methodological premise to the work would be that it positions itself in the field of Comparative Law and Economics. Having that said, the reader might still wonder: what can exactly be defined as Comparative Law and Economics?

In order to answer this question it is fruitful to borrow some words from the work of a prominent scholar, who has recognized an operative interaction between the two disciplines. “It seems likely that the two disciplines may benefit from each other. Specifically, comparative law may gain theoretical perspective by using the kind of functional analysis employed in economic analysis of law...moreover, in the moment in which a strong case is made for the rebirth of ‘legal process-style’ comparison of alternative legal institutions, it seems that comparative law may offer to economic analysis a reservoir of institutional alternatives

¹³ See for a classic introduction R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001. Judge Posner maintains this major theoretical subdivision of American Federal Antitrust Law along his whole work.

¹⁴ This definition of monopolization is incomplete; however, it suffices to stress that the main object of the research will be the analysis of an economic phenomenon that has different treatments in accordance with two different ways of perceiving antitrust/competition.

not merely theoretical but actually tested by legal history”¹⁵. Comparative Law may achieve more sophisticated accomplishments by combining the study of legal categories and doctrines with some tools of economics -such as the concept of efficiency- in an attempt to provide the essay with more empirical/quantitative evidence. Moreover, whereas law is generally confined within national boundaries, economics presents models and claims that have a universal foundation, and that can overcome the sovereignty constraints of legislation. An economic assumption, which claims universal validity and from which the entire work will be animated, is that firms are profit maximizers: therefore, the reach of a dominant position is more than a bad case of distortion of competition, but is a very plausible phenomenon characterizing the firm’s lifecycle. Economics will help to have a more unbiased understanding of such phenomenon and unravel the policy undertones of the legislator’s intervention. The undoubted advantage that the comparative approach can offer to the analysis is a better insight of the legal models at issue, which will be analyzed by understanding and measuring their relative analogies and differences¹⁶, in search of functional equivalents rather than merely juxtapose the legal rules. Unlike Law and Economics, the comparative method will not reduce legal knowledge to mere logic rules (efficiency), but will account for the different paths that law follows in times and in different legal cultures, without striving to categorize better rules¹⁷. The other inherent values of a comparative research are the gain of mutual international understanding of the selected topic, and the engendering of a critical attitude towards each legal model¹⁸. Conversely, the input that Comparative Law can give to Law and Economics is a cure for the insularity from which this discipline has suffered, having been mostly confined within the American scholarship –with a certain degree of acceptance by the US Courts. The marginalization of this branch of learning has been predominantly caused by the legal parochialism of the legal scholars and law professors of the other jurisdictions, who have insulated their legal systems from any outer scholarly legal ideas, in order for them to seek additional rents within their frame of

¹⁵ U. Mattei, *Comparative Law and Economics*, Ann Arbor, University of Michigan Press, (1996), preface

¹⁶ R.B. Schlesinger, H. Baade, M. Damaska, P. Herzog, *Comparative Law: Cases, Text, Materials*, The Foundation Press, Mineola (NY), 5th ed., (1988), p. 39; R. Sacco, *Legal Formants: A dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1, 1991

¹⁷ G. Comandè, *Legal Comparison and Measures: It is Logic to Go Beyond Numerical Comparative Law*, p. 4, forthcoming

¹⁸ K. Zweigert, H. Kötz, *An Introduction to Comparative Law*, Oxford, Clarendon Press, 1998, p. 13 et seq.

reference¹⁹. The Comparative method can force the exchange of ideas and foster the erosion of certain biases against the economic analysis of law.

¹⁹ The degree of acceptance of Law and Economics in the US Courts is not impressive –but nevertheless significant–, while this field is virtually ignored by Courts elsewhere. Some authors explain the legal parochialism by equating it with protectionism in trade: the main players in the legal debate outside the US have sheltered their jurisdictions from foreign legal doctrines, in order to continue holding a predominant stake. N. Garoupa, *The Law and Economics of Legal Parochialism*, 2011 U. Ill. L. Rev. 1517, 1527 (2011)

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MONOPOLIZATION LAWS OF THE UNITED STATES AND OF THE
EUROPEAN UNION: COMPARATIVE LEGAL AND ECONOMIC ANALYSIS

PART I DESCRIPTION

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MONOPOLIZATION LAWS OF THE UNITED STATES AND OF THE
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CHAPTER I
MONOPOLIZATION LAWS OF
THE UNITED STATES

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1. Introduction – The birth of American antitrust law and the first discipline of monopoly

Monopolies in the U.S. are not illegal *per se*. They become illegal when firms use their monopoly power to gain price or other advantages to the detriment of their competitors. The first Congress intervention disciplining the monopoly phenomenon is

the Sherman Anti-Trust Act of 1890²⁰. At the time the act was passed, the Anglo-American institution of trust was used as a device to agglomerate market shares in the hand of a single group or firm, in order to gain monopoly rents from the market itself. More precisely, a group of companies would form a trust to fix prices low enough to drive rivals off competition; normally, once a trust achieved a monopoly over the market, it would raise prices to recoup its losses.

Prior to analyzing the concept of monopoly in depth, it is significant to ponder on the year 1890, which saw the origins of both antitrust law and of modern economic science. The passage of the Sherman Act and the publication of Alfred Marshall's *Principles of Economics* both praised for government intervention in regulating business as a counterpart to the traditional idea that market could self-correct its shortcomings and act as self-regulator²¹. The Sherman Act strived to be an tool for public intervention against the abuses of power deriving from the highly concentrated dimension of industrial capitalism, which characterized the U.S. economy at the time the Act was enacted. By contrast to that, Marshall's *Principles* introduced a benign vision of business, based on the axiom that laws of price bring supply and demand into balance, like a "stone hanging by a string" moved by "the force of gravity", within a universe of economic forces in equipoise²². According to the economist, the market would harmonize freedom of contract to yield the best for the most in the end.

The Sherman Act responded to the fear of the small businesses and labor forces that the rapid industrialization of American economy would immobilize capitals into big corporations, which would be able to control both markets and prices. In his 1888 State of the Union Message, President Grover Cleveland disapproved of the growth of trusts, monopolies and corporations, because they went from being "the carefully restrained creatures of the law and the servants of the people" to being "the people's masters"²³. In the wake of such depiction of the US economy, the Sherman Act was passed two years later, establishing a federal forum for both public and private enforcement of antitrust law.

1.1 The *Standard Oil* case

²⁰ 15 U.S.C. §§ 15 1 *et seq.*

²¹ F.R. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 *Geo. L. J.* 1512 (1972)

²² A. Marshall, *Principles of Economics* (8th edition), p. 323-346 (1920)

²³ T.D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 *Fordham Law Review* 415 417 (1998), E.W. Kintner ed., *1 Legislative History of the Federal Antitrust Laws and Related Statutes*, 1978, p. 58

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The new piece of legislation was firstly applied to dismantle the Standard Oil Trust, a concentration that was deemed as a menace to the Republican institutions themselves.

The Standard Oil Trust was an arrangement whereby the stockholders of the properties of the Standard Oil Company, a concentration that by 1880 had gained control of virtually the whole oil marketing facilities in the U.S., transferred their shares to a board of nine trustees who controlled the property and managed the agglomerate. In exchange, the stockholders received certificates granting them a certain share of the turnover of the jointly managed companies.

Owing to his control of the board of trustees, John D. Rockefeller attained monopoly power in the oil market, aiming at both horizontal and vertical integration, i.e. the control of all the oil refineries of the country, on the one hand, and the power over other stages of production and distribution, on the other hand. He was able to control the price for oil, to create economies of scale from the control of almost all the refined oil in the U.S., and to push the railroad companies and other suppliers to charge him a lower price for transportation²⁴.

Shortly, the Standard Oil model became paradigmatic in the American industrial organization, and trusts were established in several industries²⁵. The monopolization of economy became a major topic for public opinion, in particular for those who had their small businesses cancelled by the predatory tactics of the trusts. Finally, the vehement public opposition to the trusts led to the passage of the Sherman Act, the first measure enacted by the U.S. Congress to prohibit this industrial-relationship model.

Although several states had previously enacted similar laws, they were limited to intrastate commerce. Conversely, the Sherman Antitrust Act was based on the constitutional power of Congress to regulate interstate commerce relying on the Commerce Clause²⁶. When in 1892 the Ohio Supreme Court declared the Standard Oil Trust to be an illegal monopoly and ordered its dissolution, the

²⁴ Literature on the Standard Oil case is virtually boundless. A detailed and informative reconstruction of the rise of the Standard Oil trust can be found in B. Bringham, *Antitrust and the Oil Monopoly: The Standard Oil Cases, 1890–1911*. New York: Greenwood Press, (1979)

²⁵ A. D. Chandler & H. Daems, (eds), *Managerial Hierarchies: Comparative Perspectives on the Rise of the Modern Industrial Enterprise*, Cambridge MA: Harvard, (1980)

²⁶ The Commerce Clause refers to Article 1, Section 8, Clause 3 of the U.S. Constitution, which gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes”. The individual components of the provisions are often referred to as 1) the Foreign Commerce Clause, 2) the Interstate Commerce Clause and 3) the Indian Commerce Clause. L.H. Tribe, *American Constitutional Law* p. 306, Foundation Press 3rd ed. (2000)

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decision had little effect because the trustees managed to retain their positions on the boards of the component companies by reincorporating the trust in New Jersey, as a holding company under the name of Standard Oil Company of New Jersey. In fact, looking for tax revenue, New Jersey was the first state to adopt a law allowing a parent company to own the stock of other corporations in their own right.

By 1906, Standard Oil had become a monopoly, controlling over 80 percent of oil production in the United States. Despite the existence of sufficient evidence describing the unfair practices through which Standard Oil would restrict competition, the U.S. Government was reluctant to act. The mounting public repulse for the increased costs and the shrunk levels of services encouraged President Theodore Roosevelt -and his successor President William Howard Taft- to commence both an investigation of Standard Oil's practices and a lawsuit, on the account of the alleged restriction of the interstate commerce perpetrated by the company. Standard Oil controverted the allegations, arguing that the individual companies controlled by the parent company were competitive on their market, and uninhibited in their scope from the overarching trust.

The decision was issued in St. Louis Federal Circuit Court on November 20, 1909. Justice Walter Henry Sanborn ruled that Standard Oil trust had acted with a view to restricting interstate commerce, by using its control over the individual companies to both hinder competition and monopolize the oil industry.

Standard Oil appealed the decision to the U.S. Supreme Court. Chief Justice Edward D. White, delivered the Court's unanimous opinion in favor of the United States, upholding the lower court's decision²⁷. Judge White found that the vagueness of the Antitrust Act inevitably called for the introduction of a standard to be used in outlawing specific monopolies. This standard was called the "rule of reason"²⁸.

The rule stated that restriction of competition "does not necessarily constitute or imply an illegal restraint of trade or attempt to monopolize"²⁹. The prohibition of all restraints of trade *per se* would be contrary to the congressional intent³⁰. In order to state whether an arrangement constitutes an unlawful restraint of trade, the scrutiny is to be concentrated on the scope of the arrangement, the power of the parties and the effect of their acts.

²⁷ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)

²⁸ See *infra*, para. 6.1

²⁹ M.J. Sklar, *The Corporate reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics*, p.147, Cambridge University Press (1988)

³⁰ E. Gellehorn & W.E. Kovacic, *Antitrust Law and Economics in a nutshell*, 4th ed., West Publishing Co., St. Paul (Minnesota), p.174, (1994)

If, for instance, the company can justify a restraint of trade as a necessary part of a business transaction, and both the participating companies and the general public consider such restraint reasonable, then it will not be considered illegal.

It would be up to the courts to decide based on the single case. Justice White added that even though some behaviors were considered inherently unreasonable –such as the predatory tactics–³¹ the ban of all restraints of trade would hamper the U.S. economy, since the restraint of trade was a key element of most business combinations³². All things considered, this approach underlined the behavioral element of the parties, but also acknowledged that some conducts are intrinsically unreasonable³³. As a result, by means of a ruling that has been described as “remarkable for its cloudy prolixity”³⁴, the U.S. Supreme Court ordered that Standard Oil Trust must be dissolved under the Sherman Antitrust Act and broken into 34 independent companies; its market share of refining declined from 80% in 1910 to a market share for the divested parts of Standard Oil of 40% in 1940.

1.2 The new wake of Antitrust Law – The *Microsoft* case

³¹ The analysis of predation can be found *infra* at para. 9.2

³² Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 67 L. Ed. 619 (1911)

³³ Justice John Marshall Harlan agreed with Justice White’s decision, but dissented on part of the rule of reason. Harlan, believing the rule would be difficult to apply in future cases, asserted that all restraints of trade were illegal under the Sherman Act. He wrote, “I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited every contract, combination, or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry — difficult to solve by proof — whether the particular contract, combination, or trust involved in each case is or is not an ‘unreasonable’ or ‘undue’ restraint of trade. Congress, in effect, said that there should be no restraint of trade, in any form, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it could not add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraint of interstate commerce as are shown not to be unreasonable or undue”. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)

³⁴ P.E. Areeda, L. Kaplow, A.S. Edlin, *Antitrust Analysis: Problems, Texts and Cases*, Aspen Publishers (6th ed. 2004), 148

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The most famous modern monopolization case and arguably the most analytically demanding legal question in antitrust history is the *Microsoft* case³⁵.

Of the various claims, the Justice Department contended that Microsoft had realized an illegal tying arrangement with its marketing of Windows 98 OS. In fact, a 1995 consent decree that was aimed at fostering competition in the software industry prevented Microsoft from licensing its software under tying conditions³⁶. The government sought to inhibit Microsoft from using its dominance in personal computer operating systems – by that time Windows detained more than 80 percent of PC market – to control the Internet browser market.

Microsoft countered that the integration of Internet Explorer into Windows was in line with its history of enhancing its operating system. The Department of Justice argued that Microsoft saw the Internet as a threat and sought to eliminate their Internet competition by freely distributing their browser, integrating it into their popular operating system. A great deal of this antitrust lawsuit was devoted to Internet Competition. More specifically, with the bundling of Microsoft OS and Microsoft Internet Explorer, Microsoft attempted to exclude their largest internet competitor, Netscape Communications, which was offering an internet browser not for free.

The Justice Department alleged that Microsoft had violated §1 and 2 of the Sherman Antitrust Act by:

1. Unlawful exclusive dealing arrangements in violation of § 1, by obliging PC hardware manufacturers to agree to license, preinstall, and distribute Internet Explorer on every Windows PC

³⁵ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). A. Chin, *Decoding Microsoft: A First Principle Approach*, 40 Wake Forest L. Rev., 6 (2005). For a detailed description of the case, see *infra*, para. 7.5

³⁶ In 1994, the Justice Department filed suit alleging that Microsoft has unlawfully maintained a monopoly and unreasonably restrained trade in the market for IBM-compatible personal computer operating systems. The department filed a proposed consent decree embodying the terms of the settlement agreement, which provided at section IV(E)(i): “Microsoft shall not enter into any License Agreement in which the terms of that agreement are expressly or impliedly conditioned upon: (i) the licensing of any other Covered Product, Operating System Software product or other product (provided, however, that this provision in and of itself shall not be construed to prohibit Microsoft from developing integrated products)”. *United States v. Microsoft Corp.*, 147 F.3d 935, 939 (D.C. Cir. 1998) In amicus briefs filed with the Court of Appeals, some anonymous companies had argued that Microsoft could exploit a loophole in the language of the provision. In fact, Microsoft would be able to avoid this prohibition simply by “integrating” the “other product” into a next-generation operating system. The Court of Appeals dismissed this concern by offering some assurance as to how it expected to interpret the provision in the future: “We perceive no interpretation of the decree’s definition of covered products which would allow such a result.”

such manufacturers shipped, as a condition of obtaining licenses for the Windows 95 operating system.

2. Unlawful tying of IE to Windows 95 and Windows 98, the successor of Windows 95, in violation of § 1;
3. Unlawful maintenance of a monopoly in the PC operating system market in violation of § 2, by requiring PC hardware manufacturers to agree as a condition of acquiring a license to the Windows operating system to adopt the uniform “boot-up” sequence and “desktop” screen specified by Microsoft; and
4. Unlawful attempted monopolization of the Internet browser market in violation of § 2, through the distribution of Internet Explorer for free, by virtue of a bundle of it with the Windows OS³⁷.

In June 1999, the District Court issued separate findings of fact and conclusions of law, holding Microsoft liable for tying under section 1 of the Sherman Act. In June 2001 however, the Court of Appeals reversed the legal question of Microsoft’s tying liability by striking a balance between the anticompetitive consequences and the pro-competitive justifications of Microsoft’s conduct under the rule of reason.

The Court of Appeals entirely upheld the District Court’s findings of fact, but reversed the conclusions of law regarding the alleged violation of § 1, ruling that the government had failed to establish “a precise definition of browsers” and “a careful definition of the tied good market” at trial and would be precluded from doing so on remand³⁸. Based on these hindrances, the government decided to drop the tying claim in September 2001. Consequently, the claim was never finally adjudicated.

With regard to the claim of violation of § 2, the Court of Appeals ruled that the Microsoft had used its monopoly to quash nascent and potentially competitive technologies. Moreover, the fact that in the internet industry rapid technological advance and continuous shifts in paradigms take place contributed to sustain that the other browsers were a potential threat for the defendant’s monopoly in the operating system market.

In conclusion, the Court considered Microsoft’s monopoly leveraging as relevant *in re ipsa* to the exclusion of other competitors from the market, and as a way of protecting its – legally acquired- monopoly rents by means of anticompetitive practices. The naked quashing of a new technology in a rapidly evolving market sufficed to integrate violation of § 2.

1.3 The intriguing parallels between *Standard Oil* and *Microsoft*

Reference to these two famous cases right at the outset of the

³⁷ *United States v. Microsoft Corp.*, 253 F.3d Introduction 48 (D.C. Cir. 2001)

³⁸ *United States v. Microsoft Corp.*, 253 F.3d 95 (D.C. Cir. 2001)

present analysis is not unintentional, since they are emblematic of the attitude of American Courts towards the drive of a single individual to dominate some crucial sectors of the industry, and towards the drift towards maintaining such dominance through practices incompatible with the competitive process. In both cases, the possession of monopoly in a strategic industry allowed the defendants to control and shape the development of a groundbreaking technology.

In the 124-year history of the Sherman Antitrust Act, the sole antitrust policy the judicial process has enforced consistently is the safeguard of the competitive process as the basic standard under which private and economic activity must be governed. An author has highlighted the existence of “intriguing parallels” between *Microsoft* and the *Standard Oil* case, since the two companies gave rise to antitrust challenges for their quest to dominate a new fundamental technology³⁹.

Standard Oil and Microsoft attained and consolidated monopoly in their respective industries by resorting to means that have been found at odds with the Sherman Act, with claims of tying, price discrimination, rising rivals’ costs and strategic conduct; these particular claims, as it will be displayed through the course of the chapter, represent the most controversial examples of anticompetitive conduct under § 2, which have often been based on highly hypothetical assumptions of the Courts, rather than on economic accuracy.

Moreover, both cases reflect the key policy choice of Courts that the treatment of monopoly power not be left to the market forces, but be either regulated by government or effectively circumscribed by an antitrust remedy, when the dominance of a crucial industry based on the consolidation of entry barriers to new innovation thwarts the future development of the industry itself.

1.4 The incidents of monopoly

From an economic point of view, three are the goals of every antitrust action, which are also embedded in both the *Standard Oil* and *Microsoft* Courts’ reasoning: 1) the preservation of efficiency of the market, 2) the safeguarding of economic progress and 3) the fostering of technological innovation. These are the *prima facie* instances that are symbolic of the “economic sense” that all antitrust cases must make⁴⁰.

In both cases, the Court has seen an even more severe public injury in the delay or denial of new innovations being brought to

³⁹ J.J. Flynn, *Standard Oil and Microsoft: intriguing parallels or limping analogies?*, 46 Antitrust Bull, 2001, p. 645

⁴⁰ *United States v. Syufy Enterprises*, 903 F.2d 659 (1990) *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 106 S. Ct. 1356 (1986)

the market, where restraints of trade or monopoly power undermine the competitive process determining technological change and open market access for the new innovation⁴¹.

Beyond the above correspondences between the policy choices underlying the two rulings, there appears to be a surprising continuity between the outcomes and what was the perception of the evils of monopoly in the British Common Law in 1602:

“There are three inseparable incidents to every monopoly: 1) that the price will be raised. 2) The second incident to a monopoly is, that the monopoly granted, the commodity is not so good and merchantable as it was before. 3) It tends to the impoverishment of diverse artificers and others who before by their labor had maintained themselves and their families...A society in which a few men are the employers and the great body are merely the employees or servants is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to consumers”⁴².

In turn, the economic disadvantages of higher prices, the weakening of technological innovation and the detriment to the overall welfare of consumers were and are the threats that judicial review has traditionally identified in a monopolized market.

All things considered, the mission of antitrust law is to classify the varieties of profit-maximizing behaviors in accordance with their relationship with consumer welfare. There are three possible relationships, which correspond to three different “ways of making money”⁴³ and judicial attitudes. A firm might increase its profits 1) by achieving new technological, managerial or productive efficiency, which is beneficial to consumers, 2) by gaining monopoly power through output restriction, which is detrimental to consumers, or 3) by some other device unrelated to technological, productive or allocative efficiency, which is indifferent to consumers⁴⁴. Once the inference of the firm on consumer behavior is identified, antitrust will sanction those behaviors whose effect is output restricting⁴⁵.

Certainly, there are some “grey areas”, in which Courts oscillate between intervening and leaving the market structure untouched, such as when the firm achieves monopoly by integrating the

⁴¹ J. Brodley, *The Economic Goals of Antitrust: Efficiency, Economic Progress and Technological Innovation*, 62 N.Y.U.L. Rev., 1020-1027 (1987)

⁴² W.C. Noyes, *A Treatise on the Law of Intercorporate Relations*, Boston: Little, Brown and Company, 1902, p. 468-quoting a British case *Darcy v. Allein*, Coke Part 11, 86b (1602), (Noy 173)

⁴³ Compare R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p. 122 (1993)

⁴⁴ On the traditional understanding of the concept of efficiency in economic analysis of law, see *infra* the economic thinking of market power, para. 4.3

⁴⁵ On the anticompetitive conduct through output restriction, see *infra*, para. 4.2

market through technological progress. Technological progress can be seen as an inseparable component of consumer welfare; however, progress sometimes implies the sacrifice of other resources, such as the openness of the market and exclusion of rivals. Therefore, the judicial weighing of whether or not the exclusion brought about by a firm's technological advancement is improper cannot but be highly conjectural and dependent on different considerations than allocative efficiency and consumer welfare.

2. The offense of monopolization and the difference between monopoly and the act of monopolizing

*"The heart of our national economic policy long has been faith in the value of competition"*⁴⁶. One of the policy considerations that have traditionally characterized the US legal discourse has been the alarm for monopoly, and in general for the distortive effects of the concentration of economic power in the hands of a few⁴⁷.

As said above, the basic federal antitrust law is the Sherman Antitrust Act. By then, many industries were already concentrated into what the Congress deemed too few hands; this piece of legislation was passed in an attempt to prevent practices that create undue monopolies or restraints of trade or commerce, and to guarantee free competition in business and commercial transactions⁴⁸. More specifically, from this moment onwards the Congress began to ascertain the inherent favorable effects of having a free and competitive market; thus, it developed a public policy as regards monopoly and proscribed restrictive practices as a form of public injury⁴⁹.

⁴⁶ In the Sherman [Act] ... 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' Emphasis added. *Staley Mfg. Co. v. Federal Trade Commission*, 7 Cir., 135 F.2d 453, 455, cited and quoted in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 249, 71 S.Ct. 240, 249, 95 L.Ed. 239; *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 369 (9th Cir. 1955)

⁴⁷ *U. S. v. Von's Grocery Co.*, 384 U.S. 270, 274, 86 S. Ct. 1478, 1480, 16 L. Ed. 2d 555 (1966).

⁴⁸ "The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor". *Appalachian Coals v. United States*, 288 U.S. 344, 359, 53 S. Ct. 471, 474, 77 L. Ed. 825 (1933) overruled by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)

⁴⁹ "The end sought [by the Sherman Act's prohibition against unreasonable restraints of trade] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services [emphasis added], all of which had come to be regarded as a special form of public injury". *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1009-10 opinion amended on denial of reh'g sub nom. Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367 (9th Cir. 2003). On the development of the

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From a consumer-welfarist perspective, the underlying scope of the Sherman Act was the promotion of commercial competition through the ban of certain anticompetitive practices⁵⁰ and the safeguard of the competitive process that brings the benefits of lower prices, better products, and more efficient production methods⁵¹.

The main provision regulating the action of monopolizing a market is § 2 of the Sherman Act, which reads as follows:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the direction of the court⁵².

The *actus reus* embedded in the provision at stake is the offense to monopolize, attempt to monopolize, or combine or conspire to monopolize any part of the nation's interstate or foreign commerce. Violations are punished as felonies, subject to fines of up to \$100 million for corporations and \$1 million for individuals, possible imprisonment of as much as 10 years, or both fines and imprisonment⁵³.

Not only does § 2 of apply to concerted misconduct by two or more persons or entities, but also to unilateral conduct involving only a single actor⁵⁴. Therefore, cases brought under § 2 have fallen into four broad categories:

concept of public policy as regards monopoly see J.E. Schefter, *Historical Policy of the United States Toward Monopoly*, 43 NDL Rev 17 (1966); C. Wilcox, *Public Policies Toward Business*, Homewood, Illinois: Irwin, 4th Ed., (1971).

⁵⁰ "Anticompetitive ... refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process" Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1st Cir. 1988); Columbia River People's Util. Dist. v. Portland Gen. Elec. Co., 217 F.3d 1187 (9th Cir. 2000);

⁵¹ Central aim of the antitrust laws is to protect consumers against certain abusive business practices-especially price-fixing and monopoly. Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp., 271 F.3d 6 (1st Cir. 2001); 7 P. Areeda & D. Turner, *Antitrust Law*, 1978, 1502; Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 486 (1st Cir. 1988)

⁵² 15 U.S.C.A. § 2 as amended by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (Pub. L. No. 108-237, 118 Stat. 668)

⁵³ 15 U.S.C.A. § 2

⁵⁴ Section 2 has, thus, played a pivotal role in antitrust actions where concerted action between multiple parties was either not present or difficult to prove. W Holmes and M. Mangiaracina, *Antitrust Law Handbook*, Thomson Reuters, 2011, § 3:2

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(1) Actual monopolization, in which a firm acquires or retains actual monopoly power through competitively unreasonable practices.

(2) Attempted monopolization, in which a firm not yet in possession of actual monopoly power engages in competitively unreasonable practices that create a dangerous probability of monopoly power being achieved.

(3) Joint monopolization, in which two or more parties conspire to jointly retain or acquire monopoly power, where actual monopoly power is achieved.

(4) Conspiracies to monopolize, in which parties not yet in possession of monopoly power conspire to seize monopoly control of a market, but where monopoly power has not yet actually been reached.

Within the confines of the present analysis, only the first two categories will be examined, on the grounds of the fact that joint monopolization and conspiracies to monopolize are conducts that border the offense proscribed under § 1 of the Sherman Act, which prohibits contracts, combinations and conspiracies in restraint of trade⁵⁵. The overarching scope of the present study is a survey of the unilateral conducts of the firm that are relevant to antitrust law and regard the establishment of an anticompetitive price.

Even though the provision at stake does not define the term monopoly, its meaning can be inferred by the common law, provided that the act of “monopolizing” presupposes the possession of market control power in a relevant market, by means of which it is possible to exclude actual or potential competitors from any part of trade or commerce.

Yet, the mere possession of market power cannot be equated with the act of monopolizing, since § 2 refers to a conduct – monopolization – rather than a status –monopoly– and “it is directed against activities rather than results”⁵⁶. Moreover, the relevant conduct must be integrated by the intent to exercise such dominance. The test of illegality is to ascertain both the existence of market power and the intent to exercise it⁵⁷.

⁵⁵ U.S. Code › Title 15 › Chapter 1 › § 1 15 U.S.C.

⁵⁶ It is a consolidated opinion that “... ‘monopoly in the concrete’ is not prohibited under the section [2]” United States v. E.I. Du Pont De Nemours & Co., 118 F. Supp. 41, 214 (D. Del. 1953) aff’d sub nom. U. S. v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)

⁵⁷ Int’l Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947) abrogated by Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006); Kansas City Star Co. v. United States, 240 F.2d 643, 663 (8th Cir. 1957), in which the Court held that “monopolization means the possession of monopoly power by a party or parties through which power it is possible to exclude actual or potential competitors from any part of the trade or commerce among the several states, provided that he or they have the intent or purpose to exercise that power”; United Banana Co. v. United Fruit Co., 245 F.

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More specifically, monopoly does not fall within the reach of the Act when it has been “thrust upon it”⁵⁸, that is when it is not acquired as a goal in itself, but it is “the incidental result of a constructive competitive effort”⁵⁹. It follows that a monopoly is lawful when it stems from the normal growth of an industry, from natural advantages⁶⁰, from technological innovation, from the business acumen or the superior skill of the entrepreneur, from the limited amount of the demand that is satisfied only by one provider, from a sudden change in tastes of the consumers, from a patent⁶¹, from ownership of land⁶². In other terms, there appears to be a distinction between unlawful achievement of a monopoly and lawful passivity⁶³.

Even when a monopoly is lawfully acquired –i.e. by means of a patent-, it becomes illegal when it is maintained through anticompetitive conduct that causes economic injury⁶⁴. A properly vested monopolist can adopt different practices in order to increase or misuse his monopolistic power, by using his dominant position in one market to gain anticompetitive leverage in another⁶⁵, by using predatory or discriminatory means, by using

Supp. 161 (D. Conn. 1965) *aff'd*, 362 F.2d 849 (2d Cir. 1966); Heath v. Aspen Skiing Corp., 325 F. Supp. 223 (D. Colo. 1971)

⁵⁸ In the case law, particularly under the structuralist approach to § 2, there is a clear-cut distinction between the achievement of monopoly, on the one hand, and monopoly that has been ‘thrust upon it’, on the other hand, to which the Sherman Act does not apply. United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945). Note, The Thrust-Upon Defense: An Affirmative Defense or Judicial Balm, 72 W. Va. L. Rev. 260 (1970)

⁵⁹ The classical expression of constructive effort may be found in the Homeric words: “Be ever best and o’ertop other men”(The Iliad, VI, 208, XI, 784). This is the advice given by two fathers to their sons who were leaving for war and is the unsurpassable exposition of the ideal in an age of sportsmanlike fighting. Rudolf Callmann, What is Unfair Competition?, 28 Geo. L. J. 601 1939-1940. In McIlhenny Co. v. Bulliard, 265 F. 705 (W.D. La. 1920), the Court said the product of a manufacturer “should stand on its own merits, and gain its way to popular favor by its own inherent quality”.

⁶⁰ It is the hypotheses of natural monopoly, and of the “essential facility” doctrine and. See *infra* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S. Ct. 2847 (1985) J. Cirace, An Economic Analysis of Antitrust Law’s Natural Monopoly Cases, 88 W. Va. L. Rev. 677, 728 (1986)

⁶¹ United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945). See *infra*.

⁶² Souza v. Estate of Bishop, 821 F.2d 1332, 1336 (9th Cir. 1987). Bishop Estate’s monopoly power was lawfully acquired as a consequence of historic accident.

⁶³ R.H. Bork, The Antitrust Paradox, A Policy at War with Itself, Basic Books, Inc. Publishers, New York, p. 166 (1993)

⁶⁴ Patent holder’s modification of its patented biopsy gun to prevent competitors’ non-infringing, flangeless needles from being used in patent holder’s guns constituted antitrust violation, based on evidence that patent holder enjoyed monopoly power in market for replacement needles and maintained its monopoly position by exclusionary conduct. C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340 (Fed. Cir. 1998)

⁶⁵ Cases of unlawful leveraging on a lawfully acquired monopoly are numerous, and the outcomes are oscillating. In United States v. Griffith, 334 U.S. 100, 68 S.

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Ct. 941, 92 L. Ed. 1236 (1948) disapproved of by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) it was held that monopoly leveraging may be proved by showing that the monopolist achieved only a “competitive advantage” in the target market. In *Great W. Directories, Inc. v. Sw. Bell Tel. Co.*, 63 F.3d 1378 (5th Cir. 1995) opinion withdrawn and superseded in part, 74 F.3d 613 (5th Cir. 1996) violation of Section 2 was found in an action brought by independent yellow pages telephone directory publishers against a parent holding company of telephone local exchange carrier (LEC) contending company orchestrated affiliation-wide effort, by means of charging unreasonable rates for directory information, in order to extend monopoly of yellow pages market and to eliminate competition. In *Cost Mgmt. Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937 (9th Cir. 1996) an unregulated natural gas seller brought actions for attempted monopolization under the Sherman Antitrust Act against natural gas local distribution company (LDC), alleging that company engaged in monopoly leveraging, using its monopoly over gas delivery facilities in unlawful attempt to monopolize gas sales market. The Court maintained that plaintiff must prove specific intent to control prices, destroy competition, predatory or anticompetitive conduct to accomplish monopolization, dangerous probability of success, and causal antitrust injury. Concerning the exploitation of a patent, in *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997) the Court adopted a presumption that a patent’s holder refusal to sell or license patented work or copyright is a valid business justification, when it is aimed at excluding others from its protected work, notwithstanding any immediate harm to consumers; conversely, exclusionary conduct supporting claim of unlawful monopoly can include monopolist’s unilateral refusal to license patent or copyright, when evidence shows that such rebuttal is a pretext to conceal anti-competitive activities. In *re Indep. Serv. Organizations Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000), The Federal Circuit held that a patent holder who refuses to license or sell a patented item in any product market does not violate antitrust laws without evidence of illegal tying, fraud in the patent procurement process or sham litigation. See also S. B. McCullen, *The Federal Circuit and Ninth Circuit Face-Off: Does a Patent Holder Violate the Sherman Act by Unilaterally Excluding Others from a Patented Invention in More Than One Relevant Market?*, 74 Temp. L. Rev. 469, 470 (2001). The author argues that case law does not support inquiries into the subjective motivation of a patent holder who refuses to license or sell a patented item. In *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) the Court affirmed that the use of monopoly power attained in one market to gain an anticompetitive advantage in another is a violation of Section 2, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability. But... a large firm does not violate Section 2 simply by reaping the competitive rewards attributable to its efficient size, nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. Conversely, in *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), the 9th Circuit held that plaintiff cannot establish violation of Sherman Act without proving that defendant used its monopoly power in one market to obtain or attempt to obtain monopoly in downstream or leveraged market, and, thus, firm cannot violate Section 2 merely by obtaining competitive advantage in second market, absent attempt to monopolize leveraged market. In *Gen. Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp. 2d 1335, 1353 (S.D. Fla. 2002) aff’d sub nom. *Gen. Cigar Holdings v. Altadis, S.A.*, 54 F. App’x 492 (11th Cir. 2002) it was held that liability pursuant to Section 2

any other means that would be “honestly industrial” under other circumstances, but that foster the maintenance or the increase of a monopolistic regime in market⁶⁶. In the event a monopoly is actively perpetuated, the exception that it is “thrust upon it” does not apply. Moreover, in the event a monopolist uses its lawfully acquired monopoly rents to leverage in another market, inference of the unlawfulness of the conduct is more easily attainable than the inference of monopolization through exclusionary practices.

On the account of the above affirmed, the most recognized defenses against a *prima facie* violation of § 2 are the “innocently acquired” and “natural” monopoly ones. Where the monopoly power was innocently acquired, namely as the result of superior skill of natural advantage, § 2 is not infringed.

When it comes to the identification of positive standards, in over 123 years of litigation thereupon, federal Courts have failed to set consistent standards of interpretation of the offense of monopolization. Some commentators have referred to the confusion surrounding the interpretation of this provision as follows:

“There is a genuine dilemma here. We urge everyone to try his damndest to get to the top of the heap, but we do not genuinely want anyone to actually make it. Consequently, when someone does make it we find the courts speaking out of both sides of their mouths”⁶⁷.

2.1 The three waves of enforcement of American monopolization law

The oscillation of American jurisprudence reflects the role that antitrust law has in turn assumed in industrial relationships. Accordingly, in the case law three distinct phases can be ascertained, each characterized by a different attitude in inflicting legal sanctions pursuant to Section 2⁶⁸.

can be generally assessed when there is a threat of monopoly in a target market, not merely a “competitive advantage.”

⁶⁶ In *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945)

⁶⁷ M.M. Blecher & C.S. Woodhead, *Bigness and Badness: A Review of the Requirement of ‘Deliberateness’ in Monopolization*, 10 Sw. U. L. Rev. 121, 125 (1978). This dilemma also echoes in the opinion that Justice Learned Hand rendered in the famous Alcoa Case. After stating in that case that [A] single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. . . [T]he Act does not mean to condemn the resultant of those very forces which it is its prime object to foster”. “The successful competitor, having been urged to compete, must not be turned upon when he wins”. Contrary to these premises, Hand found Alcoa liable of monopolization by simply excluding competitors by virtue of the corporation’s expansion. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

⁶⁸ Thomas A. Piraino Jr., *Identifying monopolists’ illegal conduct under the Sherman Act*, 75 N.Y.U. L. Rev. 809

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The first phase is characterized by the assumption that the mere possession of a monopoly was *per se* not sufficient for bringing an action of monopolization, but the defendant should have engaged in predatory practices⁶⁹. In the arguably most famous case on monopolization –the *Standard Oil* case– the act of unifying the power and control over the oil industry which resulted from combining the capital stock of various corporation trading in oil and its products in the hands of a holding company was held as a conduct seeking a perpetual control of the movement of these commodities the detriment of competitors, therefore as an improper attempt to monopolize such part of trade or commerce⁷⁰. The Supreme Court found violation of § 2 insofar as it deemed that such an agreement establishing a trust in the oil industry was, by rule of reason⁷¹, a restraint of trade.

As regards the substance of violation, the Court adopted the “abuse standard” of monopolization, under which a dominant firm can be found guilty of violating § 2 if it engages in conduct that would violate § 1 if engaged in by a combination of firms. Furthermore, the standard requires a finding of specific intent to monopolize, which can be reasonably inferred from a conduct that cannot be unjustifiable on the basis of legitimate competitive goals, but can only be debunked as an effort to destroy competition.

The landmark *Alcoa* case⁷² is illustrative of the second “structuralist” phase, in which § 2 was policed in a rather strict way, encompassing even non-predatory practices: by the 1940’s the Aluminum Company of America (Alcoa) had become a corporation which controlled over 90% of aluminum market thanks to technological innovation secured by a patent. Aluminum was a relatively new material that could only be

⁶⁹ In *N. Sec. Co. v. United States*, 193 U.S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904) the Supreme Court held that [T]he idea of monopoly involves something more than a mere acquisition of the whole, or of the major part, of a commodity or of shares of stock. It involves the idea of exclusion of other supply, as well as inclusion of what is actually acquired.

⁷⁰ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)

⁷¹ On the rule of reason criterion, see *infra* para. 6.1. Elsewhere, the Supreme Court found that the constitution of a holding company “organized by competing manufacturers of iron and steel, and which is greater in size and productive power than any of its competitors, and equal or nearly equal to them all, will not be dissolved under the Sherman Anti-Trust ...where a monopoly was not thereby achieved, and it was not able to fix prices, and there was genuine, direct, and vigorous competition reflected in prices and production, and its attempts to persuade competitors, by means of pools, associations, trade meetings, etc., had been abandoned as futile prior to the institution of the suit”. The approach of the Court shows that *United States v. U.S. Steel Corp.*, 251 U.S. 417, 40 S. Ct. 293, 64 L. Ed. 343 (1920)

⁷² *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945)

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produced thanks to a complex and innovative process. Alcoa reached its market dominance by enjoying the positive effects of economies of scale in aluminum manufacturing and by keeping profit margins low.

Notwithstanding it abstained from any predatory conduct, Alcoa could not escape charge of monopoly on ground that it did not seek, but could not avoid control of market⁷³. In his notorious opinion, Judge Hand found Alcoa liable just for engaging in vigorous competition, merely by meeting the growing demand for aluminum with its superior market capacity⁷⁴. It was held that a manufacturer who expands his capacity before others enter the field is liable even when he does not attempt to exclude competitors deliberately, on the account of the fact that there is no more effective exclusion of competition than the expansion of facilities due to the so-called "first-mover advantage"⁷⁵, the better organization, the longer experience and the more efficient trade connection than every newcomer.

In sum, regardless of whether or not a firm with a dominant position has rigged prices by means of predation, it can be held liable of monopolization when it drives competitors off the market with the rent that it has obtained over the market itself.

Filings of antitrust suits against high-technology manufacturers characterize the third phase, which starts with the IBM case in 1969, when Courts acknowledged defendants' argument that the creation of a monopoly in their industry would promote economic efficiency. Courts began to identify the "economic rationale"⁷⁶ behind the Sherman Act; however, the economic justification supporting the existence of monopolies in the high-tech industry did not overcome the unequivocal policy underlying the enactment of this statute, that is the "Congress' desire to promote

⁷³ *United States v. United Shoe Mach. Co. of New Jersey*, 247 U.S. 32, 38 S. Ct. 473, 62 L. Ed. 968 (1918)

⁷⁴ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424-426 (2d Cir. 1945) In line with the Alcoa case, in *U.S. Philips Corp. v. Windmere Corp.*, 861 F.2d 695 (Fed. Cir. 1988) the Court reaffirmed "Evidence that a firm holding 90% of a market that had a substantial entry barriers drastically slashed its prices in response to the competition of a new entrant, for the purpose and with the effect of eliminating that entrant, was sufficient to show monopolization under the Sherman Act". See also *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir. 1952), in which it was stated that "Abuses of price fixing and price leadership have been traditional criteria of illegality under the Sherman Anti-Trust Act, but there are other indicia of monopoly power, of which exclusion of competitors from the market is one, that are condemned by the act, regardless of whether or not position of dominance has been exploited to rig prices".

⁷⁵ For a definition of "first-mover advantage" see Chapter II, para. 7.2

⁷⁶ *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 994 (N.D. Cal. 1979) *aff'd sub nom. Transamerica Computer Co., Inc. v. Int'l Bus. Machines Corp.*, 698 F.2d 1377 (9th Cir. 1983)

competition through the protection of viable, small, locally owned businesses”⁷⁷. Therefore, Courts did not fully appraise the justification of a monopoly in the software industry, by virtue of the welfare maximization that a reduction in the output price would cause.

3. Monopoly power in a relevant market

3.1 The notion of market power and its relationship with the relevant market

In a perfectly competitive market, no one firm is able to affect prices by restricting output; conversely, the resource allocation of an economy might be severely altered if industries were monopolized. A monopolist firm may raise the price or reduce the supply of its product and, along with that, the distribution of resources within its sector to the detriment of consumers.

Market power is the ability of a firm to raise prices profitably by restricting output⁷⁸, and is the most ostensible symptom of monopoly. More specifically, a firm holding a significant degree of market power cannot but be a monopolist firm.

The measurement of market power, or monopoly power (the terms can be used interchangeably) helps recognize changes in market structures that are regarded as unfavorable. Appraising market power presents several difficulties, in that it entails the identification of non-quantitative and complex-to-weigh factors. In fact, commentators assert that this tool to understand changes in market structures is to be seen as a “competitive thermometer”, a scale of presumptive indices through which the impact of the forces of monopoly can be evaluated⁷⁹.

When a US Court challenges the conduct of a monopolist firm, it will begin by asking whether the latter has market power. Market power is a basic concept in antitrust law and in the analysis of monopolization in particular, since it is by virtue of such command over the market that the monopolist can impose its choices on both competitors and customers. The Sherman Act never mentions the term “market power”; nevertheless, economists were using the concept of monopoly power long before American Courts started understanding the economic implications of monopoly⁸⁰.

⁷⁷ *Ibidem*.

⁷⁸ P.E. Scherer & H. Hoverkamp, *Antitrust Law – An Analysis of Antitrust Principles and Their Application*, Wolters Kluwer Law and Business, New York, p.109 (2007)

⁷⁹ J.P. Miller, *Measures of Monopoly Power and Concentration: Their Economic Significance*, in *Business Concentration and Price Policy*, Princeton, p.119 (1955)

⁸⁰ D.F. Turner & C. Kaysen, *Antitrust Policy: an Economic and Legal Analysis*, Cambridge: Harvard University Press, p. 76-78 (1959). According to W.K. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm*

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The most recurrent authority on the definition of market power is *United States v. Grinnell Corp.*, in which the Supreme Court affirmed that the offense of monopoly entails two elements:

“(1) The possession of monopoly power in the relevant market and

(2) The willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident”⁸¹.

In his famous dissenting opinion in *Grinnell*, Justice Fortas has contended the lacking of an account of the relevant market on the basis of the economic facts of the industry concerned. He has censured the “Procrustean” approach of the Court⁸², in that the market has been tailored precisely to fit the defendant’s business.

It is manifest that the delineation of the market is a subtle issue, which can be manipulated and used as the tool to convey various policy reasons in the Sherman Act. In fact, the plaintiff and the defendant will have different interest in identifying the market: on the one hand, the former will seek to prove a smaller market, whereas the latter will aim at proving the existence of a bigger market, in order to show a lesser adverse impact of his anti-competitive conduct on the trade or commerce⁸³.

In order to understand the meaning of “market power”, it is useful to preliminarily focus on the concept of market in a non-technical way. “Market” can be *prima facie* used to label the general conditions under which sellers and buyers exchange goods. Within such structure, monopoly is often and in an empirical way identified with a specific market share, that is 100% or a segment close to it. As a consequence, market power should empirically correspond to the market share that the monopolist benefits from.

Conduct: The Chicago/Harvard Double Helix, 1 Colum. Bus. L. Rev. 1 31 (2007) has affirmed that the book by Turner and Kaysen is the most influential law and economics synthesis of their time. The authors advocated for a no-fault provision to address the monopolist’s conduct. At a doctrinal level, this is the most forceful endorsement for the structuralist approach of Courts following Alcoa.

⁸¹ *United States v. Grinnell Corp.*, 384 U.S. 563, 570, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966), The *Grinnell* case will be analyzed in more detail with regard to the role of market power, see *infra* note n. 80 *et seq.*, and with regard to the *per se* rule, see note n. 186

⁸² *United States v. Grinnell Corp.*, 384 U.S. 563, 587, 86 S. Ct. 1698, 1712, 16 L. Ed. 2d 778 (1966). See *infra*. Procrustes is a mythological character who lodged travelers, but forced them to fit his standard-size beds by stretching them or cutting them down to size, as required. L. Altman & M. Pollack, *1 Callmann on Unfair Competition, Trademarks and Monopolies*, 4th ed., § 4.31, *The Market Power – The relevant market.*, Thomson Reuters, New York (2012)

⁸³ EW Kintner, *An antitrust primer: A guide to antitrust and trade regulation laws for businessmen*, MacMillan, New York, p.91 (1964)

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In antitrust litigations concerning monopolization, an orthodox way of proceeding would involve the definition of a relevant market, the identification of the defendant's market share and, finally, the assessment of whether such share amounts to monopoly power under the Act⁸⁴. Contrariwise, Courts have focused less on the measurement of monopoly power and more on the uses and abuses of such dominance. Some commentators have criticized this approach for its lack of effectiveness in combatting persistent monopolies not attributable to superior performance, and have stirred debate on the opportunity of establishing a "no-fault" provision⁸⁵. Vigorous

Whilst market power measurement is normally passed over lightly, the product and the geographic market are first defined in monopolization cases. Once these boundaries are narrowed down, the defendant's sales are compared with those of competitors. Other evidence of the defendant's profits, or of the ability of new competitors to enter the market, or of price discrimination can be used to reinforce or refute the inference of the defendant's ability to raise prices and reduce output⁸⁶.

In the famous *Kodak* case, the Court has defined "market power" as the "power to prices or to exclude competition"⁸⁷. This definition is vague and raises an exegetical problem: in a perfectly competitive market, every firm holds a control over its power to prices; consequently, every firm has a quantum market power, hence every firm is to be considered as a potential monopolist. Evidently, not every firm is wholly capable of influencing prices by reducing outputs on the market. Therefore, the first issue for monopolization is to define what degree of market power would imply the exercise of a control over the firm's behavior. As it has been argued above, the Sherman Act does not mention market power or gives guidance for measuring it or determining what is the minimal aggregation that represents a monopoly.

When it comes to economic theory of monopoly, the concept of market power is closely intertwined to the laws of demand; market power is the ability to raise prices (or to restrict output) above competitive level for a sustained period of time without

⁸⁴ W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, (1981)

⁸⁵ The above-mentioned debate did not bring to the enactment of any measure. P. Areeda & D.F Turner, *Antitrust Law: an Analysis of Antitrust Principles and their Application*, Little, Brown and Co., Boston, p. 614, 1978. E. Kovacic, *Failed Expectations: the troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 Iowa L.Rev., 1105, 1136, 1989.

⁸⁶ W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 939.

⁸⁷ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992), quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956), and *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). With regard to the latter case, see *infra*, note n. 148 *et seq.*

incurring in losses of sales that would outweigh the benefits of the higher price⁸⁸. The “power over price” is the fundamental postulation of the economic concept of monopoly, and it is reflected in the economics’ assumption that the demand curve is downward sloped, whereby market price is inverse to quantity. The monopolist seller who controls the supply of a product can raise the price for it by restricting the amount supplied. The more steeply sloped the demand curve is, the greater the market power of the monopolist will be⁸⁹.

3.2 The notion of relevant market and the twofold dimension of the relevant market

The notion of market power risks to degrade into a theoretic conjecture if the market within which the firm exercises its power is not narrowed down. The concept of “relevant market” to the scopes of § 2 entails setting the boundaries that identify groups of sellers or goods, over which monopoly power is exercised. That requires the identification of a domain in which sellers and buyers operate to establish price and output of specific groups of goods; such domain has a twofold dimension including the product lines, on the one hand, and the geographic area, on the other hand.

To put it better, the “product market” includes the group of products with which the monopolizing firm’s product or service effectively competes, whereas the “geographic market” entails the physical area within which the effects of the monopolizing conduct are felt. Most of the case law regarding the offense of monopolization is concerned with the analysis of market power in the aforesaid twofold dimension⁹⁰.

In order to recognize relevant markets, antitrust doctrines tend to determine links in the chain of available fringe alternatives, with a view to selecting the possible alternative goods available to buyers, and the transactions that are sufficiently interrelated and that can

⁸⁸ J. Tirole, *The Theory of Industrial Organization* Cambridge MA: MIT Press, 1992, p. 284; P.E. Areeda, L. Kaplow, A.S. Edlin, *Antitrust Analysis: Problems, Texts and Cases*, Aspen Publishers (6th ed. 2004) p. 556; D.W. Carlton & J.M. Perloff, *Modern Industrial Organization* 3d ed. 1999 Reading, MA: Addison Wesley Longman Inc., p. 92; D.E. Waldman & E.J. Jensen, *Industrial Organization: Theory and Practice*, Upper Saddle River NJ: Prentice Hall, 2d ed. 2000 pp. 40, 437, 953. E.T. Sullivan, *Antitrust and its economic implications*, 5th ed., LexisNexis Publisher, Newark (NJ), p.23 (2008)

⁸⁹ R. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, p.9. For a more in-depth analysis of the economic notion of market power, see *infra*,

⁹⁰ T.G. Krattenmaker et al., *Airlie House Conference on the Antitrust Alternative: Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 251-52 (1987)

be affected by the dominance of a firm⁹¹. Thus outlined, the grouping is often difficult to execute.

3.2.1 The relevant product market

The relevant product market is the one in which all of the substitutes of the seller's product are available to buyers. If the characterization of a product market were too narrow, it would not encompass genuine substitutes; conversely, if it were too wide, it would overestimate the defendant's ability to affect price and output. In the famous *Cellophane* case, the Supreme Court has availed itself of a "reasonable interchangeability criterion"⁹²: the control over a relevant part of the commerce or trade of a product is determined by reference to the availability of alternative commodities for buyers, or, to put it in economic terms, reference should be made to the cross-elasticity between the demand for the alternative commodities⁹³.

More specifically, the economic account of the reasonable interchangeability of two products does not include the extent to which they are substantially and objectively fungible or have the same price, but is based on an economic notion, namely the degree to which the change of price/output of a product of an industry a firm is alleged to monopolize is likely to affect the change of price/output of the alternative commodity. If the variation in price/output of the product affects the alternative commodity, they can be considered as part of the same commerce or trade for the scope of § 2. If there is substantial interaction (high cross elasticity) between the two products, they will be included in the same market⁹⁴; contrariwise, if there is little interaction between

⁹¹ R. Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum L. Rev. 1805-1810, (1990)

⁹² *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956)

⁹³ In *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 380, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956), the Supreme Court had to determine whether there was competition between cellophane and other wrapping materials and it borrowed the notion of cross-elasticity from the realm of economics to evaluate the part of trade or commerce the defendant was suspected to have monopolized.

⁹⁴ Compare *Se. Missouri Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 612 (8th Cir. 2011), in which the Court affirmed that "the outer boundaries of a product market can be determined by the reasonable interchangeability, or cross-elasticity of demand, between the product itself and possible substitutes for it"..."Evidence that consumers will substitute one product for another in response to a slight decrease in price, strongly indicates those products compete in the same product market"; *AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) "In economists' terms, two products or services are reasonably interchangeable where there is sufficient cross-elasticity of demand. Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product. Cf. *Grinnell*, 384 U.S. at 571, 86 S.Ct. 1698. Also relevant to the delineation of a relevant product market is cross-elasticity of supply, which depends on the

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the two products, they will not be included in the same market, even though they are objectively fungible.

The *Cellophane* case is particularly illustrative of how the analysis of product market is carried out, on the one hand, and of how the judicial criteria are applied in concrete, on the other hand; the Court had to establish the product market in which *du Pont* was charged to possess a high degree of market power. The Government alleged that *du Pont's* control over almost 75% of the production of cellophane sold in the United States was sufficient proof of monopoly power, since the other flexible wrapping materials were not competitive enough to break the defendant's control over market price. Conversely, *du Pont* objected that there was no cellophane's product market disconnected from other market alternative that buyers could use in lieu of the former, such as pliofilm, saran wrap, aluminum foil etc. With the inclusion of these alternative options for buyers in the product market at issue, *du Pont's* market share would fall to 17%⁹⁵, well below the monopoly threshold established in other cases⁹⁶.

The Government (plaintiff) claimed to narrow down the cellophane product market in a way to only include the products that were largely fungible, and would sell within the same price range⁹⁷. The Supreme Court rejected this hypothesis, countering that under such a narrow definition of product market, the producers of many patented products should be subjected to the monopoly scrutiny⁹⁸. Instead, it advocated for appraising the cross-elasticity of demand in the trade⁹⁹, in order to determine "whether commodities are reasonably interchangeable by consumers for the same purposes for which they are produced"¹⁰⁰.

extent to which producers of one product would be willing to shift their resources to producing another product in response to an increase in the price of the other product. Where there is cross-elasticity of supply, a would-be monopolist's attempt to charge supra-competitive prices will be thwarted by the existence of firms willing to shift resources to producing the product, thereby increasing supply and driving prices back to competitive levels"; In *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-38 (3d Cir. 1997) it was held "products in a relevant market [are] characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market";

⁹⁵ *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 405, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956)

⁹⁶ See following chapter, concerning market share.

⁹⁷ *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 393-395, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956)

⁹⁸ *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 381, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956)

⁹⁹ *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956)

¹⁰⁰ *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956)

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The reasonable interchangeability test calls for considering three elements: qualities, use and price.

As regards the first element, the Court argued that cellophane did not have intrinsic qualities that other materials used in the food industry were lacking of, such as transparency, low permeability to gases and low moisture permeability. Therefore, the inclusion of other wrapping products with these features in the cellophane's product market was not deemed unreasonable¹⁰¹.

With regard to the use test, the Court affirmed that it entails the appraisal of whether the products have a "considerable degree of functional interchangeability"¹⁰², whether buyers can shift back and forth from cellophane to other flexible wrappings. This test did not encompass the analysis of some of the advantages that cellophane had compared to the alternative materials.

With reference to the price, the Court examined price movements, and responsiveness of the sales of one product to prices changes of the other. It maintained "if a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high-cross elasticity of demand exists between them; that the products compete in the same market"¹⁰³. Thus, the test includes a consideration of costs, in a way to exclude the substitutes of cellophane where, at prices producing a high cross-elasticity, the alleged monopolist has a substantial cost advantage. The substitutes are a check of the power of the alleged monopolist. To put it better, when focusing on cross-elasticity the Court considered direct competition from other products. Some scholars have stressed that the elasticity analysis was flawed, since buyer-price responsiveness to changes in cellophane prices suggested that other flexible products are close substitutes only if competitive prices were in fact being charged for cellophane¹⁰⁴. Percentage share of a market based on a definition the market itself does not in itself indicate the extent of monopoly power.

¹⁰¹ *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404-405 Appendix A, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956). The Court passed on singling out every flexible wrapping material that was fungible with cellophane. Some commentators have objected that the Supreme Court has included in this product market aluminum foil, even though it is opaque and cannot be used for packaging fresh produce. See E. Gellehorn & W.E. Kovacic, *Antitrust Law and Economics in a nutshell*, 4th ed., West Publishing Co., St. Paul (Minnesota), p.101, (1994)

¹⁰² *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 399, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956)

¹⁰³ *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 400, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956). The Court held that other wrapping materials competed with cellophane; the findings of the case showed that some customers shifted their purchases in response to price changes.

¹⁰⁴ D.F. Turner, *Antitrust Policy and the Cellophane case*, 70 Harv. L. Rev., 281, 308 (1956)

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Criticism should be addressed to the misleading aspects of the traditional approach of Courts, implying a first narrowing of the market and a successive decision of whether a firm has monopolized it. Percentage share of a market based on a particular definition of the market does not in itself indicate the extent of monopoly power. If the question of the extent of the power is to be answered in the process of deciding what the market is, market definition becomes redundant.

If, for example, *du Pont* had been the sole producer of cellophane and had had a substantial preference-cost advantage over competing materials in all significant uses, that would have been shown by substantially higher profits. That alone would tend to show monopoly power. By merely leaning on the cross-elasticity of the demand, the inquiry would fail to combat those monopolies, which do not present power over price, because - consciously or unconsciously- the monopolist has not maintained margins of advantage that his product would have made available to him.

In the case at stake, the cross-elasticity test nothing said about the actual monopoly power of *du Pont*: in fact, if the defendant was charging a monopoly price for cellophane, the high cross-elasticity would have only meant that it could not have raised its prices any further without a sales loss. This is what has been defined as the "Cellophane fallacy"¹⁰⁵, insofar as the Supreme Court erred in considering that a finding of high demand cross elasticity might mean that the defendant has already exercised monopoly power by raising price to the "tipping point", after which there would be no profit maximization, since purchasers would respond by buying close substitutes.

The Court determined the size of the relevant market, as defined by the number and availability of substitute products, with reference to a supra-competitive (monopoly) price rather than the lower competitive price. Distinctive substitutes showing a high cross-elasticity of demand at prices that have actually been charged are to be included in the market even though produced at a substantial margin of disadvantage. As a result, the Court held that the defendant had no market power when in fact it had substantial market power.

¹⁰⁵ G. C. Schaerr, *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 Yale L.J. 670, 677 (1985); L. Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative*, 95 Harv. L. Rev., 1817, 1832-35 (1982) The author has affirmed that analysis of substitution possibilities with reference to prevailing market conditions... "presents a subtle, but most important, analytic trap"; D.I. Baker & W. Blumenthal, *The 1982 Guidelines and Preexisting Law*, 71 Calif. L. Rev. 311, 325-26 (1983). Aside from this analytic trap, the cross-elasticity criterion can be used to establish whether two products are close substitutes only when both are sold at competitive price.

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In *United States vs. Grinnell Corp.*, the Government charged Grinnell with monopolization of the supply of accredited central station protective services (CSPS). Accredited CSPS included the installation of a central alarm system “[I]ncluding such services as automatic burglar alarms, automatic fire alarms, sprinkler supervisory service”¹⁰⁶. Grinnell owned 87% of the market of accredited central station protective services and, even though the central station could provide burglary protection or fire protection separately, the Supreme Court considered these submarkets as irrelevant entities for antitrust purposes¹⁰⁷, hence it identified one single market of all central services, leveraging on the fact that the relevant market was actually the central service protection of property¹⁰⁸.

The Court purported to follow the *Cellophane* approach, considering the relevant market as the one affected by the cross-elasticity of demand of reasonably interchangeable products, but – in doing so- it did not test price responsiveness of substitutes. Moreover, it argued that, under the standards of *Cellophane*, in order to compete effectively a seller had to offer central services; consequently, no reasonably interchangeable systems were found¹⁰⁹.

Another important case concerning the definition of a product market is *Telex Corp. v. IBM Corp.*¹¹⁰. Plaintiff charged IBM with monopolization “in the manufacture, distribution, sale, and leasing of plug compatible peripheral products which are attached to IBM central processing units”¹¹¹. Telex had entered the peripheral hardware market for IBM computers by copying the defendant’s equipment and by charging a lower price than the defendant for a significant amount of time prior to pressing charges¹¹².

The defendant reacted by reducing its prices on peripheral products and by introducing slight design changes; as a result, no sooner did Telex begin losing customers, than it sued IBM for

¹⁰⁶ *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)

¹⁰⁷ *Ibidem United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)

¹⁰⁸ *United States v. Grinnell Corp.*, 384 U.S. 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). The installation of accredited CSPS would substantially lower the insurance premiums on houses. This is another factor the Supreme Court considered to identify a separate CSPS market, independent on the single alarm systems that it encompassed.

¹⁰⁹ *United States v. Grinnell Corp.*, 384 U.S. 574, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)

¹¹⁰ *Telex Corp. v. Int'l Bus. Machines Corp.*, 510 F.2d 894 (10th Cir. 1975) disapproved of by *Memorex Corp. v. Int'l Bus. Machines Corp.*, 555 F.2d 1379 (9th Cir. 1977)

¹¹¹ *Telex Corp. v. Int'l Bus. Machines Corp.*, 510 F.2d 894-898 (10th Cir. 1975)

¹¹² *Telex Corp. v. Int'l Bus. Machines Corp.*, 510 F.2d 904 (10th Cir. 1975)

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monopolizing the above-mentioned market. The core matter of the case was the identification of the product market, in particular whether it should be restrained to the peripheral devices that were “plug compatible”¹¹³ with IBM’s central processing units, or whether it should encompass all peripheral devices not necessarily “plug compatible” with IBM central units.

The District Court held that the relevant market was the one of the peripheral that could be plugged into IBM machines, since the original market itself had been shaped by IBM’s own products, being the latter the only manufacturer of peripheral products that were plug compatible with its own system; therefore, the finding of individual submarkets for each particular type of peripheral product gave IBM an original 100% command over the commerce equipment compatible with its own mainframes¹¹⁴. This monopoly was slowly eroded by the entry into the plug-compatible market with IBM CPUs of other manufacturers, including the plaintiff.

The Tenth Circuit reversed the conclusions of the district court, challenging the narrow construction of the peripherals market. It expanded the defined market to all peripherals¹¹⁵. The court applied the *Cellophane* cross-elasticity test, by taking into account the responsiveness of sales of one product to price changes of the other, but objected that “finding of actual fungibility is not necessary to a conclusion that products have potential substitutability”¹¹⁶. In the case at bar, reasonable interchangeability between peripheral products plug compatible with IBM CPUs and those compatible with non-IBM systems was proven, for these products, although non fungible, were

¹¹³ *Telex Corp. v. Int'l Bus. Machines Corp.*, 510 F.2d 899 (10th Cir. 1975). The Court affirmed that “[T]he term ‘plug compatible peripheral device’ is the specific class of equipment that enters into this case. What is meant is that a producer of a complete electronic processing unit manufactures, as noted, the central processing unit and peripheral components, which are geared to use on that central processing unit. Many manufacturers produce peripheral components primarily for attachment to central processing units of a particular manufacturer and so, therefore, the plug compatible peripheral device refers to a component which is functionally equivalent to the manufacturer’s peripheral device and can be readily plugged into that central processing unit. Undoubtedly it is the wide use of the IBM central processing unit that caused Telex and others to market peripheral devices which were plug compatible with the IBM unit and which could replace IBM peripheral devices which had been made for the IBM central system”.

¹¹⁴ *Telex Corp. v. Int'l Bus. Machines Corp.*, 510 F.2d 899-900 (10th Cir. 1975)

¹¹⁵ *Telex Corp. v. Int'l Bus. Machines Corp.*, 510 F.2d 914 (10th Cir. 1975). The Court assessed the power of IBM by examining “IBM’s annual share of new installations among IBM plug-compatible units as well as among all hardware units” See E. Gellehorn & W.E. Kovacic, *Antitrust Law and Economics in a nutshell*, 4th ed., West Publishing Co., St. Paul (Minnesota), p.105, (1994)

¹¹⁶ *Telex Corp. v. Int'l Bus. Machines Corp.*, 510 F.2d 917-918 (10th Cir. 1975)

interchangeable with minimal financial outlay, so cross-elasticity existed within the meaning of *du Pont*¹¹⁷.

3.2.2 The relevant geographic market

After having surveyed the judicial faceting of the product market, it is essential to focus on the other aspect of monopoly power, namely the geographic determination of such dominance. Scholars normally define the geographic market as the entire nation where products are distributed nationally and costs do not vary significantly¹¹⁸. One of the economics' account of the geographic market holds that it is not necessarily related to a place, but rather to buyers and sellers who are "in such free intercourse with one another that prices of the same goods tend to equality easily and quickly"¹¹⁹.

In the case law, it has been argued that the relevant geographic is an economic reality, not a political one; thus, it is to be identified in terms of the distances that the defendant and its competitors are willing to travel to service their customers, regardless of the boundaries of a state¹²⁰.

When it comes to delineating the geographic market, a general rule calls for considering it as the area in which the firm and its competitors sell their product and in which their customers buy without a ready access to an outside source of supply¹²¹. This principle has been expanded by Courts, which tend to delineate the relevant geographic area as the one where market would be diverted if a relevant increase in price for the primary product or service at stake took place, in a way to include it when calculating the defendant's market share¹²². However, applications of this

¹¹⁷ *Telex Corp. v. Int'l Bus. Machines Corp.*, 510 F.2d 919 (10th Cir. 1975)

¹¹⁸ K.G. Elzinga, *Defining Geographic Market Boundaries*, 26 *Antitrust Bull.* 739 (1981), W.G. Lavey, *A Close Analysis of Buyers and Antitrust Markets*, 61 *Wash. U.L.Q.* 752 (1983), W.G. Lavey, *Commentary: Focus of Antitrust Markets*, 62 *Wash. U.L.Q.* 671 (1985), G.J. Werden, *Use and Misuse of Shipments Data in Defining Geographic Markets*, 26 *Antitrust Bull.* 719 (1981)

¹¹⁹ A. Marshall, *Principles of Economics*, Book V, London: Macmillan, p.324, (1978).

¹²⁰ *Discon Inc. v. NYNEX Corp.*, 86 F. Supp. 2d 154, 162 (W.D.N.Y. 2000)

¹²¹ *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass. 1960). See also the case note *Restraint of Trade - in General - Unfair Competition in Natural Monopoly Situation Is Sherman Act Violation; Newspaper Stock Acquisition by Neighboring Monopoly Publishers Not Clayton Act Violation.* - *Union Leader Corp.*, 73 *Harv. L. Rev.* 1632, 1633 (1960)

¹²² In *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261 amended, 890 F.2d 569 (2d Cir. 1989) the relevant market was confined "to western world production on the basis of an accepted economic benchmark for identifying substitute goods within a given market; under that benchmark, sales of a "substitute" rise significantly in response to a non-temporary increase of 5% or more in prices of the primary product".

criterion still remain casuistic, in particular where the treatment of foreign imports into the US is concerned¹²³.

The Supreme Court has dealt with the issue of the geographic market in the above-mentioned *Grinnell* case, ruling that a national market existed in accredited CSPA, even if competition for the sale of fire and burglary alarm was realistically limited to metropolitan areas. The Court relied on the national planning and price plan of the defendant –and on its relations with other businesses on a national basis– to identify a national geographic market¹²⁴, even though there was no other accredited competitor in 92 of 115 in which Grinnell operated. Grinnell, as the two of the dissenters have put it, might have had 92 separate monopolies, but it would have been difficult to attach to each of the separate markets the exclusionary practices the defendant was charged with. By identifying a nationwide market, the Court provided no incentive to create localized competition¹²⁵. In the case at bar, however, evidence was in favor of identifying a local geographic market, such as the fact that the accredited CSPA could be furnished only locally, the business was carried out locally, and the defendant was found to have violated the Sherman Act only in certain areas of the country¹²⁶.

When a discriminating incumbent monopolist controls the market, the sales made at the same price only partially identify the actual geographic market; in fact, transportation costs are another factor influencing the scope of a geographic market. Transportation costs have the effect of linking those areas where a certain product is exchanged at the same price, and where that product can be transported if price differential exceeds shipping costs¹²⁷. At any rate, there is no consensus among scholars as regards how to gauge transportation costs in the delineation of the geographic market. Some argue that if transportation costs are high, they will also have the effect of sheltering local producers from suffering losses in sale in the event they would raise prices¹²⁸. This way, transportation costs will define a geographic market by excluding the entry into the market itself of either external competitors or of external fringe products, and therefore by giving the firm a power

¹²³ G.A. Hay, J.C. Hilke & P.B. Nelson, *Geographic Market Definition in an International Context*, 64 Chicago-Kent L. Rev., 711 (1988)

¹²⁴ *United States v. Grinnell Corp.*, 384 U.S. 575, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)

¹²⁵ *United States v. Grinnell Corp.*, 384 U.S. 589, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)

¹²⁶ *United States v. Grinnell Corp.*, 384 U.S. 590, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)

¹²⁷ T.F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 Antitrust Bull., 50 (1973)

¹²⁸ E.T. Sullivan, *Antitrust and its economic implications*, 5th ed., LexisNexis Publisher, Newark (NJ), p.28 (2008)

over the market that can be evaluated accordingly.

Some other have adopted a “diversion” approach which individuates the relevant spatial framework by resorting to the cross-elasticity of demand criterion, without regard to the impact of transportation costs: they claim that Courts should tend to evaluate the extent to what buyers will increase purchases from more distant suppliers in the event the defendant will raise the price for his output. If cross elasticity is high, the relevant geographic market will encompass the areas in which the other suppliers operate¹²⁹.

Moreover, the diversion criterion can also be used “[T]o show that the supply response of the competitive fringe (here consisting of the distant sellers that have some sales in the local market in question) is an increasing function of the ratio of the distant sellers’ sales in their other markets to their sales in the local market. The higher that ratio, the higher their supply response will be, because it is easier for distant sellers to divert a small fraction of their output to the local market should price rise there than it would be to divert a large fraction of their output to the local market. The simplest way to take account of the relationship between the distant sellers’ sales in other markets and their supply response in the local market is to include those sales in the relevant market--in other words, to include in the local market the entire output of any seller who has some local sales”¹³⁰.

With regard to transportation costs, the authors of the aforementioned quote argue that in the event an external seller and the whole of his sales were to be included in the relevant geographic market, the market power of the local seller can be measured without any account of the transportation costs and of the other distance-related costs that the sellers operating in another state or country would suffer. The reason is that the local seller has an interest in setting prices for his product below the cost of external –or foreign- producers, in order to keep the latter out of the market¹³¹. This tendency to lower prices would make up for higher transportation costs, therefore expanding the relevant geographic area to include in the analysis, and making proof of monopolization more improbable.

A price lower than the actual cost that the external producer has to bear in order to divert the product in the primary market will make entry unprofitable. Therefore, the authors maintain that

¹²⁹ P. Areeda & D.F Turner, *Antitrust Law*, volume 2, p. 533, (1978), K.G. Elzinga & T.F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 *Antitrust Bull.*, 45 (1973), W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 *Harv. L. Rev.* 963, (1981).

¹³⁰ W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 *Harv. L. Rev.* 964, (1981)

¹³¹ *Ibidem*

what matters is not the existence of barriers to entry –such as transportation costs- but the appraisal of whether an external product has overcome these logistic barriers and entered the domestic market, in a way to expand the geographic frame of reference and to erode the market dominance of the local producer.

The size of the total output of the external producer relative to the size of the local market will show his ability to overcome both barriers to entry and extra costs of production. The relation is evident by including the distant seller's output in the local market¹³².

The above analysis allows consideration of foreign trades in the relevant geographic market, since it proves valid with regard to both external and foreign sellers. The inclusion of outputs of foreign sellers in the relevant market for American antitrust purposes will serve to scale down some domestic monopolies¹³³.

Leaving aside transportation costs, the qualifications required to include in the relevant market outputs of distant sellers are the consistent presence on the market for several years, on the one hand, and the "identification of a group of consumers large enough to be entitled to the protection of the antitrust laws, and identification of the sellers who can readily supply this group of consumers, which may not be a group located within easy reach of foreign suppliers", on the other hand¹³⁴.

3.3 Department of Justice and the Federal Trade Commission joint Guidelines

In 1992 the Department of Justice and the Federal Trade Commission issued joint Guidelines concerning how federal antitrust officials analyze the competitive effect of horizontal mergers¹³⁵. The Guidelines provide directions on how to define the relevant market in Section 1.1. Market definition is relevant not only for the purpose of applying Horizontal Merger Guidelines but also for cases under the Sherman Act and the Clayton Act.

With regard to the product market definition, Section 1.11 defines

¹³² *Ibidem*, p. 965

¹³³ L.C. Thurow, *The Zero Sum Society*, New York: Basic Books, p. 146 (1980)

¹³⁴ W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 967, (1981)

¹³⁵ M.E. Guerin-Calvert, *The 1992 Agency Horizontal Merger Guidelines and the Department of Justice's approach to bank merger analysis*, 37 Antitrust Bull. 667, (1992), D.T. Scheffman, *Symposium on New 1992 Merger Guidelines*, 38 Antitrust Bull., 473 (1993), P.T. Denis, *Advances of the 1992 Horizontal Merger Guidelines in the Analysis of Competitive Effects*, 38 Antitrust Bull., 479 (1993). G.J. Werden, *Market Delineation under the Merger Guidelines: A Tenth Anniversary Retrospective Symposium on New 1992 Merger Guidelines*, 38 Antitrust Bull., 571 (1993), M.B. Coate, *Entry under the Merger Guidelines 1982-1992 Symposium on New 1992 Merger Guidelines*, 38 Antitrust Bull., 557 (1993).

the relevant market as a “product or a group of products such that a hypothetical profit-maximizing firm that was the only present and future seller (‘monopolist’) likely would impose at least a ‘small but significant and non-transitory’ increase in price” (SSNIP)¹³⁶. Even if the Guidelines do not use the term antitrust market, they refer to it rather than to the understanding of market in economics¹³⁷.

The threshold for significance of market power is expressed in terms of the extent of the price increase that the presumed monopolist will be likely to impose, and it is usually deemed relevant when it is at least of 5% and lasts for at least one year¹³⁸. This criterion is purely economic: in fact, on the one hand, the guidelines link market power to the capacity of price adjustment, but on the other, hand they do not contemplate the conditions that brought to the price adjustment¹³⁹.

The process begins with the identification of a product produced or sold by the hypothetical monopolist and with the question: what would happen if a hypothetical monopolist of that product imposed at least a SSNIP, but the terms of sale of all other products remained constant? If, in response to the price increase, a large enough number of buyers switch to another product and render such an increase no longer profitable, the substitute product will be included in the relevant market, as the next-best substitute for the defendant’s product.

The price increase question is then asked again for a hypothetical monopolist controlling the expanded product group. In performing successive iterations of the price increase test, the hypothetical monopolist will be assumed to pursue maximum profits in deciding whether to raise the prices of any or all of the additional products under its control. This process will continue until a group of products is identified such that a hypothetical monopolist over that group of products would profitably impose at least a SSNIP. Generally, the relevant product market is

¹³⁶ 1992 Merger Guidelines § 1.0 *et seq.* available at the website <http://www.ftc.gov/bc/docs/horizmer.shtm>

¹³⁷ Many economists argue that the economic market is unrelated to the antitrust market. D.T. Scheffman & P.T. Spiller, *Geographic Market Definition under the U.S. Department of Justice Merger Guidelines*, 30 J.L. & Econ. 123, 127-28 (1987), and Spiller & C.J. Huang, *On the Extent of the Market: Wholesale Gasoline in the Northeastern United States*, 35 J. Indus. Econ. 131, 132-33 (1986). Others argue against this distinction. J.A. Ordovery & D.M. Wall, *Understanding Econometric Methods of Market Definition*, 3 Antitrust, 20-23 (1989)W.F. Shughart II, *The organization of Industry*, 2nd ed. Houston TX, Dame Publications, p.148 (1990);

¹³⁸ 1992 Merger Guidelines § 1.11. Under the 1992 Guidelines, the price increase is not uniform, and the 5% threshold is applied to the product of one of the merging firms around which the market is delineated.

¹³⁹ J.F. Rill, *Merger Enforcement at the Department of Justice*, 59 Antitrust L.J. 45, 49-50 (1990)

considered to be the smallest group of products that satisfies this test.

In sum, the relevant product market pursuant to the Guidelines is identified as follows: a) singling out the defendant's product; b) identifying the products that the customers of the firm view as good substitutes if these have a prevailing price c) evaluate whether circumstances suggest "coordinated interaction"¹⁴⁰ between the two categories. In order to estimate the shift of customers to substitute products in the event of a SSNIP of the principal product, the government will use various factors:

1. Evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;
2. Evidence that sellers base business decisions on the prospect of buyer substitutions between products in response to relative changes in price or other competitive variables;
3. The influence of downstream competition faced by buyers in their output markets
4. The timing and costs of switching products¹⁴¹.

The relevant product market is identified when switches no longer occur. In case law, Courts have occasionally availed themselves of the SSNIPP tool as "a valid diagnostic tool" for both horizontal merger hypotheses and monopolization practices¹⁴². It has been said that "determining the relevant market can involve a complicated economic analysis, including concepts like cross-elasticity of demand, and 'small but significant non-transitory increase in price' ('SSNIP') analysis. ... Cross-elasticity of demand measures the percentage change in quantity that consumers will demand of one product in response to a percentage change in the price of another. ... When demand for the commodity of one producer shows no relation to the price for the commodity of another producer, it supports the claim that the two commodities are not in the same relevant market. ... Similarly, a SSNIP analysis asks whether a monopolist in the proposed market could

¹⁴⁰ The expression "coordinated interaction" is repeatedly used in the Guidelines. When it comes to the relevant product market, the need to test an interaction between the two sets of product, aside from the SSNIP criterion conveys an attempt to avoid the afore-mentioned *Cellophane* fallacy.

¹⁴¹ 1992 Merger Guidelines § 1.11

¹⁴² In *Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 917 (6th Cir. 2009) the Court has held that the SSNIPP test "measures whether increasing a product's price-usually by five percent-results in a substantial number of consumers purchasing an alternative product. The use of this technique has been recognized in antitrust case law, see *F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1038 (D.C.Cir.2008) (recognizing the SSNIP test as a valid diagnostic tool), and the district court found that the parties in this case agreed that it is "an accepted means of analyzing the interchangeability of a product and its substitutes".

profitably impose a small but significant and non-transitory price increase. ... If a significant number of customers would respond to a SSNIP by purchasing substitute products, the SSNIP would not be profitable for the hypothetical monopolist. ... If a monopolist could not profitably impose a SSNIP, the market definition should be expanded to include those substitute products that constrain the monopolist's pricing"¹⁴³.

With regard to geographic market, guideline n. 1.21 affirms that it entails the region within which the firm selling the relevant product can profitably impose a small but significant and non-transitory increase in price, holding constant the terms of sale for all products produced elsewhere.

The analysis departs from locating the firm under investigation, together with the locations of the other suppliers from which consumers will be induced to buy by a SSNIP for the main product¹⁴⁴; the same question is asked: what would happen if the hypothetical monopolist imposed a SSNIP for the main product, but the terms of the sale at all other locations remained constant? If the increase results unprofitable for the monopolist, then the location from which production is next best substitute for the monopolist's product will be added.

When assessing the likelihood that buyers will switch to other suppliers, the Government will consider the four above factors. Nevertheless, the Government can isolate a narrower market in the event that, on the one hand, the firm under investigation will raise prices and, on the other hand, buyers will be refrained from defeating the price increase by switching to a more distant seller¹⁴⁵.

Guidelines outlay some tools to delineate the relevant market diachronically, since they require the ascertainment of a price increase and an assessment of the substitutability that the price adjustment is likely to cause, in terms of both switching to a different product and buying in a different geographic area; moreover, the fact that the 5% SSNIP is not an fixed benchmark, but any change in price that is seen as made at "prevailing prices" can be held relevant show that the Guidelines ultimately leave room for the Government to evaluate circumstances of the concrete case at issue.

Finally, the extent to which a firm possesses market power over a

¹⁴³ *Theme Promotions, Inc. v. News America Marketing FSL*, 546 F.3d 991 (9th Cir. 2008) (California antitrust law).

"acknowledging the agency guidelines test for defining a relevant market as "recognized in antitrust case law" and generally describing the test as "measur[ing] whether increasing a product's price —usually by five percent— results in a substantial number of consumers purchasing an alternative product"

¹⁴⁴ <http://www.ftc.gov/bc/docs/horizmer.shtm>

¹⁴⁵ <http://www.ftc.gov/bc/docs/horizmer.shtm>

product in a geographic area is determined by the conduct of the firm and by the concurrence of three factors constraining the market: demand substitutability, supply substitutability and entry in the market¹⁴⁶. Demand substitutability indicates the extent to which an attempted exercise of market power in the market under investigation would bring consumers to switch to another market. Supply substitutability and entry both refer to the extent to which an attempted exercise of market power in the market would induce other suppliers not currently selling in the candidate market to begin operating in it. The distinction between the two factors (at least under the Guidelines) is that entry entails significant new investment in production or distribution, whereas supply substitution does not¹⁴⁷.

4. Proving market power

4.1 The economic definition of market power

In order to understand antitrust law, it is important to understand the meaning of “competition”, on the one hand, and of “market power”, on the other hand in economic terms, namely in terms of how the price system affects the distribution of income and the rationing of scarce resources in a market economy. The tools of economic analysis can be a formidable tool in understanding both court decisions and antitrust policies.

Competition on part of the producers allows consumers to bid for goods and services, matching their desires with society's opportunity/costs. The economic foundation of antitrust action is the belief that competition induces firms to satisfy consumer needs at the lowest price while using the fewest resources. Antitrust, in other terms, is about the effects of business behavior on consumers, and the relationship of the firm's conduct with the consumers' well being. Consumer welfare can be expressed by resorting to basic economic theory, particularly on the concept of efficiency.

The traditional economics understanding of efficiency is inherent in the process that compels business to respond to consumers.

¹⁴⁶ It is noteworthy to keep in mind that the guidelines refer to horizontal mergers; however, the above said holds true for monopoly power as well. G.J. Werden, *Market Delineation under the Merger Guidelines: a Tenth Anniversary Retrospective Symposium on New 1992 Merger Guidelines*, 38 Antitrust Bull. 520 (1993)

¹⁴⁷ The analysis of competitive constraints is marginal in the Guidelines; conversely, it plays a fundamental role in the definition of the relevant product market in the EU context, according to the *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5. The Commission itself defines the relevant market in terms of both demand-side and supply-side substitutability. See *infra* Chapter II, paras. 2.1.1 and 2.2

Consumer welfare is maximized when resources are allocated in a way to satisfy consumers' needs to the fullest. This process may be viewed under two perspectives, as allocative efficiency, on the one hand, and as productive efficiency, on the other hand¹⁴⁸.

Allocative efficiency implies the optimal assignment of the available resources among the various lines of industry, and occurs when there is an optimal distribution of goods and services, taking into account consumer's preferences. On the demand curve, allocative efficiency is reached at a rate of output at which price equals marginal cost of production, since at that point the price that consumers are willing to pay is equivalent to the marginal utility of that they extract from that output level; if the firm produces one more unit of output, the marginal cost will be greater than the marginal revenue and the extra unit is sold at loss; if it produces one less marginal cost will be less than marginal revenue and the firm will lose business¹⁴⁹.

Productive efficiency implies the coordination of the means of production of each industry in a way that produces the greatest result.

Allocative and productive efficiency are the two elements of consumer welfare. The goal of antitrust is to maximize allocative efficiency without impairing productive efficiency¹⁵⁰.

Allocative and productive efficiency are to be taken into account also to evaluate whether a particular monopoly is beneficial or detrimental to consumers. The monopolist is able to restrict output and in way to create a misallocation of resources. The evil of monopoly is the misallocation of resources that brings along both higher prices and smaller rates of production.

4.2 The economic thinking of the act of monopolizing – the output restriction rule

A monopolist is a seller that can change the price (p) of his product by changing the quantity (q) placed on the market; by reducing the quantity, he will raise the price above the competitive level, namely the price that established by market forces in a competitive market.

It has been seen that a company can be a single seller of a product and yet not a "monopolist" according to the Sherman Act provisions, because of the lack of entry barriers in that market.

¹⁴⁸ R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p. 91 (1993), quoting F.H. Knight, *The Economic Organization*, University of Chicago Press, p. 9 (1933)

¹⁴⁹ *Ex multis*, A. Sullivan and S.M. Sheffrin, *Economics: Principles in action*. Upper Saddle River, New Jersey, p. 111 (2003); E. Silberberg & W. Suen, *The Structure of Economics, A Mathematical Analysis*, 3rd ed. McGraw-Hill, p. 181 (2001)

¹⁵⁰ For the purposes of this essay, when the word efficiency alone is used, allocative efficiency is meant.

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Conversely, a company may not control 100% of market share and, nevertheless, align with the market power requirements that define a “monopolist”, because of the lack of solid enough competitors on the market.

The classic definition of “market power” is power to set the price for a product, which will be accepted by the other smaller operators in the market, also known as the competitive fringe. A firm has market power because its rivals do not have sufficient strength to increase or decrease output and influence the market. The market power is exercised over the remaining demand that is left unsatisfied by the competitive fringe¹⁵¹.

The measurement of the monopolist’s market power can be measured against the “perfect competition” benchmark, a theoretical hypothesis, where there are many suppliers each with the same market power, homogeneous products, full information, no transaction costs, and –in static economic terms- when price equals average cost, namely the cost of production of an extra unit of product.

In reality, all firms have a degree of market power, and are capable of raising their price above the perfect competition level. Market power becomes of concern for antitrust law when firms can exercise it for a sustained period of time in order to bring price above competitive level, and exclude one or more rivals that do not have the same degree of power to influence the price/output.

Another analytical flaw with regard to the analysis of market shares stems from law and economics: if market power were accounted as the ability to set prices above the marginal cost, that cost that would prevail in a perfectly competitive market, market power could be inferred in most markets, with the result that antitrust law could not feasibly address every deviation from perfect competition; it follows that courts have never equated the economic definition of market power with the antitrust notion of monopoly power underlying the interpretation of § 2. While most judges have recognized that “substantial” market power is involved in the statutory concept of monopolization, they have not succeeded in indicating how much power is substantial¹⁵².

The classic economic model of monopoly implies that there be a sole producer in a well-defined market¹⁵³; however, this model can be applied with a satisfying degree of approximation to firms that are simply dominant. The dominant firm model suggests that a

¹⁵¹ GJ Stigler, *The Dominant Firm and the Inverted Price Umbrella*, 8 Journal of Law and Economics 167 (1965)

¹⁵² P. Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 Cal. L. Rev. 959, 960 (1987)

¹⁵³ L. Cabral, *Economia Industriale*, Carocci Ed., Rome, p. 91 (2002)

firm may have the power to control prices even though there are other firms competing in the relevant market¹⁵⁴.

Parallel to the concept of market power, the economic notion of monopoly is “power over price”, and derives from the classic assumption that price is inverse to quantity¹⁵⁵. If the monopolist reduces his output below the competitive level, the market price will rise. His total costs will be lower, since he will be producing less, but his revenue will be higher, since he will charge a higher price.

The hypothesis that the monopolist’s cost will be lower since he will produce fewer units implies that his total costs vary proportionately with his output; if the reduction in output does not affect the price on the market, the market conditions will be invariant to the firm’s decision on how much to produce at a given cost. In such event, demand can be said to be inelastic, because an increase in the price will bring about a proportionately smaller decrease in the quantity demanded.

The concept of price elasticity of demand (PED) summarizes the relationship between price and quantity demanded, and illustrates the revenue changes (price per quantity) or, in general terms, the proportional change in one variable brought about by a proportional change in another¹⁵⁶.

¹⁵⁴ On the equivalence between the monopolistic and the dominant firm economic models, compare chapter II, para. 5 *et seq.*

¹⁵⁵ R.A. Posner, *Economic Analysis of Law*, 7th ed., Aspen Publishers, New York, p. 282, (2007), R.A. Posner, *Wealth Maximization Revised*, 2 Notre Dame J.L. Ethics & Pub. Pol’y 90 (1985-1987), E.K. Browning, *A Neglected Welfare Cost of Monopoly – and most Other Product Market Distortions*, 66 J. Pub. Econ. 130 (1997)

¹⁵⁶ R.A. Posner, *Economic Analysis of Law*, 7th ed., Aspen Publishers, New York, p. 279, (2007)

The notion of elasticity relevant to the present analysis is the elasticity of demand with respect to price, namely the proportional effect on the quantity demanded of a proportional change in price¹⁵⁷. In less scientific terms, demand is considered elastic if a small change in price causes a large change in quantity demanded. Inelastic demand is a situation in which the quantity demanded is unresponsive to price changes.

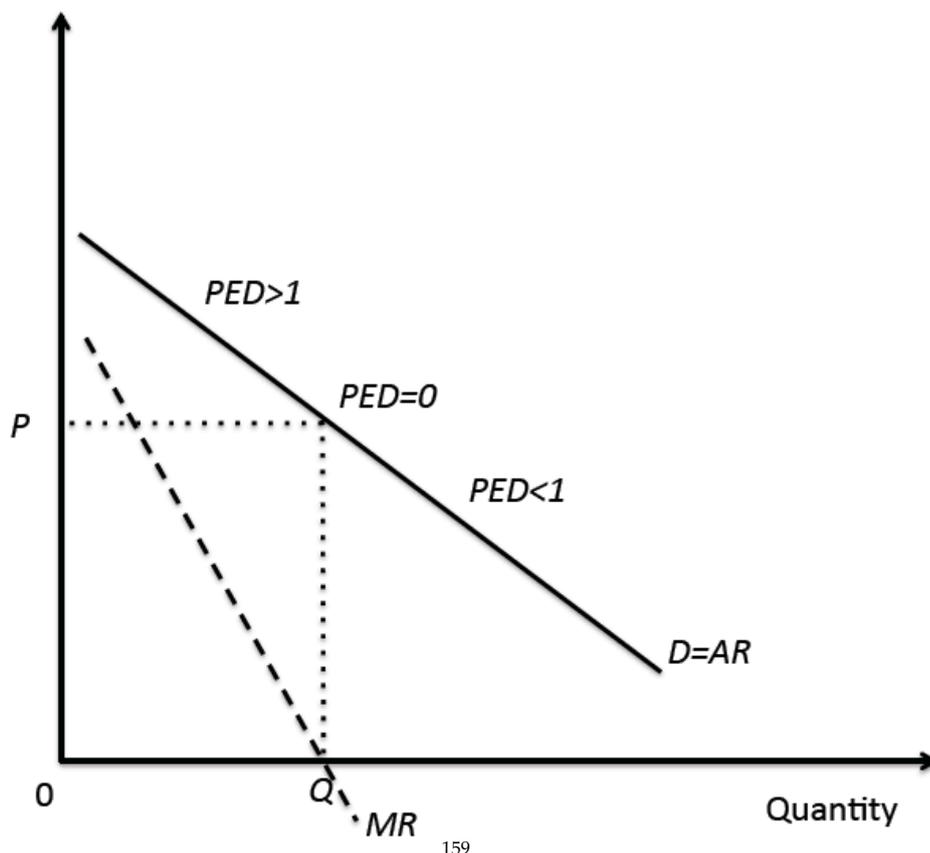
The elasticity of demand is normally expressed in minus value, because the negative sign indicates that P and Q are inversely related, which is the normal assumption for price/demand relationships: if a 1% price increase causes a demand fall by 2%, the elasticity of demand will be - 2. If a 1% price increase causes a demand fall by 1% the elasticity will be - 1, thus the total revenue will remain unchanged and the demand will be inelastic¹⁵⁸.

The relationship price/demand can be less than one, which means PED is inelastic; greater than one, which is elastic; zero (0), which is perfectly inelastic (demand curve vertical); infinite (∞), which is perfectly elastic (demand curve horizontal).

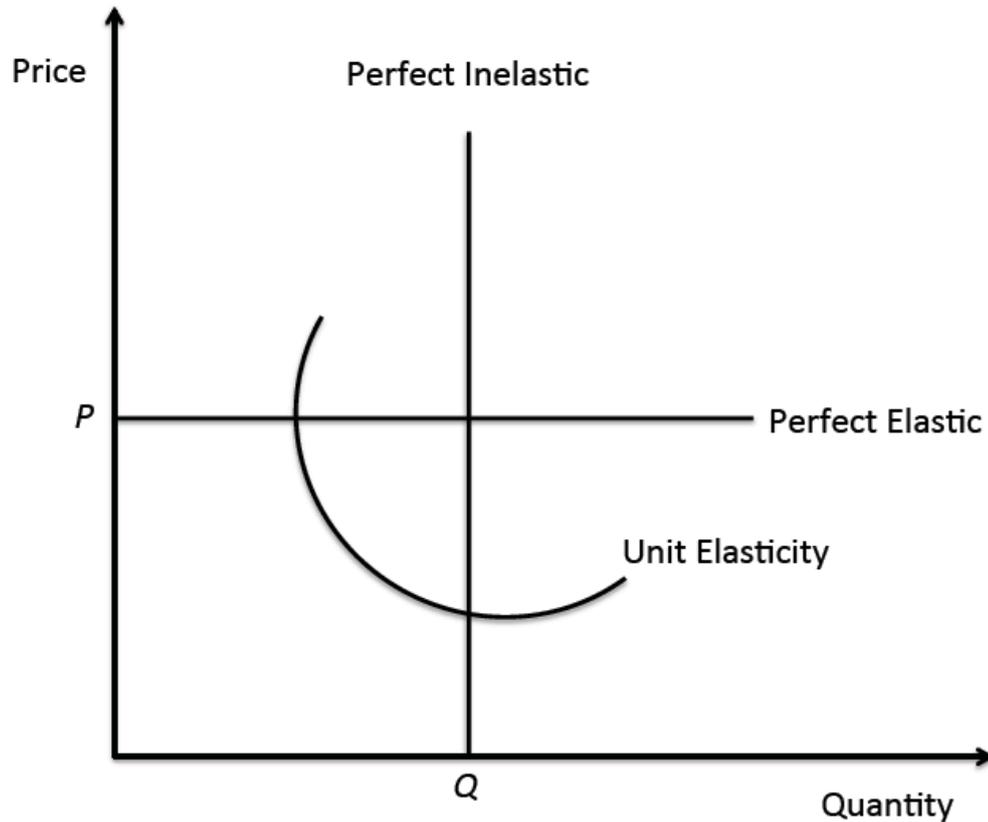
¹⁵⁷ *Ibidem*

¹⁵⁸ In order to grasp the inelasticity of demand, consider the following example. Suppose that at price 4 the quantity sold is 5, whereas if price were raised up to 5 the quantity sold would decrease to 4. In both cases the total revenue of the firm is 20; therefore the demand is said to be inelastic.

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There are three extreme cases of PED: 1) Perfectly elastic, where only one price can be charged; 2) perfectly inelastic, where only one quantity will be purchased; 3) Unit elasticity, where all the possible price and quantity combinations are of the same value. The resultant curve is called a rectangular hyperbola.



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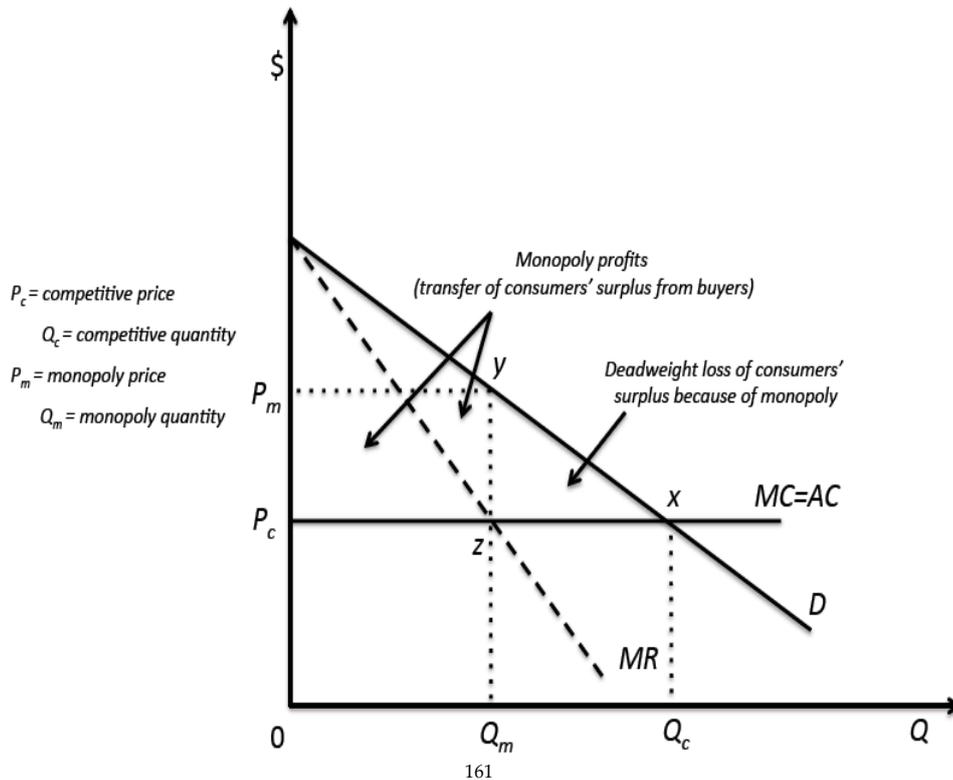
The main problem in expressing the degree of monopoly power by means of an economic index is the extent of variables that are to be taken into account, in particular the elasticity of the demand curve, rates of profit, degree of product substitution, marginal costs and related conditions of supply.

More specifically, this power is expressed by saying that the monopolist is confronted with a downward-sloped demand curve for his product, or with an elasticity of the demand that is less than infinity (non horizontal).

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http://www.economicsonline.co.uk/Competitive_markets/Price_elasticity_of_demand.html

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The above figure shows three curves. The first is the demand curve (D) and shows the relationship between change in output and change in price, the second is the average cost/marginal cost curve, the third one is the marginal revenue curve and shows the relationship between change in total revenue and change output sold. For the sake of clarity, marginal costs are assumed constant and identical.

In a perfect competition model, the marginal revenue curve would be assumed to be horizontal; however, in a monopoly, the curve is normally assumed to be downward sloped, always below price and to never intersect the demand curve. In other terms, the marginal revenue of the monopolist is always declining, and the more output the monopolist places on the market, the less his marginal revenue will amount to. Hence, one tenet of the monopoly model is that the output is artificially smaller than in the competitive market; that equals to asserting -in economic terms- that the core peculiarity of a monopolist is his power over price.

Marginal revenue is the contribution to the industry's total revenue made by selling one more unit of output. Because of the negative slope of the demand, any increase in output is associated with a decline in price, and marginal revenue will be positive

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http://www.justice.gov/atr/public/hearings/single_firm/docs/222104.htm

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(above the axis) or negative (below the axis) based on whether the change in output is proportionately smaller or greater than the change in price. The monopolist will increase his price (or reduce his output – the one implies the other) as long as a price increase would cause a proportionally greater reduction in the quantity demanded.

Another important assumption is that the monopolist is interested in maximizing profits, not revenues; thus, he might raise the price beyond the level at which demand turns elastic and his total revenues begin to shrink, and “so will stop raising his price only when any further increase would reduce his total revenues by more than the reduction in total cost resulting from the small quantity produced. He will raise his price until marginal revenue, the effect on his total revenues of price change, equals marginal cost”¹⁶².

The area YXZ in the above diagram is the so-called deadweight loss, representing what is lost by not using the enough resources to increase the output to the efficient point –where price equals marginal cost-.

The above model assumes that average cost is constant, and equals to marginal cost ($AC = MC$). Under perfect competition, equilibrium price and output is at P_c and Q_c . If the market is controlled by a single firm, the equilibrium for the firm is where $MC = MR$, at P_m and Q_m . Under perfect competition, the area representing economic welfare encompasses the triangle formed by the MC curve, the demand curve and the \$ axis, but under monopoly the area of welfare is deprived of the area Y, Z, X, which is traditionally defined “deadweight loss” and indicates the welfare loss that an artificial monopoly price will impose on society.

An increase in price above competitive level has two negative effects on consumers welfare: first of all it causes a transfer of wealth from consumers to firms, since the former purchase the good or the service at a higher price than in a competitive market; second, they destroy rents by forcing some consumers with “shallower pockets” to exit the market.

In economic terms, the deadweight loss is the loss incurred in the non-fulfillment of the condition of “optimality”, in which price equals marginal cost¹⁶³. The deadweight loss is a conversion of

¹⁶² R. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, p.12 (2001)

¹⁶³ The point at which the demand curve intersects the marginal cost/average cost curve represents the “Pareto optimality”. In theoretical welfare economics “Pareto optimality” is a measure for efficiency. It was named after Vilfredo Pareto, an Italian economist who contributed to develop the field of microeconomics, and in particular the study of individuals’ choice. An allocation is Pareto-optimal when it is not possible to make at least one person better off without making anyone else worse off. “Better” and “worse” express

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social costs into monopoly profits, a transfer from consumers to the monopolist seller; it is not simply the cost that consumers are to bear due to a reduction in output. That justifies the hostility of economics towards monopoly.

According to the vast majority of industrial-organization scholars, the deadweight loss does not encompass the Pm, Y, Z, Pc (L) area, because it corresponds to the increase in profits associated to the above competitive price. It represents a mere transfer of rents from consumers to the firm that is irrelevant to the scopes of antitrust law. Some authors, however, indicate that the social loss brought about by a monopoly is quite small in relation to the total revenue of the industry at the monopoly price. They hold that the costs of monopoly should not only be represented by the area Y, Z, X (D), but the area Pm, Y, Z, Pc (L) should also be recognized as relevant¹⁶⁴. Therefore, the call for an efficient antitrust policy is more significant.

$$D = \frac{1}{2}(\Delta P \Delta Q)$$

$$L = \Delta P(Q_c - \Delta Q)$$

$$\frac{D}{L} = \frac{\Delta Q}{2(Q_c - \Delta Q)}$$

$$\frac{D}{L} = \frac{P}{2\left(\frac{1}{\varepsilon} - p\right)}$$

$$D + L = pR_c - \frac{1}{2}(\Delta P \Delta Q) = R_c\left(p - \frac{1}{2}\varepsilon p^2\right)$$

purely subjective preferences, which can be exemplified in a "utility function", or ordinal numerical index of preference satisfaction. L. Amoroso, *Vilfredo Pareto*, 6 *Econometrica*, no. 1, (1938)

¹⁶⁴R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, p.17 (2001). Elsewhere, the author has affirmed that the social costs of monopoly should account the total revenue of the industry at the monopoly price, under two assumptions: the first is that becoming a monopolist is a competitive activity; hence, the expected profit from obtaining a monopoly is zero. Firms seeking a monopoly expend resources until the last dollar spent increases the expected value of having a monopoly by one dollar. The second assumption is that the costs of becoming a monopolist are constant, so that the sum of the opportunity cost of becoming a monopolist is equal to the expected value of the monopoly. Therefore, the total social costs are to encompass the total revenue of the industry and the difference in costs brought about by the output reduction. See R.A. Posner, *Social Costs in Monopoly and Regulation*, 83 *Journal of Political Economy*, n. 4, 811 (1975)

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Since $D = \frac{1}{2}(\Delta P \Delta Q)$ and $L = \Delta P(Q_c - \Delta Q)$, the relative sizes of D and L are given by $\frac{D}{L} = \frac{\Delta Q}{2(Q_c - \Delta Q)}$, assuming that the demand curve is linear.

This ratio can also be expressed in terms of elasticity of demand for the product at stake at the competitive price (E_d = elasticity of demand) and the percentage increase in price brought about by monopolization (p): $\frac{D}{L} = \frac{P}{2(\frac{1}{\varepsilon} - p)}$.

C, the total social cost of monopoly, is equal to $D + L = pR_c - \frac{1}{2}(\Delta P \Delta Q) = R_c(p - \frac{1}{2}\varepsilon p^2)$, where R_c stands for total sales revenue at the competitive price. This cost is higher, the less elastic the demand for the product at that output. For instance, at $E_d = 1$, a 1% increase in price above the competitive level will yield a total social cost of monopoly equal to 0,995% of the total revenues of the industry at the competitive level. At $E_d = \frac{1}{2}$ the percentage rises to 0,9975%. Posner warns that these formulas are accurate only for small changes in the price level. For larger changes E_d -the measurement of elasticity at a point- can no longer be used. And monopolization can result in large price increases.

As stated above, the economic concept of market power is the ability to set price above marginal costs. Under the perfect competition assumption, price equals marginal cost; therefore, when the firm does not face perfect competition, it will be likely to have some degree of market power and it will be likely to fix the output (q) which will sell at a price (P(q)), or to fix a price (p) and let the buyer decide how much he will buy at that quantity (D(p)). In order to produce the quantity (q) the monopolist will bear a cost (c). Since price and quantity are in function on the demand curve, it is irrelevant whether the monopolist will act on the output or on the price.

In order to maximize profits, the monopolist will choose to sell the quantity:

$$\Pi(q) = R(q) - C(q) = p(q)q - C(q)$$

The profit maximization condition occurs when marginal revenue equals marginal cost, at which point it has been seen that the misallocation of resources will cause the greatest loss in terms of consumer welfare:

$$\Pi(q) = R(q) - C(q) = p(q)q - C(q)$$

$$\frac{d\Pi(q)}{dq} = 0$$

$$\frac{dq(q)}{dq}q + p(q) - \frac{dC(q)}{dq} = 0$$

$$MR - MC = 0$$

$$MR = MC$$

Furthermore, marginal revenue is expressed by the formula:

$$MR = \frac{dp(q)}{dq}q + p(q)$$

$$MR < p$$

$$\frac{dp(q)}{dq} < 0$$

$$MR = \frac{dp(q)}{dq}q + p(q) = p(q)\left[\frac{dp(q)}{dq} \times \frac{q}{p(q)} + 1\right] = p(q)\left[1 - \frac{1}{\varepsilon}\right]$$

$$\frac{p - MC}{p} = \frac{1}{\varepsilon}$$

In a monopoly MR is always less than p, since $\frac{dp(q)}{dq} < 0$ ¹⁶⁵.

4.1 Economic Thinking of market power – the Lerner index and the Bain index

The law and economics account of market power suffers from an analytical flaw: if market power is the ability to set prices above the marginal cost, that cost that would prevail in a perfectly competitive market, market power could be inferred in most markets, with the result that antitrust law could not feasibly address every deviation from perfect competition; that probably explains the reason why courts have never equated the economic definition of market power with the antitrust notion of monopoly power underlying the interpretation of § 2. While most judges have recognized that “substantial” market power is involved in the statutory concept of monopolization, they have not succeeded in indicating how much power is substantial¹⁶⁶.

The above is not to deny the analytical attempts that have been made to measure market power quantitatively, in search of a

¹⁶⁵ L. Cabral, *Economia Industriale*, Carocci Ed., Rome, p. 101 (2002)

¹⁶⁶ P. Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 Cal. L. Rev. 959, 960 (1987)

relevant economic threshold that could also be used in antitrust litigation. 1934 professor Abba Lerner published an article in the *Review of Economic Studies* in which he developed a mathematical formula to measure the monopolist's market power. This formula is nowadays known as *Lerner Index*, which is expressed mathematically by the equation:

$$L = \frac{(P - C)}{P}$$

L stands for *Lerner Index*, P is the profit maximizing price and C is the marginal cost at the profit maximizing output¹⁶⁷. Lerner holds that a monopolist is a firm facing a downward sloping and elastic demand curve. The slope of a demand curve defines monopoly; the index measures the degree of monopoly, which is identified by the difference between the firm's price and its marginal cost at the profit-maximization rate of output. It expresses proportional deviation of price at the firm's profit maximizing output from the firm's marginal cost at that output¹⁶⁸.

The assumption is that the price charged under competitive conditions is equal to marginal cost; therefore, the formula measures the difference between the firm's profit maximizing price and the competitive price divided by the profit-maximizing price. The higher the index is, the greater market power of the firm is. In pure and perfect competition price equals marginal cost, and the index is equal to zero. If the output is costless and marginal costs equals to zero, the index is 1 and shows the ability to fix a price for a free good¹⁶⁹.

Lerner was the first scholar who maintained that the social loss from monopoly consists of the divergence between price and marginal cost rather than price and average cost¹⁷⁰.

Moreover, not only does the formula express market power, but also shows the relationship between the firm's market power and the elasticity of the demand that the firm itself faces. It is manifest that the ability of the firm to charge prices above competitive level depends on the elasticity of demand. Thus, the *Lerner Index* is

¹⁶⁷ E.T. Sullivan, *Antitrust and its economic implications*, 5th ed., LexisNexis Publisher, Newark (NJ), p. 24 (2008), A. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 *Rev. Econ. Stud.* 157 (1934), W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 *Harv. L. Rev.* 937, (1981). The *Lerner Index* is grounded on the assumption that firms are profit maximizers.

¹⁶⁸ F.M Scherer & D. Ross, *Industrial market structure and Economic Performance*, 2nd ed., Rand-McNally Inc., Chicago p.56 (1980)

¹⁶⁹ In high technological markets (e.g. software markets), marginal costs are close to zero, since the cost for the production of one more unit of a product does not rise above average. The Lerner index shows that in this case the producer has a greater market power, being free to fix the price or establishing the output at the point of maximum revenue, without incurring in extra costs.

¹⁷⁰ A. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 *Rev. Econ. Stud.* 168 (1934)

equal to the reciprocal of the elasticity of the demand curve of the firm¹⁷¹:

$$L = \frac{(P - C)}{P} = 1 / E_d \text{ (elasticity of demand)}$$

A lower elasticity implies a higher index and a greater market power, whereas a higher elasticity implies a lower index and a lesser market power. A bigger divergence between P and C meant a bigger monopoly power. The degree of monopoly power varies directly and only in accordance with the demand elasticity of the product sold by the monopolist.

The starting point of the Lerner construct is what he defined “the social optimum” which is reached in perfect competition and stands as the welfare-benchmark in the study of economics of welfare¹⁷². This condition is met when the demand curve for the product of the monopolist coincides with his average cost curve. Whether this equilibrium is feasible is irrelevant, since Lerner index measures the divergence from this optimal point.

Since marginal cost is an assumed construct –the effect on total cost of a small change in output- it is difficult to determine in practice what is the actual market power of the firm. Furthermore, the Lerner Index does not reveal whether the level of marginal cost is the result of superior efficiency or, in contrast, is the reflection of anachronistic methods of production in plants of uneconomic size and purchasing practices that exploit suppliers¹⁷³. In fact, “new economy” industries have marginal costs close to zero, but high research, development and innovation costs. Aside from the rather outmoded methodology, the *Lerner Index* has received numerous applications in the course of time, in particular to ascertain the change in the degree of monopoly in certain industries¹⁷⁴, and in general to identify the degree of monopoly of the whole American economy¹⁷⁵.

Another traditional index to measure market power is the *Bain Index*, elaborated by Professor Bain, who used the divergence between price and average cost to measure monopoly, rather than the difference in the *Lerner Index* between price and marginal

¹⁷¹ Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 940, (1981)

¹⁷² A. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 Rev. Econ. Stud. 168 (1934)

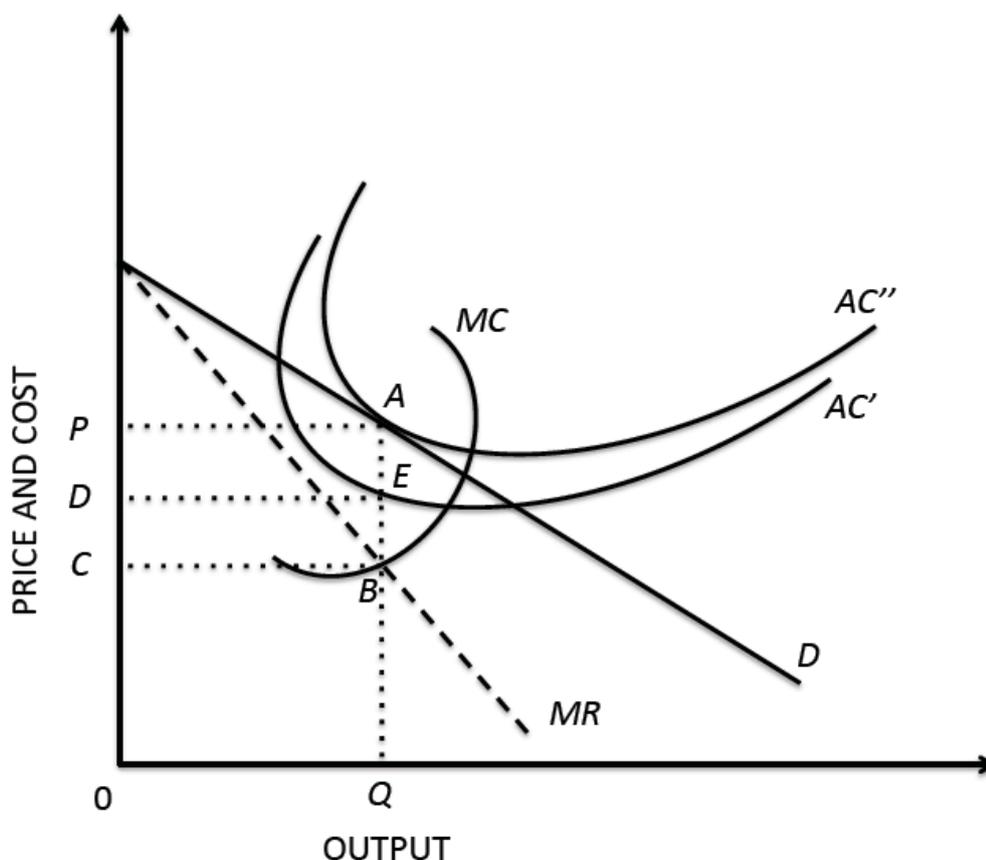
¹⁷³ E.M. Singer, *Antitrust Economics: Selected Legal Cases and Economic Models*, Prentice-Hall, Inc. Englewood Cliffs, NJ, p. 66 (1968)

¹⁷⁴ J.T. Dunlop, *Price Flexibility and the Degree of Monopoly*, 53 *Quarterly Journal of Economics* 522, (1939)

¹⁷⁵ M. Kalecki, *The Determinants of the Distribution of the National Income*, 6 *Econometrica* 97, (1938)

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cost¹⁷⁶. The author argues that it is possible to view the divergence between price and average cost as evidence, on a probability basis, of the divergence between price and marginal cost. He affirms: "Although excessive profits (a price-average discrepancy) are not a sure indication of monopoly, they are *if persistent*, a probable indication"¹⁷⁷.



Holding that average costs and marginal costs are neither constant nor identical, the graph shows that the firm has a demand curve D and an average cost curve AC^I , in which case the discrepancy between average costs and price is represented by the segment AE and the discrepancy between marginal costs and price by the segment AB . In accordance with the *Bain Index* assumption, the existence of AE (discrepancy average costs-price) is evidence of the existence of AB (discrepancy marginal costs-price).

Where the average cost curve is AC^I , the area $PAED$ represents the profits made by the firm at output Q ; this rate of profit is the measure of monopoly, and is defined as "the rate at which, when used in discounting the future rents of the enterprise, equates their

¹⁷⁶ J.S. Bain, *The Profit Rate as a Measure of Monopoly Power*, 55 *Quarterly Journal of Economics* 271 (1941)

¹⁷⁷ J.S. Bain, *The Profit Rate as a Measure of Monopoly Power*, 55 *Quarterly Journal of Economics* 271 (1941) *ibidem*

capital value to the cost of those assets which would be held by the firm if it produced its present output in competitive equilibrium. If this rate is greater than the rate of interest (or "normal rate of return"), the difference may be defined as a rate of excess profit¹⁷⁸.

Bain calculates the excess profit rate as follows:

R = total annual sales revenue;

C = currently incurred costs for materials, wages and salaries;

D = past incurred costs allocable to the above current venue, depreciation charge for the plants and machinery bought in the previous years, and amortization expenses for stock and materials bought in prior years but used in the current year;

V = owners' investments;

i = current interest rate for capital funds requiring the same degree of risk.

Economic excess profit = $R - C - D - i.V$, that is excess profits are equal to total revenue, less current costs, depreciation and amortization, and imputed interest on owners' investment.

Accounting profit = $R - C - D$, since it does not deduct the imputed interest on owners' investment.

If accounting profit equals the imputed interest on owners' investment ($R - C - D = i.V$), no economic excess profit will be generated and the price will equal average costs.

The main criticism towards the *Bain Index* is that there can be a divergence between price and marginal cost that does not imply a divergence between price and average costs. The above graph describes such a scenario by means of the curve AC^II , which at output Q is tangent to the demand curve D, and shows that the firm will gain no excess profits, even though it may possess monopoly power in the "Lernerian" sense, as the inverse of the elasticity of the demand curve¹⁷⁹.

Other criticism to an index based on profits is that it does not explain whether the profits are the result of monopolistic practices, or of superior efficiency, resulting from different factors of production, better techniques of manufacturing, or expertise in management. In fact, economic rents from specialized resources or factors of production, which give rise to profits, should be capitalized into the average cost curve for the firm¹⁸⁰.

¹⁷⁸ J.S. Bain, *The Profit Rate as a Measure of Monopoly Power*, 55 *Quarterly Journal of Economics* 276 (1941)

¹⁷⁹ E.M. Singer, *Antitrust Economics: Selected Legal Cases and Economic Models*, Prentice-Hall, Inc. Englewood Cliffs, NJ, p. 68 (1968)

¹⁸⁰ M. Friedmann, Comment of C.A. Smith's article *Survey of the Empirical Evidence of Economies of Scale*, in *Business Concentration and Price Policy*, Princeton University Press, p.235 (1955)

In conclusion, rather than its actual application, the importance of the Lerner index comes from the fact that it provides the conceptual tool for the decoding market power, namely the directly proportional relationship between the power of the monopolist and the elasticity of demand. The shortcoming of the Lernerian approach is that the lack of marginal cost data often makes the formula impracticable.

That in practice often leads to the employment of the Bain index, based on the empirical assessment of the firm's profit rates. Moreover, the attractiveness of the Bain model rests on the fact that there is not a one-to-one correspondence between monopoly power and market performance.

All things considered, both measurements are indicators of the market performance, which can complement the legal argument in monopolization claims.

5. Measuring market power – the role of market shares and the interaction with the firm's conduct

Once the relevant market is determined, the tool to assess the dominance of the purported monopolist firm is the computing of its market shares; at any rate, market share is only a starting point to prove the monopoly power of a firm¹⁸¹. Notwithstanding the traditional account in American antitrust law is that a mere high market share is something to be avoided, the standard view on the role of market share has been re-discussed in particular in the wake of *United States v. Microsoft Corp*¹⁸², in light of both network effects and economies of scale that monopolies in high technological markets are likely to bring about.

When network effects characterize a market, one product moves towards dominance because "the utility that a user derives from consumption of the good increases with the number of other agents consuming the good"¹⁸³. Therefore, high market shares in certain sectors ought not to be evaluated as inherently detrimental to competition, since the convenience of some products increases

¹⁸¹ Department of Justice, *Competition and Monopoly: single firm conduct under section 2 of the Sherman Act*, Gude- Report, September 2008, 2008 WL 4606679 (D.O.J.), 2, available at www.justice.gov

¹⁸² *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001). The issue of the efficiency of the relevant conduct of the monopolist, namely of network externalities and economies of scale will be analyzed *infra*.

¹⁸³ M.L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 *am. Econ. Rev.* 424, 424 (1985). To put it better "[a]n individual consumer's demand to use (and hence her benefit from) the telephone network ... increases with the number of other users on the network whom she can call or from whom she can receive calls."

H.A. Shelanski & J.G. Sidak, *Antitrust Divestiture in Network Industries*, 68 *u. Chi. L. Rev.* 1, 8 (2001), *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001)

in accordance with the increase of the number of people using them. As a scholar has rightly pointed out, network effects make competition to be “for the field rather than within the field”¹⁸⁴.

As stated above, finding of a dominant market share is a prerequisite for any inquiry into a firm’s monopolizing conduct, albeit courts have not asserted a fixed threshold amounting to monopoly power¹⁸⁵. Market shares are usually calculated by virtue of a two-prong process: first, the defendant’s historical output in production units or sales is measured, and second the output is divided by the total amount of production or sales in the demarcated area¹⁸⁶. Production units and sales are similar, even though sales typically match a firm’s output over a period of time. In fact, in the lifecycle of the firm it may happen that either orders exceed production, or production exceeds sales. In the first hypothesis, orders will inevitably overstate the defendant’s position when they remain unattended. Conversely, if production exceeds orders, large stocks will be set aside as unused capacity and will threaten to flood the market in the long, bringing harmful consequences to an entrant. Having that stated, sales provide the better measure for the defendant’s output.

Another way of measuring the “competitive significance”¹⁸⁷ of a firm is through its productive capacity, in both terms of unused capacity and capacity to meet market’s demand compatibly with its resource constraints. As regards the unused capacity, the defendant can reduce output in order to raise prices, but this ability can be hindered by the excess capacity of rivals that can soon generate saleable output. Therefore, a dominant firm’s capacity can be also defined as the current output on the market, plus the competitors’ capacity to meet the remaining demand that has been left unsatisfied by the defendant’s attempt to profit by reducing output.

As regards the firm’s resource constraints, in an expanding market the current production of a firm overstates its significance if the firm’s is not promptly capable of expanding its capacity in accordance with the market demand¹⁸⁸. All things considered, a

¹⁸⁴ H. Demsetz, *Why Regulate Utilities?*, 11 J. L. & Econ. 55, 57 & n.7 (1968)

¹⁸⁵ American Bar Association (ABA), Section of Antitrust Law, *Market Power Handbook: Competition Law and Economic Foundations*, ABA Publishing, Chicago, p. 19-20 (2005), E. Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 343

¹⁸⁶ P.E. Areeda & H. Hoverkamp, *Antitrust Law – An Analysis of Antitrust Principles and Their Application*, Wolters Kluwer Law and Business, New York, §2 p. 273-274 (2007)

¹⁸⁷ *Ibidem*, p. 276

¹⁸⁸ In case law, the above hypothesis is defined as “failing firm” defense. It is the extreme case of a dominant firm with large production but depleted reserves, and competitors with small production but larger reserves. Compare *F.T.C. v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 125 (D.D.C. 2004) case dismissed, 04-5291,

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caveat for using market capacity would be that it requires data that are not always available or easy to process.

One of the most renowned cases regarding the measurement of market shares of a firm is the afore-discussed *Alcoa* case, in which the core issue was the estimation of Alcoa's share in the virgin ingot market. The relevant market was initially narrowed down to the ingot market consumed in the U.S.¹⁸⁹, disregarding "secondary" ingot market -metal recovered from scrap, imported ingot, virgin ingot that Alcoa consumed in its own fabrication plants. This included the entire virgin ingot produced and sold in market. Under this market delineation, Alcoa was the sole producer of primary aluminum in the United States, and could not but be regarded as a monopolist, also on the grounds of a patent monopoly granted to the latter that lasted from 1899 to 1909¹⁹⁰. Yet, some concurring elements rendered the analysis more fragmented, namely the inclusion in the market of "secondary" aluminum. Under this market delineation, Alcoa's market share would oscillate between 33% and 90%¹⁹¹. In particular, if Alcoa's sales were divided by the sum of "primary-virgin", "scrap" and "import" aluminum, its market share would amount to 33%; contrariwise, if the "captive"-ingot that Alcoa produced and consumed in its own fabrication plants- were to be added to the defendant's sales and then the figure were to be divided by the sum of "primary", "scrap" and "import" aluminum, the defendant's market share would increase to 64%. Finally, if the sum of "captive" ingot and sales were to be divided by the sum of primary and import, Alcoa's market share would amount to 90%. In his famous opinion, Justice Hand affirmed that Alcoa's market share was 90%, therefore he bound the virgin ingot market to the "captive" one¹⁹². He encompassed the "captive" production in the totaling of market shares, based on the remark that "all ingot-with trifling exceptions- is used to fabricate intermediate or end, products; and therefore all intermediate, or end, products which 'Alcoa' fabricates and sell, *pro tanto* reduce the demand for ingot

2004 WL 2066879 (D.C. Cir. Sept. 15, 2004) in which the Court affirmed, "current production...may not be a stable predictor of future competitiveness, or a producer's ability to deliver in the future in the form of sales or contracts". Current production rates overstate the market presence of a firm that only has limited reserves remaining at present production rates, and cannot support the growing demand for its product in the long run.

¹⁸⁹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 425 (2d Cir. 1945).

¹⁹⁰ As a matter of interest, Alcoa had a patent for the production of the virgin ingot in the U.S., since the inventor of the process through which aluminum can be isolated, and can become commercially practicable by the elimination of the oxygen, had assigned the patent to the defendant itself. Therefore, Alcoa's monopoly was allegedly "honestly industrial" F.2d 416, 431 (2d Cir. 1945).

¹⁹¹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945)

¹⁹² E.M. Singer, *Antitrust Economics: Selected Legal Cases and Economic Models*, Prentice-Hall, Inc. Englewood Cliffs, NJ, p.44 (1968)

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itself”¹⁹³. Likewise, he excluded the secondary ingot from the computing of the total market product, even if scrap aluminum was a substitute for virgin ingot and had the same price as the latter. He leaned on the argument that the production of scrap aluminum over the course of years would have depended on the virgin aluminum that Alcoa had produced in the first place. Therefore, Alcoa “had its share in determining how much to produce”¹⁹⁴ and could estimate the impact of its production on the secondary cycles of the metal at issue¹⁹⁵.

Finally, Hand found that the only competition Alcoa was facing was from the imported virgin ingot, which in fact was included in the relevant product market. In doing so, he acknowledged the concept of cross-elasticity of demand and the likelihood that foreign producers would enter the market in the event Alcoa would raise its prices¹⁹⁶. Nevertheless, he gauged that the elasticity was low due to tariff barriers, transportation costs, and a historically documented low import volume. At any rate, the inclusion of import aluminum cut Alcoa’s market by 10%, down to 90%. With that affirmed, Hand uncompromisingly purported “that percentage [90%] is enough to constitute a monopoly; it is

¹⁹³ United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945). In stating so, Judge Hand followed the line of reasoning purported in the *Standard Oil* case: “as substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other”. Standard Oil Co. v. United States, 221 U.S. 1, 77, 31 S.Ct. 502, 523, 55 L.Ed. 619, 34 L.R.A., N.S., 834, Ann.Cas. 1912D, 734. Likewise, in *Alcoa* the defendant’s control over the ingot supply made it indifferent whether it was consumed in its own plants or sold to other producers. See *contra* E. Gellehorn & W.E. Kovacic, *Antitrust Law and Economics in a nutshell*, 4th ed., West Publishing Co., St. Paul (Minnesota), p.115, (1994). The authors argue in favor of the irrelevance of the “captive” production with the following example “[I]n measuring a coal’s company’s market power, it probably would be inappropriate to include all the production of coal mines owned by automobile or steel company whose entire output is consumed by them. Output from these mines may reduce total demand for coal, but this production is often unavailable to the market unless the auto and steel makers also have a sales force and the other capabilities needed to sell coal. To include all their production would understate the defendant’s coal company’s power”.

¹⁹⁴ E. Gellehorn & W.E. Kovacic, *Antitrust Law and Economics in a nutshell*, 4th ed., West Publishing Co., St. Paul (Minnesota), p.115, (1994)

¹⁹⁵ Posner suggests that the complete exclusion of the scrap aluminum market may have resulted in a too narrow market. The narrowness of the market might have led Justice Hand to require significantly high shares to characterize Alcoa’s enterprise as a monopoly. W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 978-979, (1981)

¹⁹⁶ United States v. Aluminum Co. of Am., 148 F.2d 416, 426 (2d Cir. 1945)

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doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not"¹⁹⁷.

Hand demonstrated that a 90% market share obtained without predation or merger is monopoly pursuant to § 2 of the Sherman Act, based on the distinction between a lawfully acquired monopoly and the act of monopolization, which is necessarily illegal¹⁹⁸. Despite acknowledging that a firm can passively achieve the status of monopoly by virtue of its "superior skill, foresight or industry"¹⁹⁹, and that Alcoa maintained its market position by superior efficiency, Justice Hand reasoned that Alcoa had nonetheless contravened § 2, because combining "90% of the producers of ingot would have been to 'monopolize' the ingot market". For that matter, Hand admits that the "so far as concerns the public interest it makes no difference whether an existing competition is put an end to, or whether prospective competition is prevented"²⁰⁰.

Three are the arguments that he used to support his analysis, of which the first two refer to the defendant's conduct, whereas the third implies a political consideration:

- 1) Price-fixing among competitors is illegal for it: Alcoa maintained its monopoly by obtaining promises from some electrical utilities not to supply power to any other aluminum manufacturer, whereby competitors would face higher prices for electricity as they would bid for the remaining input (naked exclusionary right)²⁰¹;
- 2) Alcoa barred other competitors from entering the aluminum market by repeatedly expanding its capacity, through excess accumulation of scarce inputs of bauxite necessary to produce aluminum, before demand for aluminum increased (overbuying)²⁰²;
- 3) The Sherman Act was passed to promote economic goals, as well as also social and moral ones. Courts would not be capable of

¹⁹⁷ United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945). Justice Hand found Alcoa liable of monopolization for solely having an honestly industrial monopoly See *supra*, note 35.

¹⁹⁸ United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945). See also R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p.166-168 (1978). The author stresses the inconsistency of Justice Hand's line of reasoning, in that he ultimately equates gaining and maintaining a monopoly.

¹⁹⁹ It is the "Monopoly thrust upon it" defense. See *supra* the *Alcoa* case, para. 2. As for the difference between unlawful achievement of monopoly and lawful passivity -monopoly thrust upon it-, Hand gives three examples in view of the achievement-passivity distinction: 1) natural monopoly because of economies of scale, 2) changes in taste or cost that drive all but one seller, 3) single producers who survives by virtue of its superior skill, foresight, industry;

²⁰⁰ United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945)

²⁰¹ United States v. Aluminum Co. of Am., 148 F.2d 416, 422 (2d Cir. 1945)

²⁰² United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945)

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constantly scrutinizing whether a producer -“having command of the domestic market”- was able to make a “fair” profit by virtue the highest possible ingenuity, the adoption of every possible economy, or the anticipation of technological advancement. Owing to this structural limitation, the Congress has chosen not to “condone good trusts and condemn bad ones”, but to forbid all. In doing so, the Congress possibly preferred a system of small producers rather than big concentrations, regardless of economic motives alone²⁰³.

As antitrust scholars have rightly highlighted, although the Supreme Court asserted the first two arguments that merely reflected the defendant’s internal efficiencies, the case was merely adjudicated on the basis of a political and social concerns²⁰⁴.

Consequently, there appears to be a benchmark, between 60% and 90% market share, in which any conduct of the firm might be

²⁰³ United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945)

²⁰⁴ United States v. Aluminum Co. of Am., 148 F.2d 416, 430-431 (2d Cir. 1945); on the point see T.G. Krattenmaker & S.G. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 Yale L.J. 209, 236 (1986). The authors advocate for a test to assess violation of § 2 based on the raising of rivals’ cost. In particular, they illustrate this basic paradigm with four types of behavior that could raise rivals’ costs: (1) “a bottleneck”; (2) the “cartel ringmaster”; (3) the “Frankenstein Monster”; and (4) “real foreclosure”. The bottleneck is the “most obvious method by which foreclosure of supply can raise rivals’ costs is the purchaser’s obtaining exclusionary rights from all (or a sufficient number of) the lowest-cost suppliers, where those suppliers determine the input’s market price”. The main application is the “essential facilities doctrine” (see *infra*).

The “cartel ringmaster” is a vertical restraint that facilitates cartel-like price coordination and enriches suppliers while raising the costs of the purchaser’s competitors. An example is the so-called “price squeeze”, when a firm purchasing a vertical restraint may, as part of the agreement, induce a number of its suppliers to deal with the purchaser’s rivals only on terms disadvantageous to those rivals.

The “Frankenstein Monster” is a method through which “the purchaser of an exclusionary rights contract creates and turns loose upon its rivals an industry structure likely to generate a price increase”. An example is when a manufacturer signs exclusive dealing contracts with all but one retailer. If entry barriers characterize the market, the one remaining retailer can monopolize trade with the manufacturer’s rivals. That manufacturer is the Frankenstein Monster.

Real foreclosure “can raise rivals’ costs when the purchaser acquires an exclusionary right over a representative portion of the supply, withholding that portion from rivals and thereby driving up the market price for the remainder of the input still available to rivals”. In *Alcoa*, Justice Hand reasoned that the defendant had acquired naked exclusionary rights over the supply of electricity in order to raise prices for the remaining inputs to the detriment of its rivals. Moreover, the defendant had overbought excessive amounts of bauxite before demand for aluminum increased. That left potential entrants facing the prospect to raise the prices for the remaining inputs by bidding higher on them. Krattenmaker and Salop argue that these practices are an example of real foreclosure by raising rivals’ cost.

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alleged illegal as such, by reasons of public interest. The only non-economic argument that Hand brought to sustain his claim against the defendant was that the latter's monopoly was perpetuated between 1909 and 1912 through unlawful practices²⁰⁵. However, the weight of the internal evidence of this allegation does not offset the populist rationale underlying the decision to quash Alcoa's market share as illegal. The struggle to individuate unfair practices yields to a no-fault monopolization theory and, when it comes to attacking on persistent monopolistic corporate size in itself, political and social decentralization concerns prevail over economic efficiency²⁰⁶.

Alcoa's reading is still a matter of dispute: the firm's size was found to contravene § 2 since it discouraged entry of other competitors, and whereas an illegal intent to monopolize did not apply in the decision, the display of monopoly power created a presumption of illegality, being at odds with the no-fault structural test put forward in Justice Hand's analysis.

After *Alcoa*, the Supreme Court embraced Justice Hand's reasoning in *American Tobacco Co. v. United States*²⁰⁷, for the analysis of single firm behavior rested on the *Alcoa* definition of monopolization as monopoly power -subsequent to a consistent market share- plus exclusionary conduct; where "exclusionary" is not limited to unlawful maneuvers actuated to limit competition, but can encompass any practice that has exclusionary consequences. With regard to the market share, the Court stressed that the defendant had a monopoly "amounting to over two-thirds of the entire domestic field of cigarettes, and to over 80% of the field of comparable cigarettes"²⁰⁸, which was rendered more effective by the reduced opposition of small competitors. Such a market share, accompanied by some acts -exchange of words- that gave effect to an unlawful conspiracy, was the relevant element the Court deemed necessary to decide against the petitioner.

Thus, a monopoly, although lawfully acquired, could contravene § 2, since the statute condemns the result to be achieved rather than the means used to acquire a monopolistic position²⁰⁹. In all, what is

²⁰⁵ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 423 (2d Cir. 1945)

²⁰⁶ R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p.168 (1978), J.E. Lopatka & P.E. Godek, *Another Look at ALCOA: Raising Rivals' Costs Does Not Improve the View*, 35 J.L. Econ. 311 (1992).

²⁰⁷ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)

²⁰⁸ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 797, 66 S. Ct. 1125, 1133, 90 L. Ed. 1575 (1946)

²⁰⁹ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 (1946). See similarly *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 488, 112 S. Ct. 2072, 2093, 119 L. Ed. 2d 265 (1992), in which the Court stressed "Our § 2 monopolization doctrines are...directed to discrete situations in which a defendant's possession of substantial market power,

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required is a general intent to establish and maintain the monopoly, “for no monopolist monopolizes unconscious of what he is doing”, which can be presumed by the conduct itself²¹⁰.

In *United States v. United Shoe Machinery*, the United Shoe’s monopoly on the industry of machineries used in shoemaking processes fell under the Government investigation; the defendant’s monopoly had been obtained from the acquisition of over 50 shoe machinery producers holding complementary patents. United Shoes was then the sole company in the US offering a complete line of shoe machines and had a share of approximately from 75 to 95% of the shoe machinery market; despite this large share, the defendant faced competition from a group of competitors, which offered competitive fringe machines for all the steps in the shoe manufacturing process²¹¹. The defendant’s dominance essentially leaned on its research, development, and on the actual supplying a large number of dependable machines and services; according to the facts of the case, shoe machinery costs only represented 2% of the wholesale price of a shoe²¹².

In that respect, *United Shoe* could not have allegedly monopolized the shoe manufacturing industry. Nevertheless, the Court found that the defendant had established its monopoly position in the machinery supply through the policy of not selling its machineries to shoe producers, but of merely leasing them. The practice was regarded as exclusionary because it gave *United Shoe* effective control over the shoe machinery commerce in violation of the Sherman Act.

In its reasoning, the Court defined the shoe machinery sector as a service industry rather than a manufacturing one, on the ground that through the restrictive lease the manufacturer would benefit from a range of supplier services provided by the lessor, but would also find himself bound to the lessor along the entire course of shoe manufacturing. By means of practices that do not

combined with his exclusionary or anticompetitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant’s agglomeration of power... Where a defendant maintains substantial market power, his activities are examined through a special lens: behavior that might otherwise not be of concern to the antitrust laws -or that might even be viewed as pro-competitive- can take on exclusionary connotations when practiced by a monopolist”. On the point, compare P. Areeda & D.F Turner, *Antitrust Law: an Analysis of Antitrust Principles and their Application*, Little, Brown and Co., Boston, §813, p. 300-02 (1978)

²¹⁰ *United Shoe Mach. Corp. v. United States*, 347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)

²¹¹ S.E. Masten & E.A. Snyder, *United States versus United Shoe Machinery Corporation: On the Merits*, 36 J.L. Econ. 41 (1941). The author argues in favor of the role of the leasing agreement as a solution to the-durable-goods-monopoly problem.

²¹² *Ibidem*

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contravene antitrust provisions *per se* –the defendant’s leasing policy and the supplying of assistance services-, in conjunction with its vast market power, United Shoe was found to have violated § 2. Ultimately, *United Shoe* reaffirmed the *Alcoa* principle that deliberate restrictive practices, yet not illegal, though apt to perpetuate a large market share were enough to satisfy the § 2 conduct requirement, regardless of proof of an actual abuse.

Post *United Shoe* approaches in policing § 2 with a view to both the relevant behavior and market share were more stringent, requiring not just an “improper conduct, but at a pernicious market structure in which concentration of power saps salubrious influence of competition”²¹³. *Berkey* reasserted the need to prove the abuse of market power, in that the defendant had consolidated its market share “by reaping the competitive rewards attributable to its efficient size”²¹⁴. In the case at bar, the plaintiff alleged that Kodak had restricted competition by introducing a new film format that was only compatible with new pocket-size Kodak cameras, therefore leveraging on its monopoly in the film industry, in order to drive Berkey off competition in amateur camera and photo-finishing equipment. In particular, Kodak had allegedly violated § 2 of the Sherman Act by not disclosing the new format in which it was manufacturing the film, thus, enabling rivals to prepare similar designs in order to stay on the amateur camera market once the new film would be introduced.

The Court of Appeals for the Second Circuit decided against the plaintiff’s claim and countered that Kodak’s ability to introduce both the new film and the new camera without pre-disclosure was a function not of its monopoly power, but of its superior business skill, innovation, and integration. Thus, the defendant’s refusal to disclose the product innovation did not constitute willful maintenance of monopoly power in violation of the Sherman Act²¹⁵. Moreover, it argued that a pre-disclosure duty would enable rivals to free ride on the dominant firm’s research and development and, therefore, would hamper incentive to innovate²¹⁶. Then, from the last passage it results that the interface between market share and the incentives for the development of new products is determined in favor of the latter. In fact, “the process of innovation is clearly tolerated by the antitrust laws”²¹⁷.

²¹³ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979)

²¹⁴ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979)

²¹⁵ C.E. Bagley & G. Clarkson, *Adverse Possession for Intellectual Property: Adapting an Ancient Concept to Resolve Conflicts Between Antitrust and Intellectual Property Laws in the Information Age*, 16 Harv. J.L. & Tech. 327, 337 (2003)

²¹⁶ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979)

²¹⁷ *Ibidem Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979), quoting *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 343 (D. Mass. 1953) *aff’d*, 347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)

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Likewise, great market shares are legitimate inasmuch as they stem from the entrepreneurial endeavor to innovate and integrate. The ability of a monopolist to market an innovation without pre-disclosure does not depend on its market power. Any firm, regardless of its market share, may introduce a new product without prior notice to competitors, although it may have to disclose details to non-rival firms in its supply and distribution chain. The ability not to pre-disclose is based on the capacity to manufacture enough of the complement to satisfy the initial demand, not on monopoly power²¹⁸. From a consumer-welfare perspective, to the extent consumers can reap the fullest possible benefits from technological change, normal incentives to innovate must be preserved, even for monopolists²¹⁹.

In sum, *Berkey* shows that high market shares fall outside the reach of the Sherman Act when they are qualified by technological and integration reasons. Even if the market is restricted to fewer options, an innovation is accepted so long as consumers can still choose between existing products and the new one; hence, a monopoly vested by high market shares is lawful when shares are a consequence of the innovation and integration process that the firm is likely to put in practice, unless some decisions have been biased through the use of monopoly power²²⁰.

²¹⁸ Case comment, *Antitrust Scrutiny of Monopolists' Innovations: Berkey Photo, Inc. v. Eastman Kodak Co.*, 93 Harv. L. Rev. 408, 415 (1979), Copyright (c) 1979 by the Harvard Law Review Association.

²¹⁹ A similar policy is followed as to patents. See *SCM Corp. v. Xerox Corp.*, 463 F.Supp. 983, 997-98 (D.Conn. 1978), *remanded on other grounds*, No. 79-8018 (2d Cir. May 10, 1979). P. Areeda & D.F. Turner, *Antitrust Law: an Analysis of Antitrust Principles and their Application*, Little, Brown and Co., Boston, §706, p. 127-33 (1978); F.M. Scherer & D. Ross, *Industrial market structure and Economic Performance*, 2nd ed., Rand-McNally Inc., Chicago p. 380-84 (1980); Turner, *supra* note

²²⁰ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2d Cir. 1979); drawing the line between the ability to leverage on innovation or on monopoly power is not easy. In that respect, some tying agreements can offer an example of abuse of monopoly position. A tying agreement violates the Sherman Act whenever the party imposing the tie has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not-insubstantial amount of interstate commerce is affected. *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307 (5th Cir. 1976). Another example of distortion is the "physical tie-in" between products, which occur when "[A] dominant or economically powerful manufacturer of a primary product introduces a newly designed product for which the manufacturer and its competitors make parts or accessories, and the competing secondary parts are physically incompatible with the new primary product. Because the manufacturer makes the only compatible secondary products, it achieves a temporary monopoly in the secondary market". D.W. Jordan, *Physical Tie-ins as Antitrust Violations*, 1975 U. Ill. L.F. 73 p.224. The above scenario was scrutinized in *Bell & Howell Co. v. Eastman Kodak Co.*, Civil No. 73-35 (N.D. Ill., July 8, 1974) in which the plaintiff contended that Kodak had violated § 2 of the Sherman Act by using its monopoly in the film

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As regards the relationship between market share and market power, in the measurement of market power Courts seldom consider market share independently, since direct evidence of monopoly power from the mere share is only rarely available. Monopoly can be proved circumstantially by examining market structures in conjunction with other factors, such as, the size and stability of the market shares, profitability and, in particular entry conditions²²¹. Since market share “is just a way of estimating market power, which is the ultimate consideration” the absence of barriers is relevant even though “the defendant has a large market share”²²². When a firm controlled nearly 100% of an industry characterized by easy entry, Courts have declined to infer monopoly power, since either actual or potential entry of rivals is likely to keep prices on a competitive level. Elsewhere, 70% market share in conjunction with numerous barriers to entry the US market has been deemed sufficient to integrate monopolization of the industry pursuant to § 2²²³.

Likewise, in *Spirit Airlines v. Northwest Airlines* the Court has gone further and affirmed that where monopoly power is ordinarily inferred by the possession of a predominant share, and “2/3 is generally considered to be a predominant share”, in markets with high entry barriers a share between 78 and 89% shows the requisite of monopoly, and any predatory conduct may be likely to bring prices above competitive level²²⁴.

The share of significant market may vary with other factors, but it is held relevant when it is well above 50%²²⁵; Courts have thus

market to strengthen its position in the camera market. Prior to introducing the new film, Kodak had developed new cameras compatible, in a way to immediately render the cameras manufactured by its competitors obsolete. The defendant can overcome the charge of illegal tie-in by proving that the tying and the tied products are so functionally interrelated that they constitute one single product. See D.W. Jordan, *ibidem*, p. 228.

²²¹ *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993). See also *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1250, 2002-1 Trade Cas. (CCH) 73607 (11th Cir. 2002) “Because ... evidence is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power.... Absent other pertinent factors, a share significantly larger than 55% has been required to establish prima facie market power. Other germane factors include the size and strength of competing firms, freedom of entry, pricing trends and practices in the industry, ability of consumers to substitute comparable goods, and consumer demand”.

²²² *Ball Memorial Hosp. Inc. v. Mutual Hosp. Inc.*, 784 F.2 1325, 1336 (7th Cir. 1986)

²²³ *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 451 (4th Cir. 2011)

²²⁴ *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 936 (6th Cir. 2005)

²²⁵ *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969) “[S]omething more than 50% of the market is a prerequisite to a finding of monopoly”; *Jack Winter, Inc. v. Koratron Co.*, 375 F. Supp. 1, 68 (N.D. Cal. 1974) market share of 42% “does not approach” monopolization; *Pacific Eng. & Prod.*

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purported that irrespective of the entry barrier “a market share at or less than 50% is inadequate as a matter of law to constitute monopoly power”²²⁶. It goes without saying that the 50%-market-share threshold below which Court do not assert §2 violations is a rule of thumb applied with due exceptions²²⁷.

When it comes to defining the term entry barrier, scholars divide between two models: on the one hand, an entry barrier is considered as any market condition that enables an incumbent firm to charge monopoly price without attracting new entry²²⁸, whereas on the other hand it consists of “a cost of producing (at come or every rate of output) which must be borne by firms which seek to enter an industry but is not borne by firms already in the industry”²²⁹. On the account of the first definition, the investment necessary to enter the market is not considered as an entry barrier, since it is assumed that the new entrant will bear the same costs that the incumbent firms had previously borne. The notion of entry barrier is drafted in terms of divergence between the difficulty for a new entrant to enter a market and the ease of the incumbent firm to charge a monopolist price. On the account of

Co. v. Kerr-McGee Corp., 1974 Trade Cas. 75,054, at 96,740 (D. Utah 1974) (51% of market does not constitute monopoly); Scholarship affirms that amongst other elements, market share is the primary factor in measuring market power. The percentage of share that supports the inference of monopoly is not a figure capable of precise definition, but it is well above 50%, American Bar Association, Section of Antitrust Law, *Antitrust Law developments*, New York: National Bureau of Economic Research, Columbia University Press, p.47 (1997)

²²⁶ Bailey v. Allgas, Inc., 284 F.3d 1237, 1250 (11th Cir. 2002). In United Air Lines, Inc. v. Austin Travel Corp., 867 F.2d 737 (2d Cir. 1989) the 2nd Circuit held that less than 31% of national market share does not suffice for asserting antitrust violations. In Dimmitt Agri Indus., Inc. v. CPC Int'l Inc., 679 F.2d 516, 529 (5th Cir. 1982) the 5th Circuit affirmed “market shares in the range of 16 to 25 percent... are insufficient-at least absent other compelling structural evidence-as a matter of law to support monopolization”.

²²⁷ In Energex Lighting Indus., Inc. v. N. Am. Philips Lighting Corp., 656 F. Supp. 914, 921 (S.D.N.Y. 1987) the Court found violation of §2 where defendants had only 25% of market share; however, that was sufficient to assert monopoly power, provided that defendants had failed to meet their burden of demonstrating that there was no factual support for the plaintiff’s allegation.

²²⁸ J.S. Bain, *Barriers to New Competition: their Character and Consequences in Manufacturing Industries*, Cambridge: Harvard University Press, p.3 (1962). The author considers economies of scale as barriers to entry, since in a market characterized by economies of scale the existing firm tends to have lower costs at a high output rate than the new firm.

²²⁹ G.J. Stigler, *The Organization of Industry*, University of Chicago Press, p. 67 (1983). The author argues that economies of scale and demand conditions of the firm –as well as of the industry- are the only factors governing the firm size. His definition of barrier as a higher entry cost overrides economies of scale, because the incumbent dominant firm is confronted with the same problem, namely the achievement of a lower cost through higher output. The incumbent firm is to bear higher entry costs, such as the losses arising out of selling below competitive price, in order to obtain higher market shares.

the second definition, investment costs are an entry barrier depending on the characteristics of each market. Entering a high-tech market implies significantly higher costs than entering a fruit distribution market. Therefore, the more burdensome the requirements for a firm to enter a market are, the higher the entry barriers.

In the wake of *United States v. Microsoft Corp.*²³⁰, the role of market shares has been analyzed in light of both network effects and economies of scale that monopolies in high technological markets are likely to produce. As it has been noticed above, in highly technological markets competition is rather for the field, than within the field²³¹. It is therefore not inherently detrimental to consumers that a firm achieves a high market share, since the former would extract a lower price, or a “network” utility in accordance with the increase of the number of people using them, on the one hand, and with the increase of the demand for these, on the other hand.

The original understanding of antitrust action that the unilateral practices of monopolistic businesses inevitably erode consumer welfare, has given way to the idea that in certain markets the size of the firm can actually be beneficial to consumers.

In conclusion, even if Alcoa’s formula for identifying relevant market shares is still valid in modern antitrust litigation²³², the role of market shares *per se* little adds to the antitrust scrutiny of the unilateral practices of a firm with a significant market power. Case law shows that the quantitative projection of monopoly power on a given market has constantly been read in conjunction with other elements, such as the market definition, or the political concern for small businesses that, following Alcoa, brought to the naked quashing of every monopoly as quantitatively identified, or in conjunction with the conduct element of § 2, following the post-structural interpretation of the provision, or in conjunction with the ability of the firm to innovate, with the entry barriers characterizing the market, or with the network effects or the economies of scale produced by a concentration of shares.

6. “Purposeful” and “anticompetitive” conduct requirement – Prohibited market behavior

Section 2 of the Sherman Act provides that both the act and the attempt of monopolizing are a crime, without defining what monopoly is, or specifying whether the mere attainment of

²³⁰ *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001).

²³¹ See *supra*, para. 5, note n. 162

²³² “Percentage [90%] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not” *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945)

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monopoly absent any offense is unlawful. This vagueness has brought Courts to police § 2 in accordance with different waves, in turn requiring an impropriety in achieving the monopoly position, or requiring a sole act of monopolizing. As seen above, in order to untangle the issue of monopoly Courts have focused on market definition rather than on a critical degree beyond which a market share in an industry contravenes § 2.

The formula found in the case law with regard to monopoly – power to control prices- has no meaning if price does not refer to the divergence from the competitive price (price of a good in a perfectly competitive market). It has been seen, however, that Courts tend to avoid an economic definition of price and rely on a rule of thumb, specifically the scrutiny whether under concrete circumstances the defendant has power to exclude competition with its presence on the market.

Monopoly power alone is not unlawful pursuant to § 2 unless some additional act is ascertained. More specifically, the alleged monopolist must obtain or maintain a monopolistic position by means of “deliberate and purposeful” acts, namely acts showing that the firm with market power purposefully and intentionally acquired, maintained, or exercised that power²³³.

Conversely, defendant can exculpate himself by showing that monopoly power was 1) attained “by superior skill, foresight, or industry”, or 2) “thrust upon”, because of a thin market or the enjoyment of economies of scale²³⁴.

A first consideration can be made by reflecting on the *Alcoa* formula: even though there is no violation of § 2 unless it is proved that the monopolist deliberately exercised its market power, specific intent to monopolize is not required. Law of monopolization may be contravened without a specific intent to build monopoly, if or monopoly results as consequence of defendant’s conduct; furthermore specific intent in common-law sense is necessary only where the conduct fall short of results condemned by the antitrust laws²³⁵, such as in the attempted monopolization hypothesis²³⁶.

²³³ United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945)

²³⁴ United States v. Grinnell Corp., 384 U.S. 563, 570, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966). Endorsing Justice Hand’s opinion. The *Grinnell* formula is reported for the sake of clarity: “[T]he offense of monopoly . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident”. See *infra*, para. 6.2.1, the analysis of the *Grinnell* case with regard to the *per se approach* of Courts.

²³⁵ United States v. Griffith, 334 U.S. 100, 68 S. Ct. 941, 92 L. Ed. 1236 (1948) disapproved of by Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

²³⁶ See *infra* para. 10, Attempted monopolization.

The second paramount element of the monopolization test is whether the conduct is anticompetitive; whilst a judicial notion of anticompetitive act has not yet been elaborated, the Supreme Court has followed the Areeda and Turner definition of exclusion and established that “exclusionary” conduct “comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way”²³⁷.

In 2007, Areeda and Hovenkamp reformulated the test, and held that exclusionary conduct entails acts that: (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits²³⁸.

6.1 *Standard Oil and the Rule of reason*

The foundational exegesis of § 2 was set in the seminal cases *Standard Oil Co. of New Jersey v. United States*²³⁹ and *United States v. American Tobacco Co.*²⁴⁰; Standard Oil controlled almost 80% of the US business of shipping, refining and selling petroleum and its products. Amongst all the business practices put in practice by the monopolist, some were found to restrain the interstate commerce in petroleum and its products: rebates, preferences, and other

²³⁷ See *infra*, para. n. 6.3

²³⁸ Courts have been reluctant to censor conducts of the dominant firm merely on the grounds of the firm’s dominance, conducts that were nevertheless available to its smaller rivals and that, absent monopoly power, would have been deemed lawful. Nevertheless, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 2859, 86 L. Ed. 2d 467 (1985), the court borrowed the Areeda-Turner formula to infer violation of § 2 in the defendant’s conduct, who refused to venture business with a competitor. P. Areeda & D.F Turner, *Antitrust Law: an Analysis of Antitrust Principles and their Application*, Little, Brown and Co., Boston, vol. 3 § 651 p. 78 (1978). As for the new formulation of the test, compare P.E. Areeda & H. Hovenkamp, *Antitrust Law – An Analysis of Antitrust Principles and Their Application*, Wolters Kluwer Law and Business, New York, § 3 p. 96 (2007). As regards the *Aspen* case, see note n. 211.

²³⁹ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62, 31 S. Ct. 502, 516, 55 L. Ed. 619 (1911)

²⁴⁰ *United States v. Am. Tobacco Co.*, 221 U.S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911). The two cases were delivered in the within a short distance of time were both decided on the ground of the rule-of-reason doctrine. In *American Tobacco* the Supreme Court stated “The standard of reason which had theretofore been applied at the common law and in the United States in dealing with subjects of the character embraced by the prohibitions of Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209, 15 U.S.C.A. §§ 1-7, 15 note, against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part thereof, was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided”.

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discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts, and the limiting the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed²⁴¹.

At issue in the case was not whether the monopolist had a relevant market power or whether he had attained that power through the afore-mentioned practices, but whether those practices could be defined anticompetitive²⁴².

The Supreme Court outlined the renowned "rule of reason" and stated that §2 is a complement of §1 of the Sherman Act, whose primary scope is the prohibition of monopolization. Such ban is to be read in conjunction with § 1, which prohibits unreasonable restraints of trade brought about by concerted actions. More specifically, a dominant firm can be found guilty of violating § 2 if it engages in conduct that would violate § 1 if engaged in by a combination of firms. Furthermore, the rule of reason requires a finding of specific intent to monopolize, which can be reasonably inferred from a conduct that cannot be unjustifiable on the basis of legitimate competitive goals, but can only be debunked as an effort to destroy competition. In other words, § 2 only seeks to prohibit the undue restraints of trade and the improper exercise of the right to contract, conducive to monopoly²⁴³.

Thus, when investigating the single firm conduct, criteria must reflect the policy these restrictions were enacted to serve, namely the prevention of any kind of undue restraint of trade or commerce, and the protection of freedom of contract as the most efficient mean for the prevention of monopoly. Freedom of contract is the core of freedom from undue restraint on the right to contract²⁴⁴. Having that affirmed, the Sherman Act does not

²⁴¹ Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 42-43, 31 S. Ct. 502, 509, 55 L. Ed. 619 (1911)

²⁴² "[T]he steps taken to protect that dominance involved the suppression of independent providers of new technology, followed by the assumption of control over the technologies". M.J. Bauer, The Metamorphosis of Antitrust Law: From Standard Oil Co. of New Jersey v. U.S. to U.S. v. Microsoft Corporation, 5 Duq. Bus. L.J. 81, 97 (2003)

²⁴³ Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 62, 31 S. Ct. 502, 517, 55 L. Ed. 619 (1911)

²⁴⁴ Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 62, 31 S. Ct. 502, 516, 55 L. Ed. 619 (1911)

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condemn all business practices leading to a concentration of market power in the hands of a firm, but only those that unreasonably restrain trade, and that would violate §1 if adopted by two or more firms jointly.

Whether a particular restraint of trade is unlawful is to be assessed with the employment of the same reason that courts have traditionally employed in interpreting the common law of restraints of trade²⁴⁵, with a view to deciding solely against those curtailments of competition that -under the circumstances of the case- have the purposeful and unduly tendency to monopoly or to generate its consequences²⁴⁶.

These evil consequences are the power to restrict output, the power to fix prices and the danger to deteriorate quality of the monopolized product²⁴⁷. Therefore, under *Standard Oil*, the Sherman Act serves as an externality regulation and can be used to abridge freedom of contract only when the latter produces monopoly and harms consumers and society²⁴⁸.

Competition is protected in a quantitative way: under the rule of reason Courts would ensure the appropriate amount of competition -and contractual liberty- that protects society from practices resulting in monopoly. Under this assumption, restraining practices can be classified as either pro-competitive or anti-competitive, and the defendant can be granted grounds to prove that his restraint might have "potentially redeeming value" or "pro-competitive justification"²⁴⁹.

The analysis has thus far regarded the rule of reason as one of the canons of antitrust analysis. This standard of reasonableness is a vacuum that Courts theoretically fill with meaning by recourse to the common law of trade restraints in force at the time Congress passed the Sherman Act. However, Courts have never translated the principle in static precedents, but have applied price theories

²⁴⁵ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60, 31 S. Ct. 502, 516, 55 L. Ed. 619 (1911)

²⁴⁶ Compare *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6th Cir. 1898) aff'd as modified, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899) "where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void".

²⁴⁷ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 57 and 61, 31 S. Ct. 502, 516, 55 L. Ed. 619 (1911).

²⁴⁸ Compare A.J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. Ill. L. Rev. 77, 88 (2003): the author argues that the reading of the Sherman Act as an externality regulation is consistent with the then-dominant approach to political economy, approach that was embraced by the Courts in the interpretation of the Due Process Clause of the fifth and fourteenth amendment.

²⁴⁹ *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)

to assess whether a certain restraint was reasonable, scrutinizing the economic consequences of the firm's conduct²⁵⁰. In other terms, restraint of trade has been interpreted not as a list of forbidden practices, but with a view to the economic conditions surrounding an arrangement.

6.2 *Alcoa and Griffith* the birth of the *per se* approach

The decision in the *Standard Oil* was not delivered unanimously, since Justice Harlan dissented in part from the majority opinion. Harlan held that the arguments sustaining the rule of reason interpretation of § 1 and § 2 -as a corollary of the former- had been rejected by the Supreme Court fifteen years earlier in the *Trans Missouri Freight Association* case²⁵¹. The concept of a *per se* approach, as the antithesis of the rule of reason interpretation is developed in one of the passages of the case:

"The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption of that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the Act of the Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the government, and this is done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do"²⁵².

Harlan maintained that a decision as to the reasonableness of the contract necessitated a judgment as to the reasonableness of the levels of price resulting from the contract. This type of inquiry

²⁵⁰ A.J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. Ill. L. Rev. 77, 90 (2003). Compare *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959), in which the Supreme Court stated "[S]ection one of the Sherman Act prohibits those classes of contracts or acts which the common law had deemed to be undue restraints of trade, and those which new times and economic conditions would make unreasonable, and section two of the Act makes prohibitions thereof more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade by any attempt to monopolize, or monopolization thereof, and the effect of both sections is to adopt the common-law proscription of all contracts or acts which have a monopolistic tendency and which interfere with the natural flow of an appreciable amount of interstate commerce".

²⁵¹ *United States v. Trans Missouri Freight Assn.*, 166 U.S. 290 (1896)

²⁵² *United States v. Trans Missouri Freight Assn.*, 166 U.S. 340 (1896)

would open floodgates of evidence and create considerable uncertainty as to the import of the Sherman Act and the legality of business conduct. Courts would not be allowed to set a standard to judge a reasonable price, since there would be too many parameters to evaluate in such assessment. Following this line of argument, the *per se* approach was elaborated with regard to the interpretation of § 2 of the Sherman Act, in response to the inefficiency of the rule of reason²⁵³. The inquiry of anticompetitive conduct proved vague and arbitrary, because of the lack of unanimity as to whether it was solely grounded on economic ends, or whether political and social considerations were at stake²⁵⁴. In addition to that, there was no consensus as to the values underlying the application of this standard, in particular whether the sole consideration ought to be consumer welfare, or whether the law should acknowledge competition considerations. The simultaneous use of conflicting values rendered the reasonableness approach insufficient for the purposes of the Sherman Act²⁵⁵.

As a consequence, a shift from an inquiry of the firm's intent to an inquiry of firm's business expansion has characterized the subsequent developments of §2 jurisprudence. Whereas in *Standard Oil* the Court affirmed that the statute omits "any direct prohibition against monopoly in the concrete"²⁵⁶, thus only monopoly as a consequence of a specific intent to restrain trade is forbidden, in *Alcoa* the defendant was condemned since it had merely expanded output, without any assessment of the pro-competitive effects of its presence on the market.

Likewise, *United States v. Griffith* indicated that antitrust laws may be contravened without a specific intent to restrain trade or to build monopoly, if restraint of trade or monopoly results as consequence of defendant's conduct, and specific intent in common-law sense is necessary only where the conduct falls short of results condemned by the antitrust laws²⁵⁷.

One could consider the *per se* rule as an exception to the rule of reason, or as an entirely separate approach to antitrust analysis;

²⁵³ T.A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685, 691 (1991)

²⁵⁴ R.H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 376 (1965)

²⁵⁵ R.H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 376 (1965)

²⁵⁶ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62, 31 S. Ct. 502, 516, 55 L. Ed. 619 (1911)

²⁵⁷ *United States v. Griffith*, 334 U.S. 100, 68 S. Ct. 941, 92 L. Ed. 1236 (1948) disapproved of by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). See *infra*, attempted monopolization.

instead, this rule is consistent with the first criterion, being an abbreviated version of the rule of reason²⁵⁸.

In fact, Courts determine that particular restraints are unlawful *per se* on the account of the experience acquired under the rule of reason, namely on the account that under the rule of reason certain arrangements will always create market power and will always unduly curtail competition²⁵⁹. Hence, even after the development of a *per se* jurisprudence, many commentators agree that the rule of reason should be the departing point of any antitrust analysis²⁶⁰.

6.2.1 *Grinnell* – a landmark application of the *per se* rule

A landmark application of the *per se* rule is *United States v. Grinnell Corp.*, in which the Supreme Court stated the prevailing formula that monopoly entails two elements, market power in conjunction with willful acquisition or maintenance of it²⁶¹.

A remark on the *Grinnell* formula is that it is difficult to distinguish a willful acquisition of a monopoly from the intent of a firm to expand business or improve its product or service, given the fundamental postulation that firms are profit maximizers.

Therefore, while firms often acquire or maintain monopoly by virtue of superior product, business acumen or historic accident, these occurrences may not exclude the concurring willful maintenance of monopoly power, because a monopoly “thrust upon it” is hardly sustainable without the help of an active conduct²⁶².

Nonetheless, the *Grinnell* Court does not give guidance as to how to define “business acumen” or “superior product”, and these notions lend themselves to become mouthpieces for the Court to proscribe a conduct as unlawful according to the circumstances, or to a particular “policy” reason²⁶³.

²⁵⁸ T.A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685, 692 (1991)

²⁵⁹ *Per se* treatment is appropriate “once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.” *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 279, 139 L. Ed. 2d 199 (1997).

²⁶⁰ L.A. Sullivan & W.S. Grimes, *The Law of Antitrust: An Integrated Handbook* 192-194 St. Paul (Minnesota) (2000). 7 Philip E. Areeda, *Antitrust Law* §1501 (1986);

²⁶¹ *United States v. Grinnell Corp.*, 384 U.S. 563, 570, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966). The *Grinnell* formula is reported for the sake of clarity: “The offense of monopoly . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident”.

²⁶² E. Elhauge, *Defining better monopolization standards*, 56 Stan. L. Rev. 253, 261 (2003)

²⁶³ Compare the *Berkey* case (*supra*, note n.147 *et seq.*), in which Kodak Co., the

Moreover, as an eminent scholar has held, if a conduct enhances the economic performance of the firm engaging in it will be perfectly lawful; conversely, if a conduct impedes competitors' ability to compete is by no means unlawful. Monopolization can be identified through the following test: if the dominant firm has improved its own efficiency in order to make a better or cheaper product, it should be free to sell that product at any above-cost price it wants, even though that may shrink rival market share to a size that leaves rivals less efficient. If the dominant firm has succeeded in furthering monopoly power by impairing rival efficiency, its conduct should be deemed unlawful²⁶⁴. At any rate, within this spectrum it is problematic to assess a course of conduct that on the one hand increases the firm's efficiency, but on the other hand decreases those of the rivals²⁶⁵.

6.3 The difficulties of establishing monopolization standards – the Areeda-Turner formula

Per se rule remains a vague concept among practitioners and even among some judges, who mainly fail to separate out two different components of the rule itself: whether and when (1) exculpatory claims are to be considered and (2) power must be proved in order to condemn a business practice.

As a scholar has rightly indicated, in practice the *per se* rule has been interpreted as the absence of a justification or a defense for the restraint of trade, regardless of the proof of monopoly power.

defendant, was charged with monopolization for having introduced a new film format that was only compatible with new pocket-size Kodak cameras, therefore leveraging on its monopoly in the film industry, in order to drive Berkey off competition in amateur camera and photo-finishing equipment. The introduction of the new film format could be interpreted in either way, as "business acumen" or as a malicious act of monopolizing the amateur camera industry. To the same extent, if the incumbent firm lowers prices in order to discourage new entries in the market but manages to keep prices above costs, that conduct can be considered as either the result of business acumen or as a willful maintenance of monopoly power. See, E. Elhauge *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—and the Implications for Defining Costs and Market Power*, 112 Yale L. Jour., 681 (2003)

²⁶⁴ E. Elhauge, *Defining better monopolization standards*, 56 Stan. L. Rev. 253, 263 (2003)

²⁶⁵ E. Elhauge *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—and the Implications for Defining Costs and Market Power*, 112 Yale L. Jour., 681 (2003). The difference between performance competition and impediment competition resembles the Ordoliberal doctrine of the difference between "performance competition" (*Leistungswettbewerb*) – making products more attractive for consumers, by improving their characteristics or lowering their price- and "impediment competition" (*Behinderungswettbewerb*) – inhibiting the rivals' capacity to perform. This doctrine has influenced EU Competition law, in particular with regard to the idea of "performance-based competition", to which the EU Courts approach is informed. See Chapter II, para. 5.1

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More specifically, the analytical process in finding a conduct unlawful *per se* is the same, and implies the consideration and rejection of a ground of exculpation based on a standard of reasonableness, namely on the rule of reason, on the one hand, and the application of this standard to the whole class of conduct. The validity of defenses or exculpations for the conduct and the proof of power place themselves on different standpoints, because the inquiry into power is much more costly and time consuming than the assessment of the defendant's defenses. Therefore, once a type of conduct has been defined as anticompetitive *per se*, absent an exculpation or defense, the court will decline to analyze the standard of reasonableness of that course of conduct, based on the proof of monopoly power²⁶⁶. In all, the rule of reason would degrade into an evaluation of the validity of the defendant's defenses, and into a standardization of this process.

The shortcomings of the *per se* rule above referred might explain why the attitude of Courts towards allegedly monopolizing acts, which are lawful absent proof of monopoly power, is oscillating.

In search of better monopolization standards, Courts have gauged firm's conducts in conjunction with the element of substantial market power, and have borrowed the famous formulation by professors Areeda and Turner (relevant conduct must be "anticompetitive or exclusionary"), where exclusionary "comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way"²⁶⁷. Clause 1 of the formula sets down an objective parameter, since conduct is to be substantially capable of creating or prolonging monopoly, while clause 2 implies that

²⁶⁶ P. Areeda, *The Changing Contours of the Per Se Rule*, 54 Antitrust L.J. 27, 27-28 (1985)

²⁶⁷ Courts have been reluctant to censor conducts of the dominant firm merely on the grounds of the firm's dominance, conducts that were nevertheless available to its smaller rivals and that, absent monopoly power, would have been deemed lawful. Nevertheless, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 2859, 86 L. Ed. 2d 467 (1985), the court borrowed the Areeda-Turner formula to infer violation of § 2 in the defendant's conduct, who refused to venture business with a competitor. P. Areeda & D.F. Turner, *Antitrust Law: an Analysis of Antitrust Principles and their Application*, Little, Brown and Co., Boston, vol. 3 § 651 p. 78 (1978). A new formulation of the formula can be found in P.E. Areeda & H. Hoverkamp, *Antitrust Law – An Analysis of Antitrust Principles and Their Application*, Wolters Kluwer Law and Business, New York, § 3 p. 96 (2007). In the 2007 book the authors define monopolistic conduct as acts that: (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits. As regards the *Aspen* case, see *infra*, para. 7.3.

anticompetitive exclusion a) shows no consumer benefit, b) shows that alternative and less exclusive practices are likely to bring about the same consumer benefit, in a way that the exclusion is unnecessary, c) shows ample lack of balance between the gains and the evils of exclusion²⁶⁸.

Both the rule of reason and the *per se* approach are essential elements in the interpretation of current monopolization laws; moreover, they both reflect “the never-ending conflict between the desire for certainty and the desire for flexibility that is as old as the process of the law itself”²⁶⁹. The *per se* doctrine offers greater elements of certainty but sacrifices the flexibility typical of the rule of reason. Whereas the rule of reason operates through a process of inclusion and exclusion of case in a spectrum on the basis of a case-by-case evaluation, the *per se* approach operates by converting single fact categories into fixed rules of law²⁷⁰.

6.4 Lawful practices

Courts have been reluctant to censor lawful conducts of the dominant firm that were available to its smaller rival, merely on the grounds of the firm’s dominance. The most significant outcomes adhesive to this line of argument is the afore-mentioned *Berkey* case, in which the Court allowed the defendant not to disclose a product innovation to the plaintiff²⁷¹ and, thus, reap the advantages of the disclosure when market conditions were more profitable for it.

Elsewhere, the dominant firm has been allowed to introduce a design change that improved the product for the benefit of consumers, but impaired competitors’ complementary products or services; the court refused to weight the anticompetitive effects brought by the innovation, but rested on the advantageous effects for consumers of the design improvements²⁷².

A manufacturer was not found to have monopolized a market by refusing to sell or license patented or copyrighted intellectual property to its competitors, in the absence of fraud on the Patent

²⁶⁸ A balance between gains and harms of exclusionary conduct is extremely difficult to strike. An example of that is the sacrifice of short-run benefits that are redistributed to consumers in order to gain a monopolist position in an industry in the long run; more specifically, it is the case of monopoly-predatory pricing of a firm which is meant to recoup the losses stemming from below-cost sales incurred in the attempt to reach a dominant position. E. Elhauge, *Defining Better Monopolization Standards*, 56 *Stan. L. Rev.* 343

²⁶⁹ C. Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 *Mich. L. Rev.*, 1149 (1952)

²⁷⁰ C. Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 *Mich. L. Rev.*, 1152 (1952)

²⁷¹ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979). Compare note n. 147 *et seq.*

²⁷² *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 998 (9th Cir. 2010)

and Trademark Office, even though such refusal had anticompetitive effects; conversely, the refusal was considered by the Court as the exertion of the defendant's statutory rights²⁷³.

A predatory price-cutting –above cost pricing, yet below market level- was not considered unlawful to the extent the predator had no reasonable prospect of recouping his investment prices through later supra-competitive profits; such interference in price competition falls outside of the scope of American antitrust laws in general, and of the Sherman Act in particular²⁷⁴; the reason is self-explanatory, in that American antitrust goal is not the protection of firms from price cuts, but the protection of consumer welfare in an perspective of market efficiency.

7. The most significant outcomes

In search of better monopolization standards, the following section will concisely describe the most significant outcomes of both the Supreme Court and the Circuit Courts that have shed light on the contours and the scopes of § 2.

7.1 *Trinko*

Similarly, in *Verizon v. Trinko* the refusal to provide assistance, parts or other support to competitors was not seen as a violation of § 2²⁷⁵. Under the Telecommunication Act of 1996 the claimant (the incumbent local exchange carrier – LEC) was under a duty to share its telephone network with its competitors; the duty consisted of offering, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and non-discriminatory²⁷⁶.

The Supreme Court argued that the presence of a substantial degree of regulation in that industry did not imply that the Sherman Act could be an independent source of liability: failure to meet the duty pursuant to the Telecommunication Act did not state any further claim under the Sherman Act. The Court

²⁷³ *In re Indep. Serv. Organizations Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000). The Court did not even question the anticompetitive effects of the defendant's conduct, but asserted the lack of opportunity to inquire into the subjective motivations for exerting his statutory rights.

²⁷⁴ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993). In particular, the Court held "To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result."

²⁷⁵ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410, 124 S. Ct. 872, 880, 157 L. Ed. 2d 823 (2004).

²⁷⁶ 47 U.S.C. § 251(3)

reasoned that the 1996 act did not alter antitrust law standards or created new claims, and that Verizon did not violate preexisting antitrust standards. The justices declined to add a new claim by making an exception to the proposition that there is no duty to aid competitors²⁷⁷.

This proposition is grounded on one pre-existing standard of § 2 expressed in *U.S. v. Colgate & Co.*, in that “in the absence of any purpose to create or maintain a monopoly (the *intent test*), the [Sherman] Act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal”²⁷⁸, with the exception to this rule set down in the *Aspen* case²⁷⁹, according to which under certain circumstances, a monopolist’s refusal to cooperate with rivals can constitute exclusionary conduct and violate § 2.

Elsewhere, the Court has held that a valid business justification exists for a conduct that is allegedly predatory or anticompetitive, that conduct cannot support inference of a § 2 violation²⁸⁰; in particular, the Court did not uphold the plaintiff’s claim that the defendant had monopolized a market of computer-based testing services, by acquiring a third party’s existing network of testing centers upon learning that the plaintiff was about to partner with the network as part of its own efforts to enter the market. The defendant managed to prove that such acquisition would expand its business and give it access to more customer, and that it was not characterized by a mere intent of eliminating competition²⁸¹.

7.2 Noerr and the Noerr-Pennington doctrine

In the renowned *Noerr* case, a group of 24 major railroad companies was charged with conspiring to restrain trade through a joint publicity campaign directed to influence governmental action with a view to impeding the ability of long-distance trucking companies to compete with them²⁸². The Supreme Court held that while an “anticompetitive purpose” underlay the defendants’ behavior, joint action to induce legislation was held to be of sufficient societal importance to warrant immunity from the

²⁷⁷ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411, 124 S. Ct. 872, 881, 157 L. Ed. 2d 823 (2004) The Court refused to extend the essential facility doctrine beyond the facts of the controversial *Aspen* case. Compare note n. 190

²⁷⁸ *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919).

²⁷⁹ See *infra*, note n. 211

²⁸⁰ *ACT, Inc. v. Sylvan Learning Sys., Inc.*, 296 F.3d 657, 670 (8th Cir. 2002)

²⁸¹ *ACT, Inc. v. Sylvan Learning Sys., Inc.*, 296 F.3d 657, 670 (8th Cir. 2002)

²⁸² *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S. Ct. 523, 529, 5 L. Ed. 2d 464 (1961)

antitrust laws²⁸³. As a matter of fact, the divergence between such conduct, on the one hand, and an actual monopolization or attempt to monopolizing, on the other hand, rests on the fact that an action of pressure expresses a mere aspiration to make wishes known to the government. Treating the faculty of associations to influence the passage of laws as relevant conduct for the purposes of the Sherman Act would substantially impair the government action on behalf of people and, ultimately, the whole concept of representation²⁸⁴.

Under the Noerr-Pennington doctrine²⁸⁵, antitrust laws do not apply to individual or group actions pursuing to influence legislative, executive, administrative or judicial decision-making, provided that the action is pursued in *bona fide* and is not a mere sham to cover an attempt to interfere with a competitor's business capacity²⁸⁶.

7.2 *Mercatus Group v. Lake Forest*

Another exemption from inference of § 2 violation with regards to conducts with anticompetitive effects was found when the defendant promotes its own product or service over those of competitors, even with misrepresentations²⁸⁷. A hospital did not engage in anti-competitive conduct that would support claims of actual or attempted monopolization, where it had successfully employed various tactics to dissuade two physician practice groups from relocating to a new physician practice center, including offering the groups incentives to not relocate, falsely implying that the center was in violation of federal anti-kickback regulations.

²⁸³ *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139, 81 S. Ct. 523, 530, 5 L. Ed. 2d 464 (1961)

²⁸⁴ *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139, 81 S. Ct. 523, 530, 5 L. Ed. 2d 464 (1961)

²⁸⁵ Four years after the *Noerr* case a similar reasoning was applied in *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), in which the Supreme Court extended antitrust immunity to an allegedly conspiratorial action between a union and a group of large mining companies directed towards inducing the Secretary of Labor to set minimum wages at a level adverse for employees of small mining companies. In particular, Small coal mine operators could not collect damages under Sherman Act for any injuries which they suffered from action of Secretary of Labor in acceding to behest of large operators and coal miners' union and establishing under Walsh-Healey Act a minimum wage for employees of contractors selling coal to Tennessee Valley Authority for purpose of making it difficult for small operators to compete in TVA term contract market, since secretary was a public official who was not claimed to be a conspirator, and jury, on request, should have been instructed to exclude these damages.

²⁸⁶ W. Holmes and M. Mangiaracina, *Antitrust Law Handbook*, Thomson Reuters, 2011 § 8:8.

²⁸⁷ *Mercatus Group, LLC v. Lake Forest Hosp.*, 641 F.3d 834, 841 (7th Cir. 2011)

The Court affirmed that the hospital “did not leverage its market power to make the physicians offers on supra-competitive terms impossible for any competitor to match. The Hospital simply offered the physicians many of the same incentives the new center offered to induce them to relocate their practices in the first place. Nor is there any evidence that the Hospital resorted to unfair or coercive tactics, such as threats to revoke the physicians’ Hospital staff privileges if they relocated to the new physician center”²⁸⁸. In addition, the alleged violation of anti-kickback regulation was found to have had, “at best, a minimal anticompetitive effect”²⁸⁹. All these situations reflect an intellectual endeavor to evaluate the merits of some acts that claimants argue to have an anticompetitive effect. It results that Courts tend to admit some practices that -although exclusionary- have a slightly rational business justification, and to repeal those conducts that have no intent other than driving existing competitors off competition, on the one hand, and obtaining monopoly power by raising prices and reducing output, on the other hand. Conversely, conducts that would be legal if employed by firms without monopoly power, but have the purpose of suppressing competition -rather than a valid business justification- have been found in contrast with § 2.

7.3 *Aspen* and the monopoly refusal to deal

The tendency to infer § 2 violations from conducts that would be legal in a competitive setting is evident in the controversial *Aspen*²⁹⁰ case, which has set down the standard “monopoly refusal to deal” theory. The Supreme Court identified an anticompetitive practice in the unjustified refusal of a monopolist to venture together with a competitor in a pooled multi-mountain ski-lift service that the two had developed jointly, where the refusal lacked any legitimate business justification²⁹¹.

Of the four major sky resorts that formed the entire ski area in Aspen, three belonged to the defendant, and only one to the plaintiff. The Supreme Court agreed that a firm is not obligated to participate in a joint marketing program with a competitor; nevertheless, the defendant’s decision not to cooperate amounted to liability under the circumstance that such refusal gave rise to monopoly in the downhill skiing market; at issue in the case was the characterization of the monopolist’s conduct can be characterized as exclusionary, anti-competitive, or predatory.

²⁸⁸ *Mercatus Group, LLC v. Lake Forest Hosp.*, 641 F.3d 834, 855 (7th Cir. 2011)

²⁸⁹ *Ibidem* *Mercatus Group, LLC v. Lake Forest Hosp.*, 641 F.3d 834, 855 (7th Cir. 2011)

²⁹⁰ See *supra*, note n.190

²⁹¹ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 2859, 86 L. Ed. 2d 467 (1985)

The monopolist did not merely reject an offer to participate in a cooperative venture, but instead elected to make an important change in the pattern of distribution, that is the termination of the “all-Aspen ticket” without a rational business justification, other than the attempt to drive the plaintiff off competition²⁹². The Supreme Court determined that the defendant’s conduct was characterized as anti-competitive on a threefold perspective: with regard to customers, skiers had developed a strong demand for the All-Aspen Ticket, which had originated in a market persisting for several years, and which customers had become accustomed to consider as one. With regard to the claimant, after this change in the pattern of distribution it had faced a significant decline of its business. Thirdly, with regard to the defendant itself evidence could not support the claim that its conduct was justified by a normal business rationale, but suggested a willingness to forsake short-term profits to achieve an anticompetitive end.

In all, the *Aspen* Court recognized the monopoly refusal-to-deal when affirmed “the high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified”²⁹³; however, the refusal-to-deal theory was accepted as an exception, given that the virtue of forced sharing is uncertain.

7.4 *Eastman Kodak Co. v. Image Technical Services, Inc.* and the contours of the anticompetitive tying

Another controversial and analytically demanding case in which the Supreme Court attempted to articulate some guiding principles to distinguish monopolizing conducts from lawful competition is *Eastman Kodak Co. v. Image Technical Services, Inc.*²⁹⁴

The petitioner adopted policies to restrict the availability of replacement parts -manufactured by itself- for its equipment to the respondent, independent service organizations (ISO), after the

²⁹² Originally, each competitor offered its own daily and half-day ski-passes, as well as a six day All-Aspen ski pass, a carnet containing six tickets, each redeemable at any resort of the area, at a significantly discounted price. No sooner did the defendant acquire three resorts of the area, than it issued a multi-resort ticket covering only its ski resorts. In 1978, the defendant threatened to discontinue sales of the All-Aspen ticket unless the plaintiff accepted a fixed percentage of the ticket revenue rather than an amount based on the fluctuating survey system and the historical average usage of each resort. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 585, 105 S. Ct. 2847, 2848, 86 L. Ed. 2d 467 (1985)

²⁹³ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). For a more in-depth analysis of the monopoly “refusal-to-deal” and of the “essential facility” doctrine, see *infra*, note n. 276

²⁹⁴ The case is also relevant as regards the offense of monopoly leveraging. See *supra*, para 2, note n. 46. And *infra*, para. 9, note n. 302. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)

latter began servicing the equipment.

Amongst other violations Kodak was charged with monopolizing and attempt to monopolize the sale of parts and services for copying and micrographic equipment, since only Kodak manufactured key parts needed to repair its equipment²⁹⁵. At the time, Kodak held an alleged share of 80 to 95% of the service market for repairing its own equipment and virtually 100% of the market of parts compatible with its equipment²⁹⁶. The termination of competitors' continued access to these parts drove the independent services organizations off the Kodak service market. The Supreme Court accepted ISOs' claim that, through tying the sale of parts and services for its cameras to the use of its service, Kodak had monopolized the market for its own parts and services. Furthermore, the Court found sufficient evidence of monopolization of this market in the fact that, after restricting supply of its replacement parts to ISO, Kodak had engaged in price increases and extracted monopoly rents from its consumers²⁹⁷.

Price discrimination against the claimants was in itself not sufficient to prove monopoly power. The Court maintained that possession of a dominant share in a market with no available substitutes sufficed to infer monopoly power within the meaning of *Grinnell*²⁹⁸. In fact, the price increase over the competitive level operated by Kodak constituted possession monopoly power on the account of the lack of readily available substitutes in the market of services and parts, which forced purchasers to buy at a price that they would have not agreed on in a competitive market²⁹⁹.

In reflecting on the Court's reasoning, an eminent scholar has argued that the economic sophistication for antitrust has stopped with this outcome. The Court accepted that Kodak had no power in the market in which it sold its equipment, but assumed that Kodak would use its monopoly in the parts and services to raise prices without harming the sale of its equipment. It is arguable

²⁹⁵ *Ibidem*

²⁹⁶ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 452, 112 S. Ct. 2072, 2076, 119 L. Ed. 2d 265 (1992)

²⁹⁷ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 467, 112 S. Ct. 2072, 2076, 119 L. Ed. 2d 265 (1992)

²⁹⁸ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 499, 112 S. Ct. 2072, 2099, 119 L. Ed. 2d 265 (1992). The Court applied the *Grinnell* test (monopoly power in conjunction with willful acquisition or maintenance of that power) see above note n.186

²⁹⁹ The Supreme Court was barred from applying the *Cellophane* case test (cross-elasticity of demand – see note n. 55 *et seq*), since there were no alternative substitutes on the market. This market configuration upheld the claim that Kodak's restrictive policy was not a consequence of a business strategy, but an attempt to jack up the market by reaping monopolist rents from it.

whether Kodak was able to extract monopoly profits on parts or services; nevertheless, the Court held that economic theory was not adequate to overcome allegations of fact of the contrary, and that the raise of the price for parts and services was inevitably above competitive level, merely by virtue of the absence of readily available substitutes. The author counters that it is impossible to raise the price for parts or services without raising the price for Kodak's machines. Thus, the decision would make no economic sense and would constitute an unsatisfactory development of antitrust law³⁰⁰.

As for the second element of "willingness of dominance" set down in *Grinnell*, the Court reckoned on the existence of valid business justifications for Kodak's restrictive policies. The petitioner purported the following reasons for its acts: (1) Maintaining product quality: "to promote inter-brand equipment competition by allowing Kodak to stress the quality of its service"; (2) achieving inventory efficiencies: "to improve asset management by reducing Kodak's inventory costs"; and (3) Avoiding free ride: "to prevent ISOs from free-riding on Kodak's capital investment in equipment, parts and service"³⁰¹.

The Supreme Court found none of these business justifications persuasive: the commitment to quality service leaned on the assumption that customers were unable to distinguish what breakdowns were due to bad equipment and what were due to bad products. But this justification was found inconsistent with Kodak self-service policy.

As for the second reason, the control of inventory costs, the Court affirmed that "the inventory of parts needed to repair Kodak machines turns only on breakdown rates, and those rates should be the same whether Kodak or ISO's perform the repair"³⁰².

With regard to the third justification, the Court affirmed that Kodak's understanding of ISO's free riding was inaccurate, in that it argued that ISO was free riding the repair market since it failed to enter the equipment and parts market. Conversely, the Court affirmed that one of the evils proscribed by the antitrust laws is

³⁰⁰ R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p. 433 (1993) By accepting ISOs' claim that, through tying the sale of parts and services for its cameras to the use of its service, Kodak had monopolized the market for its own parts and services, the Court assumed that the defendant had monopoly power over this market without any particular economic justification for the affirmation.

³⁰¹ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 483, 112 S. Ct. 2072, 2091, 119 L. Ed. 2d 265 (1992). The first and the third justifications (quality maintenance and avoidance of free riding) brought about by Kodak are two of the major arguments justifying the existence of a monopoly.

³⁰² *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 484-85, 112 S. Ct. 2072, 2091, 119 L. Ed. 2d 265 (1992)

the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously³⁰³.

7.5 *Microsoft* and the interface between monopolization and the thwarting of a new technology

In *US v. Microsoft*³⁰⁴ the firm's alleged anticompetitive conduct was characterized by the attempt to use its lawfully acquired Windows operating system (OS) monopoly to leverage its position into the Internet browser and other software markets³⁰⁵. More specifically,

³⁰³ *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 485, 112 S. Ct. 2072, 2092, 119 L. Ed. 2d 265 (1992)

³⁰⁴ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). The *Microsoft* case is one of the most articulated litigations of the 124-year history of the Sherman Act. Several violations were alleged, regarding both § 1 and § 2 of the Act. In sum, the case regards both a tying arrangement and leveraging a monopoly position in one market into another market. Often, the grounds claims of violations of § 1 and § 2 were based are intertwined; more specifically, inference of violation of § 2 by Microsoft was amongst other things based on a tying arrangement of the browser part and the non-browser part in the Windows operating system. This tying arrangement was also the objective element of violation of § 1 in the case at issue, and a standard conduct in restraint of trade in general; the case agreed that it is unlawful to maintain monopoly by a restraint of trade violating § 1; however, within the confines of the present work, the tying arrangement will be only analyzed with regard to the charge of monopolization pursuant to § 2 pressed by the US Government. For a more detailed description of the facts of the case, see *supra*, para. 1, Introduction.

³⁰⁵ S.C. Salop, R.C. Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 Geo. Mason L. Rev. 617, 623 (1999) The authors' manifest criticism towards the assumption that Microsoft –or any other monopolist– would have an incentive to leverage its monopoly power in the desktop operating systems market into a second market and increase the harm to consumers. They argue, in fact, that according to an economic result that was developed by Chicago School economists and legal commentators, a monopolist generally has no such incentive. The “single monopoly profit” theory says that in a single chain of production a monopolist can extract all of the monopoly profits available in the first market without vertically integrating (either explicitly or by contract) the non-dominated market. Because there is no anticompetitive incentive for leverage, it is argued, a monopolist's decision to integrate into a second market must be motivated by pro-competitive rationales. These rationales would involve either producing a superior product, reducing costs, facilitating entry, or increasing price competition. These efficiencies often may involve elimination of free riding of some type. Thus, it is argued, the antitrust laws should not attack vertical integration.

A firm with both market power and the ability to charge prices above cost would not increase its overcharge by tying or other forms of vertical integration, but by operating a sort of price discrimination, which permitted to extract more profits, but also to increase output (and decrease price). To the contrary, in the case of successive or complementary firms with market power, combining two products or process stages into a single firm would actually create efficiency, by increasing output and reducing price through the eliminations of double marginalization.

Post-Chicago economic analysis has suggested that there are a number of limiting assumptions required for this single monopoly profit theory to apply

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the Court investigated three conducts of Microsoft that were allegedly anticompetitive:

1) Microsoft had used various anticompetitive product design tactics to monopolize the market for Intel-compatible PC operating systems, integrating Windows OS with its Internet browser (IE - Internet Explorer) first contractually and then technologically -by excluding it from the "Add/Remove" program utility of the OS. This change reduced the usage share of rival browsers not by making Microsoft's own browser more attractive to consumers but, rather, by discouraging PC Original Equipment Manufacturers (OEMs) from distributing rival products³⁰⁶.

(See L. Kaplow, *Extension of Monopoly Power through Leverage*, 85 Colum. L. Rev. 515 (1985); M.H. Riordan & S.C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513 (1995)). When these assumptions are relaxed, the theory's strong result and the public policy implications no longer hold. There are a number of common market situations in which integration into a second market may raise anticompetitive concerns. These include a) markets in which the first monopoly is regulated, b) markets that are characterized by economies of scale and scope and in which the inputs are not used in fixed proportions, and c) markets with multiple types of buyers. In such markets, it is possible for a monopolist to profitably extend its power into a second market and harm consumers.

A monopolist may also utilize vertical integration or exclusives to raise barriers to competition that can preserve or enhance its monopoly power in the first product. This scenario is relevant to the type of allegations made against Microsoft. The single monopoly profit theory is premised on the firm having monopoly power in the first product. However, sometimes the initial monopoly would face a challenge and possible dissipation by new entry or expansion by fringe competitors. In this situation, the monopolist may attempt an exclusionary strategy in order to deter or destroy that emerging competition. Stated differently, the monopoly power might be reduced or disappear, but for the exclusionary conduct. Under these circumstances, the single monopoly profit theory, and its strong policy implications about the efficiency of integration, clearly would not apply.

In this preserving monopoly theory, it is alleged that the exclusionary conduct is used to impede the efforts of firms that might reduce the monopolist's power and thereby cause it to reduce its prices, increase innovation or perhaps lose out to a superior rival (See T.G. Krattenmaker *et al.*, *Airlie House Conference on the Antitrust Alternative: Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 251-52 (1987)). This approach has important implications for gauging the firm's monopoly power. The existence of constraints that prevent the firm from raising its price above the current level would not contradict the theory or render the theory inapplicable. The theory focuses instead on the role of the exclusionary conduct in eliminating competition that otherwise would force the firm to reduce its prices below the current level. Deterring such price decreases is an exercise of market power that harms consumers. In the case of innovation, maintaining a lower level of innovation also harms consumers. Nor would the existence of attempts to compete against the monopolist contradict the theory. The monopoly power is maintained by the anticompetitive exclusionary conduct.

³⁰⁶ *United States v. Microsoft Corp.*, 253 F.3d 34, 65 (D.C. Cir. 2001)

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2) Secondly, the technological design of Windows had sometimes the effect to override the user's choice of a browser other than IE as default browser for certain applications; moreover, consumers were discouraged from using other Internet browsers than IE, since the latter was free.

3) Finally, the commingling of browsing and non-browsing codes deterred original equipment manufacturers from pre-installing rival browsers, since the delete of the browser files would hamper the OS functionality.

The D.C. Circuit noted that, by bundling technologically IE to Windows, Microsoft both prevented OEMs from pre-installing other browsers and deterred consumers from using them. "[I]n particular, having the IE software code as an irremovable part of Windows meant that pre-installing a second browser would "increase an OEM's product testing costs," because an OEM must test and train its support staff to answer calls related to every software product preinstalled on the machine; moreover, pre-installing a browser in addition to IE would to many OEMs be "a questionable use of the scarce and valuable space on a PC's hard drive"³⁰⁷.

The Court investigated all of the three allegedly anticompetitive practices: since Microsoft had failed to provide a business justification for two of the three (exclusion of IE from the add-remove utility, commingling browser and non-browser parts), the Court maintained the plaintiff's allegation that these technical features made it virtually impossible to separate the browsing parts from the non-browsing parts of the operative system³⁰⁸. As a result, the tying violated § 2, in particular because Microsoft has passed from contractual arrangements to technical commingling features to render the two parts undividable³⁰⁹.

As for the third practice (override of browsers other than IE for certain applications) the Court found that Microsoft justification that this feature limited conflict when the user was attempting to use certain sub-features that existed only on IE was plausible; since the plaintiff did not rebut this claim, the practice was found not to be unlawful.

As regards the causation element, Microsoft countered that no link had been established between the above exclusionary practices and the maintenance of Windows monopoly, which had originated from both the plaintiff's superior product and its business acumen. The Court stressed that in the case at bar causation could be merely inferred from the "reasonable" appearance that the ascertained anticompetitive conducts were

³⁰⁷ United States v. Microsoft Corp., 253 F.3d 34, 64 (D.C. Cir. 2001)

³⁰⁸ United States v. Microsoft Corp., 253 F.3d 34, 66-67 (D.C. Cir. 2001)

³⁰⁹ *Ibidem*.

capable of making a significant contribution to the maintenance of monopoly power³¹⁰.

In particular, the Court affirmed “to require that § 2 liability turn on a plaintiff’s ability or inability to reconstruct the hypothetical marketplace absent a defendant’s anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action. We may infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes. Admittedly, in the former case there is added uncertainty, inasmuch as nascent threats are merely potential substitutes. But the underlying proof problem is the same - neither plaintiffs nor the court can confidently reconstruct a product’s hypothetical technological development in a world absent the defendant’s exclusionary conduct. To some degree, the defendant is made to suffer the uncertain consequences of its own undesirable conduct”³¹¹.

Therefore, what mattered in the case was not whether the other Internet browsers would have had a deeper impact on the market absent Microsoft’s anticompetitive conduct, but the fact that the Microsoft used its monopoly to quash nascent and potentially competitive technologies. Moreover, the fact that in the industry at stake rapid technological advance and continuous shifts in paradigms take place contributes to sustain that the other browsers were a potential threat for the defendant’s monopoly in the operating system market.

With regard to the evaluation of the anticompetitive conduct, the Court articulated a balancing test based on the absence of sufficient evidence of anticompetitive effects (inefficiencies) or of business justifications (efficiencies). First “to be condemned as exclusionary, a monopolist’s act must have an “anticompetitive effect” That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice”³¹².

Second, “the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist’s conduct indeed has the requisite anticompetitive effect”³¹³.

Third, “if a plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect, then the

³¹⁰ *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001). In order to assess the relevance of conduct Court availed itself of the standard of “reasonable appearance” of maintenance of monopoly outlined by P.E. Areeda & H. Hoverkamp, *Antitrust Law – An Analysis of Antitrust Principles and Their Application*, Wolters Kluwer Law and Business, New York, vol. 3 § 650 p. 89 *et seq* (2007). Previous edition, at § 651 p. 78

³¹¹ *Ibidem*, vol. 3 § 650 p. 89 *et seq* (2007). Previous edition, at § 651 p. 78

³¹² *United States v. Microsoft Corp.*, 253 F.3d 34, 15 (D.C. Cir. 2001)

³¹³ *United States v. Microsoft Corp.*, 253 F.3d 34, 16 (D.C. Cir. 2001)

monopolist may proffer a ‘procompetitive justification’ for its conduct”³¹⁴.

Fourth, “if the monopolist’s procompetitive justification stands un rebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. In cases arising under § 1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric of the ‘rule of reason’”³¹⁵.

The Court considered Microsoft’s technological bundling as *in re ipsa* material to the exclusion of other competitors from the market, and as a way of protecting its –legally acquired– monopoly rents by means of anticompetitive practices. The naked quashing of a new technology in a rapidly evolving market sufficed to integrate violation of § 2, absent a real balance of the anticompetitive harm and the procompetitive benefit.

As a scholar has rightly pointed out, the D.C. Circuit condemned Microsoft bundling as exclusionary conduct “not because its anticompetitive effect outweighed its technological benefit, but because it turned out not to have any technological benefit at all”. Likewise, the Court disregarded the claim that a superior product has sometimes exclusionary effects, “because a social welfare calculus was ‘not feasible in any predictable or useful way’ since placing a value on any technological benefit is beyond the ability of antitrust courts, and weighing any such technological value against the anticompetitive harm would involve trading off ‘incommensurable factors’”³¹⁶.

8. Monopolization in a nutshell

At the conclusion of the description of the proscribed conducts, it is worth epitomizing the elements of monopolization according to judicial enforcement of § 2. A *caveat* applies to the following scheme, the fact that these indicators cannot always account for the imperfections of the market, or always reflect the rigor of economic analysis of law. In fact, it has been seen that monopolization claims can often lead to unpredictable results.

Having that affirmed, when it comes to defining monopolization pursuant to § 2:

- 1) Something more than the mere existence of monopoly power is required³¹⁷, generally some exclusionary practices;

³¹⁴ United States v. Microsoft Corp., 253 F.3d 34, 17 (D.C. Cir. 2001)

³¹⁵ United States v. Microsoft Corp., 253 F.3d 34, 18 (D.C. Cir. 2001)

³¹⁶ E. Elhaage, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 318 (2003)

³¹⁷ The modern interpretation of monopolization has overcome the structuralist approach of *Alcoa*.

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- 2) Monopoly achieved or maintained by means that are not honestly industrial violates § 2, even though it is difficult to define these categories without a certain degree of approximation;
- 3) The monopoly “solely” attributable to economies of scale, natural advantages, patents or legal license, superior skill, or accident is lawful; however, even in such occurrences the monopolist may engage in unlawful exclusionary practices to maintain its monopoly rents; furthermore, once a firm has achieved a monopolist position, a smaller degree of causative relationship between exclusionary practices and monopoly power might suffice to infer violation of § 2 (in particular in the hypothesis of monopoly leveraging)³¹⁸.
- 4) The typical defense monopolists have tried to deploy is that their monopoly power is attributable to the recognized exceptions (above, n.3).

9. Examples of Anticompetitive Conduct

Unlike the European law of abusive dominance, which is characterized by a more in-depth inquiry into single types of anticompetitive conducts, American Courts have not translated § 2 of the Sherman Act into a list of specific prohibited behaviors, partly owing to the difficulty of identifying classed of conduct unlawful *per se*³¹⁹, partly because of the preference for a rule of thumb, on the one hand, and the general restrictive interpretation of the provision, based on the strive to avoid false positives, on the other hand³²⁰. Nonetheless, and in general terms, monopolization litigation has focused on six general types of anticompetitive conducts³²¹:

- 1) Exclusionary conduct impairing competition,
- 2) Predatory pricing,
- 3) Refusal to deal,
- 4) Monopoly leveraging³²²,

³¹⁸ Compare *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2d Cir. 1979). The distinction between an abusive leverage on a lawfully acquired monopoly and a lawful attempt of a firm to expand its business capacity into another market is not always readily achievable courts. It has been seen *supra* that Courts tend to rely on a rule of thumb in the ascertainment of the causation in claims of monopoly leverage; however, in general terms, the existence of monopoly in a market sustains surreptitiously the claim of monopolization of the target market more incisively than the proof of the impairment of competition in the market at stake. See *supra*, para. 2, note n. 46, and *infra*, note n. 303, a brief excursion into monopoly leveraging.

³¹⁹ See *supra*, para. 6.3

³²⁰ On the risk of awarding false positives in the American law of monopolization, see *infra*, chapter III, para 12 *et seq.*, and the different policy considerations between the two models.

³²¹ E. Gellehorn & W.E. Kovacic, *Antitrust Law and Economics in a nutshell*, 4th ed., West Publishing Co., St. Paul (Minnesota), p. 99, (1994)

³²² The treatment of monopoly leveraging is closely intertwined with the offense

5) Accumulation of patents³²³,

of monopolization as under § 2. For a detailed excursus of the treatment of monopoly leveraging see *supra*, para. 2, note n. 46 in particular. Over the last decade, U.S. antitrust jurisprudence has seen the expansion and contraction of this aspect of the monopoly leveraging doctrine. A laxer interpretation of the abuse characterized the *Berkey Photo* decision, in which it was held that “a firm violates Section 2 by using its monopoly in one or more markets to gain a competitive advantage in another, albeit without an attempt to monopolize the second market”. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 263 (2d Cir. 1979). Thus, it appears that the structural elements of monopoly leveraging are two: the maintenance of a monopoly position in one market, on the one hand, a causative link between the monopoly position and the consolidation of monopoly power, or, at the very least, a dangerous probability of acquiring monopoly power in a target market, on the other hand. The gaining of monopoly power in the target market would be unlawful irrespective of the actual lessening of competition caused by the exercise of monopoly power itself.

However, in the *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001) decision, the Second Circuit Court of Appeals interpreted the offense of monopoly leveraging more strictly: “In *Berkey Photo, Inc. v. Eastman Kodak Co.*, we stated it would also be a violation of § 2 to use monopoly power in one market to gain a competitive advantage in another, even without an attempt to monopolize the second market. Since *Berkey Photo*, we have questioned this proposition.... In *Spectrum Sports*, the Supreme Court stated that § 2 of the Sherman Act “makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so”. Therefore, the requirement of actual proof of monopolization of the target market goes beyond “gain[ing] a competitive advantage” as set out in *Berkey Photo*. *Spectrum Sports v. McQuillan Et Vir, Dba Sorboturf Enterprises*, 506 U.S. 447 (1993), 113 S.Ct. 884, 122 L.Ed.2d 247

³²³ The antitrust implications of accumulation of patents show the interface between two separate systems of law, intellectual property law and antitrust law, which both widely aim at promoting innovation and economic growth. S.D. Anderman (ed.), *The Interface between Intellectual Property Rights and Competition Policy*, Cambridge, (2009), introduction. The mere accumulation of patents is not in itself illegal. *Automatic Radio Manufacturing Co. v. Hazeltine Research* 339 U.S. 827 (1950). However, the unilateral acquisition of patents from third parties is subject to the antitrust scrutiny pursuant to § 2 of the Sherman Act, in particular to the rule of reason. *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947). More specifically, acquisitions of patents raise the question of monopolization when they are part of a scheme to attain monopoly or to attempt to monopolize a market. In that respect, in *United States v. General Electric Co.*, 82 F.Supp. 753 (D.N.J. 1949) Court found the defendant had unlawfully attempted to monopolize by following the policy of acquiring every patent right in the market in order to exclude market participants, with the result that the latter are dissuaded from conducting research and development on the product. In *Kobe v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.) (1952), the Tenth Circuit held that the accumulation of patents without an apparent need by a firm with monopoly power, together with other intimidating tactics to force competitors to exit the market, will amount to monopolization. It follows that, despite the mere accumulation of patents is not in itself an offense, it will be censored under § 2 when such practice is pretentious and can thwart the development and evolution of a technology.

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6) Product innovation and thwarting the development of a technology³²⁴.

It has been seen above that modern §2 jurisprudence is permissive, affording dominant firms broad discretion to develop its own strategy concerning pricing, product development and promotion³²⁵. Courts have not expanded the *Grinnell* formula that the offense of monopoly consists of “possession of monopoly power in the relevant market” and “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident”, but have rather narrowed the list of anticompetitive behaviors relevant for the application of § 2.

Within the confines of the present analysis, only pricing abuses will be analyzed more in detail. The reason superseding the choice to focus on these types of abuse is twofold: first and foremost, not only are they relevant to the firm –irrespective of its dominance-, but they are also the affect consumers; second, pricing abuses convey, more than any other unlawful unilateral behavior, the fundamental policy struggle of competition authorities to mediate between the risk of discouraging legitimate price competition, and the threat to leave unlawful price competition to go unpunished. Economics has shown how consumer welfare will grow when price discrimination leads to a lower price and, consequently, to a redistribution of that wealth, which the firm with market power will not subtract to market forces in the form of deadweight loss.

Aside from that, the treatment of price discrimination shows two different approaches of the models under investigation: while the American price discrimination is part of a different piece of legislation, the Robison-Patman Act, not requiring prior finding of monopoly to be applied, the European law of price discrimination is recollect in the discipline of abusive dominance, as under article 102(c).

³²⁴ In line with the rationale underlying the treatment of accumulation of patents, the thwarting of the development of a new technology justifies antitrust intervention pursuant to § 2. That is the case in which a firm forces one or more competitors to exit the market by using “dirty tricks” to impede the development of one or more nascent technologies. The emblematic case of monopolization through thwarting a new technology is *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). See *supra*, para. 7.5. Once again, this type of offense shows the interrelation between antitrust law and intellectual property law, on the one hand, and the modern attitude towards monopolization, which is justified inasmuch as it impedes technological advance, on the other hand.

³²⁵ J.D. Hurwitz & W.E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 Vand. L. Rev. 63 (1982); W.J. Liebler, *Whiter Predatory Pricing? From Areeda and Turner to Matsushita*, 61 Notre Dame L. Rev. 1052 (1986)

The treatment of monopoly refusal to deal deserves greater focus due to the fact that it is one of the critical areas of divergence between the American and European model.

Finally, the other types of exclusionary conduct, such as monopoly leveraging, the accumulation of patents and the thwarting of the development of a technology, have been scrutinized above as part of the relevant anticompetitive conduct, because they display salient features of the interpretation of § 2 in general.

9.1 Exclusionary conduct impairing competition

The judicial understanding of the exclusionary nature of a practice may vary. In other words, Courts apply the rule of thumb when ascertaining whether a conduct impairs competition. Examples of exclusionary conducts may be found in *Alcoa*³²⁶ and in *United Shoe Machinery*³²⁷: in the former the Court found it sufficient that the defendant exponentially increased its production by virtue of a patent, before competitors could enter the field; in the latter, the Court found that the “lease only” policy of 10 years minimum and the connected assistance policy were exclusionary because it kept competitors from effectively operating in the shoe manufacturing market.

Contrary to these two renowned outcomes, the Court has affirmed that the expansion of a business into new geographic markets is not anticompetitive, since there are no damages stemming from an increased competition in a certain area³²⁸. In fact, in order to support a monopolization claim, injury must be brought by an anticompetitive or predatory conduct, not by mere competition, and at any rate a conduct can be regarded as exclusionary when it

³²⁶ See *supra* the detailed description of the case, para 2.1

³²⁷ See *supra*, para. 1.4 and 7.5

³²⁸ *Pacific Express Inc. v. United Airlines*, 959 F.2 814 (9th Cir. 1992). Pacific Express was an airline carrier, concentrating on the route between Los Angeles and San Francisco. After sustaining losses in this market, Pacific Express restructured its business to serve routes connecting western cities with San Francisco and Los Angeles. After restructuring its business, the plaintiff entered into negotiations with United Airlines in order for the latter to provide it with passengers from the western region of the US so that United could concentrate on its longer routes. These negotiations did not prove profitable and were shortly terminated. No sooner did Pacific Express begin showing a profit on its new operations, than United announced that it would expand its service to cities in the western region of the US, which were previously served solely by Pacific Express. United also increased its service on routes where it had previously competed with Pacific Express. By early 1984, Pacific Express was unable to continue business operations. Pacific Express sought protection under Chapter 11 of the Bankruptcy Code on February 4, 1984.

seeks to exclude rivals on some basis other than efficiency³²⁹. The boundary between exclusion and increased competition on the one hand, and between expansion into a new market and monopoly leveraging, however, remains dim and arduous to grasp.

9.2 Predatory pricing

Broadly speaking, every conduct of the monopolist that specifically aims at driving current competitors off competition is defined as predatory³³⁰. Predatory pricing is one particular example of predation, which takes place when the monopolist temporarily set prices below its competitors' –and its own– costs in order to render competition unsustainable for rivals with “shallower pockets” and cause them to leave the market. Once rivals are driven off the market, the monopolist would normally raise prices above competitive levels seeking to reap the benefits of its predation.

Unlike price cuttings aimed at increasing or maintaining market share, predatory pricing seeks to cause the exit of rivals from the market, or to ensure that potential rivals would be deterred from entering or competing aggressively, for fear of being pushed out of the market by strategic, below cost price.

Antitrust jurisprudence has not offered a solid theoretic underpinning to distinguish an unlawful predatory pricing from a lawful price reduction resulting from the a change in market conditions³³¹, owing to a structural lack of a limit to price competition in antitrust legislation³³².

However, it is apparent that an excessively low price can bring harmful effects to the market: a firm that artificially fixes the price for its product below its rivals does not seek to gain more rents from the market by virtue of an honestly industrial policy, but looks to exclude its rivals through a predatory scheme. That is why the practice of predatory pricing falls within the scope of § 2 of the Sherman Act, being either monopolization or attempt to monopolize³³³.

³²⁹ *Pacific Express Inc. v. United Airlines*, 959 F.2 814 (9th Cir. 1992) citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S.Ct. 2847, 2859, 86 L.Ed.2d 467 (1985). See *supra* note n. 213 *et seq.*

³³⁰ L. Cabral, *Economia Industriale*, Carocci Ed., Rome, p. 328 (2002)

³³¹ E. Gellehorn & W.E. Kovacic, *Antitrust Law and Economics in a nutshell*, 4th ed., West Publishing Co., St. Paul (Minnesota), p.101, (1994)

³³² P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975).

³³³ The Clayton Antitrust Act (1914), as modified by the Robinson-Patman Act 15 U.S.C. § 13 (1970) –or “Anti-Price Discrimination Act” (1936)- prohibits predation on the account of the ban of discriminatory prices, which seek to fetter competition and to monopolize the market. It is unlawful [to] “sell ... at unreasonably low prices for the purpose of destroying competition or eliminating a

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In line with the reluctance of the Congress to set a threshold under which a price can be considered predatory, Courts have never outlined a predatory price *per se*; however, it has provided essential guidelines to ascertain violation of § 2 by means of a predatory scheme. In particular, the plaintiff is to prove:

- 1) The specific intent of the opponent to control the price for a product in a market, or to dampen competition on that market;
- 2) A predatory/anticompetitive course of conduct of the defendant aiming at pursuing the above intent;
- 3) A dangerous probability of success;
- 4) Damage to competition³³⁴.

Economic analysis of law defines the predatory price as a price below marginal cost. Since marginal costs cannot be measured in practice, average variable costs can be accounted as a proxy for marginal cost.

The Supreme Court seems to adhere to the above principle, in that it has maintained that predatory pricing is to be pondered in economic terms: the plaintiff has to prove that the defendant has set price below cost; the defendant is to have a dangerous probability of recouping the losses incurred during the below-cost sale³³⁵. In that respect, the Supreme Court distanced itself from prior case law on predation, in which on the basis of the Robinson-Patman Act predation was inferred from proof of price discrimination plus exclusionary intent³³⁶.

In *Brooke Group* case, the Court rethought of price discrimination in light of its proximity with the predation standards as under § 2 of the Sherman Act. After stating that the Robinson-Patman Act is a tool to proscribe a conduct that would be lawful under the Sherman Act, it stated: “the essence of the claim under either statute is the same: a business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market”³³⁷. Therefore, absent the discriminatory intent, the core substance of predation is yet a price cut below an appropriate measurement of cost with a view to foreclosing competition.

competitor”. For a further inquiry of antidiscrimination law in the US, compare *infra*, para. 11; Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2nd Cir.), cert. denied, 279 U.S. 858 (1929).

³³⁴ California Computer Prod., Inc. v. IBM Corp., 613 F.2d 727 (9th Cir. 1979); Williams Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981)

³³⁵ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)

³³⁶ Utah Pie Co. v. Continental Baking Co., 386 U.S. 702 (1967). Compare *infra*, the analysis on the Robinson-Patman Act.

³³⁷ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

However, the dangerous probability of recouping is essential to assess liability in predation because, absent the recoupment and the consequent transfer of the losses from the firm to the consumers, a below-cost price reduction would actually be favorable to purchasers and cause an increase in consumer welfare aggregate, since the aggregate price for a product that consumers are willing to pay would decrease. In other terms, if competition in a market is strong enough that the predatory conduct of a firm, however much detrimental to its rival(s), is not compensated by the recoupment of the losses incurred due to the predatory phase, there will be no inference of violation of § 2.

With respect to scholarship, studies on predation can be recollected into four broad categories resembling the four main policies underlying antitrust law and, more generally, four different accounts of the role of the legislative and judicial formants in the regulation of market and services.

The first and most influential doctrine is based on the analysis of costs (*cost-based school*) and has been drafted by the prominent Harvard scholars Areeda and Turner, according to whom the only relevant price to affirm violation of § 2 is the price set below marginal cost for the short run, which can be recouped in the long run by raising prices at a monopolistic level³³⁸.

This formula is based on neoclassical price theory, which holds that both in a perfect competition and in a monopoly scenario a firm cannot maximize its profits in the short run by pricing below its marginal costs. Therefore, a price below marginal costs is exclusionary since it will drive competitors off the market, even if these are equally efficient as the firm engaging in predation.

Only the price below marginal cost is presumptively predatory, whereas the price reduction that remains above marginal cost is not, since this latter situation will only be detrimental to less efficient firm, which will be driven off the market in the long run,

³³⁸ P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 697 716-718 (1975). With regard to predation, the Spirit Airlines case is emblematic. Spirit Airlines was a small air carrier operating the Detroit-Philadelphia line at a cost of 49 \$ per ticket; the fare of Northwestern Airlines –its competitors– for the same route was 170 \$. When Northwestern lowered its tariff to the same level as Spirit, it increased its traffic by 30% and forced Spirit to exit the market. After attaining monopoly on the route, Northwestern raised the price to a higher level than its pre-predation tariff and, moreover, it reduced the traffic on the route. Spirit brought a suit against Northwestern alleging violation of § 2 of the Sherman Act; Northwestern countered that its total revenue was higher than its average total costs and that the price reduction was not predatory but exclusively beneficial to consumers. The Supreme Court found violation of § 2, in that the defendant's strategy was aimed at excluding Spirit from the market, on the grounds of the fact that Northwestern had recouped its losses in the post-predation phase. *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005).

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but will cause a wealth redistribution and an increase of consumer wealth³³⁹.

However, since marginal costs cannot be measured in practice, Areeda and Turner propose to use average variable costs (AVG) as a proxy for marginal cost, calculated by dividing the overall costs of the firm (minus fixed costs) and the number of units produced³⁴⁰. A price below average variable cost is presumptively predatory and cannot be deemed promotional³⁴¹:

In sum, the two scholars conclude:

1. A price equal or above average total cost is not predatory even it does not allow profit maximization in the short run;
2. A price equal or above short-run marginal cost (SRMC) or above average variable cost (AVC) is not predatory even if it does not allow profit maximization in the short run;
3. A price equal or above anticipated average variable cost is presumptively lawful;
4. A price below anticipated average variable cost is presumptively unlawful³⁴².

The second theory is the so-called “*structural filter school*”, which applies the cost-based criterion only when market conditions indicate that the price established by the monopolist is likely to lessen competition. The “filter” to the application of the marginal cost as the limit below which a price reduction is considered predatory is the existence of barriers to entry in the market: if the market is open to the entry of other competitors, it is unlikely that the monopolist will be able to recoup the losses occurred during the predation phase³⁴³.

³³⁹ Criticism to the marginal-cost criterion have been expressed by L. Cabral, *Economia Industriale*, Carocci Ed., Rome, p. 338 (2002), who has argued, for example, that a firm might charge a price lower than its marginal costs in the short term, only with a view to a faster movement on his learning curve, thus without an anticompetitive intent.

³⁴⁰ The total cost (TC) is the sum of fixed costs (FC) and average costs (VC). Average costs (AC) is expressed by the relationship between fixed costs and output (q). Since $TC/q = FC/q + VC/q$, then $AC = AFC + AVC$, and $AVC = AC - AFC$.

³⁴¹ P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 730 (1975). Parallel to that, Courts have deemed the charging of a price lower than the firm’s average variable cost as presumptively predatory. *California Computer Products v. IBM Corp.*, 613 F.2nd 727 (9th Cir. 1979).

³⁴² P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 732-35 (1975).

³⁴³ P.L. Joskow & A.K. Klevorich, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979); K.G. Elzinga & A. Mills, *Testing for Predation: is Recoupment Feasible?*, 34 Antitrust Bull. 869 (1989)

The third theory was elaborated by the “no rule” school, which holds that predation is such an unlikely occurrence that should be irrelevant to antitrust law. The resistance of the predated firm, the possibilities for other firms to enter the market, together with the expansion of other existing firms will end up defusing the predatory strategies of the firm seeking to monopolize. An antitrust intervention would lead to a price freeze, which would in turn deprive consumers of the benefits of price competition³⁴⁴.

The fourth and last doctrine is was elaborated by the renowned “game theoretic school”, which has outlined the issue of predatory pricing in strategic terms, rejecting the marginal-cost analysis as the threshold for assessing predation, in light of the static nature of the Areeda-Turner model³⁴⁵. In fact, the analysis of predation in terms of restriction from an output/price level (qp) to a lower level (q_1p_1) on the demand curve (Δ) does not account of those contingent strategies of the firm, aiming at discouraging the entry of new rivals³⁴⁶.

Prior to the entry of the new firm, the monopolist will fix the price at the level at which the marginal revenue equals the marginal cost of the last unit produced. Both the output and the price are influenced by the entry of new firms, which will act on the market assuming that the incumbent monopolist firm will behave in the most anticompetitive manner to their detriment. In particular, entrant firms will expect that the monopolist will reduce price without increasing its output.

On the other hand, entrant firms will seek to satisfy the remainder of demand, namely the one left unsatisfied by the monopolist.

The main difference of the game-theoretic approach compared to the other static-economic doctrines is that it is relational and behavioral: the static change in marginal cost is analyzed together with the strategy of the monopolist, aimed at discouraging the entry of new firms, which will give rise to lawful and unlawful behaviors.

The static-economic assumption of the Areeda-Turner formula is that efficiency is achieved when price equals marginal cost, since net welfare is maximized where marginal social benefits equal marginal social costs. Every shift below marginal cost would render the system inefficient, because it would inevitably drive

³⁴⁴ F.H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U.Chi. L. Rev., 263 (1981)

³⁴⁵ Criticism to the game theoretic approach can be found in G. Stigler, *The Organization of Industry*, University of Chicago Press, 21 (1968), according to whom the firm’s decision of entering a market, or of exiting it, depends upon the dominant firm’s behavior or, in other terms, on the remainder of demand that can be satisfied after a price reduction of the dominant firm.

³⁴⁶ R. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, 184-196. The author focuses on the relevance of the monopolist’s predatory intent in predation claims.

competitors off the market and, in the long run, it would enable the dominant firm to raise prices to the detriment of consumer welfare³⁴⁷. The Areeda-Turner model, however, does not account of the difference among an ongoing price reduction, a temporary reduction imposed by the market conditions and a strategic reduction aimed at discouraging rivals' entry.

Advocates of the game theoretic method affirm the legitimacy of a strategic and temporary predatory price cut, provided that it only seeks to deter the entry of new firms, or that it is a mere signal to the predated firm to either exit the market or to restrict its output³⁴⁸. In particular, price-cost tests overlook a strategic price cut, whose aim is merely warning prospective entrants that entry is unattractive. Consequently, rules on predation should weigh the likelihood of new entrants to enter the market. In light of that, three rules would apply:

- 1) Output restriction rule - $Q \leq \mathbf{Q}$: where \mathbf{Q} is the output placed on the market by the dominant firm prior to the entry of new firms and Q is the post-entry output level. After the entry of the new firm, the dominant firm is barred from increasing its output (by lowering the price) to a higher level than the pre-entry one, because the economic disadvantage that the new entrant would suffer from would prevent the latter from accruing experience and viability on the market³⁴⁹. Therefore, this rule substantially allows the dominant firm to operate at $Q = \mathbf{Q}$, upon condition that the resulting price exceed average variable costs when output is held unchanged.
- 2) Marginal Cost Rule - $\mathbf{P} \geq \text{SRMC}$, where \mathbf{P} is the price and SRMC is the short run marginal cost, by virtue of which the dominant firm can lawfully expand its output to respond to an entry, to the extent that the price is not lower than the short run marginal cost, at which level it would be predatory³⁵⁰.
- 3) Average Cost Rule - $\mathbf{P} \geq \text{SRAC}$, where \mathbf{P} is the short run average cost, by virtue of which a price cut of the dominant firm would be lawful as long as it does not go below short run average cost³⁵¹.

³⁴⁷ P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 711 (1975)

³⁴⁸ O.E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977)

³⁴⁹ O.E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 296 (1977). The extent of the ban should span between 12 and 18 months, because such is the proper time length to allow the entrant firm to carry out its own market evaluations and find its own market dimension.

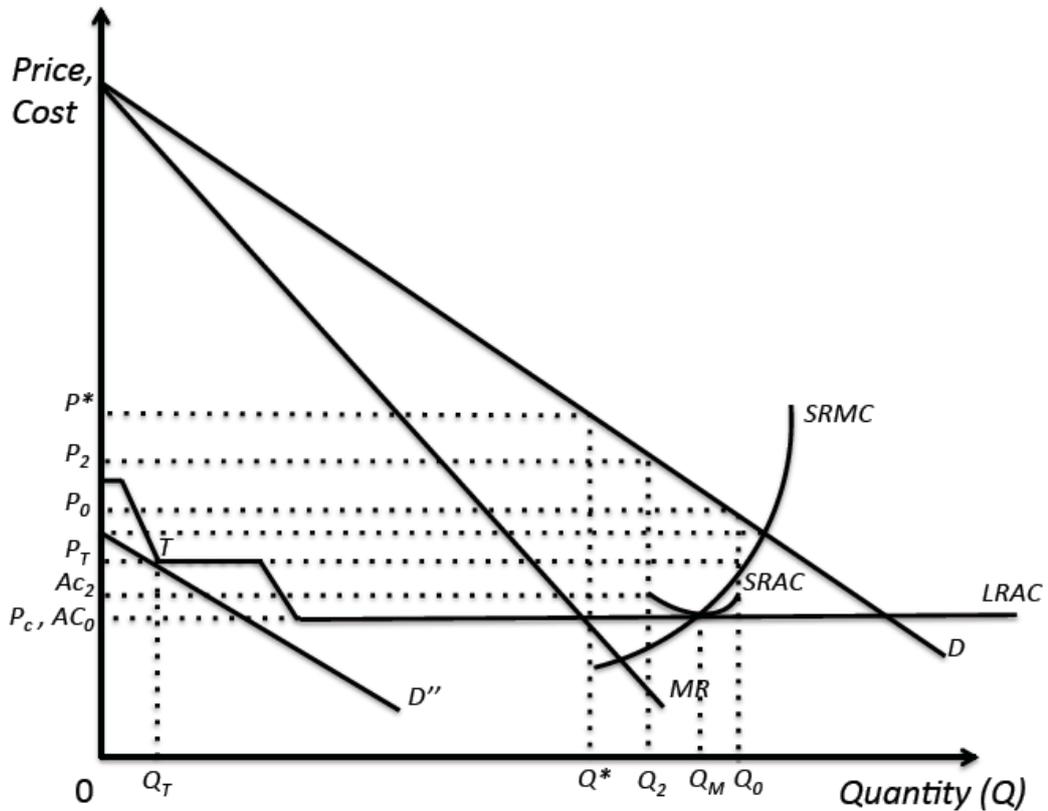
³⁵⁰ O.E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 296 (1977). The author recalls the marginal cost threshold as the limit below which the firm cannot lower its price, but assumes that marginal costs are variable.

³⁵¹ O.E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 296 (1977)

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In particular, four situations can be observed:

- A. Short run: if the dominant firm reduces or maintain the output unchanged despite the likelihood of new entries, its conduct will not be deemed predatory, provided that its price is higher than average variable cost.
- B. Long run: price established to recoup the expenses sustained over a production cycle –being either for the modernization of the plant or for whichever emerging cost- is not considered as predatory. This hypothesis is a corollary of the first one and tolerates an output increase upon condition that the price lets the firm recoup the costs sustained.
- C. Short run: the dominant firm that increases its output by reducing price to deter new prospective entrants is deemed to engage in a predatory conduct, even though the market price is higher than its average variable cost;
- D. Long run: price is deemed predatory if the firm’s turnover does not cover the expenses sustained in the long run.



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³⁵² Source O.E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 300 (1977)

The above analysis affirmed can be explained by referring to the scheme. The curve D is the industry demand curve and the curve $LRAC$ is the long run average cost curve, which shows the relationship between average cost and quantity of output over the long run, in which the firm for instance can vary its plant size. The curve D' is the residual demand curve, which is open to prospective entrants and shows the amount of demand remaining when the dominant firm leaves its output unchanged. The curve $SRMC$ shows the short run marginal cost. The curve $SRAC$ shows the short run average cost.

- 1) Sub $Q \leq Q_0$: Considering Q_0 as the dominant firm's pre entry level of output, the firm may not supply more than Q_0 in the post-entry period (12-18 months): because the dominant firm will choose investment such that the prospective will profit zero on the residual demand curve, the dominant firm will stop at Q_0 , so that D' is tangent and never exceeds in value the $LRAC$ curve. T is the point at which the prospective entrant earns zero profits. If the dominant firm chose to supply a lower output than Q_0 in the pre-entry period, the D' curve would be shifted to the right –since more demand would be left unsatisfied–, and the prospective entrant could earn positive profits under the output restriction rule. If the monopolist chose to place Q_0 at P_0 , the entrant could only hope to break even at T . Any entry at below or above T will not be able to cover costs, because the residual demand lies below $LRAC$ at all points other than T .
- 2) Sub $P \geq SRMC$: under this rule the monopolist is permitted to respond to an entry by increasing its output so long as the price remains above short run marginal cost. In the pre-entry period, the monopolist will choose the output that maximizes his profits; thus, he will fix price at Q_2P_2 , where the marginal revenue equals the short run marginal cost. In response to an entry, the monopolist will react by increasing the output until the curve reaches the output Q_0 , where the entrant's P_T will at least allow him not to break even on its demand curve D' (P_TQ_0 is the point on the $SRMC$ curve at which the monopolist can fix its price and the entrant will not suffer a loss because its average costs will equal its price T).
- 3) Sub $P \geq SRAC$: under this rule, similarly the optimum price for the dominant firm is the one at which the short run marginal cost curve passes through the point P_TQ_0 , where the prospective entrant will break even. Optimum output is inevitably smaller than Q_M . Accordingly, the output at which the dominant firm's short run marginal cost is equal to the industry marginal revenue will be less than Q_2 . Pre-entry price will thus exceed P_2 .

Despite the lack of a clear standard for predation, one aspect recurring in all the above explanations of predation is the sacrifice

of today's profits for tomorrow's gains. Once the competitor(s) is eliminated, the dominant firm will recoup the losses incurred throughout the price-cut phase by raising prices at monopoly level to make good those losses³⁵³.

Without the possibility of recouping, the business strategy of the firm is not profit maximizing but, conversely, is beneficial to consumers, because the predator will inflict losses onto himself only³⁵⁴. There is no consensus, however, as to the factors that should be taken into account to verify the possibility of recoupment. Scholarship essentially suggests two tests to distinguish predatory discounts from pro-competitive strategies:

- 1) The *structural recoupment test* seeks to infer the possibility of recoupment from the structural factors of the market, such as high barriers to entry, the excess capacity of the dominant firm, its market position vis-à-vis the competitor, and the increase of market shares during the predation phase³⁵⁵.
- 2) The *strict recoupment test* seeks to infer predation from an economic quantification of losses and estimated post-predation gains. Only if this information is available, and economic calculus shows that the predator can recoup all the money lost during predation, should then he be held liable for the price-cutting strategy³⁵⁶. Post predation gains can be quantified in the form of prices established after the market has been jacked up.

Modern doctrine has led courts to reformulate standards for dominant firms pricing strategies according to three trends.

First and foremost, the majority of the Courts accepted the tenets of the cost-based school, which has explained predation in terms of below-cost pricing and dangerous probability of recoupment of the losses occurred during the below-cost phase³⁵⁷. The Areeda-Turner doctrine firstly appeared in their seminal article of 1975³⁵⁸, and has exerted a significant appeal on Courts ever since, inducing them to create a presumption that pricing below average variable cost is unlawful and to require the defendant to justify such pricing –by proving that the below-cost pricing was

³⁵³ Compare H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice*, 3rd ed., St. Paul, (2005), p. 350. The author analytically divides predation schemes in two phases: the predation period in which the predator incurs losses, and the post-predation period, in which the predator recovers its losses by monopoly prices.

³⁵⁴ K.G. Elzinga & D.E. Mills, *Testing for Predation: is Recoupment Feasible*, 34 Antitrust Bulletin 874, (1989)

³⁵⁵ P.L. Joskow & A.K. Klevorick, *A framework for Analyzing Predatory Pricing Policy*, 89 Yale Law Journal 245 *et seq.*, (1979)

³⁵⁶ K.G. Elzinga & D.E. Mills, *Testing for Predation: is Recoupment Feasible*, 34 Antitrust Bulletin 874, (1989)

³⁵⁷ V. *supra*, para. 9.2, the cost-based school

³⁵⁸ V. *supra*, para. 9.2, the cost-based school

promotional. Areeda and Turner firstly addressed the uncertainty surrounding predation claims based on the lack of a cost-based test, together with and the risks of creating false positives by sanctioning a pro-competitive conduct as anticompetitive.

Furthermore, Courts have ignored other factors whereby predation can be inferred, and have applied a rebuttable presumption of legality for prices at or above average variable cost and a categorical presumption of legality for prices above average total cost. The assessment of the lawfulness of a price at or above average variable cost, but below average total cost depends on the evaluation of whether the existence of entry barriers would permit the dominant firm to charge monopoly prices once the plaintiff is driven off competition³⁵⁹.

The second trend has been to focus on the structural prerequisites for successful predation. In the renowned *Matsushita* case, the Supreme Court has defined predation not only in light of the price/cost relationship, but also in light of other factors such as the profitability of predation for the defendant³⁶⁰. The plaintiffs, two American manufacturers of electrical appliances, contested that the defendants, a group of 21 Japanese producers or sellers of televisions sets, had conspired for over 20 years to charge predatorily low prices on the U.S. market for their products³⁶¹, with a view to eliminating American firms. Furthermore, the defendants had allegedly used monopoly profits earned in Japan to subsidize below-cost pricing in the U.S.

Notwithstanding the allegations contained evidence of the predatory conspiracy to the detriment of the defendants, the Court concluded that predation could not be directly proved since a “predatory pricing conspiracies are by nature speculative”, on the account that “they require the conspirators to sustain substantial losses in order to recover uncertain gains”³⁶².

According to the Court two aspects of the allegations were highly unlikely: on the one hand, the predatory conspiracy had allegedly begun twenty years prior to the litigation, which implied that the Japanese cartel had stayed in place for over twenty years; on the other hand, predatory pricing schemes are “rarely tried and even more rarely successful”, and a false positive in adjudicating a predatory claim would result in an injury to the core interest

³⁵⁹ W.L. Liebler, *Whiter Predatory Pricing? From Areeda and Turner to Matsushita*, 61 Notre Dame L.Rev., 1055 (1986). Compare P. Areeda & D.F Turner, *Antitrust Law: an Analysis of Antitrust Principles and their Application*, Little, Brown and Co., Boston, vol. 3 § 711 p. 151 (1978).

³⁶⁰ *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 538 (1986).

³⁶¹ In the plaintiff’s allegations, the relevant market encompassed the whole industry of electronic appliances for consumers; the Court narrowed down the relevant market to the market for TV of the United States.

³⁶² *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 588 (1986). The Court’s reasoning echoes the *no-rule* school. See *supra*,

protected by the Sherman Act, namely competition³⁶³.

In the absence of a perfect test to distinguish between a predatory price and a significantly low price –yet vigorously competitive–, legal standards should take into account the fact that predatory schemes are generally unlikely to occur, and the occurrence that a lawful price can erroneously be judged as predatory³⁶⁴.

Furthermore, the Court argued that albeit the defendants had raised prices at monopoly level once the plaintiffs had exited the market, the economic loss of the predators had been so consistent that post-predation price raise would allow the recoupment. The monopolistic pricing, together with the absence of entry barriers, was an incentive for new entries, because “without barriers to entry it would presumably be impossible to maintain supra-competitive prices for an extended time”³⁶⁵ as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. For these reasons the Supreme Court adjudicated the case in favor of the defendants.

Through *Matsushita*, the Supreme Court has underscored the principle that absent direct evidence of a predatory intent, plaintiff is to prove that not only was the defendant’s price below a certain cost relevant for the market at stake, but also that the defendant had a reasonable expectation to recoup the predation losses and to “harvest some additional gain”³⁶⁶, on top of the dangerous probability of monopolizing the market. Conversely, when there is no direct evidence “of a plausible motive to engage in predatory pricing”, plaintiff is to prove equally plausible explanations, along the lines that the defendant’s conduct would not merely generate losses without corresponding gains³⁶⁷.

Aside from the above affirmed, the Court has also argued that in predation cases the issue must make economic sense, and can be explained by means of formal economic models³⁶⁸. In that respect,

³⁶³ *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 601 (1986)

³⁶⁴ *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 589 (1986) “predatory pricing schemes are rarely tried and even more rarely successful”. Compare K. N. Hylton & M.J. Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 *Antitrust L.J.* 469 (2001)

³⁶⁵ *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 604 (1986). In this passage, the Court appears to invoke the *structural filter* tenet that a predatory scheme is to be evaluated together with the ease of entry in the market. See *supra*.

³⁶⁶ *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 602 (1986). The Courts continues “Absent some assurance that the hoped-for monopoly will materialize, and that it can be sustained for a significant period of time, [t]he predator must make a substantial investment with no assurance that it will pay off”. F.H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 *U.Chi.L.Rev.* 263, 268 (1981).

³⁶⁷ *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 609-611 (1986)

³⁶⁸ *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 597 (1986) Compare the Areeda-Turner criterion, *supra*.

predation must be economically profitable for the defendant; thus, the Court must evaluate the profits generated by the latter, which would account of costs, units sold and prices at which the product is sold. Such assessments are arduous to carry out and are likely to be based on some static postulates on both costs and demand that vary in accordance with the economic model taken as a reference. Conversely, "If the claim is one that simply makes no economic sense - respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary"³⁶⁹. All things considered, the Court does not indicate a criterion for the assessment of the predatory cost, nor does it indicate the economic model to adopt in the evaluation of the predatory nature of the price, nor does it provide any guidelines as to evaluate the possibility of recoupment of the predation losses. In spite of that, as someone has argued, *Matshushita* represents the rise of economic rigor in antitrust³⁷⁰.

The third judicial trend on predation is manifest in *Brooke Group*³⁷¹, which is the leading case on modern predation. The action was brought by a generic producer of cigarettes against a producer active in both markets for generic and branded cigarettes. The plaintiff complained that the defendant Brown & Williamson Tobacco Corp had engaged in below-cost predation for 12-18 months, entailing pricing below average variable cost, not with the intent of driving the former off the market, but to lead it to subdue its sale generic cigarettes, therefore reducing the gap between generic and branded cigarettes. The market structure in the case at bar was oligopolistic, and the defendant's market share

³⁶⁹ *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 597 (1986)

³⁷⁰ R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p. 433 (1993). At the same time, aside from the predation hypothesis, the author argues that, in the realm of anticompetitive tying arrangements claims, the economic sophistication for antitrust has probably stopped with the 1992 *Kodak* decision, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). By accepting the plaintiff ISOs' claim that through tying the sale of parts and services for its cameras to the use of its service, Kodak had monopolized the market for its own parts and services, the Court assumed that the defendant had monopoly power over this market. At the same time, the Court accepted that Kodak had no power in the market in which it sold its machines, but assumed that thanks to its monopoly in the parts and services, Kodak could raise the price for these without harming the sale of its equipment. Even if Kodak did not attempt to gain monopoly profits on parts and services, the Court held that economic theory was not adequate to overcome allegations of fact of the contrary, and that the raise of the price for parts and services was inevitably above competitive level. The author counters that it is impossible to raise the price for parts and services without raising the price for Kodak's machines. Thus, the decision would make no economic sense.

³⁷¹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

was only over 10%.

The Supreme Court held that predatory claims are to be judged by means of the same two-element test as all the other claims brought under §2 of the Sherman Act. In particular, in order to hold a firm liable for charging low prices, the plaintiff is to prove that:

- 1) the defendant charged a price “below an appropriate measure of its rival’s costs”³⁷².
- 2) the defendant had a “dangerous probability” of recouping its investment in below cost pricing³⁷³.

With regard to the measure of cost, albeit in an *obiter dictum*, the Supreme Court has affirmed that prices above the appropriate measure of average variable costs are considered legal *per se*³⁷⁴.

With regard to the probability of recoupment, determining the degree of likelihood of recoupment in the post-predation phase implies the ascertainment of *the ability of the predator to set supra-competitive post-predation prices* to recover the losses sustained during predation, “including the time value of the money invested in it”³⁷⁵. The recoupment threshold is constructed in a strict and stringent way, in order to avoid false overcompensation of plaintiffs, who resort to antitrust law to chill competition on the market. In all, predation occurs when evidence sufficiently shows that the predator is able to raise prices to monopoly level to make up for the predation losses.

More specifically, the recoupment test is structured in a two-pronged manner:

- 1) First, “below cost pricing must be capable of producing the intended effects on the firm’s rivals, whether driving them from the market or causing them to raise prices to supra-competitive levels”³⁷⁶,
- 2) Second, it must be shown that “the predatory scheme alleged would cause a raise in price above a competitive level that would be sufficient to compensate for the amounts expended on the predations, including the time value of the money invested in it”³⁷⁷. This evaluation will rely on “an estimate of the cost of the alleged predation and the close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the

³⁷² Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

³⁷³ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

³⁷⁴ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

³⁷⁵ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

³⁷⁶ *Ibidem*

³⁷⁷ *Ibidem*

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relevant market³⁷⁸.

If either element of the recoupment cannot be demonstrated, the claim will fail. Other factors, such as new entry, the ability to expand capacity and whether the market is diffuse will determine the extent to what recoupment is possible³⁷⁹. Ultimately, the essence of recoupment is proving that the structure and the conditions of the relevant market would enable the alleged predator to engage in “sustained supra-competitive pricing” once the predated firm is driven off the market³⁸⁰.

The ability to recoup losses is proof of the achieved monopoly power of the dominant firm over an industry. If the firm cannot recoup the losses of below-cost pricing the predation scheme will only result in a temporary price reduction of the product at issue, which would enhance consumer welfare and benefit society.

Further and most importantly, the Court justifies the addition of the recoupment requirement on the basis that the Congress has passed antitrust laws “to protect competition, not competitors”³⁸¹. Thus, the mere fact that a predatory scheme will inflict losses to the predated firm does not signify violation of § 2; without the ability to recoup there is no harm to competition, therefore there is no violation of antitrust law.

The issue raised in *Brooke Group* is whether the expectation of recoupment suffices to infer proof of predation, or whether actual proof of recoupment is needed. It appears that defendant shows that predation “was likely to have succeeded” –aside from an actual proof of success. Therefore, evidence of the probable success of predation would flow *in re ipsa* into the proof of the occurred predation, since the very fact that defendants had lowered their price to chill competition on the market would convey for it the probability of success of such illegitimate conduct.

The procedural peculiarity of the case is that the Supreme Court has allowed judges to dismiss predation claims as a matter of law for lack of the likelihood of recoupment. The Supreme Court has strengthened the power of court to review and assess the complex economic evidence presented on the recoupment issue against the market realities, and to dismiss the claim if they do not find evidence sufficient to establish the high recoupment threshold. In the wake of this outcome, most predation claims are nowadays dismissed as a matter of law³⁸².

³⁷⁸ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

³⁷⁹ *Ibidem*

³⁸⁰ *Ibidem*

³⁸¹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis in original).

³⁸² *R.W. Intern, Corp v. Welch Food, Inc.*, 13 F.3d 478 (1st Cir. 1994); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995); *AD/SAT, Div. of Skylight*,

Moreover, in *Brooke Group* the *Matsushita* rule was applied in the hypothesis in which there is no proof of a concrete predation scheme. In fact, the Supreme Court held “when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability”, that is when market reality shows that predation took place with a probability of success, namely the recoupment of the losses suffered, the “economic sense” test will not impede the finding of liability³⁸³.

Another element that the Court has underscored in terms of evidence of the probability of success of the predatory scheme is the capability of the defendants to raise prices above competitive level. Ultimately, the “economic sense” recalled in *Matsushita* is a tool to define predatory standards, but recesses when documentary evidence of the likelihood of recoupment is provided.

9.2.1 Legal and economic thinking of predation – the above-the-cost pricing and recoupment requirements

Assessing whether pricing above average variable cost can be tantamount to predation is a matter of dispute among legal and economic antitrust scholars. On the one hand, leading scholars agree that all pricing above average variable cost should be presumed lawful, based on the assumption that firms that are equally or more efficient than the monopolist are able to compete against above average variable cost, and that there is no net welfare loss if less efficient firms are driven off competition.

According to Posner, a “seller may want to destroy a competitor, but if the only method used is underselling him by virtue of having lower costs, there is no rational antitrust objection to the seller’s conduct”³⁸⁴. Areeda and Turner, analogously, maintain that “the low price at or above average costs is competition on the merits and exclude only less efficient rivals”³⁸⁵.

On the other hand, some economists affirm that even an above average cost pricing policy can be anticompetitive, where the

Inc. v Associated Press, 181 F.3d 216 (2d Cir. 1999); *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 58 (5th Cir. 1999); *Taylor Pub Co. v Jostens, Inc.*, 216 F.3d 465 (5th Cir. 2000); *United States v. AMR Corp.*, 335 F.3d 1109, 1116 (10th Cir. 2003)

³⁸³ “When the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability”. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

³⁸⁴ R. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, p.188

³⁸⁵ P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 706 (1975)

monopolist prices above its own costs, but below those of the rival that he seeks to exclude³⁸⁶. Particularly in the U.S. air transport sector, in response to new entry, the monopolist carrier lowered prices by adding capacity, yet remaining above cost, and increased prices back to monopoly (pre-entry) levels when the entrant had been eliminated. Therefore, the monopolist's costs may not provide a sound guidance as to investigate the predatory nature of certain courses of action of the monopolist:

Above cost predation is possible if rivals have higher costs than the incumbent monopoly (where predatory pricing means low prices that hurt consumers by limiting competition). After all, a firm rarely achieves a monopoly without one or more advantages. Any such firm probably has gone down the cost learning curve and produces more efficiently than a newcomer. The industry may enjoy increasing returns to scale or scope. The firm may simply have a first-mover advantage and be able to hide behind entry barriers from start-up costs. It may have figured out how to make a superior quality product, enjoy demand-side network externalities, or simply have a familiar and trustworthy brand.... Some advantage or combination of advantages gives the firm monopoly power in the first place. The very advantages that give a firm monopoly power can allow it to drive out rivals without pricing below cost³⁸⁷.

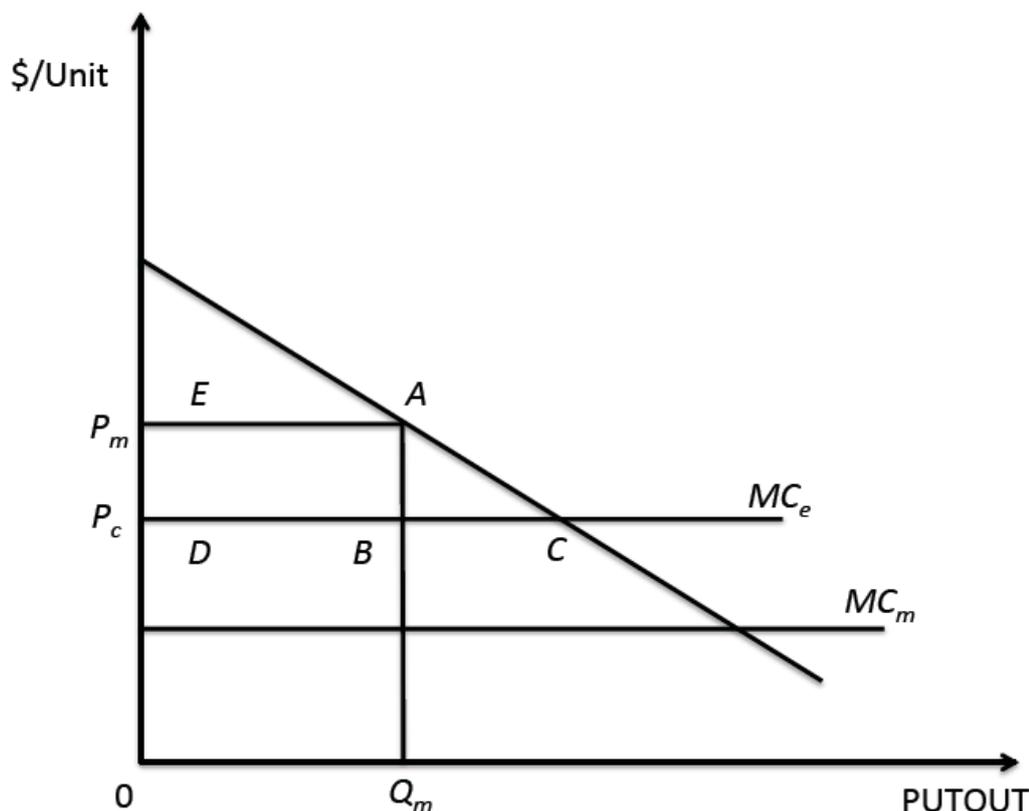
In quantitative terms, it is also possible to explain how above-cost pricing might lead to undesirable exclusion. George Hay posits the following simple example³⁸⁸. A new entrant has costs (MC_e) that are below the price (P_m) charged by the dominant company but greater than the dominant firm's costs (MC_m). Upon entry, the dominant firm lowers its price to P_c , the entrant's break-even point. Under the Areeda and Turner model, the dominant company can still lower its price further below P_c as long as it does not go below its own costs. The entrant is therefore making a loss and exits the market only for the price to return to the pre-entry monopoly level P_m .

³⁸⁶ A.S. Edlin, *Stopping Above Cost Predatory Pricing*, 111 Yale L.J. 941 (2002)

³⁸⁷ A.S. Edlin, *Stopping Above Cost Predatory Pricing*, 111 Yale L.J. 963 (2002)

³⁸⁸ G.A. Hay, *A Confused Lawyer's Guide to the Predatory Pricing Literature*, in *Journal of Reprints for Antitrust Law and Economics*, Vol. XVIII, n. 2, p. 155-203 (1988)

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Edlin purports the idea that the dominant firm should be prevented from responding with substantial price cuts or product enhancements until the entrant becomes “viable”³⁸⁹.

With regard to the element of recoupment, the debate as to whether it shall be part of the law of predation was initiated by Areeda and Turner, who argued that predation has no sense unless the predator can recoup the losses in the post-predation phase³⁹⁰.

Chicago scholars adhered to this line of thought and further argued that predation is never or hardly successful, since competition often shrinks the chances of the predator to reap the benefits of his predation strategy. Thus, many Chicagoans argued in favor of applying the strict recoupment test³⁹¹, or to expunge the offense of predation from antitrust law³⁹².

³⁸⁹ A.S. Edlin, *Stopping Above Cost Predatory Pricing*, 111 Yale L.J. 941 (2002)

³⁹⁰ P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 698 (1975)

³⁹¹ See *supra*, Elzinga & A. Mills, *Testing for Predation: is Recoupment Feasible?*, 34 Antitrust Bull. 869 (1989), R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p.145 (1993)

³⁹² F.H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U.Chi. L. Rev., 337 (1981)

This skeptical view influenced the Supreme Court³⁹³, which has traditionally dreaded the risk of creating false positives³⁹⁴, due to nature of the enforcement system -based on private plaintiffs- and the possibility of awarding treble damages. Determining whether recoupment is likely to occur requires proving strictly that the predator will be able to raise prices to recover the losses, “including the time value of the money invested in it”³⁹⁵. In fact, if the standards for predation liability were too low, “antitrust suits would become a tool for keeping prices high”³⁹⁶.

9.3 Refusal to deal

In antitrust legislation -and generally in Common Law- there is no general provision requiring that a company deal with its competitors. However, under certain circumstances there are some exceptions to the principle of freedom of business for a firm with market power³⁹⁷.

Many cases have regarded the issue of the obligation of a monopolist to consent its competitor to access its products or services³⁹⁸; however, case law has not set forth a general standard to define the monopolist’s obligation to do business with a competitor, to the extent that a court has designated the issue of “refusal to deal” as among “the most unsettled and vexatious in the antitrust field”³⁹⁹.

One of the first cases reproaching the refusal to deal under § 2 is *Eastman Kodak Co. v. Southern Photo Materials Co.*⁴⁰⁰: the plaintiff had sought to integrate forward into the distribution of photographic supplies by refusing to sell at wholesale to the defendant, which had previously refused to be bought by Kodak. The Supreme Court inferred violation of § 2 from Kodak’s refusal to deal, since the refusal “was in pursuance of a purpose to monopolize”⁴⁰¹. Kodak –as the Court found- did not decline to do business with Southern Photo based on innocent motives, but based on the intent to perpetuate a monopoly. The “intent test”⁴⁰² was applied to ascertain whether the refusal helped the

³⁹³ See *supra*, *Matshushita*

³⁹⁴ In other terms, the judicial prohibition of legitimate competition.

³⁹⁵ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

³⁹⁶ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993). Opinion of Justice Kennedy.

³⁹⁷ See Guidelines of the Federal Trade Commission, available at http://www.ftc.gov/bc/antitrust/refusal_to_deal.shtm In *United States v. Colgate and Co.*

³⁹⁸ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985). See *supra*, para. 7.3.

³⁹⁹ *Byars v. Bluff City News Co.*, 609 F.2d 843, 846 (6th Cir. 1979)

⁴⁰⁰ *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927)

⁴⁰¹ *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 375 (1927)

⁴⁰² The “intent test” was firstly used in *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919). See *supra*, para. 7.1

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monopolist maintain its monopoly, or allowed the monopolist to use its monopoly in one market to attempt to monopolize another market.

Refusals to deal have not been analyzed with a view to determining the degree of market power of the monopolist, but with a view to establishing whether the firm has utilized its market power, by means of refusing to deal with a competitor, to drive the latter off the market or to gain a monopoly position in another chain of distribution.

As a matter of fact, Kodak had already achieved a monopoly position in the photographic supply market, and by refusing to deal it had tried to expand its dominance in the supply wholesale segment. Refusals, in other terms, are not examined to assess the extent of dominance of a firm on a market; they are instrumental to the market power and are interpreted as ways to exploit market power to hold a position that has already been gained, or to gain a dominant position in another chain of the market. In that respect, refusals to deal have been treated by Courts in a similar way to monopoly leveraging⁴⁰³.

Another aspect of the refusal to deal is connected to the “essential facility” doctrine. The term “essential facilities doctrine”⁴⁰⁴ was firstly used in *Hecht v Pro-Football*, but the contours of the doctrine have been further outlined in *MCI v. AT&T*⁴⁰⁵. The hypothesis at stake is when a company possesses exclusive access to a facility that is essential to competition and that could be feasibly shared: in that case, the company may be required to provide access to that facility on a reasonable, non-discriminatory basis – even to its competitors. The Court of Appeal for the Seventh Circuit set forth a four-prong to establish whether the monopolist is under the obligation of sharing the essential facility.

First, the departing point is to assess whether or not the firm that controls the facility is a monopolist in the relevant market.

Second, the competitor must be unable to practically or reasonably duplicate the facility. Aside from the indispensable nature of the facility, it suffices that duplication of the facility would be economically infeasible and that “denial of its use inflicts a severe handicap on potential market entrants”⁴⁰⁶. The Court interpreted the element of essentiality by disregarding the circumstance for which, but for accessing the facility in question, the rival could not perform his activity, and focused on the economic unfeasibility of replicating the facility, and on the lack of a viable alternative for the plaintiff. Moreover, the facility in question must be truly

⁴⁰³ See *infra*, next paragraph.

⁴⁰⁴ *Hecht v Pro-Football Inc.*, 570 F.2d. 992-93 (1977)

⁴⁰⁵ *MCI Communication Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983)

⁴⁰⁶ *Hecht v Pro-Football Inc.*, 570 F.2d. 993 (1977)

essential to competition, to the extent that denial to access would concretely endanger the competitive process;

Third, there must be a concrete denial to a competitor to use the facility.

Fourth, the provision of the facility must be feasible. As mentioned earlier, the general rule is that even a monopolist is free to decide with whom to deal, and this element of the MCI test proves that antitrust law does not entail that the essential facility must be shared if such sharing would be impractical or would weaken the ability of the monopolist to serve its customers satisfactorily, and would negatively affect its performance in the market.

The leading case on the treatment of essential facilities is *Aspen*, in which the Supreme Court rephrased the fourth element “essential facility” doctrine, adding that the defendant must have a “valid business justification” for denying access to the facility, or for conditioning of the access to terms that are manifestly onerous for the plaintiff⁴⁰⁷.

Thus drafted, the essential facility doctrine represent an exception to the *Colgate* rule, under which “in the absence of any purpose to create or maintain a monopoly (the *intent test*), the [Sherman] Act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal”⁴⁰⁸, as long as the exercise of monopoly power is not aimed at dampening competition, at obtaining an anticompetitive advantage, or eliminating a competitor.

The valid business justification becomes fundamental in the evaluation of the monopolist’s conduct: the Court appears to have endorsed the claim of the “Chicago School” doctrine, that the main goal of antitrust action is to promote economic efficiency with a view to maximizing consumer satisfaction⁴⁰⁹. In other terms, the equation of the valid business justifications with the efficiency concerns, brought the Court to conclude that the defendant’s sacrifice of short-run benefits and consumer good will in exchange for a perceived long-run impact on its smaller rival was illicit. In considering the issue of the consumer good will, the Court relied on direct evidence of consumer unhappiness⁴¹⁰.

⁴⁰⁷ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2851 (1985)

⁴⁰⁸ *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919). See *supra*, para. 7.1

⁴⁰⁹ J.A. Bouknight, *Aspen Skiing Co. v. Aspen Highlands Skiing – The Conduct Standard under Section 2 of the Sherman Act*, 6 Energy Law Journal, p. 275 (1985)

⁴¹⁰ “The question whether Ski Co.’s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a firm has been

The way of policing § 2 in *Aspen* with regard to the “essential facility” doctrine sheds new light on the link between antitrust and economic theory: the monopolist should be encouraged to expand its output and compete for every sale, to the extent that his practices can be recollected in the merits of competition, and do not interfere in an unnecessary way with the efforts of other rivals to compete on the merits. The assessment of the necessary nature of the refusal in a perspective of competition on the merits is left up to the Courts, which, as it has been observed, have found violations of § 2 only in exceptional circumstances, namely when the firm’s conduct would result in an evident decrease of consumer welfare.

When competition has the opposite result of hampering economic efficiency to the detriment of consumers, enforcement agencies will infer violation of § 2. Once again, the Supreme Court rejects the *Alcoa* approach, that a monopoly is lawful only when it is “thrust upon” a passive firm and, in general, the equation “bigness – badness” put forward by this judgement. The harm to consumers caused by an economically inefficient industrial relationship between two firms –of which one is dominant- is a ground for violation of § 2 of the Sherman Act.

Despite this significant outcome, the essential facility doctrine Courts have rarely found a facility to be essential. They have considered a facility as essential only if its control of the monopolist is carried with the intent to eliminate competition, since competitors cannot do business without it⁴¹¹.

That is because an extensive application of the essential facility doctrine could reveal itself as a Trojan horse in antitrust law and enforcement, since it would allow Courts to re-interpret industrial relationships, on the one hand, and freedom of enterprise, on the other hand, in an antipodal way. Courts would be entitled to induce a firm to venture together with a competitor when the preclusion from usage of a facility that is deemed essential would curtail the latter’s ability to do business.

“attempting to exclude rivals on some basis other than efficiency”, it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on Ski Co.’s smaller rival, and on Ski Co. itself.” *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2857 (1985)

⁴¹¹ *Alaska Airlines v. United Airlines*, 948 F.2d 536 (9th Cir. 1991), in which access to the airline computer reservation system was not considered essential; *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373 (9th Cir. 1992), in which a fully integrated power company with monopoly was found to have no duty to wheel power for a municipally-owned distribution company where wheeling would have merely shifted costs from one set of customers to another. See. W.E. Kovacic, *The Antitrust Law and Economics of Essential Facilities in Public Utility Regulation*, in M.A. Crew (Ed.), *Economic Innovation in Public Utility Regulation 1*, Kluwer Academic Publishers (1992)

Likewise, professor Areeda suggests that under § 2 there is no general duty to share an essential facility, but this obligation is only exceptional. Unlike the EU Community Courts, which recognizes the duty to supply more often, American Courts hold that a single firm's facility is essential only when it is both critical to "the plaintiff's competitive vitality and the plaintiff is essential for competition in the marketplace"⁴¹². EU competition law does not require for the claimant's activity to be essential for the competitive process; however, Court holding that the sharing of a facility is essential for competitors in general (not for a particular competitor) might achieve the same result⁴¹³. Moreover, whilst in American law of essential facility the existence of a valid business justification always plays out favorably for the defendant, in the sense of constituting a ground for not sharing, the EU Community law does not explore as in detail the issue of valid business justifications, but simply affirms that the refusal to share the facility is to be done without an "objective justification"⁴¹⁴.

The intent of the monopolist when denying access is normally irrelevant, since supervising the subjective status of the defendant would make the essential facility doctrine less narrow and more flexible in its application. Courts could infer violation of § 2 by simply proving that the defendant had intent to exclude the rival, in a way to curtail its freedom to compete aggressively on the marketplace.

Moreover, obliging the owner of a facility to grant access to it against its will raises concerns about the legitimate nature of the gains the firm granted access would benefit from. The ability to retain an asset is a key element of competition and has pro-competitive consequences, since in general competitors would have to compete more harshly and redistribute some of their gains to consumers in order to "catch up" with the owner of the facility. Exceptionally, if the denial were to dampen competition in the downstream market to the detriment of consumers (harm to competition), it would become relevant to § 2 scopes.

10. Attempts to Monopolize

In addition to the offenses of monopolization and conspiracies to monopolize, § 2 also proscribes attempts to monopolize. However, even if attempted monopolization can be prosecuted as a felony, very few cases have followed this path of enforcement.

⁴¹² P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *Antitrust Law Journal* 852, (1989)

⁴¹³ *Ibidem*

⁴¹⁴ In the Bronner Case, the ECJ affirmed that access to the facility is to be denied without an "objective justification": there is no mention of a ground of exculpation based on an industrial/business argument. *Oscar Bronner v. Mediaprint*, 26.11.1998, Case C-7/97, [1998] ECR I-7817, para. 41

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Early, in *Swift & Co. v United States* it was held that attempted monopolization is a conduct bordering monopolization, but that does not attain completed monopolization. There must be a specific intent to monopolize and a dangerous probability that, if unchecked, such conduct will ripen into monopolization⁴¹⁵.

This definition has been expanded in *American Tobacco*, where the Supreme Court has established that “the phrase ‘attempt to monopolize’ means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment”⁴¹⁶.

However, this definition leaves some issues undisclosed, such as the amount of market share a firm is to attain prior to being charged with attempted monopolization, or the exact standards integrating an attempt.

The difficulty of searching attempted monopolization standards reflects the tension between prohibiting a conduct amounting to monopolization, on the one hand, and the fear of Courts of producing false positives, namely sanctioning pro-competitive business practices, on the other hand. That, together with the issue that attempted monopolization entails prosecuting an unsuccessful monopoly campaign, raised even more concern⁴¹⁷. A desire to increase market share or even to drive a competitor out of business through vigorous competition on the merits has never amounted to monopolization. In attempted monopolization cases, Courts have emphasized that aggressive efforts to compete are not illegal, but are to be encouraged⁴¹⁸.

A more recent outcome that shed light on unanswered questions above is *Spectrum Sports Inc. v McQuillan*⁴¹⁹, where the Supreme Court has adopted a three-tier test for attempted monopolization. In practice, plaintiff must prove:

⁴¹⁵ *Swift and Company v. United States*, 196 U.S. 375 (1905)

⁴¹⁶ *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946) quoting and “welcom[ing] this opportunity to endorse” these statements from *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir.1945)

⁴¹⁷ In the judicial practice, the defendant can be convicted of both monopolization and attempted monopolization, but the common view is that the attempt of monopolizing merges into the actual offense of monopolization. *American Tobacco Co. v. United States*, 328 U.S. 781, 784 (1946)

⁴¹⁸ *Midwest Radio Co. v. Forum Publishing Co.*, 942 F.2d 1294 (1991). Hiring a competitor’s employee to improve performance was not considered as an anticompetitive conduct.

⁴¹⁹ *Spectrum Sports v. McQuillan Et Vir, DBA Sorboturf Enterprises*, 506 U.S. 447 (1993), 113 S.Ct. 884, 122 L.Ed.2d 247.

1) Anticompetitive Activity: the conduct is designed to impair the opportunities of rivals or to dampen competition on the merits. It is important to distinguish this conduct from conduct that is merely competitive. In short, the defendant must be employing unfair means to achieve his goal (the same activities that are condemned in cases of actual monopolization)⁴²⁰.

2) Specific Intent to Monopolize: there must be a specific intent to exclude competitors and gain monopoly power, which can be inferred either by direct evidence from evidence that the firm had engaged in anticompetitive behavior⁴²¹. Direct evidence of the intent alone, without evidence of the anticompetitive conduct cannot sustain a claim of attempted monopolization⁴²².

The type of intent required for monopolization is different than the intent necessary to prove attempted monopolization. In the first case, plaintiff must only show that the “deliberate and purposeful” act of the defendant is not the result of historic accident or superior skill. In the second case, proof of intent is more substantial, entailing specific determination to exclude rivals. The difference rests on one of the basic tenets of antitrust law and Common Law in general, the fact that specific intent in common-law sense is only necessary where the conduct fall short of results proscribed by antitrust law itself. Because attempted monopolization regards a conduct that has not produced the desired results, plaintiff needs a stronger proof to satisfy the element of specific intent.

3) Dangerous Probability of Success: an attempt to monopolize is the employment of methods that, if successful, would accomplish monopolization and which, “though falling short, nevertheless approach so close as to create a dangerous probability of it”⁴²³.

A finding of dangerous probability of success is basically a function of market power, because the Court reversed a line of the Ninth Circuit cases holding that the “dangerous probability of success” element of the offense might be satisfied absent the proof of a relevant market or the alleged monopolist’s power therein⁴²⁴.

⁴²⁰ See *supra*, para. 2

⁴²¹ M&M Med. Supplies and Serv. v. Pleasant Valley Hosp., 981 F.2d 160, 166 (4th Cir. 1992), “Specific intent may be inferred from the defendant’s anticompetitive practices”. Volvo N. Am. Corp. v. Men’s Int’l Prof’l Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988), “proof of anticompetitive or exclusionary conduct may be used to...infer specific intent to monopolize”.

⁴²² Spectrum Sports v. McQuillan Et Vir, Dba Sorboturf Enterprises, 506 U.S. 447 457 (1993), 113 S.Ct. 884, 122 L.Ed.2d 247

⁴²³ Spectrum Sports v. McQuillan Et Vir, Dba Sorboturf Enterprises, 506 U.S. 447 458-59 (1993), 113 S.Ct. 884, 122 L.Ed.2d 247 endorsing American Tobacco Co. v. United States, 328 U.S. 781, 784 (1946)

⁴²⁴ Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964)

In *Spectrum*, the Court stated that there is a direct relationship between market shares, on the one hand, and dangerous probability of success, on the other hand; however, it held that inference of the dangerous probability of success could occur at market share levels well below those needed to establish actual monopolization.

Any change in market share brought about by the activity at issue may also be relevant. Moreover, the Court rejected the assumption that a dangerous probability of success could be inferred from proof of predatory conduct alone, but held that satisfying the dangerous probability element requires an “inquiry into the relevant product and geographic market and the defendant’s economic power within that market”⁴²⁵.

The assessment of the defendant’s market power was deemed essential for the reach of § 2. “The purpose of the Sherman Act is not to protect business from the working of the market...but it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself”⁴²⁶.

Aside from the three elements of, as well as actual monopolization ones, attempted monopolization claims must entail an antitrust injury: plaintiff must show that interstate commerce was affected by the defendant’s course of conduct, not just his individual business.

11. Other pricing abuses – Price discrimination

When the dominant firm determines its price, it is assumed it will charge only one price for his product for all the customers in the market. However, by virtue of its monopolistic position, the firm may sell the same commodity at different prices to different customers or in different markets.

The practice on the part of the dominant firm to sell the same goods at the same time to different buyers at different prices, being the price difference not justified by difference in costs, is called price discrimination.

The monopolist may discriminate in price between different markets or between different customers in the same market. In either case, price discrimination might be presumably increase the likelihood of predation by risking only a portion of the defendant’s business while threatening the entire business of smaller rivals who are confined to the geographic area in which the selective price cut was made or who serve primarily those

⁴²⁵ *Spectrum Sports v. McQuillan Et Vir, Dba Sorboturf Enterprises*, 506 U.S. 447 458-59 (1993), 113 S.Ct. 884, 122 L.Ed.2d 247

⁴²⁶ *Spectrum Sports v. McQuillan Et Vir, Dba Sorboturf Enterprises*, 506 U.S. 447 458 (1993), 113 S.Ct. 884, 122 L.Ed.2d 247.

customers who will benefit from the price reduction. Thus, in cases of price discrimination, the predation requirement of greater market power may more frequently be met⁴²⁷.

The possibility that price discrimination imposed by a powerful seller might either monopolize the market or consolidate an existing monopoly is a long-recognized antitrust issue. Price discrimination might enable large firms to obtain inputs at prices unavailable to smaller competitors, and might also lead buyers to grow market power at their competitors' expenses, without relationship to their own or their competitors' efficiency⁴²⁸.

More specifically, only a firm with market power is capable of engaging in price discrimination, namely selling the same products to different customers at different prices, causing harm to competition in a relevant market. In economic terms, price discrimination occurs when identical or similar products are sold at prices that have different ratios to the marginal cost of producing the products. If two items have the same marginal cost, then different prices are discriminatory *per se*. On the other hand, if two items have different marginal costs, the same price for them would be inference of price discrimination.

One of the negative effects of price discrimination, which makes it relevant to the scopes of antitrust law, is that this practice can be used as a predatory scheme to eliminate competitors that, due to the smaller size of their business, will not recover the profits lost in the predatory pricing scheme. Moreover, price discrimination may injure competition, since purchasers will be forced to pay a higher price.

When price discriminating, the monopolist will have a two-fold purpose: first, he will seek to increase of its total revenue and profits and, second he will seek to produce a larger output than its rivals.

Price discrimination is possible and profitable when the monopolist is able to control the amount and distribution of output and the buyers can be segregated into different sub-markets, because of a demand curve with different elasticities. Assuming that the monopolist sells his product in two sub-markets A and B, and that the demand for the product sold is more elastic in sub-market B than in sub market A, he will sell a greater amount of his product by reducing the price in market B. Parallel to that, he will be reducing output in market A, and sell at a higher price than in market B.

Thus, price discrimination under monopoly is possible when the following three conditions are met:

⁴²⁷ P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975)

⁴²⁸ T. Calvani & G. Breidenbach, *An Introduction to the Robinson-Patman Act and Its Enforcement by the Government*, 59 Antitrust L.J 765, 766 (1991)

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1. Monopoly power - the seller of the commodity is to have power to influence price.
2. Segregation of markets - there should be no possibility of transferring a unit of commodity supplied from the market with lesser elastic demand into the one with more elastic demand.
3. Segregation of demand - the elasticity of demand differs in the segregated sub-markets. The monopolist will charge a lower price for a commodity in the market where demand is more elastic. Conversely, if demand is inelastic, the monopolist will simply fix higher prices for his product.

The monopolist will price-discriminate in two ways: (1) between different geographic markets; and (2) between different customers, yet within the same geographic market.

Sub 1) According to the Areeda-Turner formula, the low price in one market should be considered predatory only if below marginal cost, whereas with regard to the competitive markets the monopolist should be entitled to any defenses available to any other seller⁴²⁹.

Sub 2) According to the economic principle that Courts have conformed to, a monopolist should be permitted to make a general price reduction as long as the price for the product will be equal or above its marginal cost.

When it comes to selective price-cutting aimed at retaining or obtaining particular customers, this principle enshrined in § 2 does not stand as a tool to for prohibiting it. In other terms, there are no legal arguments to prohibit selective price-cutting, because they offer no grounds to affirm that selective cuts are more harmful to small competitors than a general price reduction to the same level. Discriminatory price reductions are *prima facie* excluded from the reach of § 2 of the Sherman Act.

Moreover, a necessary element of predation is missing in selective price cuttings at or above marginal cost, namely the harm to competition, on the account of the fact that the increase in sales generated by the price reduction will determine an increase in short run net returns, assuming that the demand is elastic⁴³⁰.

The only possible argument for prohibiting selective cuts under the umbrella of § 2 is a pragmatic one. In the event small competitors would cut the price for their products, the monopolist will be confronted with two options: (1) a general price-cut, which would preserve his market share but would cause a loss in profits; (2) maintaining his price, which would preserve high profits on his sales, but lead to a reduction of its market share. Faced with

⁴²⁹ See *infra*, the defenses of cost justification and meeting competition pursuant to the Robinson-Patman Act.

⁴³⁰ P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 725 (1975)

that choice, the monopolist would often elect to maintain his price, thus facilitating the growth of competitors and the erosion of his monopoly. Banning discriminatory price cuts other than the marginal-cost-threshold rule would foster the growth of competitors⁴³¹.

However, establishing a rule forcing the monopolist to charge a higher price -namely imposing him to charge at a level above marginal cost- in order to prevent discrimination would reduce industry output and waste economic resources; at the same time, it would permit survival not only of equally efficient firms, but less efficient ones as well. And in the short run, at least, entry even by equally efficient firms will be undesirable since excess capacity already exists⁴³².

11.1 The Robinson-Patman Act

Aside from the difficulties in applying the Sherman Act to price discrimination, and subject to affirmative defenses of cost justification and meeting competition, the Robinson-Patman Act prohibits price discrimination in sales of the same product where the effect ... may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them⁴³³.

Section 2 of the Clayton Act in 1914 is the first antitrust ban against price discrimination. In the preamble it is affirmed that the Act was passed "to supplement existing laws against unlawful restraints and monopolies, and for other purposes"⁴³⁴. Section 2 originally forbade local price-cutting by monopolistic sellers seeking to exclude competitors from their markets⁴³⁵. The

⁴³¹ P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 711 (1975). The authors argue that such threshold would be very difficult to administer for courts, because it does not comply with any standard measurement of cost. Instead, they advocate for the use of average variable cost as a proxy for marginal cost to mitigate the administrative difficulties of enforcement.

⁴³² P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 711 (1975). The authors affirm that pricing at marginal cost level is the competitive and social optimum.

⁴³³ 15 U.S.C. § 13(a) (1970). See *infra*, the defenses of cost justification and meeting competition pursuant to the Robinson-Patman Act.

⁴³⁴ Clayton Act (Oct. 15, 1914, ch. 323, 38 Stat. 730)

⁴³⁵ Section 2 of the Clayton Act: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend

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Robinson-Patman Act (15 U.S.C.A. § 13 a–f)⁴³⁶ amended the foregoing provision in 1936⁴³⁷, prohibiting a seller of commodities from selling comparable goods to different buyers at different prices, except in certain circumstances.

In particular, the Robinson-Patman Act prohibits a seller of commodities from selling comparable goods to different buyers at different prices, except in certain circumstances. Section 2(a) contains six substantive provisions: prohibits a seller from discriminating in price between two or more competing buyers in the sale of commodities of like grade and quality, where the effect of the discrimination “may be substantially” to “lessen competition...in any line of commerce”; or “tend to create a monopoly in any line of commerce”; or “injure, destroy or prevent competition with any person who grants or knowingly receives the benefit of the discrimination, or with the customers of either of them”.

In the wake of protectionist spirit of the New Deal, the bill sought to shelter small businesses from price competition of large chain stores, with a view to preventing the latter from attaining monopoly⁴³⁸. In political parlance, the bill is known as the “chain store bill”: this epithet captures more than anything the populist and protectionist feeling animating the endeavor to discourage price competition and promote price uniformity.

Despite its antitrust origins, private parties do not resort to the Robinson-Patman Act nearly as often as they use the Sherman Act, in part because of its complexity. The government, which may bring an action under the Robinson-Patman Act through the Federal Trade Commission (FTC), rarely initiates actions under the statute⁴³⁹. As a matter of fact, the Robinson-Patman Act has

to create a monopoly in any line of commerce: provided that nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: and provided further that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade”.

⁴³⁶ The Robinson-Patman Act is a 1936 statute (15 U.S.C.A. § 13(a–f) that amended Section 2 of the Clayton Act (Oct. 15, 1914, ch. 323, 38 Stat. 730).

⁴³⁷ J.B. Kirkwood, *The Robinson-Patman Act and Consumer Welfare: Has Volvo Reconciled Them?*, 30 Seattle University Law Review 349, (2007)

⁴³⁸ The bill’s namesake, Representative Wright Patman emphasized that the amendments to the Clayton Act were intended to eliminate the ability of large chain stores to exploit their mass-producing scale to extract discriminatory treatments from sellers. Remarks of Wright Patman 74th Cong. 2d Sess. (Mar. 9, 1936) 80 Cong. Rec. 3446 (1936).

⁴³⁹ T. Calvani & G. Breidenbach, *An Introduction to the Robinson-Patman Act and Its Enforcement by the Government*, 59 Antitrust Law Journal 765, 766 (1991)

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been criticized both for its poor drafting and its underlying protective economic theory. The Supreme Court has stated that it is “complicated and vague in itself and even more so in its context”⁴⁴⁰. Moreover, price discrimination may still violate the Sherman Act if it constitutes a restraint of trade or an attempt to monopolize⁴⁴¹; or, it may constitute an unfair method of competition pursuant to sec. 5 § 45 of the Federal Trade Commission Act⁴⁴².

Section 2a of the Robinson-Patman Act applies to sales of commodities of like grade and quality in commerce. More specifically, it is unlawful for any person⁴⁴³:

- 1) engaged in commerce
- 2) to discriminate in price between different purchasers
- 3) of commodities of like grade and quality
- 4) where the effect may be to substantially lessen competition in any line of commerce,
- 5) or tend to create a monopoly or
- 6) to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with the customers of either of them⁴⁴⁴.

A seller does not violate the Act but for selling similar commodities to different purchasers at different prices. The Act only applies to sales transactions that cross the state boundaries – the “in commerce” requirement-, in which there are at least two purchasers⁴⁴⁵ and two fairly contemporaneous transactions⁴⁴⁶.

⁴⁴⁰ *FTC v. Ruberoid Co.*, 343 U.S. 470, 72 S. Ct. 800, 96 L. Ed. 1081 (1952)

⁴⁴¹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993)

⁴⁴² 15 USC § 41, [Title 15 › Chapter 2 › Subchapter I › § 45](http://www.ftc.gov/ogc/FTC_Act_IncorporatingUS_SAFE_WEB_Act.pdf), available at http://www.ftc.gov/ogc/FTC_Act_IncorporatingUS_SAFE_WEB_Act.pdf. See *infra*.

⁴⁴³ The word “person” or “persons” wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

⁴⁴⁴ Both the seller who offers and the preferred buyer who knowingly receives discriminatory prices are guilty of violating section 2a of the Act. Cfr. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968)

⁴⁴⁵ Section 2a does not cover offers to sell, leases, agency or consignment arrangements, or a seller’s refusal to deal. *Terry’s floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604 (4th Cir. 1985). Furthermore, the Act does not apply to the sale of intangible and services, since these are not “commodities”. *Tri-State Broadcasting v. UPI*, 369 F.2d 268 (5th Cir. 1966). Examples of intangibles include: 1) mutual fund shares [*Baum v. Investors Diversified Services*, 409 F.2d 872 (7th Cir.1969)], 2) patent licenses [*LaSalle Street Press v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004 (N.D. Ill. 1968), *modified*, 445 F.2d 84 (7th Cir. 1971)], 3) real estate leases [*Export Liquor Sales v. Ammex Warehouse*, 426 F.2d 251 (6th Cir. 1970), *cert. denied* 400 U.S. 1000 (1971)], 4) cellular telephone services and systems [*Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739 (7th Cir. 1993)]. Price

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The “like grade or quality” requirement implies that the products do not have physical differences and have the same degree of acceptability. Differences in the brand name, or in the labeling, do not add sufficient physical difference, not justifying price discrimination⁴⁴⁷.

The “injure to competition with any person who grants such discrimination” refers to the so-called “primary line” abuses, where the large firm applies a “substantial and sustained” reduction in price in a local area with the intent of destroying or downscaling a smaller rival to the detriment of competition⁴⁴⁸.

The general rule is that the mere diversion of sales from the discriminated competitors to the discriminating firm is not sufficient to establish a primary line injury: the plaintiff is to show that the lessening on competition resulting from the price discrimination at stake has caused him an actual injury⁴⁴⁹. Furthermore, the discrimination ought not to be temporary, and the smaller-scale plaintiff must prove the intent or knowledge of the effect of injuring him, causing at the same time harm to competition⁴⁵⁰.

Primary line abuses are generally represented by predatory price cuts of a nation-wide company in separate geographic areas: in *Utah Pie Co. v. Continental Baking Co.*⁴⁵¹, the Supreme Court found a brief local price-cutting by three “large” national firms to be a violation of section 2a notwithstanding the fact that the plaintiff, a “small” local firm, held the bulk of the market and continued to operate at a profit throughout the period covered by the complaint. The “below cost” sale of two of the three firms was found to injure competition in both the sellers’ and the buyers’ market⁴⁵² -albeit it was only below average cost- as evidence of the predatory intent sufficed to infer the discrimination intent aimed at lessening competition⁴⁵³.

discrimination in services and intangibles may still violate the Sherman Act if it constitutes a restraint of trade or an attempt to monopolize. Cfr. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

⁴⁴⁶ *Atlanta Trading Corp. v. FTC*, 258 F.2d 365 (2d Cir. 1958)

⁴⁴⁷ *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1952)

⁴⁴⁸ *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891 (3rd Cir.), *cert. denied*, 474 U.S. 863 (1985)

⁴⁴⁹ *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2551 n. 11. 110) (1990)

⁴⁵⁰ F.M. Rowe, *Price Discrimination Under the Robinson-Patman Act*, Boston: Little Brown, (1962), p. 162. “To equate the diversion of business among rival sellers is to indict the competitive process itself”.

⁴⁵¹ *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

⁴⁵² *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 702 (1967).

⁴⁵³ *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 703 (1967). Compare further *William Inglis & Sons Baking Co. v. Continental Baking Co.*, 942 F.2d 1401 (9th Cir. 1991). “To serve as sufficient evidence of intent for a price discrimination claim, a price/cost comparison must meet the same standard required to establish intent for an attempted monopolization claim”.

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Respondents were condemned for having contributed to deteriorate the price structure of the market, since evidence showed a “drastically declining price structure” that could be attributed to either sustained or sporadic price discriminations⁴⁵⁴. The Supreme Court thus affirmed the principle that a national company can be found guilty of price discrimination if it used price cuts to enter a market dominated by a local firm⁴⁵⁵.

In the renowned *Brooke Group* case, the Court rethought of the issue of primary line abuses in light of its proximity with the predation standards pursuant to § 2 of the Sherman Act. After stating that the Robinson-Patman Act is a tool to proscribe conduct lawful under the Sherman Act, it stated: “the essence of the claim under either statute is the same: a business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market”.

As well as in the event of a predation claim, in order to hold a firm liable for charging low prices in violation of the Robinson-Patman Act, the plaintiff is to prove that: 1) the defendant charged a price “below an appropriate measure of its rival’s costs”⁴⁵⁶; 2) the defendant had a “dangerous probability” of recouping its investment in below cost pricing⁴⁵⁷. Failing the defendant to prove the second requirement, the claim was not sustained; however, the Court grounded the analysis of primary line predation claims on the likelihood of recoupment of the investment in below-cost sales, therefore repudiating its approach in *Utah Pie*, whereby primary line liability can be established by merely proving that the defendant lowered its price below an appropriate measure of its rival’s cost and showed intent to drive the latter off the market⁴⁵⁸.

The “injure to competition with any person who knowingly receives price discrimination” refers to secondary line injury, namely injury to competitors of the seller’s customer. A powerful customer may injure competition by forcing sellers to give him unjustified discounts. Secondary line injury still refers to the effect of discriminatory prices, because one customer cannot obtain a

⁴⁵⁴ *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 703 (1967).

⁴⁵⁵ W.S. Bowman Jr., *Restraint of Trade by the Supreme Court: the Utah Pie Case*, 77 Yale L.J. 70, (1967)

⁴⁵⁶ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

⁴⁵⁷ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

⁴⁵⁸ The Court did not overrule *Utah Pie*, but its post-*Brooke Group* outcomes are virtually irrelevant. *AA Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 680 (S.D. Ind. 1988), where the Court rejected the primary line injury case because ease of entry in the market would preclude the defendant from recouping its investment in localized price discrimination.

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more favorable price than its competitors, absent an upstream discrimination and a difference in “bargaining power” on part of the customer. There must be competition between the customer buying the commodities at the high price and the one disfavored by the low price⁴⁵⁹. Moreover, there must be competition from both a geographic and a functional standpoint; in particular, buyers must belong to the same functional class, otherwise different prices can be lawfully charged⁴⁶⁰.

This type of injury to the buyer-level competition very often occurs between chain stores and small stores, less frequently in the context of wholesaler-retailer transactions. Even though wholesalers and retailers may appear not to be in the same level of distribution, the seller might still violate the Robinson-Patman Act in the event the two groups compete and the defendant sells at different prices to the two groups⁴⁶¹.

One of the most relevant Supreme Court decisions concerning secondary line abuses, based on the Robinson-Patman Act is *Texaco v. Hasbrouck*, which inquired into the legitimacy of functional discounts. A functional discount is one given to a buyer based on its role in the supplier’s distribution system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier⁴⁶².

In *Hasbrouck*, twelve independent Texaco retailers sued Texaco, alleging that while Texaco sold gasoline to them at retail tank wagon prices, it sold gasoline to two other independent distributors –which were in competition with the Texaco retailers– at prices 3.65 to 6 cents lower than the retail tank wagon price⁴⁶³.

The District Court ultimately found for the twelve plaintiff retailers and argued that “the presumed legality of functional discounts had been rebutted by evidence that the amount of the discounts to Gull and Dompier was not reasonably related to the cost of any function that they performed”⁴⁶⁴. The Court of Appeals affirmed.

⁴⁵⁹ *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (1993). The Court of Appeals for the 11th Circuit clarified that there must be competition in the same geographic market, even if the buyers are located in different areas.

⁴⁶⁰ *Adcom, Inc. v. Nokia Corp.*, 812 F.Supp. 81 (1993) “A plaintiff alleging a secondary-line injury must prove that the defendant seller made a sale to two different buyers at the same functional level of competition within the same geographic market”.

⁴⁶¹ *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2542 n. 11. 110) (1990)

⁴⁶² *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2542 n. 11. 110) (1990)

⁴⁶³ *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2538-40 n. 11. 110) (1990)

⁴⁶⁴ *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2541 n. 11. 110) (1990)

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The Supreme Court argued that functional discounts that represent a mere “recognition and reimbursement for actual marketing functions” are not explicitly prohibited by the Robinson-Patman Act; therefore, they are to consider as lawful⁴⁶⁵. On the other hand, the Court noted that there was no evidence that would connect the discount accorded by Texaco to any market benefits enjoyed by the later, concluding that Texaco had engaged in price discrimination with a view to dampening competition of the retail gas market⁴⁶⁶.

The *Hasbrouck* decision emphasizes that functional discounts are legitimate under the Robinson-Patman Act to the extent that they are a premium for actual marketing functions performed by the favored purchasers. The Court indicated that it would not approve of “a functional discount completely untethered to either the supplier’s savings or the wholesaler’s costs”,⁴⁶⁷ but it also indicated that establishing “a causation defense in a functional discount case does not demand the rigorous accounting associated with a cost justification defense”.⁴⁶⁸ The Court found it unnecessary to decide, however, whether the amount of the discount should be reasonably related (1) to the costs incurred by the buyer in performing the services at issue, or instead (2) to the cost savings that accrued to the seller as a result of the buyer performing the services at issue.

In *Perkins v. Standard Oil*, the defendant sold to plaintiff at a higher price than it charged Signal Oil, a wholesaler; the latter passed its lower price onto other dealers in competition with the plaintiff. The Court found Standard Oil guilty of price discrimination because the price difference resulted to be detrimental to the plaintiff, even if it was not directly targeted against him. When it comes to the competitive injury, it can be inferred from the discrimination itself, having the Court stated in *Morton’s Salt* that very little beyond a sustained and substantial difference in price that can influence resale price supports a finding of secondary line injury⁴⁶⁹.

Morton’s Salt inference of injury can be rebutted if evidence shows the breaking of the causal connection between price differential and injury to competition. In *Bois Cascade Corp.* the defendant rebutted the claim of secondary line abuse proving that price differential constituted an introductory customer-attracting discount⁴⁷⁰.

⁴⁶⁵ *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2546 n. 11. 110) (1990)

⁴⁶⁶ *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2546 n. 11. 110) (1990)

⁴⁶⁷ *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2546 n. 11. 110) (1990)

⁴⁶⁸ *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2547 n. 11. 110) (1990)

⁴⁶⁹ *FTC v. Morton Salt Co.*, 334 U.S. 37 (68 S.Ct. 822, 92 L.Ed. 1196) (1948)

⁴⁷⁰ *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (1988)

The “injure to competition with customers of any person who knowingly receives” refers to tertiary line injury, which may be suffered by a customer of a buyer who in turn suffered the discrimination, if that customer competes against those customers who received a more favorable treatment from a seller. This type of discrimination is similar to those in secondary line hypotheses.

11.2 Defenses to a *prima facie* price discrimination claims

There are two statutory defenses to a *prima facie* price discrimination claims and a third judicially-conceived one. These are in turn: 1) the “meeting competition” defense, 2) the “cost justification” defense, and 3) the “functional availability” defense.

The “meeting competition” defense is enshrined in Section 2b of the Robinson-Patman Act, which provides that discriminatory prices are lawful when the seller has charged that price “in good faith to meet an equally low price of a competitor”. This defense has been explained as the most potent means to minimize Robinson-Patman Act risks of frustrating the core objective of antitrust laws of encouraging competition between sellers⁴⁷¹. It is an absolute defense, namely it will bar a claim regardless of whether the injuries were to competition or to competitors⁴⁷².

The test applied in court seeks to establish “whether a reasonable and prudent person [would] believe that the granting of a lower price would, in fact, meet the equally low price of a competitor”⁴⁷³.

The Supreme Court has construed price discrimination abuses not as strict liability offenses, but as offenses in which the defendant’s state of mind or intent must be “established by evidence and inferences drawn therefrom, and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices”⁴⁷⁴.

The defense is construed as a “good faith believe, rather than an absolute certainty”, and in most cases it is a commercial belief that, absent the price reduction, the transaction would be lost. The standard is met when the seller can “show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would, in fact, meet the equally low price of a competitor”⁴⁷⁵.

In *Falls City v. Vanco*, the Supreme Court ruled that the good faith standard is “a flexible and pragmatic concept” that allows the

⁴⁷¹ R.T. Joseph & B.T. Harrop, *Proof of the Meeting Competition Defense: Investigation and Verification of Reported Competing Offers*, 62 Antitrust L.J. 127 (1993).

⁴⁷² <http://legal-dictionary.thefreedictionary.com/Robinson-Patman+Act>

⁴⁷³ *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978)

⁴⁷⁴ *United States v. United States Gypsum Co.*, 438 U.S. 434 (1978)

⁴⁷⁵ *United States v. United States Gypsum Co.*, 438 U.S. 422, 451 (1978), quoting *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945).

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seller to respond to what he believes is a situation of competitive necessity⁴⁷⁶. At any rate, sellers need not communicate price information with each other in order to avail themselves of this justification⁴⁷⁷, because they can still be charged with price fixing under § 1 of the Sherman Act.

Moreover, section 2b does not distinguish between one who meets a competitor's lower price to retain a current customer and one who meets a competitor's lower price in an attempt to gain new customers⁴⁷⁸. Thus, the defense can be invoked in either case.

The Court has determined that "territorial price differences that are in fact responses to competitive conditions" satisfy the requirements of the defense⁴⁷⁹. Moreover, the seller may reduce prices in order to secure new customers, as well as to retain old ones⁴⁸⁰. A firm may also rely on the meeting competition defense to support meeting a rival bid that the firm reasonably believes is lower than its own, even though the firm does not know the rival's exact bid, or seeks to match only the total bid amount and not its individual components⁴⁸¹.

The "cost justification" defense allows an otherwise unlawful discriminatory price where the differential makes "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered"⁴⁸². If the difference in two selling prices reflects only a difference in the seller's cost of supplying the different buyers, regardless of the effect of such difference on buyers themselves, the discrimination shall be deemed lawful. Proving a cost justification establishes an absolute defense to a *prima facie* violation of the Robinson-Patman Act⁴⁸³.

To rely on the cost justification the defendant must document the quantity discount by actual cost saving due to the quantity sold, not by merely asserting that sales of larger lots of a commodity are

⁴⁷⁶ *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (103 S.Ct. 1282, 75 L.Ed.2d 174) (1983)

⁴⁷⁷ *United States v. United States Gypsum Co.*, 438 U.S. 438 (1978) However, "exchanges of price information, even when putatively for the purpose of Robinson-Patman Act compliance, must remain subject to close scrutiny under the Sherman Act".

⁴⁷⁸ *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 446 (103 S.Ct. 1282, 75 L.Ed.2d 174) (1983)

⁴⁷⁹ *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 448 (103 S.Ct. 1282, 75 L.Ed.2d 174) (1983)

⁴⁸⁰ *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 445-51 (103 S.Ct. 1282, 75 L.Ed.2d 174) (1983)

⁴⁸¹ *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 82-83 (1979)

⁴⁸² 15 U.S.C. § 13(a) (1970)

⁴⁸³ F.R. Rowe, *Cost Justifications of Price Differentials under the Robinson-Patman Act*, 59 Columbia Law Review 584, (1959); D.G. Hemminger, *Cost Justification: A Defense with New Application*, 59 Antitrust L.J. 827 (1991)

more economical. In order to compute the cost differential and justify the quantity discount, the seller may classify customers into reasonable categories, in accordance with the homogeneity of each group and cost of selling to the customers in each group⁴⁸⁴.

A disclaimer applies to this justification, the fact that even if quantity discount are justified by cost savings to the seller, the FTC is empowered to “fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce”⁴⁸⁵.

The third judicially-developed defense of functional “availability” is based on the assumption that there can be no violation of section 2a of the Robinson-Patman Act if the allegedly discriminatory price is practically and functionally available to the complaining customer⁴⁸⁶. Likewise, the availability of comparable products at equivalent prices may preclude a finding of price discrimination for lack of causality⁴⁸⁷.

11.3 Primary-line injuries

The only Robinson-Patman Act issue relevant to the present analysis is that of primary-line injury, namely injury to competition between the discriminating seller and his competitors. Primary-line injury claims suggest that “the appropriate measure of cost” as under the *Brooke* test should consist of a broader prohibition of discriminatorily low prices than the marginal-cost test that Courts apply with regard to predation. In fact, in some cases it has been held that the requisite “injury to competition” is established merely by proof a “diversion” effect, namely that the lower price diverted a substantial number of sales from the competitors to the respondent⁴⁸⁸. That would imply a different understanding of the very notion of harm to competition, not as harm to the competitive structure of the market, but as

⁴⁸⁴ *United States v. Borden Co.*, 370 U.S. 460 (1962). “The groups must be composed of members of such self-sameness as to make the averaging of cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member”.

⁴⁸⁵ 15 U.S.C. § 13(a) (1970) and *FTC v. Morton Salt Co.*, 334 U.S. 37 (68 S.Ct. 822, 92 L.Ed. 1196) (1948)

⁴⁸⁶ *FLM Collision Parts, Inc. v. Ford Motor Co.*, 406 F.Supp. 224 (1975)

⁴⁸⁷ *Hanson v. Pittsburgh Plate Glass Industries*, 482 F.2d 220 (1973). But compare *Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (1969) “the availability of a similar product on equal terms and conditions, the circumstance of such availability can have no place as a defense under the Robinson-Patman Act to a discrimination by a seller against a purchaser in prices and allowances on goods which he has sold to him.

⁴⁸⁸ See, e.g., *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir.), cert. denied, 326 U.S. 734 (1945). *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961).

harm to the rivals of the firm⁴⁸⁹, which would be material with the policy objective of the Robinson-Patman Act, namely the protection of “mom and pop” stores from the aggressive competition of big chain stores.

The argument that actual enforcement of the Robinson-Patman Act necessitates a more readily determinable test than “marginal cost” might be mitigated by the usage of average variable cost as a proxy for marginal cost⁴⁹⁰. However, economics suggests that in the vast majority of situations concerning primary-line abuses, discriminatory price-cuttings will be profitable to the firm concerned and pro-competitive, because they would entail a transfer of wealth to some consumers⁴⁹¹.

Thus, applying the “diversion” test, or inferring violation primary line abuse from “deteriorating price structure” would be wrong from an antitrust standpoint most of the time. In fact, there is no mention of any injury to competitors in section 2(a); thus, the element of discrimination is to be anchored to the injury to competition, and competition is lessened when the firm will price below marginal cost and will recoup its investment in the post-predation phase. Above marginal-cost cuts will cannot be construed as a lessening of competition; thus, the discriminatory effects of the price reductions will be counterbalanced by some redistributive pro-competitive effects and will not be deemed relevant to the eye of antitrust law.

Therefore, it can be concluded that the Robinson-Patman Act’s concern with primary-line injury to competition and by the Sherman Act’s concern with predation is identical. If the Sherman Act is interpreted to permit a monopolist to lower the price so long as his price equals or exceeds marginal cost, such discrimination is *a fortiori* permissible for firms with lesser degrees of market power, and the Robinson-Patman Act should be interpreted no differently in primary-line cases, unless the statutory language or compelling legislative history dictates otherwise⁴⁹².

The locution “where the effect may be substantially to lessen competition” does not allow the interpreter to advocate for a more

⁴⁸⁹ As regards the different understanding of the meaning of competition, underlying the enforcement of the Robinson-Patman Act, see Chapter III, para. 6

⁴⁹⁰ P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 723 (1975)

⁴⁹¹ A price-cutting above average cost, although discriminatory, would not be predatory and would not imply the exit from the market of as efficient competitors as the dominant firm. See *supra*, predation in general.

⁴⁹² P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 725 (1975) The authors argue that “Without fully elucidating the point, we see nothing that compels a more restrictive substantive interpretation of the Robinson-Patman Act”.

restrictive interpretation of section 2a of the Robinson-Patman Act⁴⁹³. The original Clayton Act was primarily a response to fears of predatory pricing and primary-line effects; but the original language referred to effects on “competition” only, not individual competitors. Once again, there is no ground to deduct that the law of primary line injuries should be enforced by virtue of a stricter test than the predation one, in an attempt to grant competitors protect some competitors, such as the “diversion criterion”.

12. Loyalty rebates

Consistent with its focus on promoting consumer welfare, American jurisprudence regarding loyalty rebates tends to be permissive, and not sanction loyalty rebates, based on the presumption of legality of non-predatory prices⁴⁹⁴. In general, the U.S. approach to fidelity rebate schemes has been to refrain from challenging or interfering with dominant firms employing such schemes⁴⁹⁵. Moreover, due to the scarcity of precedents in evaluating rebates, courts have sought to analyze the antitrust implications of loyalty rebates by relying on the precedents regarding exclusive dealing, tying, and predatory pricing, which have been applied by analogy⁴⁹⁶.

In American antitrust law, pricing above cost is generally regarded as lawful; in *Henry v. Chloride* the Court of Appeals for the 8th Circuit stated that non-predatory prices are to be encouraged under American antitrust law, adding that “competitors should know for certain they are pricing legally, and ... this point should be average total cost. In other words, prices above average total cost are legal per se”⁴⁹⁷.

In *Brooke Group*, the Supreme Court affirmed that when a discount scheme does not entail pricing below cost, the judicial control of the legitimacy of the conduct might have the effect of “chilling legitimate price cutting”⁴⁹⁸. On the account of that, the Court has established that the predation test entails two elements, the proof that the a product is priced below a certain measurement of the costs, on the one hand, and that the monopolist has concrete possibilities of recouping the losses incurred during predation, on

⁴⁹³ *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543 & n.6 (1960); H.R. REP. NO. 627, 63d Cong., 2d Sess. 89 (1914).

⁴⁹⁴ B.H. Kobayashi, *The Economics of Loyalty Discounts and Antitrust Law in the United States*, George Mason University School of Law, Working Paper Series, Paper 40, 2005, p. 115

⁴⁹⁵ B.A. Facey & D.H. Assaf, *Monopolization and Abusive Dominance in Canada, the United States and European Union: A survey*, 70 *Antitrust L.J.* 513 550 (2002)

⁴⁹⁶ S. Gates, *Antitrust and Rebates: A Study in Analogies*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1495342

⁴⁹⁷ *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1346 (8th Cir. 1987)

⁴⁹⁸ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993)

the other hand.

Loyalty discounts have been mainly analyzed by lower courts, whose main focus has been the assessment of the risk of exclusion of competitors as a result of the tying-in of customers to the monopolist product. In *Grinnell Corp.* the Court of Appeals for the 1st circuit analyzed the practice of granting a non-predatory discount in the event the customer purchased almost his entire requirement for a product, based on an estimate of his overall sales for a span of two years⁴⁹⁹. Despite acknowledging that non-predatory discounts might have exclusionary effects, the Court has concluded that “the Sherman Act does not make unlawful prices that exceed both incremental and average costs”, because that interpretation of the provision would chill the pro-competitive effects of the discounts to the benefit of consumers⁵⁰⁰. In *Concord Boat*, the Court of Appeal for the 8th circuit has admonished that loyalty discounts are the “very essence of competition”, and that when it comes to above average-variable-cost (AVC) discounts, the plaintiff has to rebut a strong presumption of legality, by proving that the price charged is anticompetitive on the account of other circumstances than the amount of the discount itself⁵⁰¹. In case at issue, the biggest manufacturer of boat engines had put in place a “market share” discount system, by virtue of which purchasers would benefit from a retroactive discount that would increase parallel to the increase in market share that the defendant would gain. The plaintiffs, a group of ship constructors, alleged that this discount system would make it more difficult for them to achieve an efficient dimension of the market, and as a result it would foreclose competition. Despite the district Court upheld the allegations of the plaintiffs, the Court of Appeals for the 8th circuit quashed the decision on the grounds of the fact that the defendant had not imposed any exclusive term on the purchasers, who were free to purchase from other manufacturers of boat engines. Furthermore, there were no entry barriers in the market, and at the time the discounts took place, new entrants had ventured in the market, attempting to compete with the incumbent monopolist firm. All things considered, the “market share” discount practice was considered as competition on the merits, not in violation with § 2, since the price cut was not below AVC, nor did the defendant impose any exclusive terms on purchasers⁵⁰².

⁴⁹⁹ *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235-236 (1st Cir. 1983)

⁵⁰⁰ *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235-236 (1st Cir. 1983)

⁵⁰¹ *Concord Boat Corp. v. Brunswick Corp.*, 207 F. 3d 1039, 1061, 1062 (8th Cir. 2000)

⁵⁰² *Concord Boat Corp. v. Brunswick Corp.*, 207 F. 3d 1039, 1061, 1063 (8th Cir. 2000)

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In *British Airways*⁵⁰³, the Court of Appeals for the 2nd Circuit investigated the same loyalty discount scheme of the national company that had been under the scrutiny of the Commission of the European Communities⁵⁰⁴. British Airways granted a bonus commission to travel agents who would increase their sales of British Airways tickets over a certain period of time compared to a previous reference period. The bonus only depended on the increase of individual sales that each agent had made compared with its past trend and not on the overall increases applicable to all travel agents. The Court of Appeals dismissed the claim that the granting of a bonus commission was at odds with § 2, since the plaintiff had failed to prove that the defendant had cut prices below average incremental cost, on the one hand, and the “dangerous probability of recoupment”, on the other hand⁵⁰⁵. More specifically, the Court of Appeals, upheld the summary judgment trial court granted in favor of BA, on the grounds that Virgin failed to show how British Airways’ incentive rebate system harmed consumers.

Notwithstanding the substantial lawfulness of loyalty discount schemes, other proceedings have been brought not on the grounds of the exclusionary effects of a discounted price below a certain measurement of cost, but on the exclusionary effects implied in the loyalty scheme, based on the concern that a monopolist firm in a market characterized by a monopolized demand can lever on loyalty scheme to expand its sales and its market shares⁵⁰⁶.

The Supreme Court, however, is oriented in the sense of including

⁵⁰³ *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001)

⁵⁰⁴ See Chapter II, *para.* 7.3

⁵⁰⁵ *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 268 (2d Cir. 2001)

⁵⁰⁶ *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group, LP*, 592 F.3d 991 (9th Cir. 2010). The Court has affirmed the lawfulness of a progressive discount scheme based on the purchase certain minimum percentages of the requirement for the product in question, leaning on the argument that in the event purchasers would not buy the requirement to which the discount was conditioned, they would merely pay a higher price for the product. Such a scheme was not deemed exclusionary. In *J.B.D.L. Corp v. Wyeth-Ayerst Laboratories Inc.*, Nos. 1:01-CV-704, 1:03-CV-781, 2005 WL 1396940 (S.D. Ohio June 13, 2005), *conf'd* in *J.B.D.L. Corp v. Wyeth-Ayerst Laboratories Inc.*, 485 F.3d 880 (6th Cir. 2007) the Court of Appeal excluded the predatory nature of a discount scheme of a manufacturer of pharmaceutical products which conditioned the discount to the inclusion of its product in the formularies of the plaintiffs, organizations of the health sector. In *Southeast Missouri Hospital v. C.R. Bard, Inc.*, 643 F.3d 608 (8th Cir. 2011) the Court relied on the Concord Boat test to reject the claim of predation for a discount scheme conditioned to the purchase of 50% and 84% of the requirement for product at issue. The scheme was not exclusionary, since customers were not obliged to purchase the whole of their requirement for the product from the defendant and, furthermore, they were free to purchase from other manufacturers who would offer better prices.

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all discount policies in the predatory pricing scheme, and applying the latter restrictively. In particular, in order to avoid false positives, and proscribe a pro-competitive conduct as anticompetitive, the Court “carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low”⁵⁰⁷.

In its Report on Unilateral Exclusionary Conducts, the Department of Justice (DoJ) confirmed that loyalty rebates are substantially not predatory and pro-competitive, but has conceded that these schemes may have anticompetitive effects when they keep rival firms from reaching an efficient dimension on a monopolized market, in which customers have incentives to purchase either the whole or the majority of their requirement for the product from the dominant firm⁵⁰⁸.

In order to gauge the anticompetitive effects of the conduct, the DoJ applies the predation test to the loyalty schemes, with some temperaments: plaintiff should be required to demonstrate that the discount forecloses a significant amount of the market and harms competition. The competition harm should be estimated along with the ability of the plaintiff to remain in the market after the discount campaign of the dominant firm. Furthermore, the loyalty discount should be illegal when 1) it has no pro-competitive benefits, or 2) the anticompetitive effects outweigh the benefits⁵⁰⁹.

However, in 2009 the Antitrust Division of the DoJ has formally withdrawn the Report, in the wake of an increased awareness on the potential anticompetitive consequences of loyalty rebates, and with a view to pursue more aggressively cases in which the monopolist abuses its dominance to harm consumers and dampen competition.

The renewed interest in loyalty rebates and the expurgation of the Report has determined a new approach of the Federal Trade Commission (FTC) when it comes to policing sec. 5 § 45 of the Federal Trade Commission Act⁵¹⁰, which prohibits unfair methods of competition affecting commerce, and unfair or deceptive acts or practices affecting commerce; the leading case is *Intel*, where FTC has investigated the loyalty and exclusive-dealing schemes of *Intel*, the dominant manufacturer of microprocessors and general

⁵⁰⁷ *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1120 (2009)

⁵⁰⁸ Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, (2008), p. 110 available at <http://www.justice.gov/atr/public/reports/236681.pdf>

⁵⁰⁹ Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, (2008), p. 117 available at <http://www.justice.gov/atr/public/reports/236681.pdf>

⁵¹⁰ 15 USC § 41, [Title 15](#) › [Chapter 2](#) › [Subchapter I](#) › § 45, available at http://www.ftc.gov/ogc/FTC_Act_IncorporatingUS_SAFE_WEB_Act.pdf

processor units⁵¹¹. Amongst the contested practices was a price decrease conditioned to the purchase of the whole or the majority of requirement from the dominant firm, which resulted even more penalizing, because customers who would purchase from other suppliers were also deprived of technical and commercial assistance from the defendant.

FTC complained that *Intel* supplied an essential portion of the processor unit market and was the only manufacturer capable of satisfying the whole demand in that market⁵¹². Within that context, the discount policy of the dominant firm had the effect of inducing customers not to buy from other customers and, therefore, foreclosing competition⁵¹³. In its complaint, the FTC suggested the measure of barring *Intel* from fixing prices to the level of its predecessors “so that the incremental price to a customer of microprocessors or GPUs sold in competition with another competitor is below cost when such price includes all rebates, payments, or other price decreases on other products not in competition”⁵¹⁴.

The dispute was settled by means of an agreement between FCT and *Intel*; however, that did not preclude scholars from expressing concern for the new extensive interpretation of sec. 5 § 45, which normally only seeks to protect consumers from predatory or unfair business practices, yet irrelevant to antitrust law, to antitrust complaints, in a way to circumvent the strict interpretation and enforcement of § 2 of the Sherman Act as regards rebates and exclusive dealing⁵¹⁵.

The embedding of loyalty discounts in the predation scheme of American jurisprudence reflects two attitudes of scholarship: 1) the fear that a more intense enforcement with regard to these practices would create false positives, whose forbearance in the common law realm would be even more costly than in the civil law one -based on the *vis* of the *stare decisis*-; 2) the assumption that antitrust law is better off tolerating a false negative than a

⁵¹¹ *In re Intel Corp.*, Docket No. 9341 (Federal Trade Commission, December 16th, 2009)

⁵¹² *In re Intel Corp.*, Docket No. 9341 (Federal Trade Commission, December 16th, 2009), para. 8

⁵¹³ *In re Intel Corp.*, Docket No. 9341 (Federal Trade Commission, December 16th, 2009), para. 9

⁵¹⁴ *In re Intel Corp.*, Docket No. 9341 (Federal Trade Commission, December 16th, 2009), para. 21

⁵¹⁵ J.D. Wright, *An Antitrust Analysis of the Federal Trade Commission's Complaint Against Intel*, George Mason Law & Economics Research Paper No. 10-27, 2010, available at <http://ssrn.com/abstract=1624943>; D.A. Crane, *Predation Analysis and the FTC's Case Against Intel*, University of Michigan Law & Economics Empirical Legal Studies Center Paper No. 10-014, 2010, available at <http://ssrn.com/abstract=1617364>

false positive⁵¹⁶, because false negatives are limited by the inherent tendency of monopolistic positions to come to an end.

The conservative position of scholarship has thus induced Courts to police loyalty rebates restrictively, on an error-cost basis. Having that said, it must be noticed that, after 2009, the DoJ has analyzed loyalty schemes in light of the principles of exclusive dealing, proscribing the conditioning of proportionally increasing discounts to the circumstance that beneficiaries would not venture together with rival companies⁵¹⁷. This path has not been followed by the Courts, which find more reassuring to apply the predation test: if and when the Supreme Court were invested with the cognizance of a complaint regarding a loyalty rebate scheme of a dominant firm, it is believed that it would have the same attitude as lower courts.

13. Exclusive dealing

Exclusive dealing, which in Europe is also referred to as “single branding”, is an arrangement by virtue of which a firm induces an input supplier to deal with it but not with its competitors⁵¹⁸. The most common form of exclusive dealing is an agreement pursuant to which a retailer purchases the entire requirement of a product from the manufacturer, agreeing not to deal in competing products.

Exclusive dealing agreements may be found to have pro-competitive effects, when they are not motivated by anticompetitive scopes. Arrangements that raise antitrust concerns are those that foreclose competitors of the supplier from the market, or raise the price of competitors’ price and can give rise to liability under various antitrust and competition theories of laws. Specifically, exclusive dealing arrangements have been challenged under four provisions of the United States antitrust laws: (1) Section 1 of the Sherman Act, which proscribes horizontal agreements and contracts “in restraint of trade”; (2) Section 2 of the Sherman Act; (3) Section 3 of the Clayton Act, which prohibits exclusivity arrangements involving the sale of goods that may “substantially lessen competition” or tend to create a monopoly; and (4) sec. 5 § 45 of the Federal Trade Commission Act, which

⁵¹⁶ F.H. Easterbrook, *The Limits of Antitrust*, 63 Texas Law Review 1, 1984

⁵¹⁷ Department of Justice, *Justice Department Reaches Settlement with Texas Hospital Prohibiting Anticompetitive Contracts with Health Insurers*, February 25th, 2011, available at http://www.justice.gov/atr/public/press_releases/2011/267648.htm

⁵¹⁸ A.D. Melamed, *Thoughts About Exclusive Dealing*, 12th Annual Competition Law and Policy Workshop Robert Schuman Centre, 8-9 June 2007 EUI, Florence, available at <http://www.eui.eu/RSCAS/Research/Competition/2007%28pdf%29/200709-COMPed-Melamed.pdf>

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forbids unfair methods of competition to the detriment of consumers.

Under both § 1 of the Sherman Act and § 3 of the Clayton Act, exclusive dealing arrangements are evaluated under the rule of reason⁵¹⁹, whereby on a number of factors are taken into account to assess the lessening of competition, including: the defendant's market power; the degree of foreclosure from the market; barriers to entry; the duration of the contracts; whether exclusivity has the potential to raise competitors' costs; the presence of actual or likely anticompetitive effects; and legitimate business justifications.

Furthermore, an arrangement may be treated as exclusive dealing even if there is no express contractual requirement that parties deal exclusively, but if parties *de facto* only deal with each other⁵²⁰. The Supreme Court has analyzed exclusive dealing arrangements formulating a "quantitative substantially test", which measures whether the foreclosure of competition is substantial by looking at the percentage of the market foreclosed to competitors as a result of the arrangement⁵²¹.

In *Tampa Electric Co.*⁵²², however, the Court changed course and introduced what became known as the "qualitative substantiality" test, which requires a more detailed analysis of the market and the particular circumstances surrounding the arrangement. Thus, the later approach calls for an application of the rule of reason.

Within the confines of the present analysis, exclusive dealing arrangements can only be surveyed with regard to the scope of § 2 of the Sherman Act. Thus, while the *actus reus* embedded in an exclusive dealing arrangement is generally the same whether the arrangement itself is challenged under Section 1 or 2 of the

⁵¹⁹ See *supra*, paras. 6 and 6.1

⁵²⁰ For example Microsoft Corp. required computer manufacturers to pay a royalty on every computer they shipped, whether or not the Microsoft OS was installed, by virtue of a dealing arrangement named "per processor license", which resulted in the burden to pay two license fees in order to install a competing operating system. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)

⁵²¹ *Standard Oil Co. of California (Standard Stations) v. United States*, 337 U.S. 293 (1949). Standard Oil was the largest seller of gasoline in Western United States. It entered into an exclusive arrangement with 16% of independent retailer sellers of the region. The sale of the independent retailers amounted to 7% (or 58 million) of the market for retail gasoline. The issue before the Court was whether the arrangement could actually or potentially lessen competition, or have the tendency to establish a monopoly, pursuant to § 3 of the Clayton Act. The Court applied the quantitative substantially test and concluded that an exclusivity contract foreclosing competition on 7% (or 58 million) of the market had enough adverse effects that the substantial standard of § 3 of the Clayton Act was met. Compare K.H. Hilton, *Antitrust Law – Economic Theory and Common Law Evolution*, Cambridge, University Press, p. 303 (2003)

⁵²² *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961)

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Sherman Act, or Section 3 of the Clayton Act, there is growing support for the view that conduct -which does not constitute an illegal exclusive dealing arrangement under Section 1 of the Sherman Act or Section 3 of the Clayton Act- can still violate Section 2 of the Sherman Act⁵²³.

In fact, Courts have held that a monopolist may be held to a different standard than a non-dominant firm in the context of exclusive dealing arrangements. This view finds support in the Supreme Court's decision in *Tampa Electric Co*⁵²⁴, which states that the "relative strength of the parties" is a factor to consider in determining whether there is substantial foreclosure from the market.

In *Microsoft Corp.*, 253, the D.C. Circuit addressed the differences between exclusive dealing under Section 1 and Section 2, and held that the "basic prudential concerns relevant to §§ 1 and 2 are admittedly the same... [but] a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation".

Courts have subsequently held that exclusive dealing arrangements upheld under Section 1 or Section 3 of the Clayton Act may still violate Section 2⁵²⁵. Having that stated, while many exclusive dealing arrangements do not raise competitive concerns, a careful analysis of the factors discussed above should be undertaken prior to entering into such an agreement, particularly if a firm has dominant market power.

⁵²³ A.D. Melamed, *Thoughts About Exclusive Dealing*, 12th Annual Competition Law and Policy Workshop Robert Schuman Centre, 8-9 June 2007 EUI, Florence, available at <http://www.eui.eu/RSCAS/Research/Competition/2007%28pdf%29/200709-COMPed-Melamed.pdf>

⁵²⁴ *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 329 (1961)

⁵²⁵ *LePage's Inc. v. 3M Co.*, 324 F.3d 141 (3d Cir. 2003); *United States v. Dentsply Int'l*, 399 F.3d 181 (3d Cir. 2005); and *NicSand, Inc. v. 3M Co.*, 457 F.3d 534 (6th Cir. 2006).

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CHAPTER II
MONOPOLIZATION LAWS OF
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Final remarks on the EU law of predation.****1. Introductory remarks: historical origins of article 102**

Article 102 of the Treaty on the Functioning of the European Union (hereinafter TFEU) disciplines the abuse of dominant position. It is the most updated version of article 82 of the Rome Treaty (or EC Treaty – 1957) and complements the EC Competition Law dealing with agreements (article 101 TFEU) by sanctioning the abusive unilateral conducts of firms with a substantial market power, with a view to ensuring a system of free competition, in light of article 4 of the EC Treaty, which states the activities of the Community and its Member States should be conducted “in accordance with the principle of an open market economy with free competition”.

The first paragraph of article 102 reads as follows:

“Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States”⁵²⁶.

The origin of the wording and of the meaning of article 102 is blurry, partly because there are not many background documents on article 82 and on the EC Treaty in general, nor of the 1955 Messina Conference, when the *travaux préparatoires* of the Rome Treaty began. Scholars agree that the German *ordo-liberal* thinking had a significant impact on the shaping of the law of abusive dominance in the European Community⁵²⁷.

A second source for article 102 was the European Coal and Steel Community Treaty (ECSC), created by the 1951 Paris Treaty, which encompassed a number of provisions regarding competition among firms. In particular, the ECSC sought to guarantee equal access to the market for coal and steel to consumers, to ensure the lowest price in transactions without that implying a higher price by the same undertaking in a different transaction, to expand and promote international trade⁵²⁸. Moreover, the ECSC contained two competition law provisions, the first one prohibiting cartels and horizontal agreements between firms, the second one prohibiting vertical concentrations

⁵²⁶ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:HTML>

⁵²⁷ See *infra*, Chapter III, para. 13

⁵²⁸ Article 3 of the European Coal and Steel Community Treaty (1951), available at http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_esc_en.htm

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and abuse of economic power⁵²⁹. Article 66(7) firstly referred to the idea of dominance over a substantial part of the common market for the products whose jurisdiction pertained to the High Authority (the predecessor of the actual Commission).

Last but not least, article 102 echoes the intellectual role of the American Antitrust lawyers, who provided a solid expertise during the negotiation of the European Treaties⁵³⁰, and of the United States in general for both political and economic reasons; on the one hand, the United States was an occupying power in West Germany, whereas on the other hand it reinforced its influence over Europe thanks to the Marshall Plan, which contributed to the abolition of trade barriers among Member States with a view to recovering from the devastation of World War II⁵³¹.

⁵²⁹ Article 66(7) of the European Coal and Steel Community Treaty (1951). "If the High Authority finds that public or private undertakings which, in law or in fact, hold or acquire in the market for one of the products within its jurisdiction a dominant position shielding them against effective competition in a substantial part of the common market are using that position for purposes contrary to the objectives of this Treaty, it shall make to them such recommendations as may be appropriate to prevent the position to be so used". Available at http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm

⁵³⁰ In his *Memoires*, Jean Monnet recalls that Robert Bowie, a professor of antitrust law at Harvard school of law, who had been assigned the drafting of the competition law provisions of the ECSC Treaty, which he designed by relying on the American antitrust tradition. J. Monnet, *Memoires*, Paris, 1976, p. 413. The

⁵³¹ D.L. McLachlan & D. Swann, *Competition Policy in the European Community*, London, (1967), p. 196 *et seq*; B.E. Hawk, *Antitrust in the EEC – The First Decade*, 41 *Fordham L. Rev.* 229 1972-1973. In spite of the American contribution to the competition law provisions of the ECSC Treaty, there were and there are political, philosophical and substantial differences between article 102 and § 2 of the Sherman Act. The Sherman Act was passed in a context of a great suspicion for the adverse effects on people of trusts, monopolies and corporations, forms of industrial organizations that had dominated the US economy from the mid 1850s'. European Competition law was arose out of the desire to eliminate trade barriers among those States that, up to 1945, had fought a fratricide war, in order to reassure stability and peace.

The philosophical underpinning of the two legislations is also different: in the US it is believed that market forces can self correct market inefficiencies better than the government intervention, and that an excessive intrusion of the latter in economic matters could actually chill competition. Therefore, the approach of the Courts in enforcing § 2 is less interventionist, also on the grounds of the fact that the consequence for an antitrust violation pursuant to § 2 can be much more onerous for the defendant, since Courts can award treble damages (generally amounting to three times the actual damages), unlike the EU Courts that can only award single damages. In the US, private enforcement of antitrust law is prevalent than public enforcement compared to the EU (where it is still at an embryonic stage), which helps explain the reluctance of government agencies in intervening in litigation or in directly enforcing the law. The more interventionist approach of the EU is also justified by the nature itself of the Union, a confederation of States, each one with national interest that might

The application of article 102 has evolved with time; more specifically, three distinct phases can be identified:

- 1) In the first two decades there was virtually no application, and the overall policy objective of the Communities was quite the opposite, seeking to consolidate the European industry after the war, rather than to quash enterprises with great market power.
- 2) Starting from the mid 1970s', the first judicial outcomes outlined the guidelines for interpreting the article⁵³².
- 3) From the mid 1980s' to the present, the Commission applied these foundational guidelines to seek a more pressing enforcement of the abuse of dominant position law⁵³³, and both the Commission and the European Courts strived for a more coherent and economic-oriented approach⁵³⁴.

1.1 Elements of the abuse of dominant position

The *actus reus* embedded in the provision is the exploitation of a dominant firm of its market power with a view to strategically excluding one or more rivals, to the detriment of consumers. The normative elements for the finding of abusive dominance are: 1) the existence of an undertaking; 2) the subsistence of a position of dominance on a defined substantial part of the common market; 3) the commission of an abuse; 4) the harm to the inter-state trade of Member state.

With regard to the notion of "undertaking", the confines of the present analysis do not allow to extensively examine the meaning of the term. The lack of a definition of undertaking in the EC

justify some distortions of competition, such as state monopolies, or the remainder of the central state control over the economy of some newly entrants, former member States of the Eastern block.

From a substantive perspective, while article 102 sanctions the exploitation of a dominant position over a market, not the mere possession of it, § 2 sanctions the mere conduct that creates or attempts to create a monopoly, regardless of a prior finding of a dominant position. Dominance is a mere presumption that certain conducts seek to eliminate rivals.

⁵³² *Ex multis, Europemballage Corporation and Continental Can v. Commission of the European Communities*, 21.02.1973, Case 6/72, [1973], ECR 215; *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, Case 27/76, [1978], ECR 207; *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461; *NV L'Oreal and SA L'Oreal v. De Nieuwe AMCK*, 10.12.1980, 31/80, 1980, ECR 3775.

⁵³³ Within the confines of the present essay, the Commission decisions will not be analyzed, by virtue of their nature of "soft law" in the mass of EU law, and of the fact that in most of the cases regarding abuse of dominant position they have been appealed to the European Courts. Thus, the core object of the paper will be the definition of a jurisprudential notion of abuse of dominant position, by reference to the case law of the EU Courts.

⁵³⁴ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359; *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951

treaty has left room to a broad interpretation of the notion by the EU Competition authorities. In sum, “Undertaking” stands for any person or company engaged in an economic activity, regardless pervasive of whether it possesses legal personality, or of its way of subsidizing itself⁵³⁵, or of whether or not it is profit-oriented, or of how it distributes its profits⁵³⁶.

What is relevant to EU Competition law is that the firm engages in any activity of production and/or trade of products and/or services. Thus, the criterion adopted is functional: if the activity engaged complies with an economic necessity and positions itself on the market, it will be subject to competition law; conversely, if the activity fulfills a different type of necessity (health, culture, ethics, philanthropy), it cannot be regarded as an entrepreneurial activity and it will be unleashed from competition law constraints⁵³⁷.

With regard to the second element, “dominance” is a position of economic strength on a defined inter-state market, which is narrowed down by analyzing the categories of products that consumers regard as direct substitutes, on the one hand, and the

⁵³⁵ *Klaus Höfner and Fritz Elsner v. Macroton GmbH*, Case C-41/90, 23.04.1991, [1991], ECR I-1979; Compare also *Polypropylene*, Commission Decision, 23.04.1986, 86/398/EEC, published on OJ L/230-1, 19.08.1991, para. 99 “The subjects of EEC competition rules are undertakings, a concept which is not identical with the question of legal personality for the purposes of company law or fiscal law. The term “undertaking” is not defined in the Treaty. It may, however, refer to any entity engaged in commercial activities and in the case of corporate bodies may refer to a parent or to a subsidiary or to the unit formed by the parent and subsidiaries together”.

This broad notion of undertaking has led to apply the abuse of dominant position law to several enterprises, including trade associations (*Nederlandse Vereniging voor de fruit- en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en ander geïmporteerd fruit “Frubo” v Commission of the European Communities and Vereniging de Fruitunie*, 15.05.1975, Case 71-74, [1975] ECR 563), sporting enterprises (*Laurent Piau v Commission of the European Communities*, 26.01.2005, Case T-193/02, [2005] ECR II-209), self-employed professionals (*Consiglio Nazionale degli Spedizionieri Doganali v Commission of the European Communities*, 30.03.2000, Case T-513/93, ECR [2000], II-1807), professional bodies regulating the entry into a profession (*J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, interveners: Raad van de Balies van de Europese Gemeenschap*, 19.02.2002, Case C-309/99 ECR [2002] I-1577) public bodies carrying an economic activity (*Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, 21.09.1999, Case C-67/96, ECR [1999] I-5751), agricultural cooperatives (*Coöperatieve Stremsel- en Kleurselafabriek v Commission of the European Communities*, 25.03.1981, Case 61-80, ECR [1981] 851), and non-profit firms (*Distribution of package tours during the 1990 World Cup*, Commission Decision, 27.10.1992, 92/521/EEC, published on OJ L/326, 12.11.1992)

⁵³⁶ *Distribution of package tours during the 1990 World Cup*, Commission Decision, 27.10.1992, 92/521/EEC, published on OJ L/326, 12.11.1992, para. 31

⁵³⁷ C. Roth, *La notion d’entreprise selon la jurisprudence recent relative à l’article 85 du Traite CEE*, in Various Authors, *Antitrust fra diritto nazionale e diritto comunitario*, Milan, p. 24, (1996)

area in which the product is marketed, in which the economic power of the undertaking at issue renders the conditions of competition sufficiently homogeneous, on the other hand. Once the relevant market is established, the evaluation of dominance implies the calculation of market shares of the firm, by accounting for the barriers to entry and other factors, such as economies of scale and network effects that might affect the relevant threshold. The substantial part of the common market refers to the magnitude of the abuse: EC competition law is not involved with localized matters, but only with conducts that are likely to affect the trade between one or more Member States. This requirement is almost always met, because even a single port in a Member State can be a substantial part of the relevant market⁵³⁸.

With regard to the abuse, the traditional scholastic account of the concept distinguishes among 1) exploitative abuses, targeted at the vertical relationships of the firm, i.e. with its suppliers or with the customers (i.e. high prices); 2) anticompetitive or exclusionary abuses, targeted at the horizontal relationship of the firm, i.e. with its competitors (exclusion of rivals), and 3) reprisal abuses that can have both vertical and horizontal effects (retaliation for dealing with rivals)⁵³⁹.

With regard to the last element, the abuse should affect the interstate trade of Member State, in order to be a matter of EU and not national competition law.

1.2 The goals of article 102 – preliminary remarks

It is worthwhile to introduce the main policy goals that historically have characterized the enactment and the interpretation of article 102, which will be discussed more analytically throughout this chapter, and in the comparative analysis.

The Commission has always played a pivotal role in guiding the interpretation of the Treaties; with regard to article 102, it has highlighted the objectives of the law of exclusionary abuses, are reflected on the whole article at issue: “The objective of article 82 [article 102] is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation”⁵⁴⁰.

⁵³⁸ *Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl. and others*, 19.06.1998, Case C-266/96, [1998], ECR I-1783

⁵³⁹ J. Temple Lang, *Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law*, 3 *Fordham Int. L. J.*, Issue 1, p. 17, (1979-1980)

⁵⁴⁰ *DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, para. 4

A constantly recurring standard in EC Competition Law is the protection of consumer welfare, which is outlined as the difference in what a person is willing to pay for a commodity and the amount he/she is actually required to pay⁵⁴¹. Increases in price for a product over a persistent period of time have two negative effects on consumer welfare: on the one hand, they cause a transfer of wealth from consumers to firms, since the former purchase the good or the service at a higher price than in a competitive market; on the other hand, they destroy rents by forcing some consumers with “shallower pockets” to exit the market. Article 102 does not sanction the mere possession of a dominant position, but the exploitation of it to unlawfully dampen competition on a market.

The provision at stake cannot be read but in conjunction with other provisions of the TFUE and with other policy goals of the EU integration. First and foremost, the law of abuse of dominant position cannot impede the fostering of the internal market. Firms are generally barred from taking initiatives that reduce trade between member states, even though there is some reluctance to see competition law provisions as a means to promote this general policy objective of the Treaty⁵⁴².

Another wide policy goal affecting the application of article 102 is the promotion of fairness and the protection of small and medium enterprises. The notion of fairness appears to derive from the German Ordoliberal thinking that maintained that big businesses should not hamper the activity of small ones⁵⁴³. Moreover, the ban of “unfair” prices and contractual terms is expressly stated in paragraph (a) of article 102 as a means to promote fairness from a twofold perspective, the consumers’ and the SMEs’ one⁵⁴⁴.

⁵⁴¹ M. Motta, *Competition Policy, Theory and Practice*, Cambridge, Cambridge University Press, p. 18. The author draws an interesting distinction between economic welfare, the aggregate welfare of different groups or industries in the economy and the single industry welfare, which is the aggregate of consumer surplus and producer surplus. Producer surplus is the sum of all profits made by producers in an industry, whereas consumer surplus (or welfare) is the difference between how much he is willing to pay for a good and how much he actually pays for it.

⁵⁴² *Synetairismos Farmakopoiou Aitolias & Akarnanias (SYFAIT) and others v. GlaxoSmithKline plc and GlaxoSmithKline AEVE*, 31.05.2005, Case 53/03, ECR I-4609. The case concerned the reduction of a dominant pharmaceutical manufacturer of supplies for traders who would parallel export the supplies to foreign markets with higher prices. The refusal to supply was held abusive by the Court, on the grounds of the adverse effect on the intra-community trade. However, the Advocate General concluded that the refusal to supply for parallel trade could be justified by the specificity of the pharmaceutical sector, which cannot be affected by market integration concerns.

⁵⁴³ See more in details *infra*, Chapter III, para. 13

⁵⁴⁴ The achievement of general fairness is extraneous to the policy goals of §2 of the Sherman Act.

2. The relevant market

Both the definition and the narrowing of a relevant market are essential to EU competition law scopes. With respect to the abuse of dominant position under article 102, the identification of the relevant market is a crucial prerequisite to any inquiry on an alleged abuse⁵⁴⁵; matter-of-factly, the Community Courts have consistently affirmed that the assessment of dominance is to depart from the delineation of the relevant market⁵⁴⁶.

Once the relevant market is determined, it will be possible to determine the market shares of a firm and assess whether its dominance violates article 102; furthermore, market definition is essential to define the competitive constraints on the exercise of market power of a firm that originate from the ease of entering the market for potential competitors. As well as in the US model, the relevant market implies has a twofold dimension, a product and a geographic one.

The definition of the relevant market has been one of the most complex issues of EU competition law and policy, due to the absence of a definition of market of reference until recent times.

In fact, in 1990 –and in 1994– the Form CO relating to the notification of a concentration pursuant to Regulation (EEC) no 4064/89 of 21.12.1989 was published⁵⁴⁷, which reads as follows:

“The relevant product and geographic markets determine the scope within which the market power of the new entity resulting from the concentration must be assessed.

The notifying party or parties shall provide the data requested having regard to the following definitions:

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use. A relevant product market may in some cases be composed of a number of individual products

⁵⁴⁵ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461 para. 38; G. Bruzzone, *L’individuazione del mercato rilevante nella tutela della concorrenza*, in *Autorità Garante della Concorrenza e del Mercato* (eds.), *Temi e Problemi*, p. 12 June 1995

⁵⁴⁶ *Europemballage Corporation and Continental Can v. Commission of the European Communities*, 21.02.1973, Case 6/72, [1973], ECR 215, para. 32.; *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, Case 27/76, [1978], ECR 207, para. 10; *NV L’Oreal and SA L’Oreal v. De Nieuwe AMCK*, 10.12.1980, 31/80, 1980, ECR 3775, para. 25; *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 51; *Kish Glass & CO Ltd. v Commission of the European Communities*, 30.03.2000, T-65/96, 2000, ECR II-1885, para. 62, confirmed in appeal *Kish Glass & Co Ltd v. Commission* Case C-241/00 P [2001] ECR I-7159, paragraph 41.

⁵⁴⁷ Published on the Official Journal, *OJ L 377*, 31.12.1994

and/or services, which present largely identical physical or technical characteristics and are interchangeable.

Factors relevant to the assessment of the relevant product market include the analysis of why the products or services in these markets are included and why others are excluded by using the above definition, and having regard to, e. g. substitutability, conditions of competition, prices, cross-price elasticity of demand or other factors relevant for the definition of the product markets.

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply of relevant products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas because, in particular, conditions of competition are appreciably different in those areas.

Factors relevant to the assessment of the relevant geographic market include the nature and characteristics of the products or services concerned, the existence of entry barriers, consumer preferences, appreciable differences of the undertakings' market shares between neighboring geographic areas or substantial price differences".

The definition of market of the Form CO is applied to dominance cases pursuant to article 102. The equivalence shows the intent of the Commission to build a common framework to police the three main areas of EU competition law, namely articles 101 and article 102 of the TFEU, and the EC merger regulation⁵⁴⁸.

Notwithstanding the theoretical proximity, the concept of relevant market as under article 102 and relevant market as under the EC merger regulation maintain a number of differences, in particular when it comes to the scopes of such definitions. In the merger control, the purpose of defining the market is to identify the competitive constraints faced by the merging parties at pre-merging price, without questioning the legitimacy of those prices. Conversely, in the dominance cases the delimitation of the relevant market is used to establish whether the firm under investigation has illegitimate market power, based on the competitive constraints faced by its competitors at competitive prices. Hence, the market definition under article 102 is more

⁵⁴⁸ The definition of the relevant market in Form CO is employed by the ECJ in the case law concerning the abuse of dominant position. In *United Brands Company and United Brands Continental BV v Commission of the European Communities*, Case 14.02.1978, [1978] Case-27/76, ECR 207, para. 12-35 and in *NV L'Oreal and SA L'Oreal v. De Nieuwe AMCK*, 10.12.1980, 31/80, 1980, ECR 3775, para. 25, the Court affirmed that "The possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products".

ambiguous because of the difficulty of establishing whether a price is competitive, as opposed to identifying the relevant market in the merger cases, where the pre-merging prices are readily observable.

The Form CO definition bears a significant resemblance with the US concept of relevant market, in particular as regards the emphasis on the substitutability of two products. However, unlike the US experience, the Form does not provide any indication as to the degree of substitutability between two products or guidelines to determine such degree.

With regard to the relevant geographic market, the Form does not provide any guidance to evaluate whether the competition conditions are sufficiently homogeneous in an area and sufficiently different from the surrounding ones.

The shortcomings of the Form have been partly amended after the Commission has published its Notice on the Definition of Relevant Market for the Purposes of Community Competition Law⁵⁴⁹, in which it is affirmed:

Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved (2) face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behavior and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 101.

2.1 The relevant product market

As it has been observed above, the European Commission acknowledges a twofold definition of relevant market, encompassing both a product and a geographic dimension. The product market comprises

⁵⁴⁹ *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5

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All those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use⁵⁵⁰;

Whereas, the relevant geographic market

Comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas⁵⁵¹.

The relevant product market is defined in terms of interchangeability. Interchangeability is the extent to what one product can be replaced in the market because of its features, application or usefulness for a specified purpose⁵⁵².

When it comes to the relevant product market, the issue rests on establishing whether product A and product B belong or do not belong to the same market. It is often the case that the inclusion of product B would be enough to remove any competition concerns. Product characteristics and intended use are insufficient to show whether two products are demand substitutes. Functional interchangeability or similarity in characteristics may not, in themselves, provide sufficient criteria, because the responsiveness of customers to relative price changes may be determined by other considerations as well. The Notice provides several types of evidence to define the relevant product market:

- (1) Evidence of substitution in the recent past⁵⁵³: when this information is available, it will normally define the market;
- (2) Quantitative tests⁵⁵⁴: these econometric and statistical tests estimate of elasticity and cross-price elasticity for the demand of a product.
- (3) Views of customers and competitors⁵⁵⁵: the Commission will consider consumer and manufactures' reactions to increases in price in the candidate geographic area small amount (5-10%)
- (4) Consumer preferences⁵⁵⁶: the Commission can commission marketing studies to gather the direct views of end consumers about substitute products

⁵⁵⁰ Official Journal, OJ C 372, 09.12.1997, 5, para. 7

⁵⁵¹ Official Journal, OJ C 372, 09.12.1997, 5, para. 8

⁵⁵² *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, Case 14.02.1978, 27/76, ECR 207, 1978

⁵⁵³ *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5, paragraph 38

⁵⁵⁴ *ibidem*, paragraph 39, Compare *infra*, para. 2.1.1., the "critical loss analysis"

⁵⁵⁵ *ibidem*, paragraph 40, see *infra*, para 3.3

- (5) Barriers and costs associated with switching demand to potential substitutes⁵⁵⁷; and
- (6) Different categories of customers and price discrimination⁵⁵⁸.

The relevant product market can also be defined in terms of constraints, encompassing all those products that affect the conduct of the undertaking under investigation, by imposing a competitive restraint on it.

The main constraint is the demand-side substitution and originates from consumers who substitute the product with others that they deem interchangeable. A second constraint is the supply-side substitution and stems from the conduct of competing firms, which can produce and place on the market products that are demand-side substitutable of the product at stake, in the event of a price increase of the dominant firm⁵⁵⁹.

With regard to the demand-side substitution, the Commission regards it as the fundamental guideline for the narrowing of the product market, since it requires a factual assessment of the economic circumstances of the case. Consumers will substitute – interchangeable- products in the event of a price increase of the product of the firm at issue. The demand substitutability limits the firm's power to raise prices above competitive level, since the firm will be confronted with the choice of increasing the margin per unit sold but losing sales because of the substitution effect.

Demand-side substitution is exclusively determined by consumers, regardless of the degree of convergence/commonality that products, which are viewed as interchangeable, have: consumers will define the product market when they regard other products as close substitutes.

2.1.1 The economic inference in the relevant product market: demand-side substitutability

From an economic standpoint, demand-side substitution can be evaluated both quantitatively and qualitatively. Qualitative analysis is direct and refers to consumers' "revealed preference"⁵⁶⁰: if consumers react to a price increase of the product

⁵⁵⁶ *ibidem*, paragraph 41

⁵⁵⁷ *ibidem*, paragraph 42

⁵⁵⁸ *ibidem*, paragraph 43

⁵⁵⁹ R. O'Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 69

⁵⁶⁰ Consumers' revealed preference is a theory elaborated by the economist Paul Samuelson, in his article *Consumption Theory in terms of Revealed Preference*, 60 *Economica*, 1948, pp. 243-253. Consumption can be expressed in terms of preferences, which reveal utility functions, namely the benefit that one gets from using a good or a service. Supposing that consumers are insatiable, and utility functions grow with quantity, utilities themselves are maximized when consumers have a budget restraint, and are to limit their consumption of a good

of the firm at issue by switching to another product, that is direct evidence of the demand-side substitution⁵⁶¹. When evidence of the substitution between two products is available, that will easily define the relevant product market.

When evidence of the product substitution is not readily available from the analysis of consumers' preference, demand-side substitution can be inferred indirectly and quantitatively, by means of a counterfactual analysis of the cross price-elasticity of the products that consumers are likely to interchange⁵⁶². Cross-elasticity is the measurement of the degree of interchangeability of two products. If there is an increase in the price for a product and it results that many consumers switch to another product, the two products will be deemed as part of the same market⁵⁶³.

With regard to the entity of the price increase deemed suitable to trigger the demand-side substitution, the Commission adheres to the SNIPP criterion set forth by the American Federal Trade Commission, insofar as the market will be narrowed down in accordance with the reaction of consumers to a hypothetical small but non-transitory price variation of the product, ranging from 5 to 10%⁵⁶⁴. In fact, the Notice on the Relevant Market reads as follows:

The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 % to 10 %) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and

or service. Revealed preference theory assumes that utility functions can be empirically deduced from consumer behavior.

⁵⁶¹ Compare *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5, para. 38;

⁵⁶² *Ibidem*, para. 39, which reads: "[T]here are a number of quantitative tests that have specifically been designed for the purpose of delineating markets. These tests consist of various econometric and statistical approaches estimates of elasticities and cross-price elasticities...for the demand of a product, tests based on similarity of price movements over time, the analysis of causality between price series and similarity of price levels and/or their convergence. The Commission takes into account the available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing patterns of substitution in the past".

⁵⁶³ Office for Competition and Consumers' Protection, *Abuse of a dominant position, in the light of legal provisions and case law of the European Communities*, Warsaw, p. 4 (2003), Study prepared by Dariusz Tokarczuk i Wspólnicy, Kancelaria Prawna GLN spółka komandytowa. For an economic analysis of demand cross-elasticity see Chapter I, paragraphs 3.2.1 and 3.3

⁵⁶⁴ For an analysis of the SSNIP criterion See Chapter I, paragraph 3.2.1

geographical areas is such that small, permanent increases in relative prices would be profitable⁵⁶⁵.

A quantitative measurement of the profitability of a price increase can be found in the economic literature. Pursuant to the classic assumption stemming from the downward-sloped demand curve, an increase in the price for a commodity has two opposite effects: it raises the profit per unit sold, on the one hand, it decreases demand, on the other hand.

The price increase is thus profitable when the higher profits outweigh the loss in sales. Such assessment is made possible through the *critical loss analysis*, which compares the actual losses arising from the price increase with the critical-loss threshold, which equals the level of sale losses for which a given price increase is profitable⁵⁶⁶. The critical loss is the point at which the two opposite effects of the price increase counterpoise each other, making the profits after the increase (net profits) equal to the ones prior to the increase. In other terms, what amount of sales would have to be lost to make a hypothetical price increase unprofitable? If the actual losses are higher than the threshold, then the price increase itself is not profitable.

The above analysis implies three steps: 1) the calculation of the critical-loss threshold; 2) the calculation of the loss of sales which the price increase is likely to bring about 3) the comparison of the two figures.

With regard to the first step, Z is the reduction in output that the price increase causes. The critical-loss threshold is the value of Z that makes the profits before and after the price increase equal.

$$Z = \frac{X}{X + m}$$

X is the 5 – 10% increase in the price for a product and m is the Lerner index, which expresses in percentage the gross margin achieved by the monopolist (the percentage difference between price and marginal-incremental cost $(P-C)/P$) and which is equal to the reciprocal of the elasticity of the demand curve of the firm ($m = L = 1/Ed$)⁵⁶⁷. The critical loss is lower when m is higher.

As regards the second step, the loss in sales resulting from an X per cent price increase is expressed by the price elasticity (E) of

⁵⁶⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law, published on Official Journal, OJ C 372, 09.12.1997, 5, para. 17

⁵⁶⁶ The critical loss analysis was elaborated by B.C. Harris & J.J. Simmon, *Focusing Market Definition, How Much Substitution Is Necessary*, 12 Research in Law and Economics, 207 et seq., 1989

⁵⁶⁷ For an analysis of the Lerner Index see Chapter I, para. 4.2. The Lerner index is expressed in percentage: if the price for a product is 100 \$ and the Marginal Cost (MC) is 40 \$, the Lerner index will be $(100-40)/100 = 60\%$. A gross margin of zero means that price equals incremental cost, as under perfect competition.

demand of the product in the candidate market and expresses the amount of sales lost as a result of a small but significant and non transitory increase in the price of a product subject to the power of the monopolist. A high elasticity reflects a more downward-sloped demand curve, implying a substantial loss in profits and showing that consumers are more responsive to price increases by substituting the products subject to the price increase with other products.

As regards the third step, if the price-increase leads to a loss lower than the critical loss, the net profit will be positive and the product subject to the increase will identify the product market. Contrariwise, if the loss is higher than the critical loss, the increase will not be profitable and will lead consumers to switch to other products, which will have to be included in the relevant market.

An emblematic application of the demand-side substitutability scheme can be found in the *Wanadoo* case⁵⁶⁸, in which the Commission had to define the relevant product market in the high-speed Internet access sector. In particular, the question whether the market included both the ADSL broadband and the dial-up narrowband Internet access, or whether the ADSL constituted a separate market from the dial-up and the cable-based access, was controversial. Based on consumers' behavior, the Commission found that there was no significant degree of substitutability between the low-speed to the high-speed access, since the migration from the former to the latter was "extremely asymmetrical" -as opposed to the switch from low to high speed-, given the intrinsic features of high-speed access⁵⁶⁹, amongst which were the "always on" opposed to the "dial-up" access, the higher download band of the high-speed access, the difference in price between residential and business high speed users⁵⁷⁰.

The *Hoffmann-La Roche* case⁵⁷¹ is one of the pivotal outcomes of the European Courts dealing with the concept of abuse of dominant position, which provides useful indications as how to define the relevant product market. The Court maintained that the product

⁵⁶⁸ *Wanadoo Interactive*, Commission Decision, 16.07.2003, COMP/38.233, non confidential version available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38233/38233_87_1.pdf

⁵⁶⁹ *Wanadoo Interactive*, Commission Decision, 16.07.2003, COMP/38.233, para. 193

⁵⁷⁰ *Wanadoo Interactive*, Commission Decision, 16.07.2003, COMP/38.233, para. 202

⁵⁷¹ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461

market encompasses all the products that have a “sufficient degree of interchangeability”⁵⁷².

The case at bar referred to bulk vitamins belonging to 13 groups, of which Hoffmann-La Roche manufactured and marketed 8 (A, B1, B2, B3 (pantothenic acid), B6, C, E and H (biotin) and 5 purchased by Hoffmann-La Roche and resold by it, B12, D, PP, K and M)⁵⁷³. The Commission found that there was a dominant position in the case of 7 of the 8 groups of vitamins manufactured by the claimant. Even though parties agreed that there was no interchangeability among the groups, since each one served a different metabolizing function, the Commission eventually accepted that the C and E groups of vitamins formed part of a wider market.

The Court concurred with the argument that vitamins C and E apart from their uses in the pharmaceutical industry and in food and animal feed, are also sold for “technological” uses – antioxidants, fermentation agents and additives-, which uses expose them to the competition of other products. Moreover, it held that there was no sufficient degree of interchangeability between the C and E vitamin groups and the other products that could substitute the former for technological uses, since

Conversely, ECJ case law shows how products that have similar characteristics can be included in different markets in accordance with their designated use. In the *Michelin* case⁵⁷⁴, the Court has not included in the same market for tires for heavy vehicles, on the one hand, and tires for passenger cars, on the other hand, due to material differences in the production technology, equipment or tools necessary to manufacture them. The switch from the production of light tire lines to the production of heavy tires and vice versa required material expenditure of time and funds, which indicated that these products are not similar enough to adapt their production in the scope of varied market demand. Because of this, the two product markets were held separate.

Another controversial decision regarding the product market is the *Napier-Brown* case, in which the Court distinguished the market for industrial sugar, sold in 50-kilo sacks, from the market for retail sugar, sold in 1-kilo sacks⁵⁷⁵.

2.1.2 The scholarly criticism to the Commission’s approach and the call for a dynamic definition

⁵⁷² *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 29

⁵⁷³ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 23

⁵⁷⁴ *Michelin v Commission* Case C-322/81, 09.11.1983, [1983] ECR 3461

⁵⁷⁵ *Napier-Brown* Commission Decision, 18.07.1988, Case No IV/30/178/CE, published on OJ L/284-41, 19.10.1988

Some scholars have affirmed that the Commission definition of relevant market should depart from the notion of market power, since the focus on demand substitutability lacks a sufficiently definite economic foundation. In fact, the above definition does not clarify what is the significant degree of interchangeability between two products, nor does it define the “temporal horizon” of substitutability relevant to delimit the market⁵⁷⁶.

Furthermore, the Commission does not indicate a sufficient number of consumers who should deem a product not substitutable with another, therefore making that product market relevant to the reach of antitrust law. Following this argument, in order to meet the criteria of the Form, it would be sufficient that only one consumer would rigidly demand one product, in order for that product market to be considered relevant. That would imply a rigid definition of market, which would virtually coincide with one product⁵⁷⁷.

Reference to the monopolist’s power over price would provide a more exact appraisal in economic terms of the number of consumers who can circumscribe a market.

Matter-of-factly, a market is relevant when it is characterized by a small consumer mobility: a significant increase in the price of a product will provoke a minor product substitution or a minor change of the geographic area for a small number of consumers, so that the raise will be beneficial to the monopolist. *A contrario*, a product market is relevant if it is lacking a sufficient number of consumers who would be willing to either substitute the product or obtain that same product in another geographic area, therefore making the non-competitive price raise of the monopolist non profitable. Conversely, a consistent number of “marginal” consumers, who would either change product or geographic area parallel to the price raise, will guarantee more stable prices.

The products’ characteristics, their price and their intended use are not evaluated in absolute terms, but are considered together with all the circumstances of the case, including consumer preference.

Moreover, the price criterion (*price test*) resulting from the definition of the relevant product market is not alternative to the product substitutability criterion: the former and the latter combined will provide a more effective framework for the analysis of the relevant product market in economic terms⁵⁷⁸.

⁵⁷⁶ G. Bruzzone, *L’individuazione del mercato rilevante nella tutela della concorrenza*, in Autorità Garante della Concorrenza e del Mercato (eds.), *Temi e Problemi*, p. 25 June 1995

⁵⁷⁷ J. Briones Alonso, *Market Definition in Community’s Merger Control Policy*, in *European Competition Law Review*, n. 4, p. 199, (1994)

⁵⁷⁸ In *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, Case 14.02.1978, 27/76, ECR 207, 1978, para. 31. The

The product substitutability is not evaluated in accordance with the inherent features of the product, but by referring to the general use of consumers. More generally, it is not excluded that two eminently different products can serve the same use, and be included in the same relevant market. Along this line of thinking, scholars discern a horizontal and a vertical differentiation: in the first hypothesis, the relevant market encompasses products of different varieties; in the second, it encompasses products of different qualities⁵⁷⁹. When it comes to both horizontally and vertically differentiated products the substitutability analysis is to be performed on a casuistic basis, since not always will the different characteristics of the products coincide with the existence of different product markets.

2.2 The economic inference in the relevant product market: supply-side substitutability

The second constraint is the supply-side substitution, which occurs when suppliers of non-substitute products will try to compete with the products of the relevant market, by switching their production to these products. An example of supply side substitution can be found in the Commission Notice:

A practical example of the approach to supply-side substitutability when defining product markets is to be found in the case of paper. Paper is usually supplied in a range of different

case involved the identification of the product market for bananas. The Court did not avail itself of quantitative evidence, in order to state the extent to what consumers would switch to substitute products in the event of a price raise of bananas. It based its decision on the analysis of the intrinsic characteristics of bananas and their differentiation from other fruits, concluding that the market for bananas constituted a separate one from other fruits. See *infra*, para. 2.4

⁵⁷⁹ In the horizontal differentiation, consumers have different preferences for different types of products. The typical hypothesis is when there are two stores in a town, selling the same product for the same price. Consumers will normally prefer to go the nearest shop to their house. If one store were to raise prices, some consumers would find it convenient to change provider. Those are "marginal" consumers, for whom the disadvantage of the price raise is higher than the disadvantage caused by having to shop in a more distant store. In order to assess whether each store holds a sufficient market power to isolate a separate relevant market, it is to be ascertained whether the amount of marginal consumers who would change store in the event of a small but significant increase in the price operated by their habitual store would render the increase itself non profitable. What is relevant is the extent to what marginal consumers will affect the conduct of each firm.

In the vertical differentiation, the market is characterized by different degrees of quality for each type of product: consumers would shop in accordance with their proneness to pay more for a better-quality product. In order to define the relevant market, it is necessary to analyze whether the power to raise price of each seller is diminished by the threat that consumers would prefer the other product in terms of price-quality. G. Bruzzone, *L'individuazione del mercato rilevante nella tutela della concorrenza*, in Autorità Garante della Concorrenza e del Mercato (eds.), *Temi e Problemi*, June 1995, p. 33

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qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time span. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use. The various qualities of paper are included in the relevant market, and their sales added up to estimate total market value and volume⁵⁸⁰. Supply-side substitution is equivalent to demand-side substitution when it is sufficiently immediate and not excessively costly for suppliers.

Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behavior of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect⁵⁸¹.

From an economic standpoint, several conditions are to be met in order to include the supply-substitution test in the criteria to narrow down the relevant product market.

- 1) The assets to produce the relevant products are to be readily available, such as know-hows, machineries, infrastructures etc;
- 2) The firm can purchase additional assets to produce the relevant products without incurring excessive costs;
- 3) There is to be an economic incentive for suppliers to produce the relevant products;
- 4) Suppliers are to be able to modify production from supply-side products to the relevant products at no excessive costs –for instance- because they have unused plant capacities;

⁵⁸⁰ *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5, para. 22

⁵⁸¹ *Ibidem*, para. 20

- 5) Consumers are to regards suppliers' products as acceptable substitutes for the products under investigation⁵⁸².

Aside from these conditions, "most of the suppliers" are to divert production to the relevant products in response to a price increase of these products⁵⁸³.

The most renowned case concerning supply-side substitution is *Continental Can*, in which the European Court of Justice annulled the Commission's decision regarding the relevant product market, on the grounds -amongst other things- that it had not considered supply-side substitution⁵⁸⁴. The Commission distinguished several markets: 1) light containers for canned meat products, 2) light containers for canned seafood, 3) metal closures for the food packing industry (other than crown corks). According to the ECJ, the Commission erred in not considering how these markets differed from each other and how they differed from the general market for light metal containers. Conversely, in *Michelin I* the ECJ concurred with the Commission's distinction between markets for regular car tires and markets for heavy vehicle car tires, on the grounds that the infrastructures, machineries and production techniques to produce the latter were significantly different from the former. The switch from the production of the heavy tires to the regular tires required a significant investment; therefore, the two products were not considered as supply-side substitutes. As they were not demand-side substitutes either, the ECJ held that the two markets were separate⁵⁸⁵.

2.3 Chains of substitution

In order for products to be included in the same market, they are not to be direct substitutes, but they can be indirect substitutes, provided that they are linked through "chains of substitution". Chains of substitution are defined in the Notice on the Relevant Market:

In certain cases, the existence of chains of substitution might lead to the definition of a relevant market where products or areas at the extreme of the market are not directly substitutable. The geographic dimension of a product with significant transport costs accounts as an example. In such cases, deliveries from a given plant are limited to a certain area around each plant by the impact of transport costs. In principle, such an area could constitute the

⁵⁸² Commission Notice on the definition of relevant market for the purposes of Community competition law, published on the Official Journal, OJ C 372, 09.12.1997, 5, para. 21-23

⁵⁸³ *Ibidem*, para. 21

⁵⁸⁴ *Europemballage Corporation and Continental Can v. Commission of the European Communities*, 21.02.1973, Case 6/72, [1973], ECR 215, para. 20

⁵⁸⁵ *NV Nederlandsche Banden Industrie Michelin v Commission*, Case 322/81, also referred to as "*Michelin 1*" [1983] ECR 3461, para. 41

relevant geographic market. However, if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. The same reasoning may apply if product B is a demand substitute for products A and C. Even if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B⁵⁸⁶.

2.4 The hypothetical Monopolist Test (HMT): a more rigorous approach

In order to define which products are direct substitutes, the most economically rigorous approach is the so called Hypothetical Monopolist Test (HMT), under which a market is defined as a product or a group of products on which a hypothetical firm, constituting the sole producer and seller, could impose a small but significant and non-transitory increase in price (SSNIP). In other terms, the market is the narrowest area on which the hypothetical monopolist could exercise his market power. The HMT was first elaborated by the US Department of Justice and Federal Trade Commission Merger Guidelines⁵⁸⁷ and has gained success among the Community Courts. It is based on both qualitative and quantitative evidence and can be applied in practice with discretion.

The HMT is applied through three steps: the first step is the identification of the “candidate market” of the monopolist, encompassing a set of products whose marketability the monopolist aims at controlling⁵⁸⁸, namely those products subject to monopolist practices –such as pricing below cost– and which, therefore, undergo investigation.

The second step is the evaluation of the price increase that the monopolist would impose on at least one product, and the effect of demand-substitution on the profitability of such increase. In particular, it is to be assessed whether in response to the price increase consumers would switch to products that are outside the candidate market.

⁵⁸⁶ Commission Notice on the definition of relevant market for the purposes of Community competition law, published on the Official Journal, OJ C 372, 09.12.1997, 5, para. 57

⁵⁸⁷ First Issue on April 2nd 1992, second issue on April 8th 1997. Available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>

⁵⁸⁸ G.J. Werden, *The 1992 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 Antitrust Law Journal, 253-75 (2003). The author defines this set of product “the candidate market”.

The third step involves the assessment of supply-side substitutability on the profitability of the price increase, namely whether producers of products that are outside the candidate market would enter the market and offer substitutable products in response to a price increase of the hypothetical monopolist. In that event, the candidate market would include those substitutable products.

With regard to assessing the demand-substitutability, the Commission and the ECJ rely on both quantitative and qualitative evidence. The most consistent quantitative evidence employed in the HMT is the afore mentioned SSNIP criterion, which takes into consideration the reaction of consumers confronted with a 5 to 10% price increase of a product over a sustained period of time, assuming that the prices of other products remain constant. If data show that the price raise is profitable for the monopolist, the product market will coincide with the candidate market.

Conversely, if data show that a sufficient number of consumers will switch to another product and render the increase no longer profitable, the substitute product will be included in the relevant market⁵⁸⁹.

The example provided for in the Notice on the Relevant Market regards the substitutability of soft drinks of different flavors: if a sufficient number of consumers of flavor A switch to flavor B when confronted with a permanent 5 to 10% increase for flavor A, the market will comprise both flavors⁵⁹⁰. The market is thus the smallest set of products circumscribed through the sufficient substitutions in reaction to the price raise for one product⁵⁹¹.

The most consistent qualitative evidence is based on product characteristics, consumer preferences and needs. The market is defined through the mere analysis of substitutability that may hamper the monopolist's attempt to raise prices in a market without the employment of the price raise evidence itself. In other terms, qualitative analysis is based on the subjective characteristics of products.

The most important case involving market definition by means of qualitative analysis is *United Brands*, in which both the ECJ and the Commission agreed to classify the banana market as a separate one from the other fruits by virtue of the inherent characteristics of the fruit. The Court affirmed "the banana has certain characteristics, appearance, taste, softness, seedlessness, easy handling, a constant level of production which enable it to satisfy the constant needs of an important section of the population

⁵⁸⁹ Commission Notice on the definition of relevant market for the purposes of Community competition law, published on the Official Journal, OJ C 372, 09.12.1997, 5, para. 17.

⁵⁹⁰ *Ibidem*, para. 18

⁵⁹¹ With regard to the SSNIP evidence, compare Chapter I, para. 3.2.1

consisting of the very young, the old and the sick". Moreover, "the specific qualities of the banana influence customer preference and induce him not to readily accept other fruits as a substitute"⁵⁹². Even though the Court scrutinized the fact that the banana market is influenced by the price change, it asserted that price adapts affect competition in an extremely limited way. Moreover, price difference and cross-elasticity of demand were solely employed to confirm the results of the qualitative analysis⁵⁹³.

With regard to the employment of supply-substitutability in the HMT, the Notice on the Relevant Market sets down three parameters⁵⁹⁴: 1) ability of other suppliers to switch production without major additional investment, or sunk costs, namely the consideration of the assets needed to produce the relevant products; 2) economic incentives of manufacturers to divert production, namely the profitability of such switch⁵⁹⁵; 3) consumer reaction. The third parameter is decisive, in that the facts of the case are to show that consumers' behavior is concretely affected by the existence of substitute suppliers; more particularly, it must be assessed whether consumers will substitute the dominant's firm product(s) with the substitute supplier's one(s). Consumer's reaction is therefore what renders supply-side substitution effective.

Besides the above three parameters, the Commission further requires that "*most of the suppliers*" are able to offer and sell the various qualities immediately and without the significant increases in costs described above⁵⁹⁶. Therefore, irrespective of the economic incentive to switching production, the Commission requires that a sufficiently large number of suppliers will readily respond to an increase in price of the dominant firm by "hopping in" the production of that good or service. This situation arises when companies market a large range of grade and quality of one product. Sometimes, a mere change in the market strategy or in the design will reposition a product in a different market at no sunk cost, therefore making supply-side substitution relevant for

⁵⁹² In *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, Case 14.02.1978, 27/76, ECR 207, 1978, para. 31

⁵⁹³ T. Kauper, *The Problem of Market Definition under EC Competition Law*, in B. Hawk, *International Antitrust Law and Policy: Fordham Corporate Law Institute*, London Sweet and Maxwell, p. 251 (1996)

⁵⁹⁴ *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5, para. 20

⁵⁹⁵ As regards the first two parameters, see *supra*, para. 2.2

⁵⁹⁶ *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5, para. 21

the narrowing of the product market⁵⁹⁷. In that respect, in *Kish Glass & Co Ltd v. Commission*⁵⁹⁸ the ECJ found that the relevant float-glass market was the sale of glasses of all thickness, since the production technique is identical and manufacturers can readily switch production to a certain thickness.

3. The relevant geographic market

The second dimension of the relevant market pursuant to Article 102 is the geographic one. The relevant product market has no concrete meaning if it is not complemented with its geographic projection. At first glance, the relevant geographic market functions as background setting, comprising the area in which the product is marketed, in which the economic power of the undertaking at issue renders the conditions of competition sufficiently homogeneous, and therefore the effect of the economic power of the undertaking concerned can be evaluated⁵⁹⁹.

Under the homogeneity test, the relevant geographic market is the area of the Common Market (interstate) where the objective conditions of competition applying to the product in question must be the same for all traders. However, the application of the test might be perturbed by some factors typical of the European frame of reference, such as national borders, cultural/linguistic barriers, regulatory barriers, national preferences.

As stated above, three are the features of the relevant geographic resulting from the Commission Notice on the relevant market: first and foremost, it is to encompass the area in which the

⁵⁹⁷ Other applications of the supply-side substitutability criterion can be found in the Commission's decisions regarding merger cases, which nevertheless constitute good case law for the purpose of narrowing the relevant market pursuant to Article 102. In *Electrolux/AEG*, Case IV/M.458 paragraph 9, the Commission found that all models/sizes in each product group of major domestic appliances were "part of the same product market since their intended end uses are the same, and since the core technology and components used in the manufacture of these different models are largely identical". Furthermore, it took into consideration the high degree of supply-side substitutability, in light of the fact that all major manufacturers produce a full range of models and that flexibility of manufacturing lines used to produce domestic appliances allows products that are differentiated both technically and aesthetically to be manufactured on the same line. In *Volvo/Scania*, Case COMP/M.1672 the Commission affirmed that all types of heavy truck –rigid truck, tractor truck of more than 16 tonnes- constitute a single product market, on the account that any major European truck producer was virtually able to offer a complete range of different heavy trucks, by only having to bear non-substantial additional costs related to switching from the production of one heavy truck to the production of another heavy truck.

⁵⁹⁸ *Kish Glass & Co Ltd v. Commission* Case T-65/96 [2000] ECR II-1885 paragraph 68, confirmed in appeal *Kish Glass & Co Ltd v. Commission* Case C-241/00 P [2001] ECR I-7159, paragraph 41

⁵⁹⁹ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, Case 14.02.1978, 27/76, ECR 207, 1978, paragraph 11

undertaking at issue operates by supplying and demanding goods or services; furthermore, the conditions of competition in such area are to be sufficiently homogeneous; finally, the conditions of competition are to be sensibly different from the neighboring areas.

The same constraints defining the relevant product market apply also to the geographic market⁶⁰⁰, which is the result by both demand-side substitution and supply-side substitution. As regards the first constraint, the geographic market includes all those regions where consumers can find suitable substitute products for the products of the undertaking under investigation. As regards the supply-side, the geographic market includes the regions where suppliers, which can readily switch to the production of the product of the firm under investigation, operate. The Commission Notice on the relevant market sets down three fundamental steps to define the geographic market.

[First], The Commission's approach to geographic market definition might be summarized as follows: it will take a preliminary view of the scope of the geographic market on the basis of broad indications as to the distribution of market shares between the parties and their competitors, as well as a preliminary analysis of pricing and price differences at national and Community or EEA level. This initial view is used basically as a working hypothesis to focus the Commission's enquiries for the purposes of arriving at a precise geographic market definition.

The reasons behind any particular configuration of prices and market shares need to be explored. Companies might enjoy high market shares in their domestic markets just because of the weight of the past, and conversely, a homogeneous presence of companies throughout the EEA might be consistent with national or regional geographic markets. The initial working hypothesis will therefore be checked against an analysis of demand characteristics (importance of national or local preferences, current patterns of purchases of customers, product differentiation/brands, other) in order to establish whether companies in different areas do indeed constitute a real alternative source of supply for consumers. The theoretical experiment is again based on substitution arising from changes in relative prices, and the question to answer is again whether the customers of the parties would switch their orders to companies located elsewhere in the short term and at a negligible cost.

⁶⁰⁰ M. Motta, *Competition Policy, Theory and Practice*, Cambridge, Cambridge University Press, p. 113 (2004)

[Second], if necessary, a further check on supply factors will be carried out to ensure that those companies located in differing areas do not face impediments in developing their sales on competitive terms throughout the whole geographic market. This analysis will include an examination of requirements for a local presence in order to sell in that area the conditions of access to distribution channels, costs associated with setting up a distribution network, and the presence or absence of regulatory barriers arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, monopolies, freedom of establishment, requirements for administrative authorizations, packaging regulations, etc. In short, the Commission will identify possible obstacles and barriers isolating companies located in a given area from the competitive pressure of companies located outside that area, so as to determine the precise degree of market interpenetration at national, European or global level. The actual pattern and evolution of trade flows offers useful supplementary indications as to the economic importance of each demand or supply factor mentioned above, and the extent to which they may or may not constitute actual barriers creating different geographic markets. The analysis of trade flows will generally address the question of transport costs and the extent to which these may hinder trade between different areas, having regard to plant location, costs of production and relative price levels.

Finally, the Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographic markets, especially in the area of concentrations and structural joint ventures. The measures adopted and implemented in the internal market program to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition of a concentration or a structural joint venture. A situation where national markets have been artificially isolated from each other because of the existence of legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market shares or trade patterns. A process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market for the purposes of assessing concentrations and joint ventures⁶⁰¹.

⁶⁰¹ *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5, paragraphs 28-32

The Notice on the Relevant Market provides several types of evidence to define the relevant geographic market:

- (1) Past evidence of diversion of orders to other areas⁶⁰²: the same quantitative tests used for product market definition might be used in geographic market definition, with the *caveat* that a number of factors such as exchange rate movements, taxation and product differentiation might render international comparisons more difficult;
- (2) Basic demand characteristics⁶⁰³: factors such as national preferences or preferences for national brands, language, culture and life style, and the need for a local presence have a strong potential to limit the geographic scope of competition;
- (3) Views of customers and competitors⁶⁰⁴;
- (4) Current geographic pattern of purchases⁶⁰⁵: when customers purchase from companies located anywhere in the Community or the EEA on similar terms, or they procure their supplies through effective tendering procedures in which companies from anywhere in the Community or the EEA submit bids, usually the geographic market will be considered to be Community-wide;
- (5) Trade flows/pattern of shipments⁶⁰⁶: information on trade flows may be utilized when the number of customers is so large that it is not possible to obtain through them a clear picture of geographic purchasing patterns;
- (6) Barriers and switching costs associated to divert orders to companies located in other areas⁶⁰⁷.

The Commission identifies the geographic market on the account of a) the demand-side substitutability, b) the supply-side substitutability and c) the function of future integration of the Common Market. The emphasis added on the demand side leads to consider it as the main step in the identification of the geographic market. It involves gathering evidence of market shares and prices of an undertaking -at a national level and at a Community level-, on the one hand, and evidence of whether the conditions of competitions are homogeneous, on the other hand. At this stage, the goal of the analysis is to determine whether companies located in different areas outside of the putative geographic market constitute a real alternative to the undertaking

⁶⁰² *ibidem*, paragraph 45

⁶⁰³ *ibidem*, paragraph 46. See *infra*, para. 3.1. Consumer preference also stands as a barrier to trade; in fact, a region-wide market will can be isolated by the consumer preference for local products.

⁶⁰⁴ *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5, para. 47

⁶⁰⁵ *ibidem*, para, 48

⁶⁰⁶ *ibidem*, para. 49

⁶⁰⁷ *ibidem*, para. 50, See *infra*, para. 3.1

under investigation, with the result of enlarging the putative market to the areas where they operate.

Supply-side substitutability is a means to verify whether suppliers outside of the putative area are able to enter the market in response to an increase in price for the product of the undertaking under investigation. Supply substitution also allows weighing transportation costs in the definition of the relevant geographic area.

Finally attention must be paid to the ongoing market integration process, and to whether it results in a widening of the relevant market from a geographic standpoint.

3.1 The role of price evidence and of barriers to trade

In practice, both Community institutions and national authorities have proved demand and supply substitution by means of diverse sources of evidence, of which the core one is the price evidence. If the price for a product in the putative market is substantially higher than the price for the same product outside the area, the market will be *prima facie* defined, with two *caveats*: on the one hand, obstacles to trade should prevent consumers from purchasing the product outside of the indicated region; on the other hand, suppliers from outside the region face obstacles to shipping the product in the putative market. If price analysis shows an interrelation between prices at what the product is sold in different regions, the obstacles above referred will not isolate the market, which will be enlarged to the areas where consumers can purchase at a homogeneous price and suppliers can offer at homogenous conditions⁶⁰⁸.

The second source of evidence is the analysis of existing barriers to trade, which will isolate a market. The main barriers to trade have been identified by the literature and the case law:

- 1) Transportation costs: they play a pivotal role in the identification of the geographic market, since they have the effect of linking those areas where the product is exchanged at the same price, where that product can be transported and price differential exceeds shipping costs⁶⁰⁹. Yet, the lower the value of the product is the higher the impact of transportation costs and the stronger the effect of sheltering local manufacturers from suffering losses in sale in the event they would raise prices⁶¹⁰. This way, transportation costs will define a geographic market by excluding the entry into the market itself of either external competitors or of external "fringe" products, and therefore by giving the

⁶⁰⁸ *ibidem*, para. 49.

⁶⁰⁹ T.F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 Antitrust Bull., 50 (1973)

⁶¹⁰ E.T. Sullivan, *Antitrust and its economic implications*, 5th ed., LexisNexis Publisher, Newark (NJ), p.28 (2008)

undertaking a power over the market that can be evaluated accordingly. The Commission has taken transportation costs into account in the *Napier Brown* case⁶¹¹, holding that the United Kingdom market for sugar constituted a separate geographic market from the rest of the European area because of the natural barrier of the English Channel, which allowed United Kingdom producers of sugar to charge a premium on the price of sugar compared with Continental prices.

- 2) Consumer preferences: sometimes the geographic market of a product is defined on the account of the habits of consumers, who will isolate a region-wide market, by preferring local products⁶¹². The Commission has sometimes emphasized the importance of cultural identity the identification of a geographic market.
- 3) Capacity constraints: if a firm is capable of reaching remote areas without incurring sunk costs, the market will be extended to those areas. Likewise, the market can be narrowed in accordance with the capacity constraints of the firm.
- 4) Long-term contracts: if a firm is bound by a long-term contract to supply a certain area, and by virtue of that obligation is barred from expanding its market to other regions, the candidate market will be defined accordingly.
- 5) Regulatory barriers: the candidate market can be defined on the account of legal monopolies, price regulation, exclusive rights or technical standards⁶¹³.
- 6) Local presence: a market can be characterized by the presence of a local distributor, who will put a competitive disadvantage on foreign firms and narrow the market itself.

4. The notion of abuse

⁶¹¹ *Napier-Brown* Commission Decision, 18.07.1988, Case No IV/30/178/CE, published on OJ L/284-41, 19.10.1988, para. 41

⁶¹² *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5, paragraph 29

⁶¹³ In *Amministrazione Autonoma dei Monopoli di Stato (AAMS) v Commission*, ECR II-3413 [2001], paragraph 40. The Commission narrowed the geographic market for cigarettes to the territory of Italy since AAMS enjoyed a monopoly on that market, under which it regulated distribution and sales. See also M. Monti, *Policy Market Definition as a Cornerstone of EU Competition Policy*, in *Workshop on Market Definition*, Helsinki, Fair Center, October 5, 2001, available at http://europa.eu/rapid/press-release_SPEECH-01-439_en.htm "The existence or absence of regulatory barriers (for example, those arising from public procurement, price regulations, quotas and tariffs limiting trade or production, technical standards, legal monopolies, requirements for administrative authorizations, or other regulations), is very important for geographic market definition. For instance, ... in a case against the Italian tobacco monopolist ..., the scope of the markets was defined as national because entry was impossible in view of the existence of exclusive rights or fiscal monopolies".

The treatment of the unilateral conduct of the firm is one of the most delicate aspects of competition law of all legal systems⁶¹⁴. The main difficulty is to distinguish illicit conducts from legitimate –yet vigorous- competition, on the hand, and conducts excluding competitors from competition from conducts that are exclusive but are still deemed competitive. As a matter of fact, in every capitalistic system the goal of the firm is to prevail over its competitors by virtue of its entrepreneurial skills and its superior products or services. In general, every act of the firm is oriented toward taking away shares of the market from incumbent rivals, and achieving dominance; some conducts, however, are unlawful since they are harmful to competition and, ultimately, to consumers.

The normative tools available to the EU Courts and authorities are scarce and confined within the blank prohibition of the abuse of dominant position, absent an actual definition of abuse; it follows that the expansion of the notion of anticompetitive unilateral conduct is heavily related to the data coming of the judicial formant. The European Courts have attained an objective notion of abuse, as a conduct that places obstacles in the way of the maintenance or of the fostering of competition in the market. In other terms, every action of the dominant undertaking likely to lessen or distort competition and, furthermore, lacking an objective justification falls within the scope of article 102 Treaty on the Functioning of the European Union (hereinafter TFEU).

Article 102 is rubricated “Abuse of Dominant Position” and is the main provision in EC competition law defining the anticompetitive unilateral conduct of an undertaking. It reads as follows:

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) Limiting production, markets or technical development to the prejudice of consumers;
- (c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature

⁶¹⁴ International Competition Network, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power and State-Created Monopolies*, presented at the 6th Annual Conference of the ICN, Moscow, May 2007

or according to commercial usage, have no connection with the subject of such contracts.

4.1 Categories of abuses – an overview

As it has been mentioned above, article 102 does not define the term “abuse”, but gives a list of examples of unlawful conducts, which have been divided in the literature into three types: 1) exploitative abuses, targeted at the vertical relationships of the firm, i.e. with its suppliers or with the customers; 2) anticompetitive or exclusionary abuses, targeted at the horizontal relationship of the firm, i.e. with its competitors, and 3) reprisal abuses⁶¹⁵, which can have both vertical and horizontal effects.

These three types are not mutually exclusive, since the same conduct can have both horizontal and vertical effects. The multi-offensive nature of certain abuses is noticeably embodied by predation (or predatory pricing)⁶¹⁶: at first instance, the conduct will be disadvantageous to the dominant firm’s competitors, which will be forced to sell their product at a reduced margin in order to stay in the market (exclusionary abuse); once all the competitors are driven off the market, the dominant firm will raise its price over the competitive level in order to recoup the losses occurred during the predation phase, thereby causing a loss to consumer welfare (exploitative abuse)⁶¹⁷.

4.1.1 Exploitative abuses

Exploitative abuses occur when the firm takes advantage of its dominance over the market to obtain benefits –“rents”- which are not obtainable in condition of normal competition, therefore causing a loss in terms of consumer welfare and/or damage to its commercial partners. The most common example of exploitative abuses is charging a discriminatory price at the expense of consumers (art. 102(a)); additionally, the practice of “limiting production, markets or technical development” also falls within this category, insofar as the reduction in output is aimed at maintaining an excessive pricing or the limitation of technical development at avoiding product’s obsolescence⁶¹⁸.

Pursuant to article 102(d), tie-ins are an example of exploitative and exclusionary abuses that do not involve monopolization, because, on the one hand, they force buyers to purchase what they do not want and, on the other hand, they keep competitors of the tied product from selling their products to the customers of the

⁶¹⁵ J. Temple Lang, *Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law*, 3 Fordham Int. L. J., Issue 1, p. 17, (1979-1980)

⁶¹⁶ As regards the analysis of predation, see *infra*, para. 9 *et seq.*

⁶¹⁷ S. Bastianon, *L’Abuso di Posizione Dominante*, Milano, p. 204, (2001)

⁶¹⁸ J. Temple Lang, *Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law*, 3 Fordham Int. L. J., Issue 1, p. 17, (1979-1980)

dominant firm⁶¹⁹, without necessarily an intent to monopolize the market.

The leading case on discriminatory pricing is *United Brands*, which was awarded on the grounds of the exploitative nature of imposing unfair prices on the customers, and of the exclusionary nature of charging other trading parties dissimilar prices for equivalent transactions⁶²⁰. The ECJ also established a test for exploitative abuses, arguing that “charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied” is abusive⁶²¹.

4.1.2 Exclusionary abuses

Exclusionary abuses occur when the firm increases its economic power over the market to the extent that inter-brand or intra-brand competition is significantly impaired. Exclusionary abuses are the broadest category of abuse, entailing those strategic acts against the ability of competitors to compete, which cause indirect loss to consumer welfare. The ascertainment of consumer loss is the key element of exclusionary abuses, since vigorous competition aiming at excluding rivals is an ineludible means of competing, which ultimately result into wealth maximization⁶²².

Discerning an exclusionary abuse from vigorous competition proves extremely difficult and it often involves some measure of cost by means of economic parameters. Predation is the most notable example of exclusionary abuses. Other examples are refusal to deal, tying and bundling, price squeezes, discrimination against downstream rivals, discount practices, exclusive dealing, vexatious litigation, the use and abuse of government approval procedures to exclude rivals, and abuses in connection with the adoption of standards or other specifications⁶²³.

4.1.3 Reprisal abuses

Reprisal abuses occur when the firm significantly interferes with the business of another undertaking by means of its dominance⁶²⁴,

⁶¹⁹ Abuses that are not conducive to monopolization, such as tie-ins, are not prohibited under US Antitrust Law.

⁶²⁰ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, article 1 of the conclusions.

⁶²¹ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 250. Compare Chapter III, para. 7.1, for a further analysis of exploitative abuses in EC competition law.

⁶²² E. Østerud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: the spectrum of tests*, Wolters Kluwer, London, p. 13 (2010)

⁶²³ R. O'Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 175

⁶²⁴ J. Temple Lang, *Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law*, 3 *Fordham Int. L. J.*, Issue 1, p. 17, (1979-1980)

preventing the latter from competing too aggressively⁶²⁵, and/or preventing its own customers from venturing with the latter.

Parallel to predatory abuses, the ultimate consequence of reprisal abuses is a loss to consumer welfare. *United Brands* suggests that an action by a dominant firm purposely designed to harm a rival without necessarily favoring the legitimate interests of the former is likely to result into an abuse⁶²⁶.

Neither the TFUE nor the case law clarify whether it is relevant to assess the anticompetitive intent in reprisal abuses; however, in the interim measure adopted against *Boosey and Hawkes*, the Commission clarified that “a dominant undertaking may always take reasonable steps to protect its commercial interests, but such measures must be fair and proportional to the threat. The fact that a customer of a dominant producer becomes associated with a competitor or a potential competitor of that manufacturer does not normally entitle the dominant producer to withdraw all supplies immediately or to take reprisals against that customer”⁶²⁷. The above suggests that certain actions, which disproportionately undermine the business of a competitor, or “retaliate” customers for dealing with the rival firm, are anticompetitive *in re ipsa*, even if the anticompetitive intent is not ascertained.

4.2 The substantive elements of abusive dominance

Aside from the paradigms of abuse singled out in Treaty provisions, three conditions are to be met in order to ascertain violation of Article 102:

- 1) The existence of a dominant position, the abuse of such dominance, the prejudice to trade between Member States.
- 2) Mere dominance is not illegal, but it becomes illegal when it is used to dampen competition. Therefore, EC competition law regards dominance as a possible position in a market, which is lawful when it is obtained by virtue of business acumen, historic accident or a superior product, but becomes unlawful when it is abused to distort the market.
- 3) Article 102 only prohibits the abuse, not the possession, nor the achievement of a dominant position on the common market. The wording of article 102 refers to the abuse in objective terms -“any

⁶²⁵ J. Temple Lang, *Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law*, 3 Fordham Int. L. J., Issue 1, p. 17, (1979-1980)

⁶²⁶ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207. The plaintiff has abused its dominant position by ceasing to supply its bananas to one of its most important customers among the distributor/ripeners. The withdrawal of supplies was made on the grounds that the distributor/ripeners concerned had taken part in an advertising campaign for bananas of a competing brand.

⁶²⁷ *BBI/Boosey & Hawkes: Interim measures*, IV/32.279 – paragraph 10. *BBI/Boosey & Hawkes: Interim measures*, IV/32.279. Commission Decision, 18.07.1988, Case No IV/30/178/CE, published on OJ L/284-41, 19.10.1988

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abuse by one or more undertakings of a dominant position within the common market". It follows that the subjective dimension of the abuse, in particular the anticompetitive intent of the conduct, is irrelevant.

Therefore, the core substance of the inquiry is not whether the dominant position on the interstate market has been purposely and intentionally exploited by the undertaking, but merely whether such an abuse has occurred. The above is corroborated by the position of the ECJ, which affirmed that "the concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition"⁶²⁸.

Moreover, in the *AKZO* case the Court has omitted to inquire the anticompetitive intent of the dominant firm's conduct, affirming that some behaviors -which have anticompetitive effects- can only be justified by an interest in eliminating competitors, being abusive *per se*. In fact, the practice of pricing below average variable costs must be regarded as abusive, without the need to examine the market effects since "a dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced"⁶²⁹.

Pricing below average variable costs is presumed abusive; pricing above average variable costs, but below average total costs may be presumed abusive when it is part of a strategy to eliminate rivals⁶³⁰.

⁶²⁸ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 6.

⁶²⁹ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 71

⁶³⁰ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 70. "From this one might assume that a price cut above average total costs that is not part of a plan to eliminate rivals is not abusive. However, the ECJ has found that unconditional price cuts below average variable costs could constitute an abuse in exceptional cases. It is to be concluded that an unconditional price cut above average total cost is abusive when it is qualified as such according to the circumstances, and even when the costs incurred by the dominant firm are lower than those of the rivals. In sum,

Another controversial aspect of the judicial enforcement of article 102 is the need to ascertain the causality between the dominance and the abuse. Judicial interpretation of the need for causality has evolved in the course of time. Initially, it was held that article 102 does not entail causation; in fact, in *Continental Can* the ECJ has affirmed that “the question of the link of causality...[which]...has to exist between the dominant position and its abuse, is of no consequence, for the strengthening of the position of an undertaking may be an abuse and prohibited under article [102] of the Treaty, regardless of the means and procedure by which it is achieved, if it has the effect of...substantially fettering competition”⁶³¹.

Elsewhere in *Hoffmann-La Roche*, the ECJ has endorsed this position, maintaining that “the interpretation suggested by the applicant that an abuse implies that the use of economic power bestowed by a dominant position is the means whereby the abuse has been brought about cannot be accepted”⁶³².

Contrariwise, in the *Tetra Pak II* case, the European Court has stated that article 102 “presupposes a link between the dominant

pricing below average total cost is abusive *per se*, whereas pricing below average total costs qualified by the circumstances of the case can be abusive”. See *infra*, para. 5.4.2.3 on the application of “the equally efficient competitor test” to the case. Compare *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*, 16.03.2000, Case C-395/96 and C-396/96, ECR I-1365 para. 118-119, where the Court found an abuse of dominant position on part of the appellant, without ruling on the legitimacy of the price cut carried out by the latter. For an extensive analysis of the *Compagnie Maritime Belge* case and the treatment of above-cost predation, see *infra* para. 9.1. The lack of a definite standard has been seen as highly unsatisfactory by R. O’Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 177. Similar criticism have been made of § 2 of the Sherman Act towards this approach has been expressed by E. Elhauge, *Defining Better Monopolization Standards*, 56 *Stanford Law Review* (2000), p. 253

⁶³¹ *Europemballage Corporation and Continental Can v. Commission of the European Communities*, 21.02.1973, Case 6/72, [1973], ECR 215, para. 27. Elsewhere in the case, the Court has affirmed that proof of the anticompetitive conduct can be “the acquisition of the majority holding of a competing company by an undertaking or a group of undertakings holding a dominant position amounts to an abuse of this position”. However, even when deducting a specific deed/fact as proof of the anticompetitive nature of the firm’s conduct, there have to be legally sufficient reasons or at least the plaintiff “must prove that competition was so essentially affected that the remaining competitors could no longer provide a sufficient counterweight”. Conversely, in his Opinion Advocate General held that article 102 “with its expression ‘abuse of dominant position within the Common Market’, appears to hint that its application can be considered only if the position on the market is used as an *instrument* [emphasis added] and is used in an objectionable manner; these criteria are therefore essential prerequisites of application of the law”. Opinion of Advocate General Roemer in *Europemballage Corporation and Continental Can v. Commission of the European Communities*, 21.02.1973, Case 6/72, [1973], ECR 215, para. 254

⁶³² *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 91

position and the alleged abusive conduct”, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market⁶³³.

It cannot be denied that the main forms of practices reproached by article 102 imply a link of causality between the dominant position –in terms of power over the market- and the abuse. In fact, an output restriction aiming at raising the market price for a product would only make sense as an abusive practice if carried out by a dominant firm; if a non-dominant firm were to raise the price for its product in a competitive market, it would in all likelihood self-marginalize from the market itself.

The same holds valid as regards predatory pricing: a non-dominant firm that would price below average variable costs would not be able to recoup the losses because it would not have a sufficient degree of dominance over the market to re-raise prices once predation is concluded. At most, predation of a non-dominant firm would be considered as an attempt to consolidate its position, or make consumers loyal to its product to accept a price raise in the long run⁶³⁴. Consumers would feel no harm, unless the predation were part of a scheme of the dominant undertaking to eliminate rivals, in which case the abuse would be causally linked to the dominance.

4.3 Definitions of abuse

The following section will examine the most recurrent definition of abuse in the case law concerning article 102.

4.3.1 The notion of “special responsibility” of the dominant firm

Even if some of the abuses that traditionally fall within the reach of art. 102 are based on contractual arrangements – i.e. art. 102, paragraph 2, letter (d)-, the core idea of anticompetitive abuse refers to the exploitation of the dominance over a market by an undertaking. Based on the assumption that competitive harm is more likely to stem from a bilateral arrangement between two or more firms, which will limit their output to raise prices, than from a unilateral conduct, article 102 does not sanction the mere obtainment of dominance over a market, but the exploitation of it. Even if the mere dominance is lawful, the achievement of such a position causes a “special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market”, in other terms the proper functioning of the market⁶³⁵; in fact, some conducts that are normally lawful when put in place by non-dominant firms are deemed unlawful when put in place by a

⁶³³ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951 para. 27

⁶³⁴ See *infra*, para. 8.1.2

⁶³⁵ *Michelin v Commission* Case C-322/81, 09.11.1983, [1983] ECR 3461, para. 57

dominant undertaking. The notion of “special responsibility”, however, does not provide any guidance as to discern the abuses from the lawful conducts.

Thus, the European Courts have filled the concept of special responsibility of the dominant firm with meaning, affirming that the spectrum of unlawful abuses not only encompasses exploitative abuses, i.e. when the firms levers on its economic power to the detriment of consumers and of its commercial partners, but also exclusionary abuses, i.e. when the firm lessens the ability of its competitors to compete. That is ultimately material with the reach of *Continental Can*, where the ECJ has maintained that article 102 is directed to both conducts that directly harm consumers, and that impair the regime of effective competition⁶³⁶.

In the *Tetra Pak* case⁶³⁷, Tetra Pak was the dominant firm in the manufacture of aseptic cartons for packaging milk and juice, and the machines that make them. Some contracts with its customers for aseptic products required the customers to buy non-aseptic machines and cartons, also from Tetra Pak, and some required exclusive dealing. The General Court held that the contracts were illegal. The Court of Justice affirmed. Tetra Pak’s dominant position in the related aseptic market “gave Tetra Pak freedom of conduct compared with other economic operators on the non-aseptic market, such as to impose on it a special responsibility under Art. 86 [art. 102] to maintain genuine undistorted competition on those markets”, irrespective of the reasons for which it had such a dominant position in accordance with the general objective set out in article 4 of the Treaty of the Rome to guarantee an open market economy with free competition.

4.3.2 The notion of abuse as deviation from “competition on the merits”

Elsewhere, the exclusionary abuse has been defined as a conduct causing detriment to the competition on the merits⁶³⁸. An example of practices deviating from competition on the merits is when the firm’s conduct has “an exclusionary effect on its equally efficient

⁶³⁶ *Europemballage Corporation and Continental Can v. Commission of the European Communities*, 21.02.1973, Case 6/72, [1973], ECR 215, para. 27, para. 26

⁶³⁷ *Tetra Pak International SA v Commission of the European Communities* 06.10.1994, Case T-83/91, [1995] E.C.R. II-762 (CFI), para. 122, affirmed in appeal, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951

⁶³⁸ Emphasized also by Commissioner M. Monti, in his press release after the conclusion of the *Microsoft* investigation and the imposition of a fine. “Dominant companies have a special responsibility to ensure that the way they do business doesn’t prevent competition on the merits and does not harm consumers and innovation”. Brussels 24 March 2004, Reference: IP/04/382 Available at http://europa.eu/rapid/press-release_IP-04-382_en.htm . As for the *Microsoft* case, see *infra*, para. 5.4.2.4

actual or potential competitors, that is to say practices which are capable of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners”⁶³⁹. Consequently, the firm can compete aggressively, but it cannot strengthen its dominant position by using methods that exclude other firms from the market.

It is apparent that in the ECJ case law the criterion of the impairment of competition on the merits only applies only to the inquiry of exclusionary abuses and not also to the inquiry of exploitative abuses. In fact, exclusionary abuses are the broadest category of illicit conduct pursuant to article 102, and are meant to protect competitors rather than consumers. Hence, it appears that the *ratio* underlying the safeguarding of “normal” competition is the protection of competitors rather than of competition and, ultimately, of consumers.

The protection of the disadvantaged party seems to regress into a subordinate position compared to the market equilibrium, being this at odds with the intent of the EU *Acquis* to ensure a high level of protection for consumers⁶⁴⁰. The Commission has addressed the issue of the lack of protection for the competitive process in its *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*⁶⁴¹, in which it has affirmed that when applying article 102 “the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market”⁶⁴².

Furthermore, “the aim of the Commission’s enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare, whether in the form of

⁶³⁹ *Deutsche Telekom AG v. Commission of the European Communities*, 14.10.2010, Case C-280/08 P, 2010, para. 177

⁶⁴⁰ G. Howells, A. Nordhausen, D. Parry, C. Twigg-Flesner (eds.), *The Yearbook of Consumer Law 2007 1 –Consumer Protection Law and Legislation*, 2007, Ashgate Publishing Lt., p. 4, G. Alpa, *Introduzione al diritto contrattuale europeo*, Bari, 2007, p. 113

⁶⁴¹ *Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02

⁶⁴² *Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, para. 6

higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice”⁶⁴³. The Commission proposes a notion of exclusionary abuse entailing “foreclosure leading to consumer harm”, and is based on two consequent elements: 1) the anti-competitive foreclosure, which occurs when the conduct of the dominant undertaking hinders or excludes access of actual or potential competitors to the market or to supplies; 2) the actual or potential anticompetitive impact of the conduct, which occurs when the firm, after excluding its competitors, will be likely to profitably increase prices to the detriment of consumers.

On the account of this approach, a conduct integrates an exclusionary abuse only when it causes an anticompetitive harm, which will provoke a loss in consumer welfare⁶⁴⁴. In the *Deutsche Telekom* case, the ECJ seems to have adhered to the Commission’s guidelines to qualify the exclusionary abuse, by ascertaining the anticompetitive impact of the conduct of the dominant firm solely on the account of an appropriate measurement of its costs. The Court has affirmed that a conduct cannot be classified as exclusionary if it does not make competitors’ market penetration any more difficult. However, the conduct is to hinder the growth of competition to the detriment of consumers’ interests⁶⁴⁵. The Court acknowledges the twofold dimension of article 102, which sanctions conducts that have concrete effects on market players, be they competitors or consumers, but also have distortive effects on competition in the internal market⁶⁴⁶.

⁶⁴³ *Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, para. 19

⁶⁴⁴ The approach based on the anticompetitive foreclosure leading to consumer harm has characterized the Commission decision in the “Microsoft case”, Commission’s Decision 24.03.2004, 2007/53/CE, COMP 37.392, published on the Official Journal, OJ L 32, 06.02.2007. For an extensive analysis of the Microsoft case before the European Commission, see *infra*, para. 5.4.2.4. Even though the outcomes of the European Commission are not binding for the European Court or for the national ones, they represent a useful point of reference. Compare *Italy v Commission* Case C-310/99 [2002] ECR I-2289, para. 52 and the case law cited.

⁶⁴⁵ *Deutsche Telekom AG v. Commission of the European Communities*, 14.10.2010, Case C-280/08 P, 2010, para. 194 and paras. 252 -254

⁶⁴⁶ To this passage, compare the opinion that Advocate General Kokott delivered on 23.02.2006, *British Airways plc v. Commission of the European Communities*, Case C 95-04 P (see *infra*, note n. 99): “the conduct of a dominant undertaking is not, therefore, to be regarded as abusive within the meaning of Article 82 EC only once it has concrete effects on individual market participants, be they competitors or consumers. Rather, a line of conduct of a dominant undertaking is abusive as soon as it runs counter to the purpose of protecting competition in the internal market from distortions (Article 3(1)(g) EC). That is because, as already mentioned, a dominant undertaking bears a particular

4.3.3 The conduct lacking “objective economic justification”

Elsewhere, the ECJ has defined the abuse *a contrario*, as a conduct lacking “objective economic justification”⁶⁴⁷, which occurs when the economic efficiencies produced by the conduct of the dominant firm outweigh the anticompetitive effects. Unlike article 101, article 102 does not single out specific exceptions in which an anticompetitive conduct is compatible with the TFUE. Nonetheless, in the case law the exclusionary conduct is not deemed illicit if the dominant firm proves an economic justification for the anticompetitive effects of its conduct. Two are the requirements for justifying the anticompetitive foreclosure: on the one hand, it is to be necessary, on the other hand it is to be proportionate⁶⁴⁸.

More specifically, the exclusionary effect arising from the conduct may be counterbalanced, or outweighed, by advantages in terms of efficiency that also benefit the consumer. If the exclusionary effect of the conduct brings no advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that conduct must be regarded as an abuse⁶⁴⁹.

In practice, the assessment of the economic justification for a pricing practice established by an undertaking in a dominant position which is capable of producing an exclusionary effect is to be made on the basis of all the circumstances of the case: dominant firm is to prove an increase in efficiency, whereby its low prices are necessary for all the firms in the market to be able to produce or distribute the product, and ultimately bring an advantage for the consumers⁶⁵⁰.

4.3.4 The assessment of the consumer harm

Notwithstanding the call for a balance between efficiencies and anticompetitive effects of a conduct, the definition of anticompetitive effects is still a matter of dispute in case law. On the one hand, it is a generally acknowledged principle of the EU *acquis* that the most reliable standard to assess the anticompetitive

responsibility to ensure that effective and undistorted competition in the common market is not undermined by its conduct”. Compare *infra*, Chapter III, para 11, as regards the influence of the Ordoliberal thinking on the EU Courts approach.

⁶⁴⁷ *Manufacture française des pneumatiques Michelin v. Commission of the European Communities*, 30.09.2003, Case T-203/01, 2003, ECR II-04071, “*Michelin II*”

⁶⁴⁸ *British Airways plc v. Commission of the European Communities*, 15.03.2007, Case C 95-04 P, [2007] ECR I-2331

⁶⁴⁹ *British Airways plc v. Commission of the European Communities*, 15.03.2007, Case C 95-04 P, [2007] ECR I-2331, para. 86

⁶⁵⁰ *Konkurrensverket v. TeliaSonera Sverige AB*, 17.02.2011, Case C 52-09, [2011] I-527, para. 76

effects of a conduct is the harm to consumers⁶⁵¹. On the other hand, it is not clear whether anticompetitive effects should be actual/likely or possible/potential, because some outcomes seem to suggest that potential competition harm would suffice in light of article 102⁶⁵², whereas others suggest that actual anticompetitive effects need be demonstrated⁶⁵³. In particular, the *Michelin II* and the *AKZO* cases advocated for a presumption of anticompetitive effects when it is clear that the conduct of the dominant firm seeks to restrict competition.

All things considered, a syncretic criterion stemming from case law is the ascertainment of actual or potential consumer harm, according to the circumstances. That would be material with the emphasis that the Commission puts on the analysis of the effects of exclusionary conducts and the possibility of recoupment after predation.

The leading case reflecting the Commission's endeavor to review the legal presumption of anticompetitive effects is the *Wanadoo* case, in which it affirmed that price reductions below average variable costs for a limited period of time might be deemed lawful under certain circumstances, such as the introduction of new

⁶⁵¹ Compare the words of the Commissioner for competition policy in 2005: "Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies". Neelie Kroes, Member of the European Commission, European Competition Policy – Delivering Better Markets and Better Choices, European Consumer and Competition Day, London, 15 September 2005, available at http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm

⁶⁵² In *Michelin II*, para. 239, the General Court affirmed that potential anticompetitive effects amount to abuse within the meaning of article 102, since it is sufficient that the conduct of the dominant firm has the object to restrict competition. Once such an object is established it follows that the conduct will have potentially restrictive effects, and it is unnecessary to ascertain the concrete effects of the conduct. In *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 71 the General Court affirmed that some behaviors -which have anticompetitive effects- can only be justified by an interest in eliminating competitors, being abusive *per se*. The practice of pricing below average variable costs must be regarded as abusive, without the need to examine the market effects.

⁶⁵³ As regards the ascertainment of actual anticompetitive effects of the dominant firm's conduct, compare *Tetra Pak International SA v Commission of the European Communities*, 06.10.1994, Case T-83/91, [1995] E.C.R. II-762 (CFI), para. 151, the General Court analyzed the below-cost pricing practice of the defendant and affirmed that such scheme was actually "corroborated by the eliminatory effect of the competition endangered by *Tetra Pak's* pricing policy". In *Van Den Bergh Foods Ltd. v. Commission of the European Communities*, 29.04.1998, Case T-65/98, [2003], ECR-II 4653 the General Court analyzed the impact of exclusive contracts of furniture of refrigerators on the retail market for ice-creams, and concluded that these would lead to foreclosure of competition where the defendant insisted that the refrigerators be exclusively used for its products. The Court based its conclusion on actual effects of the exclusivity clause on foreclosure of competition.

products or the creation of network effect of economies of scale. However, *Wanadoo's* prices were not predatory for the mere fact that they had been below average variable cost for an extended amount of time, but for the fact that the price cut was part of a clear scheme directed to eliminating competition on the French market for high-speed Internet services during a key phase of its development⁶⁵⁴, and that recoupment of losses, although not a precondition before a finding can be made of abuse through predatory pricing, was likely by virtue of the "structure of the market and the associated revenue prospects"⁶⁵⁵. The ECJ also argued that an analysis of the chances of the dominant firm to make good for its losses in the post-predation phase might shed light on the economic justifications for pricing below average variable costs, or on the existence of a plan to eliminate competition, whereby prices are above average variable costs, but below average total costs⁶⁵⁶.

The *Discussion Paper on exclusionary abuses* has also fostered the application of the actual or potential consumer harm test⁶⁵⁷, stating that article 102 "prohibits exclusionary conducts which produces actual or likely exclusionary effects in the market and which can harm consumers in a direct or indirect way".

With regard to the definition of harm to consumers, first and foremost it should be noted that it does not encompass the harm to competitors in the connotation of anticompetitive harm, within the meaning of the TFUE. Second, unless there is harm to consumers, there is no harm to the structure of competition, meaning that competition can harm competitors. The point of EC competition policy is to serve the needs of consumers on the

⁶⁵⁴ *Wanadoo Interactive*, Commission Decision, 16.07.2003, COMP/38.233, para. 322 and 369 *et seq.* The Commission analyzed in depth the actual effects of the defendant's course of conduct, and put forward the following arguments: 1) during predation, *Wanadoo's* market share rose by 30%; 2) the main competitor's market share shrunk because of *Wanadoo's* pricing scheme; 3) one of *Wanadoo's* competitors went out of business following the predation phase.

⁶⁵⁵ *Wanadoo Interactive*, Commission Decision, 16.07.2003, COMP/38.233, para. 335-336 non confidential version available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38233/38233_87_1.pdf

⁶⁵⁶ *France Télécom v. Commission of the European Communities*, 02.04.2009, Case C-202/07 P [2009], ECR I-2369, para. 111

⁶⁵⁷ *DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, para. 55. The test has been proposed by John Vickers, who argued that there is an abuse only if challenged conduct has the effect of raising prices or restricting output, innovation, or quality. See *infra*, J. Vickers, *Abuse of Market Power*, Speech of the 31st Conference of the European Association of Research in Industrial Economics, Berlin, September 3rd, 2004.

market, “not some abstract notion of competition for its own sake”⁶⁵⁸.

A first corollary to this principle is that there is no need for competition law where there is harm to the competitive process, in the sense that some competitors are driven off the market, but consumers feel no harm. A second corollary is that consumer harm is to be proved by the aggrieved party, whereas the dominant firm is to rebut the anticompetitive effects of its conduct.

Remarkably enough, the only provision that expressly mentions consumer harm –“prejudice to consumers”- is article 102(b) sanctioning exclusionary abuses. That does not mean the other forms of abuse enshrined in the article do not require the ascertainment of prejudicial effects to consumers. In fact, exploitative abuses as under article 102(a) contain forms of loss in consumer welfare by means of excessive pricing.

With regard to discriminatory abuses, it is really arduous to discern pure discrimination from an exclusionary conduct, which –as said- implies by law prejudice to consumers⁶⁵⁹. Aside from that, there is no legal ground to affirm that consumer welfare is the rationale under which pure discriminatory abuses are investigated by EC competition authorities.

In spite of the fact that proof of actual or potential consumer harm is accepted as a standard test by scholars and case law, there is little agreement on how consumer harm should be measured: in particular, economists reject the claim that dominant firms should be able to evaluate *ex ante* the negative impact of their conduct on consumers, and courts should evaluate *ex post* such impact. Instead, they call for the elaboration of clear rules and good practices based on economic evidence that would not require firms to predict the outcomes of their conduct, such as the profit-sacrifice test⁶⁶⁰.

4.4 Abuse in a nutshell

In sum, case law has established that:

1. The dominant firm has a special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market (*Michelin*)

⁶⁵⁸ J. Vickers, *Abuse of Market Power*, Speech of the 31st Conference of the European Association of Research in Industrial Economics, Berlin, September 3rd, 2004.

⁶⁵⁹ As for the analysis of discrimination abuses pursuant to article 102(c), see *infra*, note n.188 *et seq.*

⁶⁶⁰ As regards the economic thinking of abusive conducts, see *infra*, paras. n. 5 *et seq.*

2. The dominant firm may not eliminate a competitor or strengthen its position by “recourse to means other than those based on competition on the merits” (*Deutsche Telekom*)
3. The abuse involves “recourse to methods different from those which condition normal competition” that have the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (*Hoffmann-La Roche*)
4. The concept of abuse is objective and does not require anticompetitive intent;

5. Economic thinking of unilateral abusive conducts

Albeit there is a great deal of uncertainty on the normative origins of article 102, because there are not many background documents on article 82 and on the EC Treaty in general, scholars agree that the economic foundation of the European law of abusive conduct can be tracked back to the Freiburg Ordoliberal school, on the one hand, and to the American experience of the Harvard school and the Chicago school of law and economics, on the other hand.

5.1 The Freiburg School

The above principles appear to circle around the postulates of the Ordo-liberal school of law and economics based in Freiburg in the 1920s and 1930s, according to which competition law was central to the economic constitution of society as a constraint on the exercise of both private and state power in the economic sphere.

In that respect, the role of the State was merely the creation of a legal environment suitable for the economy, and the maintenance of a healthy level of competition through measures that adhere to market principles. On the one hand, the ordoliberals conceded that firms’ market power could not be eliminated, but on the other hand it called for firms’ conduct to be constrained by competition. That would consent “performance competition” (*Leistungswettbewerb*) – making products more attractive for consumers, by improving their characteristics or lowering their price, but it would forbid “impediment competition” (*Behinderungswettbewerb*) – inhibiting the rivals’ capacity to perform⁶⁶¹.

In fact, ordoliberals affirmed that in a competitive market performance competition is natural, and there are no grounds for impediment competition. For instance, conduct such as non-predatory price cuts, the offer of better quality products or better services were deemed performance competition and would be

⁶⁶¹ D.G. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, p. 53

allowed; whereas, a below-cost pricing would be prohibited because it would impede competition.

Having that said, the foundational thinking of the Freiburg school can be epitomized with the words of an eminent scholar:

- 1) A competition policy primarily oriented toward the goal of securing individual freedom of action as a value in itself, from which the goal of economic efficiency is merely derived;
- (2) A strong role for the State in the preservation of the prerequisites of the competitive system but hesitancy towards overt price regulation;
- (3) The shaping of competition policy into a rule of law rather than a mechanism for discretionary decisions; and
- (4) The embedding of competition policy into the economic order of a free and open society⁶⁶².

In the context of article 102, the influence of Ordoliberalism resulted in the birth of the “doctrine of performance-based competition”⁶⁶³, which has been largely embraced by EU competition case law. In fact, the ban of “competition that is not based on the merits”⁶⁶⁴, or of “methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators” the dominant firm can recourse to⁶⁶⁵ is nothing but the judicial interpretation of the idea that competition based on restricting the performance of rival commercial operators, therefore eliminating the residual competition in the market in which the dominant position is held –impediment competition– is unlawful.

The goal of competition law is the achievement of fairness, in other terms that firms with market power behave “as-if” the market were competitive. This view was reflected in the need for protection of small and medium enterprises, which were deemed as important to the consumers as the big businesses⁶⁶⁶. Thus, some restrictions on the dominant firm’s conduct were necessary to reassure fairness.

⁶⁶² D.G. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, p. 92

⁶⁶³ “Performance-based” competition directly derives from the idea of “performance competition” (*Leistungswettbewerb*) and consists of not impeding the rivals’ capacity of competing. Ordoliberalism thinking has had some echo in American Literature as well, in particular E. *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory – and the Implications for Defining Costs and Market Power*, 112 Yale L. Jour., 681 (2003), who deems conduct enhancing the firm’s efficiency as lawful, whereas conducts limits other firms’ efficiency as unlawful.

⁶⁶⁴ See *supra*, para. 4.3.2

⁶⁶⁵ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 91

⁶⁶⁶ D.G. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, p. 92

Other traces of Ordoliberalism in the EU case law can be found in the concept that the dominant firm is under a special responsibility “not to allow its conduct to impair genuine undistorted competition on the Common Market”⁶⁶⁷, which resembles the ordoliberal need to protect the competition structure as a goal in itself, parallel to the protection of market players (competitors and consumers). In other terms, article 102 applies not only to conducts to the detriment of consumers or of competitors, but also to conducts that have a negative impact on the competitive process⁶⁶⁸.

5.2. The Harvard School

One of the most important economic theories that also have played a significant role in the formation of EC competition law is the Harvard School, which is also called structure-conduct-performance school⁶⁶⁹, because it analyzes the interaction between the structure of an industry and the conduct of the firm involved in that industry. The structure of the industry -such as the technological development or the concentration level- determines the conduct of the firms, and, ultimately, the profits of the firms themselves and the consumer welfare. Consequently, whenever the government intervenes on the structure of the industry by indirectly imposing taxes or competition laws, it will indirectly affect the performance on the firms⁶⁷⁰.

The structure affects the conduct of the firm and its performance. For instance, if the structure of the market is close to perfect competition conditions, the firm can only decide how much it wishes to sell at the price set by the market conditions. Conversely, if the market structure is monopolistic or oligopolistic, dominant firms can be able to set the price without considering their competitors conducts. Based on the assumption that perfect competition is the best status for the market, since price is always at the competitive level, competition law should always strive for achieving this condition and suppressing monopolistic structures.

Another postulate of the Harvard School is the close relationship between the number of firms operating in an industry and the performance of the firm. The so-called “concentration doctrine” assumes that the more a market is concentrated in the hands of a

⁶⁶⁷ See *supra*, *Michelin I*, case note n. 87

⁶⁶⁸ E. Fox, *Abuse of Dominance and Monopolisation: How to Protect Competition Without Protecting Competitors*, in C.D. Ehlermann & I. Atanasiu (eds.), *2003 European Competition Law Annual – What is an Abuse of a Dominant Position?*, Hart Publishing, 2006, p. 69

⁶⁶⁹ H. Hovenkamp, *The Antitrust Enterprise – Principle and Execution*, Harvard Press, p. 36 (2005)

⁶⁷⁰ M. Glader, *The Innovation Markets and Competition Analysis: EU Competition Law and US Antitrust Law*, Lund University, Malmö, 2004

small number of firms, the higher the market power of these firms is, and the more likely the power of these undertakings to affect the price level with their course of conduct is. The doctrine does not take into account the fact that a high concentration can be the result of economies of scale or the superior product of the firms in one industry, maintaining that a high concentration in the market is always evidence of strong market power for the purposes of competition law; thus a high concentration is always a market failure and should always be a ground for government intervention. Parallel to that, competition authorities thus should enact an active policy against the mergers and concentration⁶⁷¹. Influence of the Harvard School on EU Competition Law can be traced in the fact that the competition authorities still focus on the market share rather than entry barriers, on the one hand, and support the small and medium sized enterprises, on the other hand⁶⁷².

5.3 The Chicago School

Major attacks to the Harvard School and the concentration doctrine came from the Chicago School, which mainly advocated for a free market system, untied from government intervention by means of competition law.

Unlike the Harvard scholars, Chicagoans thought that highly concentrated market structures do not necessarily result in monopoly or collusion. Instead, the high concentration ratios are the result of different structures, more specifically the economies of scale and the network effects, since high concentration is observed in markets where the mass-scale production is economically more advantageous. They abhorred government regulation on market entry and price and emphasized efficiency explanation for many phenomena, including industrial concentration⁶⁷³.

In other terms, firms operating at the maximum efficiency level increase their market shares and improve their performance according to the concentration rate of the market, benefiting from the economies of scale. Therefore, a high concentration is something desirable whereas the real problem is the collusion, which results in artificially high prices and restricted output level⁶⁷⁴.

⁶⁷¹ D. Hildebrand, *The Role of Economic Analysis in the EC Competition Rules*, Kluwer Law International, Second Edition, The Hague/London/New York, 2002

⁶⁷² M. Glader, *The Innovation Markets and Competition Analysis: EU Competition Law and US Antitrust Law*, Lund University, Malmo, 2004.

⁶⁷³ W.E. Kovacic & C. Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 *Journal of Economic Perspective* 54, (2000)

⁶⁷⁴ The Chicago school developed the argument that vertical ownership and contract integration should be lawful *per se*, with the exception of practices

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The attitude of both Harvard and Chicago scholars towards perfect competition is the same, since both hold that this market structure maximizes both the economic efficiency of the firm's performance and consumer welfare. However, while the Harvard School argues for government intervention to make the market structure closer to perfect competition, the Chicago School maintains that this condition should be achieved by means of the free display of market forces, and the only hurdle to forces of the market was the existence of artificial barriers to entry, among which the most common are predation, exclusionary practices (with regard to unilateral conducts), and collusion (with regard to multilateral conducts)⁶⁷⁵.

With regard to the concentration issue, according to Chicago scholars that is the result of superior performance of the firms. Moreover, high concentration is necessary for the achievement of greater efficiency levels in an industry, since the economies of scale –brought about by concentration- will lower prices for the benefit of consumers, who are the ultimate beneficiaries of antitrust law.

Therefore, Chicago scholars argue that the area in which competition law should intervene should be narrowed to control and eliminate the overtly collusive behaviors of firms, under the assumption that the free market forces will be conducive to the perfect competition condition without government intervention⁶⁷⁶. The effect of both Chicago and Harvard School can be observed in EC competition law, in which the efficiency concern is getting an increasingly vast echo. It should be noted, though, that the integration of the internal market is the most important goals

shown to facilitate horizontal collusion. They saw far fewer situations where monopoly could be created or maintained for long periods, and they disputed the notion that a monopolist in one market could readily leverage its monopoly position into related markets. Their Criticism to the "monopoly leverage" theory was grounded on the following argument: a firm with both market power and the ability to charge prices above cost would not increase its overcharge by tying or other forms of vertical integration, but by operating a sort of price discrimination, which permitted to extract more profits, but also to increase output (and decrease price). To the contrary, in the case of successive or complementary firms with market power, combining two products or process stages into a single firm would actually create efficiency, by increasing output and reducing price through the eliminations of double marginalization. H.J. Hovenkamp, *Harvard, Chicago and the Transaction Cost Economics in Antitrust Analysis*, University of Iowa Research Paper, Number 10-35, December 2010, available at <http://ssrn.com/abstract=1592476>, p. 3

⁶⁷⁵ I. Schmidt & J.B. Rittaler, *A Critical Evaluation of the Chicago School of Antitrust Analysis*, Kluwer Academic Publishers, Dordrecht, The Netherlands, p.75 (1989); R.H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p.328 (1993)

⁶⁷⁶ These views were maintained by R.H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p.166 (1993), R.A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA.L.REV. 925 (1979)

mandated to the EC competition law; therefore, the axiological *prius* of the EU action cannot be the achievement of efficiency of the market, but its integration. The further market integration is clearly conflicting with the unrestricted free market concept of the Chicago School⁶⁷⁷.

5.4 Post-Chicago approaches

According to an eminent scholar, there is a need for convergence between the Harvard School and Chicago School for the proper functioning of EC competition law. Apparently, the European Approach, which is very much affected by the Harvard School, is unsuccessful in utilization of economic theories in antitrust cases, whereas the arguments of Chicago School are against the protectionist attitude and common objectives of the European Union⁶⁷⁸.

Economic thinking of unilateral conduct has significantly evolved in the course of the years, and has been influenced by the above referred schools of law and economics, which have advocated that competition law rules and outcomes should be designed in a way to make their enforcement economically efficient⁶⁷⁹, by way of balancing the anticompetitive and the pro-competitive effects of the firm's unilateral conduct.

5.4.1 The dichotomy between *per se* rules and rules of reason

Based on the American experience, the Economic Advisory Group on Competition Policy has evaluated the benefits of adhering to an absolute *per se* approach or to a more nuanced *rule of reason* approach. On the account of the *per se* test, when it comes to policing the legality of a unilateral conduct, no exceptions apply; *per se* rules, however, are suitable for competition purposes only when experience suggests that the anticompetitive effects of a conduct are so unequivocal that there is no reason to further investigate the effects themselves⁶⁸⁰.

Conversely, *rules of reason* entail the evaluation of the "goods and the evils" of a unilateral practice, the untangling of a conduct in that harms and benefits are appraised and compared. Economists have emphasized that this effect-based approach is deemed more

⁶⁷⁷ B. J. Rodger, *The Oligopoly Problem and the Concept of Collective Dominance: EC Developments in the Light of US Trends in Antitrust Law and Policy*, 2 Columbia Journal of European Law 25, (1996)

⁶⁷⁸ E. Johansen, *I Say Antitrust; You Say Anticompetitive: Why Bridging the Divid between US and EU Competition Policy Makes More Economic Sense*, 24 Penn State International Law Review, 333, (2005)

⁶⁷⁹ R.A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 Journal of Legal Studies, p. 399, (1973)

⁶⁸⁰ Examples of *per se* offences are price fixings, since experience over the years has shown that they are so harmful to both competition and to consumers that they are prohibited outright.

appropriate when dealing with unilateral conduct, and have criticized past policy under article 102 due to its extreme reliance on form over effects⁶⁸¹. They have endorsed the application of effect-based rules versus form-based rules on the account of the following reasons:

A more consistent approach would start out from the effects of anticompetitive conduct, such as exclusion of competitors in the same market or in a horizontally or vertically related market one, and consider the competitive harm that is inflicted on consumers. Adopting such an effects-based approach would ensure that these various practices are treated consistently when they are adopted for the same purpose. In contrast, a form-based approach creates the risk that they will be treated inconsistently, with some practices possibly enjoying a relatively more lenient attitude (e.g., because of different standards). Arbitraging among these different treatments may facilitate exclusion, or induce the dominant firm to adopt alternative exclusionary methods, which may well inflict a higher cost on consumers⁶⁸².

Matter-of-factly, effect-based rules should take into consideration the anticompetitive effect of the conduct on the market and the detriment caused to consumers. Furthermore, an effect-based approach would permit an *ex-post* evaluation of the consequences of the conduct, whereas a form-based one would impose the establishing of *ex-ante* parameters for anticompetitive conducts. The former would allow Courts and competition authorities to include diverse practices in the anticompetitive conduct and a better evaluation of the concrete circumstances of the case. In both approaches, however, neither should the enforcement organs allow that anticompetitive conducts go unpunished ("false positives" in statistical parlance), nor that pro-competitive practices be condemned ("false negatives")⁶⁸³.

A self-explanatory example of the conflict between the two approaches regards unconditional price cuts by a dominant firm. Even if price competition is always fostered, an excessive price reduction aiming at driving competitors off the market might result into a subsequent price raise when the market has been predated.

Economists traditionally suggest that price reductions are lawful as long as price is kept above production costs. Production costs are generally defined in terms of marginal costs, but since these are difficult to evaluate in court, they normally match average

⁶⁸¹ Report by the Economic Advisory Group on Competition Policy, "An Economic Approach to Article 82", July 2005, p.5

⁶⁸² *Ibidem*, p.6

⁶⁸³ *Ibidem*, p.7

variable costs⁶⁸⁴. The ECJ in the *AKZO* case -the first ECJ outcome on predatory pricing- has endorsed this approach, arguing that pricing below average variable costs (a proxy for marginal costs) is presumed to be exclusionary⁶⁸⁵. Nonetheless, this presumption has been relaxed lately, in particular as regards the new technologies, and price reductions below average variable costs for a limited period of time have been deemed lawful under certain circumstances, such as the introduction of new products or the creation of network effect of economies of scale. In fact, in the *Wanadoo* case the Commission concluded that the dominant firm's prices were not predatory for the mere fact that they had been below average variable cost for an extended amount of time, but for the fact that the price cut was aimed at pursuing a predatory policy⁶⁸⁶.

In all, a form-based rule stating -"all price cuts below average variable costs are unlawful"- would prevent authorities from evaluating all the circumstances and practices, and might result in a false negative. Conversely, a rule stating "all price cuts below a certain threshold (to be defined with reference to possible practices and circumstances)" would allow courts to better investigate the facts of the case and police it by resorting to more elements. This method is more nuanced than the simply accounting of costs, but it does not alter the rationale underlying the competition/consumer harm test.

Undoubtedly, one could argue that a *per se* rule is less arduous to apply than a rule based on the effects of a conduct. Yet, the ex-post approach is also a means to adapt a general rule to the evolution of the legal and economic policies underlying competition law. Modern case law has shown that there are virtually no practices that could be described as *per se* unlawful pursuant to article 102.

5.4.2 The inputs of law and economics in the definition of a standard of abuse⁶⁸⁷

⁶⁸⁴ See Chapter I, para. 9.2, the Areeda-Turner criterion. P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 697 716-718 (1975)

⁶⁸⁵ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, paragraphs 70-71

⁶⁸⁶ *Wanadoo Interactive*, Commission Decision, 16.07.2003, COMP/38.233, para. 322 and 369. Compare *supra*, note n. 110 the emphasis of the Commission on analyzing the actual anticompetitive effects of the dominant firm's conduct, and the swings of the European Courts between the ascertainment of actual or potential anticompetitive effects.

⁶⁸⁷ A more detailed assessment of the tests elaborated by Law and Economics scholars will be made in Chapter III, para. 11 *et seq.*, in an attempt to find the most suitable approach to identify monopolization or abusive standards to apply in both systems.

Based on the call for evaluating the circumstances of the case surrounding the unilateral abusive conduct, legal and economic literature has provided different tests to single out an abuse: fit

1. The first one is based on the notion of profit-sacrifice, meaning that the firm is to deliberately forego some profits in the short run in order to induce exit from the market and to recoup the losses in the long term⁶⁸⁸; conduct is unlawful if it is unprofitable for the dominant firm but for the exclusion of rivals and the post-exclusion supra-competitive recoupment;
2. A second test is the “no economic sense” one, which can be regarded as a variation of the profit-sacrifice test and considers as conduct as an abuse when it makes no economic sense but for the intent to drive competitors off the market or soften competition⁶⁸⁹.
3. A third test is the equally efficient competitor one, based on which the only exclusionary conduct is the one that would exclude from competition an equally or more efficient competitor, since conduct aiming at excluding a less efficient rival is deemed competition on the merits⁶⁹⁰.
4. The final test is based on consumer welfare: the conduct that harms consumer welfare, or harms consumer welfare more than it promotes efficiency is deemed exclusionary⁶⁹¹.

5.4.2.1 The “profit-sacrifice” test

The most obvious example of profit-sacrifice conduct is predatory pricing, whereby the losses incurred by selling under price should be outweighed by the gains of excluding competition over a market. Criticism of the profit sacrifice test has been addressed to the fact that it is not clear to what extent a firm should sacrifice its profits for its conduct to be characterized as unlawful, or if any sacrifice aimed at excluding competition should be automatically unlawful. Furthermore, the profit-sacrifice test lacks certainty when it asks the court to prefigure the likely conduct of the firm in the absence of an ability to raise prices, once the predation period has ceased⁶⁹².

⁶⁸⁸ A.D. Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct – Are There Unifying Principles?*, 73 Antitrust L.J. (2006); J. Ordover & R. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 Yale Law Journal 8 (1981)

⁶⁸⁹ A.M. Mateus & T. Coelho Moreira, *Competition Law and Economics – Advances in Competition Policy Enforcement in the EU and in North America*, Edward Elgar Publishing (Inc.), Northampton, Massachusetts, (2010) p.190

⁶⁹⁰ R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, p. 194

⁶⁹¹ A.I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a better Balance*, 72 Antitrust Law Journal 3, (2004) p.3

⁶⁹² M.R. Patterson, *The Sacrifice of Profits in Non-Price Predation*, 18 Antitrust 37, (2003) p. 37

5.4.2.2 The “no-economic sense” test

Under the “no-economic sense”, a business strategy is not abusive if it would not make economic sense for the dominant firm but for its probable consequence of eliminating competition over a certain market. Compared to the “profit-sacrifice test”, this test permits to distinguish lawful short-term profit sacrifices –such as investments in network effects- from unlawful courses of conduct whose only rationale is eliminating competition, by granting more lenience for conducts that are yet aggressive, but are not solely anticompetitive. A shortcoming of this test is that there is actually no way to effectually distinguish a volume growth (caused by the reduction in output/price) justifiable under the competition-on-the merits from a volume growth centered on eliminating rivals.

As a corollary to the above, both the profit-sacrifice test and the no-economic-sense test have the advantage of shifting the inquiry on competition on the merits from a subjective to an objective standpoint, since they are both grounded on the objective rationale of a sacrifice of the dominant firm, and they are both grounded on the assessment of the economic rationality of a firm’s wealth maximization.

However, even though both approaches have the merit of shedding light on the willfulness of the conduct of the dominant firm, they leave the question of what is an exclusionary conduct essentially, which task is ultimately left to the Courts⁶⁹³. But Courts are left free to police article 102 in a maximalist way, sanctioning every profit-sacrifice of the firm resulting in a lessening of competition on a market, or in a libertarian/conservative way, sanctioning those profit-sacrifices purposely seeking to eliminate competition, but upholding a strenuous antagonism of the dominant firm on the market⁶⁹⁴.

5.4.2.3 The “equally efficient competitor” test

Under the “equally efficient competitor” test, an abusive conduct is a practice that would exclude an equally efficient rival firm. Judge Posner elaborated this test, departing from the question whether the dominant company itself would be able to survive the exclusionary conduct if it were the target. Concisely, the equally

⁶⁹³ J. Vickers, *Abuse of Market Power*, 115 *Economic Journal* 244, (2005), p. 259. According to the author, lax policy would jeopardize the competitiveness of markets, but rigid policy would chill pro-competitive, pro-consumer conduct.

⁶⁹⁴ Ordoliberal theory holds that the role of the State is merely the creation of a legal environment suitable for the economy, and the maintenance of a healthy level of competition through measures that adhere to market principles. On the policy reasons underlying the Courts’ interpretation of norms, see in particular M. Hesselink, *A Spontaneous Order for Europe? Why Hayek’s libertarianism is Not the Right Way Forward for European Private Law*, available at the website http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270566

efficient competitor test is developed as follows:

“The plaintiff must first prove that the defendant has monopoly power and second that the challenged practice is likely in the circumstances to exclude from the defendants’ market an equally or more efficient competitor. The defendant can rebut by proving that although it is a monopolist and the challenged practice exclusionary, the practice is, on balance, efficient. Only when monopoly power is used to exclude equally or more efficient firms and thus perpetuate a monopoly not supported by superior efficiency should the law step in. Even then, it should be alert to the possibility that the exclusionary effect of the monopolist’s practice is offset by efficiency gains”⁶⁹⁵.

The conduct of the dominant firm would be presumed abusive when it harms equally efficient competitors, absent overriding efficiencies that might excuse such an abuse.

With regard to article 102, in the *AKZO* case⁶⁹⁶ the “equally efficient competitor test” was applied, in that the ECJ found that unconditional price cuts below average variable costs could constitute an abuse when they are qualified as abusive being part of a scheme to eliminate rivals, which are equally or more efficient than the defendant. Less efficient firms should not be granted protection from strenuous competition by the dominant firm, because consumers can benefit more from more economically efficient market players.

In that respect, the dominant firm should be allowed to price down at least to its average variable costs, even if these are lower than those of the rivals, since such pricing is economically efficient and will bring gains to consumers, who are the ultimate addressees of competition law measures. In other terms, the exclusionary effects caused by pricing down to average variable cost are offset by the efficiency produced in terms of consumer welfare.

In the *Deutsche Telekom* case, the General Court has further admitted the test, on the assumption that the assessment is solely based on the measurement of the dominant firm’s cost, and not on the subjective intent of eliminating rivals⁶⁹⁷.

Criticism to this approach has been expressed by those scholars, who stressed on the need of the presence of less efficient undertakings, which could bring benefits to the consumers thanks

⁶⁹⁵ R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, p. 196

⁶⁹⁶ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 70

⁶⁹⁷ *Deutsche Telekom AG v. Commission of the European Communities*, 14.10.2010, Case C-280/08 P, 2010, para. 192

to the enlarging of competition in the market⁶⁹⁸. Economic theory has showed that the inclusion of less efficient rivals can reduce the deadweight loss⁶⁹⁹ caused by the dominant firm and thus offset the allocation inefficiencies produced by the presence of less efficient firms on the market⁷⁰⁰.

Another criticism addressed to Posner's test is that it underestimates the first-mover advantage or the scale-of-scope advantage of the dominant firm: even if the latter's conduct is not likely to exclude an equally efficient rival, it might curtail competition and prevent less efficient rivals from increasing business and becoming at least as competitive as the dominant firm⁷⁰¹.

Second, even if a conduct is not likely to exclude an equally efficient rival in the short run, it might be aimed at creating economies of scale, which in the long run might drive competitors off competition anyways. Therefore, other scholars have suggested adopting the "not-yet-as-efficient competitors test", entailing the evaluation of the likelihood of a firm to reach the same levels of efficiencies as the dominant firm's, absent the latter's exclusionary conduct⁷⁰².

5.4.2.4 The "consumer welfare" test

The fourth and final "consumer welfare test" seeks to assess whether the course of conduct of the dominant firm increases its market power and causes a net harm to consumer welfare⁷⁰³: the magnitude of the benefits - increased consumer welfare from lower prices or improved quality, and perhaps increased total welfare from cost savings - is to offset the amount of welfare loss attributable to the exclusion of rivals - reduced consumer surplus or perhaps the deadweight loss attributable to market power maintained or created by the conduct. If the latter is greater than the former, the conduct is anticompetitive. Thus, the analysis is based on all the available data that might have an impact on consumers and on the balance of the pro-competitive and the anti-competitive effects of the conduct⁷⁰⁴.

⁶⁹⁸ M. Armstrong & J Vickers, *Price Discrimination, Competition and Regulation*, 41 *Journal of Industrial Economics* 334, (1993)

⁶⁹⁹ For a definition of "deadweight loss", see Chapter I, para. 4.2

⁷⁰⁰ M. Armstrong & J Vickers, *Price Discrimination, Competition and Regulation*, 41 *Journal of Industrial Economics* 335, (1993)

⁷⁰¹ A.S. Edlin, *Stopping Above Cost Predatory Pricing*, in 111 *Yale Law Journal* 941, (2002)

⁷⁰² J. Tirole, *The Theory of Industrial Organization*, MIT Press, Cambridge, 1992, p. 367-374

⁷⁰³ S.C. Salop, *Section 2 Paradigms and the Flawed Profit-Sacrifice Standard*, Remarks at the ABA Antitrust Spring Meeting (Mar. 31, 2005).

⁷⁰⁴ A. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 *Antitrust Law Journal* 3, (2004)

This test has a basis in article 102(b) which reproaches the act of “limiting production, markets or technical development to the prejudice of consumers”: the inquiry whether the conduct causes a net harm to consumers is grounded in the European law of unilateral abusive conducts.

Moreover, in the controversial *Microsoft* case, the Commission applied the balancing test in relation to the tying of Windows Media Player (WMP) with Windows Operating System (OS). It found that Microsoft had “not submitted adequate evidence to the effect that tying WMP is objectively justified by pro-competitive effects which would outweigh the distortion of competition caused by it. ...What Microsoft presents as the benefits of tying could be achieved in the absence of Microsoft tying WMP with Windows. As regards other benefits identified by Microsoft, they primarily relate to Microsoft’s own profitability and, being furthermore disproportionate to the anti-competitive effects in the market caused by the tying, cannot therefore serve as a valid justification”⁷⁰⁵.

The Commission analyzed the proportionality of Microsoft’s conduct, and whether the increase of consumer welfare could justify restriction to competition caused by the tying. It leaned on four lines of argument: 1) the ease of use could be achieved without tying⁷⁰⁶; 2) distribution efficiencies were minor and could not be achieved without distortion of competition⁷⁰⁷; 3) there was no evidence of technically superior performance due to code integration of WMP with the OS⁷⁰⁸; 4) platform efficiencies (i.e. desire to keep applications focused on Microsoft interfaces) was not a recognized efficiency⁷⁰⁹.

Thus, in judging *ex post* the effects of Microsoft’s conduct, the Commission did not rely on economic elements that would guarantee the predictability *ex ante* of the competitive gains of a conduct -such as a price reduction from which consumers could benefit-, or on clear rules, due to the lack of statutory definition of “abuse” pursuant to article 102, but it rather applied a rule of reason and a policy judgment, by merely weighing the proportionality of the conduct of the defendant. The risk implied in the proportionality test, in fact, is that “the outcomes will

⁷⁰⁵ Case COMP/C-3/37.792, *Microsoft*, Commission decision March 24th 2004, para. 970

⁷⁰⁶ Case COMP/C-3/37.792, *Microsoft*, Commission decision March 24th 2004, para. 956ff

⁷⁰⁷ Case COMP/C-3/37.792, *Microsoft*, Commission decision March 24th 2004, para. 958

⁷⁰⁸ Case COMP/C-3/37.792, *Microsoft*, Commission decision March 24th 2004, para. 962

⁷⁰⁹ Case COMP/C-3/37.792, *Microsoft*, Commission decision March 24th 2004, para. 962-966

represent matters of policy rather than precision”⁷¹⁰.

6. The evaluation of dominance

In EU competition law, the evaluation of dominance is, together with the definition of the relevant market, a basic prerequisite for the assessment of liability under article 102. That represents a significant difference from the US legal system, where under § 2 the firm can be held liable for monopolizing or attempting to monopolize, even when it does not have a market share amounting to monopoly *per se*. Nonetheless, market power and market shares stand as a symptom of the dangerous probability that the firm will monopolize the market.

Conversely, under EU competition law the abuse of dominant position cannot but depart from the calculation of a relevant dominance over a clearly defined relevant market. It follows that a conduct -considered abusive if carried out by a dominant firm- will be held lawful if carried out by a firm that does not hold the sufficient market shares to be dominant, irrespective of the fact that, by virtue of the conduct itself, the non-dominant firm might reach the relevant threshold of dominance in the long run.

The economic concept of dominance does not fully match its legal definition: in fact, in the realm of economics dominance is associated with market power, as the power to set the price for a product, which will be accepted by the other small operators in the market, also known as the competitive fringe. A firm is dominant because its rivals do not have sufficient strength to increase or decrease output and influence the market. The market power is exercised over the remaining demand that is left unsatisfied by the competitive fringe⁷¹¹.

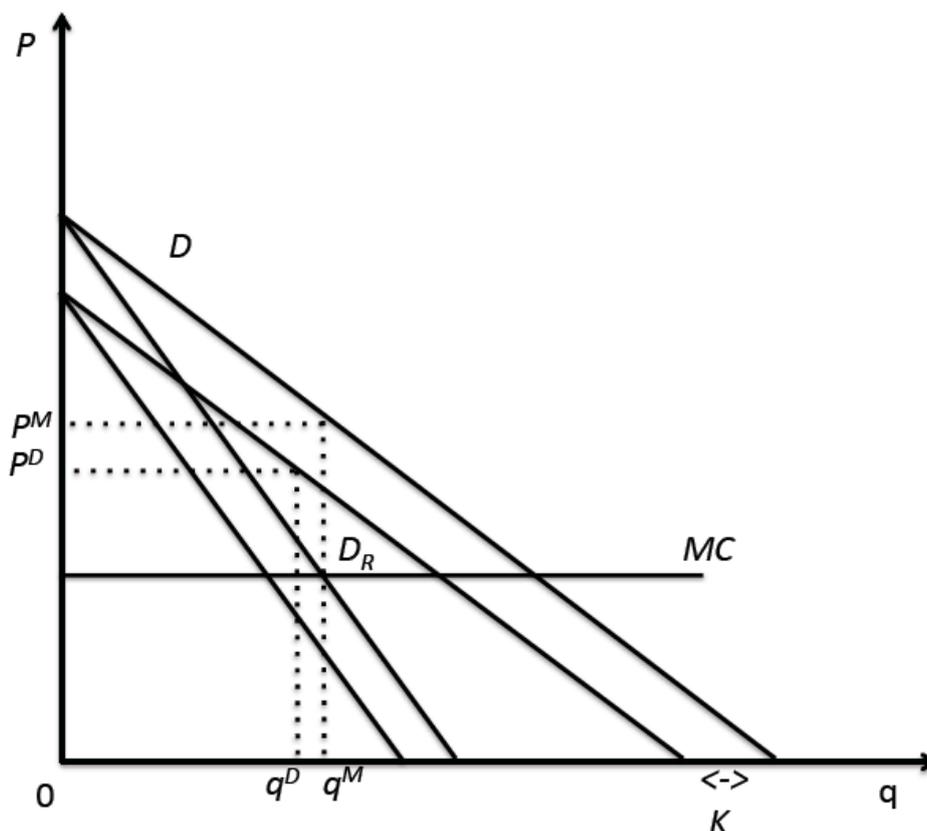
6.1 The economic thinking of dominance

When it comes to the assessment of the relevant dominance threshold for the declaratory of abuse of dominant position, the economic argument set forth in Chapter I with regard to the measurement of market power⁷¹² holds valid also as regards the interpretation and application of article 102 of the Treaty on the Functioning of the European Union, for the argument as follows:

⁷¹⁰ R. O'Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 194

⁷¹¹ GJ Stigler, *The Dominant Firm and the Inverted Price Umbrella*, 8 *Journal of Law and Economics* 167 (1965)

⁷¹² See Chapter I, para. 4.2



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In the above graph D is the total demand curve for a product. K indicates the competitors' production capacity; D^R is the remaining demand the dominant firm is capable of satisfying and is obtained by moving D towards the left by K units. Q^M is the output that the dominant firm would offer at price P^M if there were no competitors where marginal cost equals marginal revenue; Q^D is the output of the dominant firm at price P^D on the demand curve D^R , where marginal cost equals marginal revenue. If K is small, the difference between P^M and P^D will be small and it can be maintained that the dominant firm will act as if it were a monopolist. Thus, the monopoly model⁷¹⁴ can be used to analyze the dominant firm's conduct with a satisfying degree of approximation.

Cases of extensive monopolies, i.e. of firms detaining the whole of the shares of a market for a product are rare. It is not unusual that a market is characterized by the presence of a firm that has a substantial share of the market on the one hand, and a myriad of smaller firms each detaining a significantly lesser market share. That is the case of a market in which a firm is dominant and withholds a competitive advantage. The measurement of the market shares is the first step to assess dominance.

⁷¹³ Source L. Cabral, *Economia Industriale*, Carocci Ed., Rome, p. 95 (2002)

⁷¹⁴ See Chapter I, para. 4.2

6.2 The legal definitions of dominance

When it comes to the legal definition of dominance, three different types have been identified in the case law: 1) Single firm dominance, when the firm is the sole seller able to influence the market; 2) collective dominance, when two or more firms with an extensive degree of market power coordinate their conduct on the market instead of competing with each other; 3) “superdominance”, a situation of overwhelming dominance in which the firm enjoys a position of quasi-monopoly, and in which price cuts can be implemented autonomously from costs, or with a view to selectively eliminating one or more rivals⁷¹⁵.

Within the confines of the present essay, only the single dominance will be analyzed, since it is believed that the concept of “superdominance” has no different legal basis than the idea of single firm dominance, but simply covers the likely anticompetitive effects that a quasi-monopolist firm will cause by virtue of its conduct. It goes without saying that a quasi-monopolist will have more chances to succeed in excluding rivals by means of its practices; however, the same categories of abuses under 102, as elaborated and declined in the case law, should apply.

In fact, there is no legal ground to affirm that firms with very high market shares have stricter duties under article 102 than “less” dominant firms, because the jurisprudential concept of “superdominance” is merely descriptive of a specific position of the firm in the market, but does not help characterize some conducts –that would be deemed pro-competitive if carried out by a dominant firm- as anticompetitive⁷¹⁶.

In order to assess if an otherwise pro-competitive practice of a dominant firm can amount to an abuse, if put in practice by a super-dominant firm, Courts should evaluate whether high entry barriers characterize the market at issue; if not, the possibility for new entrants to subtract market shares to the super-dominant firm precludes to treat “superdominance” differently from mere dominance. However, in the case law regarding “superdominance”, there is no evaluation of the entry barriers⁷¹⁷.

⁷¹⁵ *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*, 16.03.2000, Case C-395/96 and C-396/96, [2000] ECR I-1365. Opinion of the Advocate General Fennelly, para 115. It is suggested that a super-dominant firm may be subject to stricter duties than a merely dominant one.

⁷¹⁶ In particular, the same rules regarding predatory price-cuts should apply regardless of the degree of dominance.

⁷¹⁷ Favorable to treat “superdominance” as “normal” dominance are J. Temple Lang & R. O’Donoghue, *Defining Legitimate Competition, How to Clarify Pricing Abuses under Article 82*, 26 *Fordham Int. L. J.* 135-136 (2003). The authors also argue that other renowned cases, such as *Tetra Pak* and *Irish Sugar* could have

When it comes to the legal definition of dominance, it has been affirmed above that, albeit being an essential prerequisite, article 102 does not condemn the mere possession of a dominant position, but the exploitation of it.

Dominance is assessed by virtue of several factors, and market shares are not an absolute term, but only an expression of the degree of dominance, untied from the lawfulness of it. In particular, “a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative”⁷¹⁸.

These factors have been outlined in the case law practice:

- 1) The first step is the measurement of the firm’s market shares;
- 2) Second, it should be assessed whether entry barriers characterize the market;
- 3) Third, it should be assessed whether competitor(s) have sufficient economic strength to contrast the dominant firm;
- 4) Fourth, these elements should be evaluated against the evidence of actual competition on the market;
- 5) Fifth, the facts put forward as acts amounting to abuses should be evaluated without necessarily having to acknowledge that they are abuses⁷¹⁹.

6.3 Structural and behavioral elements of dominance

Antitrust literati divide the above elements into two broad categories, structural factors, on the one hand, and behavioral ones, on the other hand⁷²⁰, arguing that European competition authorities tend to preponderantly evaluate the structural factors rather than the behavioral ones, which are only encompassed in the analysis residually, when the structural analysis has not produced any useable result. This hierarchy seems to be endorsed by the ECJ, which has affirmed that in order to establish the dominance on a relevant market, it is necessary first of all to examine the structure of the firm and then the situation on the said market as far as competition is concerned⁷²¹.

The structural elements of dominance have been firstly and incisively outlined in *Hoffmann-LaRoche*, where the General Court maintained that what is material to the application of article 102 is “a position of economic strength enjoyed by an undertaking

been explained on the account of the “superdominance” theory, due to the extent of the defendants’ dominant position, but there is no mention of it in the outcomes whatsoever.

⁷¹⁸ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 66-67

⁷¹⁹ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 68

⁷²⁰ S. Bastianon, *L’Abuso di Posizione Dominante*, Milano, p. 43, (2001)

⁷²¹ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 67

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which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers⁷²².

The most significant component of the evaluation of dominance is the calculation of market shares in a defined market -from the twofold product and geographic dimension- for a sustained period of time. In particular, market share for suppliers is calculated on the basis of their sales of the relevant product and in the relevant geographic market⁷²³. Nevertheless, holding a significant market share does not represent absolute evidence of dominance, but its relevance varies in accordance with the characteristics of the market, of the production, of demand and offer.

Therefore, a significant market share, with its correspondent volume of production and offer, enables the firm to act independently on the market of reference for a sustained period of time: the dominant position consists of this independence, and is implicit when market shares oscillates between 100% and 80%.

In the *Akzo* case, the Court purported that "Market share of over 70% is most likely to be considered to be in a dominant position. A share of between 40% and 50% raises a presumption of dominance⁷²⁴. Consequently, when market shares are between 40% and 70%, the calculation of the competitors' market power becomes of capital importance.

In fact, according to how the remaining shares are divided among competitors, the dominant firm's share can have a different weigh. If the dominant firm has a 50% market share, and the market is characterized by the presence of 10 competitors each holding 5%, the position of the bigger firm can be equated to the dominant one⁷²⁵. However, in more recent outcomes (*Akzo*), the Court appears to have adopted an absolute approach, stating that a 50%

⁷²² *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461 para. 4

⁷²³ *Commission Notice on the definition of relevant market for the purposes of Community competition law*, published on the Official Journal, OJ C 372, 09.12.1997, 5, para. 53

⁷²⁴ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359. In this case the Court held that 50% market share is a dominant position *per se*, unless some perturbing circumstances allow to state the opposite.

⁷²⁵ In the *United Brand* case, the Court concluded that the 40-45% market share of United Brands was not enough to infer dominance *per se*, given the presence of one competitor, holding a substantial share, and several other rivals holding non-substantial positions. However, the 45% market share, together with the price discrimination that the defendant operated on each national market, were considered substantial elements to assess violation of article 102. *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207

market share stand as proof of dominant position *per se*, unless some other factors perturb such a dominance.

The temporal dimension of market share is also of capital importance, being a symptom of the strength of the dominance: the unlikelihood that new entrants or existing rival firms will subtract market shares from the dominant firm in the short run makes the firm dominant on the market. The Commission highlighted the importance of the temporal aspect of dominance in its *UIP* decision, holding that dominance in the cinema industry could not be represented by the yearly changes in the distributors' market share, since these changes merely depended on the success of the single movies that distributors had commercialized, and not on the market power of the single distributors⁷²⁶.

6.4 The relationship between dominance and entry barriers

Another fundamental aspect in the evaluation of dominance is the existence of entry barriers in the market: a traditional assumption in economics is that the existence of entry is one of the difference between a competitive market and a monopolized one. When it comes to defining the term entry barrier, scholars divide between two models: on the one hand, an entry barrier is considered as any market condition that enables an incumbent firm to charge monopoly price without attracting new entry⁷²⁷, whereas on the other hand it consists of "a cost of producing (at come or every rate of output) which must be borne by firms which seek to enter an industry but is not borne by firms already in the industry"⁷²⁸. On the account of the first definition, the investment necessary to enter the market is not considered as an entry barrier, since it is assumed that the new entrant will bear the same costs that the incumbent firms had previously borne.

This notion of entry barrier is general and is drafted in terms of divergence between the difficulty for a new entrant to enter a market and the ease of the incumbent firm to charge a monopolist price. On the account of the second definition, investment costs

⁷²⁶ UIP, 12.07.1989, published on OJ L-226 (1989)

⁷²⁷ J.S. Bain, *Barriers to New Competition: their Character and Consequences in Manufacturing Industries*, Cambridge: Harvard University Press, p.3 (1962). The author considers economies of scale as barriers to entry, since in a market characterized by economies of scale the existing firm tends to have lower costs at a high output rate than the new firm.

⁷²⁸ G.J. Stigler, *The Organization of Industry*, University of Chicago Press, p.67 (1983). The author argues that economies of scale and demand conditions of the firm –as well as of the industry- are the only factors governing the firm size. His definition of barrier as a higher entry cost overrides economies of scale, because the incumbent dominant firm is confronted with the same problem, namely the achievement of a lower cost through higher output. The incumbent firm is to bear higher entry costs, such as the losses arising out of selling below competitive price, in order to obtain higher market shares.

are an entry barrier depending on the characteristics of each market. Entering a high-tech market implies significantly higher costs than entering a fruit distribution market. Therefore, the notion is selective and the more burdensome the requirements for a firm to enter a market are, the higher the entry barriers.

The European Courts have adopted a wide concept of entry barrier, encompassing the whole of the costs that a new entrant is to bear, including of all the costs that the dominant firm had previously borne to gain its position on the market⁷²⁹: the main obstacles to competition derive from the investments that the new entrant is subject to and from the lack of economies of scale he cannot benefit from.

With regard to the most recurring examples of entry barriers, in the EU case law there are two types of obstacles: on the one hand, they can be established by law, such as the existence of a patent⁷³⁰, an exclusive right or a legal monopoly for the product⁷³¹, the need of a license to carry out an activity; on the other hand, they can be related to the market structure, such as the inelasticity of demand, the control of an essential facility by the dominant firm.

6.5 The treatment of essential facilities

The American “essential facility” doctrine consists of an entry barrier contiguous to the enjoyment of exclusive rights. In the US, its restrictive interpretation is emblematic of a way of conceiving antitrust law and freedom of competition: the refusal of a firm detaining an essential facility to deal with another firm is generally lawful, except for some exceptional circumstances. In fact, imposing obligations on a firm to do business with its rivals

⁷²⁹ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 122. Compare M.H FitzPatrick, *United Brands Company v Commission of the European Communities: Windows to Price Discrimination Law in the European Economic Community*, 1 *Northwestern J. Int'l L. & Bus.* 342 (1979)

⁷³⁰ The interface between patent law and competition law has always been a matter of debate in both case law and scholarship. The European Court of Justice has repeatedly established that the existence of a patent right does not suffice in giving a firm a dominant position. Three are the conditions for violation of article 102: the existence of a dominant position, the abuse of it and the prejudice to interstate commerce. The exercise of patent rights over a product does not imply that the three conditions are met. *Parke Davis v. Centrafarm*, 29.01.1968, Case 24/67 [1968] ECR 81

⁷³¹ Firms enjoying a legal monopoly over a substantial part of the common market are subject to the same limits pursuant to article 102 as the other firms. Thus, they cannot exploit their dominant position even if they have been granted exclusive rights by the Member States. *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli*, 10.12.1991, C-179/90 [1991] ECR 5889, *Klaus Höfner and Fritz Elsner v. Macrotom GmbH*, 23.04.1991, Case C-41/90, [1991], ECR I-1979.

is at odds with other antitrust rules that discourage agreements among competitors that may unreasonably restrict competition⁷³². However, courts have, in some circumstances, found antitrust liability when a firm with market power refused to do business with a competitor. For instance, if the monopolist refuses to sell a product or service to a competitor that it makes available to others, or if the monopolist has done business with the competitor and then stops, the monopolist needs a legitimate business reason for its policies⁷³³.

A significant contribution to shed light on this doctrine can be found in the conclusions of the Advocate General in the *Bronner* case⁷³⁴, who has argued that the essential facility doctrine entails the incidence of 5 conditions: the firm controlling the essential facility is to be a monopolist; the rival firm cannot reproduce the essential facility (i.e. a railway bridge, a telecommunication network, an electricity net); the facility is to be available for usage of other firms; access to the essential facility is to be denied; the denial is not supported by any business justification. Besides that, a valid justification can also be the safeguard of business efficiency of the monopolist.

In the EU case law, the borderline between freedom not to venture with a competitor and duty to share an essential facility is blurrier, and there is no reference to the notion of “essential facility” itself. However, an emblematic application of the doctrine can be found in the *CBEM* case⁷³⁵, where

CBEM was a telemarketing company that had been practically denied access to Belgian RTL television channels owned by *CLT*, after the latter’s decision to make access to telemarketing on RTL subject to the usage of its call center system, *IPB*. The Court held that the RTL TV stations were an essential infrastructure for the telemarketing activity and the position of *CLT/IPB* had a dominant position on such market, which they had exploited to eliminate the claimant.

In the *Bronner* case, the Austrian company *Bronner*, a small editor and distributor of the magazine *Der Standard* was denied access to the distribution of *Mediaprint*, a big distributor. *Bronner* filed an injunction to oblige *Mediaprint* to nation-widely distribute the magazine at the Austrian Court, arguing that the distribution through the postal service was not as effective as the door-to-door

⁷³² B.A. Facey & D.H. Assaf, *Monopolization and Abusive Dominance in Canada, the United States and European Union: A survey*, 70 *Antitrust L.J.* 513-552 (2002)

⁷³³ See Chapter I, note n. 286 *et seq.*

⁷³⁴ *Oscar Bronner v. Mediaprint*, Conclusions of the Advocate General Jacobs, 26.11.1998, Case C-7/97, [1998] ECR I-7808

⁷³⁵ *Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*, 03.10.1985, Case 311/84, [1985] ECR paras. 26-27

delivery of *Mediaprint* to compete on the magazine market, and that, due to the small size of the magazine, the creation of a distribution arrangement just for the magazine was not economically efficient.

The ECJ argued that in order to prove the essential character of the distribution of *Mediaprint*, it was not sufficient to maintain that an alternative distribution was not economically convenient due to the small size of distribution of the magazine⁷³⁶, nor was it sufficient to merely maintain that the distribution through the postal service was not as effective as the door-to-door delivery of *Mediaprint*. Thus, *Mediaprint* distribution was not considered as an essential facility, and the company was not obliged to distribute the magazine for *Bronner*.

The Court went on and affirmed that three are the conditions for forcing owners of an essential facility to grant access: 1) the refusal to access a facility must prevent any competition at all on the applicant's market; 2) the access must be indispensable or essential for carrying out the applicant's business; 3) the access must be denied without any objective justification⁷³⁷. Thus, the interpretation of the essential nature of the facility is objective, in that the Court does not account of the intent to exclude a competitor, by denying access to the facility, or to the existence of valid business justifications, as in the American model.

Moreover, there is no reference or inquiry of the competition harm that could stem from a denial of access to a facility; in other terms, there is no reference to consequences to the consumer downstream market of the denial.

The *Hofner* decision has not been exempt from criticism on other grounds, on the account that, thus framed, the law of the essential facilities bars small-sized firms to be able to act as big-sized ones on the market. In order to establish whether or not a facility is essential, Competition authorities should evaluate whether the refusal to deal would make the performance of competitors activities in the market in question "either impossible or permanently, seriously, and unavoidably uneconomical"⁷³⁸.

6.6 Behavioral elements of dominance

⁷³⁶ *Oscar Bronner v. Mediaprint*, 26.11.1998, Case C-7/97, [1998] ECR I-7808, Conclusions of the Advocate General Jacobs. Contrariwise, the raise in the number of the memberships (15%) and in the number of advertisements which the magazine *Der Standard* had benefited from in the year when the litigation started was at odds with the claim that access to the *Mediaprint* distribution was necessary to effectively compete on the magazine market.

⁷³⁷ *Oscar Bronner v. Mediaprint*, 26.11.1998, Case C-7/97, [1998] ECR I-7817, para. 41

⁷³⁸ J. Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 *Fordham Int. L. J.* 488 (1994),

Next to the above-referred structural factors, in order to confirm and integrate the structural analysis of the position of a firm, Competition Authorities take into consideration other factors that are by their nature behavioral. In the *United Brand* case, the leading outcome on the analysis of dominance factors, the Court has deemed relevant to the assessment of dominance on part of *United Brands* the fact that it had succeeded in personalizing its product by means of commercial campaigns and that its competitors had not succeeded in raising their market shares.

Similarly, the Commission has affirmed that a high market share does not imply a presumption of dominance *per se*. However, when a manufacturer avails itself of its share to control the prices or to limit the access to the market, article 102 will apply. Other factors contributing to confirm the subsistence of dominance are: the preference for the product of the firm, the influence that the firm has on retailers, the higher price of the firm's product compared to its rivals, its technical advantage over competitors, and the strict identification of the product category with the product the firm manufactures⁷³⁹.

More generally, structural and behavioral factors do not exclude each other, but help account of the interplays between the firm's behavior and the market structure, in a way to disclose that a course of conduct independent of the other firms' behavior is only conceivable if the firm has a sufficient degree of dominance on the market⁷⁴⁰.

7. Categories of abuse

As it has been said above, there is no statutory definition of "abuse", but article 102 merely singles out four examples of abusive conducts. Furthermore, as the Commission has pointed added, the second paragraph of Article 102 does not contain an exhaustive list of abusive practices, list that the case law has developed on an individual basis, mainly in response to complaints to the European Commission and appeals to the Community Courts against Commission decisions on the grounds of such complaints⁷⁴¹.

The Commission has never developed a comprehensive notion of abusive conduct, and both the Commission and the EC Courts have interpreted article 102 without an analytical approach, or a

⁷³⁹ *BBI/Boosey & Hawkes*: Interim measures, IV/32.279 – paragraph 10. *BBI/Boosey & Hawkes*: Interim measures, IV/32.279. Commission decision 29.07.1987, published on OJ L/286-36, 09.10.1987, para. 36

⁷⁴⁰ A. Frignani & M. Waelbroek, *Disciplina della Concorrenza nella CE*, Torino (1996) p. 228

⁷⁴¹ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951 para. 37

general regard to the economic thinking. Instead, it has adopted a non-technical notion, untied from the examples of article 102:

“There is abusive exploitation of the market from a dominant position when the holder of the position uses the possibilities which flow from it in order to obtain advantages which he would not have obtained if there were effective competition”⁷⁴².

It has been seen above that the four clauses can be classified into three broad categories: exploitative, exclusionary and reprisal abuses. An author has affirmed that the only true form of abuse is the exploitative one, since it is the only unilateral conducts which has an adverse effect on consumers in the form of exploitation of market power⁷⁴³. Moreover, it has been seen that some forms of abuses can be exploitative and exclusionary at the same time⁷⁴⁴. For the sake of the analysis, however, the examples of abusive conducts set out by article 102 are to be in turn scrutinized.

Article 102(a) directly refers to exploitative practices, which are perpetrated by “*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*”. This entails taking undue advantage of consumers by using market power to charge grossly excessive prices or impose unjustifiably onerous or unfair terms. It arguably applies only in cases where there are significant barriers to entry that cannot be overcome by investments in anticipation of monopoly rents.

Article 102(b) sanctions exclusionary conducts, which are aimed at “*limiting production, markets or technical development to the prejudice of consumers*”. Examples are foreclosure or handicapping of competitors, by which competition is reduced still further, and harm is caused to consumers.

Article 102(c) sanctions discriminatory abuses, namely “*applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage*”. It is often invoked also for exclusionary abuses, and it is submitted that in such cases harm to consumers is necessary under 102(c) as it is expressly under 102(b).

Finally, Article 102(d) refers to tying abuses, “*making the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*”. Tying can also

⁷⁴² Premier Rapport sur la Politique de Concurrence (1972), available at <http://www.ceric-aix.univ-cezanne.fr/documentation/centre-de-documentationeuropeenne-cde/fonds-darchives.html>, para. 78

⁷⁴³ E.M. Fox, *We Protect Competition, You Protect Competitors*, European University Institute, Robert Schuman Centre for Advanced Studies, 2003 EU Competition Law and Policy Workshop/Proceedings, published on 26 World Competition 149 (2003)

⁷⁴⁴ See *supra*, chapter II, note n.

lead to excessive pricing, in which case the conditions of exploitative abuse should be met.

Some cases involve more than one kind of abuse, *e.g.*, both foreclosure of competitors and discrimination between customers with primary line injury. Simultaneous abuses may reinforce or aggravate one another.

7.1 Exploitative abuses

Under article 102(a), the most recurring forms of exploitative abuse are the excessive pricing and the imposition of excessively onerous terms to the transactions.

As regards excessive pricing, in the *United Brand* case the Court used a two-prong test to evaluate whether the defendant's pricing was excessive: first, it compared actual costs and prices of the defendant (cost-price analysis), second it analyzed the defendant's price by itself and compared it with the price for the competitors' product⁷⁴⁵, to assess whether there were legitimate reasons why the price grossly exceeded costs.

Given the EC authorities' reluctance to appraise what is a "competitive price" in cases concerning excessive pricing –and therefore using competition law to regulate prices on the Common Market–, this exploitative abuse has often been associated with markets characterized by high barriers to entry, since either actual or potential entry of rivals is likely to keep prices on a competitive level.

The imposition of unfair trading conditions is the second form of exploitative abuse, whereby the dominant undertaking leverages on its market power to impose conditions that would not be otherwise imposed absent the market power itself.

The exploitation entails taking undue advantage of the dominance on the market, by imposing unfair conditions⁷⁴⁶. Put better, the underlying assumption appears to be that such conditions would be impossible to impose but for the dominance of the undertaking. Aside from a unique definition of "unfair trading conditions", one common feature of such behavior stemming from the case law is

⁷⁴⁵ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 252. The ECJ charged the Commission with the burden of demonstrating the excessiveness of the price charged by United Brands.

⁷⁴⁶ This definition of exploitation stems from the German Ordoliberal subdivision of abuses into "exploitative" and "impediment" abuses. With regard to exploitative practices, they are identified by means of a hypothetical and ideal standard of competition, the "as-if competition", which economic thinking could determine with reasonable accuracy: a dominant firm utilizes economic power to achieve a transactional cost that is significantly more advantageous than it could have achieved under this standard. Compare D.G. Gerber, *Law and Abuse of Economic Power in Europe*, 62 *Tulane Law Review* 63-82 (1987-1988)

that the dominant undertaking's imposes terms on its customers that are directly harmful to them, usually by excessively restricting their freedom of action.

Examples of unfair conditions have been set forth in *Tetra Pak II*, as contract clauses deemed as "unfair", because they exceeded the recognized right of a dominant firm to protect its commercial interests; more specifically:

1. Contractual clauses prohibiting a customer from making modifications to a machine purchased from a dominant supplier⁷⁴⁷;
2. Limits to the purchasers' right to resell or transfer the equipment to third parties⁷⁴⁸;
3. Clauses giving exclusive rights to repair and maintain the equipment and⁷⁴⁹;
4. Equipment leases of excessive duration (three to nine years with penalty clauses for breach of these terms)⁷⁵⁰.

In *Alsattel v SA Novasam*, the "unilateral fixing of the prices of supplements to the contract due to modifications and the automatic renewal of contract for 15 years" was found to be "unfair" trading conditions⁷⁵¹.

In *Michelin II* a discount system applied by a dominant undertaking and which left it a considerable margin of discretion as to whether the dealer may obtain the discount was considered 'unfair' and abusive⁷⁵².

The question is, although the "unfairness" of any contract term may be objectionable, this should be regarded as a contract law issue rather than a competition law concern. It has been argued that a definition of "unfair contract terms" under Article 102(a) entails inquiring whether the clause is one that would be imposed and accepted in competitive conditions, and whether the gains in efficiency are sufficient to outweigh the onerous effect for the other parties bound by the clause. Hence, the clause should:

- 1) Have a legitimate objective other than exploitation,
- 2) Be effective in achieving the legitimate goal,

⁷⁴⁷ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951, para 2.1.1

⁷⁴⁸ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951, para 2.1.5

⁷⁴⁹ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951, para 2.1.6

⁷⁵⁰ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951, para 2.2.5

⁷⁵¹ *Alsattel v SA Novasam*, 05.10.1988, Case 247/86 reference for a preliminary ruling [1988] ECR 5987, para. 10

⁷⁵² *Manufacture française des pneumatiques Michelin v. Commission of the European Communities*, 30.09.2003, Case T-203/01, 2003, ECR II-04071, "Michelin II"

- 3) Be necessary in that there are no alternative equally effective means for achieving the same goal with a less restrictive/exploitative effect, and
- 4) Be proportionate in the sense that the legitimate objective pursued should not be outweighed by its exploitative effect on the trading party in question⁷⁵³.

7.2 Exclusionary abuses

Under article 102(b), the conduct aiming at “limiting production” is the broadest form of exclusionary abuse, encompassing all conducts seeking to shrink competition on a market and cause a consumer net harm. The vast majority of decisions on article 102 concerns exclusionary abuses, which are all based on the restriction of output on a market to make competition untenable for rivals with a smaller market power.

Two types of production restrictions fall within the overarching parameter set out in art 102(b): 1) on the one hand, the dominant firm can limit its own production, by increasing the price for the product, and at the same time creating reserves of its own product to place on the market once its rivals are driven off competition; 2) on the other hand, the dominant firm can adopt strategies to limit its rivals’ capacity to compete and marginalize them, due to the increase of the costs they are to bear⁷⁵⁴.

The limitation of output needs to have an adverse effect on consumer welfare, since a mere limitation of rivals’ capacity of competing with no harm for consumers, by means of superior product or lower prices, will be considered as competition on the merits.

The consumer harm is a more specific normative consideration to define exclusionary conducts than “normal competition”, or “genuine undistorted competition”, since it allows to police the lawfulness of a practice by balancing the gains and the losses in terms of consumer welfare arising out of the dominant firm’s conduct⁷⁵⁵.

Yet, if, on the one hand, the EU Courts can adjudicate a case based on a more normative claim, by formulating an *ex post* evaluation of the consumer harm occurred, the dominant firm should be able to judge *ex ante* whether its conduct will cause a consumer net

⁷⁵³ R. O’Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 654

⁷⁵⁴ *Consorzio Italiano della Componentistica di ricambio per autoveicoli and Maxicar v. Régie nationale de usines Renault*, Case 53-87, 05.10.1988, [1988], ECR 6039, para 16. *Klaus Höfner and Fritz Elsner v. Macrotom GmbH*, Case C-41/90, 23.04.1991, [1991], ECR I-1979, para. 30

⁷⁵⁵ See *Michelin v Commission* Case C-322/81, 09.11.1983, [1983] ECR 3461, para. 57, for the meaning of “genuine undistorted competition”; *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461 para. 6, for the meaning of “normal competition”.

harm, on the other hand. That is not always realistic of the dominant firm⁷⁵⁶. Therefore –as it has been argued above, the decision on the case not based on an *ex ante* clear legal rule can become a matter of policy rather than competition law⁷⁵⁷.

The “limiting production test” captures the common element of all exclusionary conducts, which all result into making the rival’s product less attractive or less available to the detriment of consumers.

That is the reason why predation falls within the spectrum of exclusionary abuses banned by article 102(b): pricing below average variable costs (a proxy for marginal costs) will in the short run have a advantageous effect for consumers, who will buy product of the dominant firm at a lower price⁷⁵⁸.

However, the equally efficient firm will be affected negatively by the dominant firm’s predatory price and will eventually be marginalized from competition. Once predation is perfected, the dominant firm will raise prices by restricting output –the limitation of production-, and cause a loss in terms of consumer welfare, as long as the price raise would enable the firm to recoup past losses, which have been redistributed to consumers. In economic terms, there would be a consumer net harm as long as the deadweight loss exceeds the gains consumers benefited from during the predation phase⁷⁵⁹.

The same analysis can be applied to non-pricing abuses falling within the reach of article 102(b), such as refusals to deal. In EC Competition law, as well as in American Antitrust law, there is no general provision requiring that a company deal with its competitors. However, under certain circumstances there are some exceptions to the principle of freedom of business for a firm with market power⁷⁶⁰.

A dominant firm may invest on technological innovation or may invest in patent or other intellectual property rights, whereby it can limit the business of competitors and expand its production on the market. Many cases have regarded the issue of the obligation of a dominant to consent its competitor to access its products or services, in the event that the limitation of the latter’s production has such a negative impact on consumers, that the

⁷⁵⁶ Compare, J. Temple Lang, *Legal Certainty and Legitimate Expectations as General Principles of Law*, in U. Bernitz & J. Nergelius (eds.), *General Principles of European Community Law*, Boston, Kluwer Law International, 2000, p. 170

⁷⁵⁷ Compare *supra*, the “consumer-harm test”, *supra* para. 4.3.4 and *infra*, Chapter III, para. 11.1

⁷⁵⁸ Evidence for the judicial ban of predation as a type of exclusionary abuse can be found in *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, paragraphs 70-71.

⁷⁵⁹ For a definition of deadweight loss, compare Chapter I, para. 4.2

⁷⁶⁰ See Guidelines of the Federal Trade Commission, available at http://www.ftc.gov/bc/antitrust/refusal_to_deal.shtm

obligation to share a technology or to deal with the competitor outweighs the extent of intellectual property rights or the principle of freedom of business; given the exceptional nature of such a restraint, the abuse of refusal to deal is applied narrowly, under strict conditions: the refusal is to eliminate competition from the market, and thwart the placement of new products on the market, leaving a clear and identifiable portion of consumer demand unsatisfied.

Notwithstanding their limited application, refusals to deal well capture the mechanism of adopting non-pricing strategies to limit the rival's production and limit competition on a market, as outlined in article 102(b).

By means of the *Discussion Paper on Exclusionary Abuses*⁷⁶¹ the Commission has shed light on the interpretation of article 102(b), affirming that the usage of the wording "prejudice to consumers" is to foster protection of consumers rather than competitors. In other terms, the scope of the norm is the protection of competition, rather than of the market players. Furthermore, the norm at issue intends to protect consumers from all the conducts, which are both directly and indirectly detrimental⁷⁶².

Then Commission relied on the definition of exclusionary abuse in *Hoffmann-La Roche*⁷⁶³ and maintained that it involves "foreclosure leading to consumer harm", based on two elements: 1) the anti-competitive foreclosure of competitors, which occurs when the conduct of the dominant undertaking is capable of hindering or excluding access of actual or potential competitors to the market or to supplies: to verify such capability it is sufficient to investigate the form of the conduct; 2) the establishment of market distorting foreclosure, i.e. the establishment of actual or potential anticompetitive impact of the conduct, which occurs when the firm, after excluding its competitors, will be likely to raise prices at supra-competitive levels⁷⁶⁴.

The degree of dominance is also an important factor to gauge in exclusionary cases: firms detaining market shares close to monopoly have a greater ability to foreclose competitors than

⁷⁶¹ DG Competition *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, para. 54

⁷⁶² DG Competition *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, para. 54

⁷⁶³ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 91

⁷⁶⁴ DG Competition *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, para. 58. Also compare *Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, para. 19

firms which are still dominant, but are at the minimal threshold of what can be seen as dominance⁷⁶⁵.

Criticism has been addressed to the above definition of exclusion, in that it does not draw a distinction between efficient conducts harming competitors and unlawful conducts. The practice of pricing a product below competitive level can be interpreted as a promotional operation to make consumers familiarized with the product itself, in a way that they will be willing to pay a higher price in the long run by virtue of the better qualities of the product.

By no means can such a conduct be regarded as abusive, even though, in terms of outcome, it will lead to the foreclosure of competitors.

The *Discussion Paper* acknowledges an efficiency defense available to the defendant, affirming that article 82 only applies to conducts that would exclude firms that are as efficient as the dominant one, since their foreclosure would cause a loss in consumer welfare; however, the dominant firm would not have to deploy such a defense if its conduct did not foreclose competition to begin with, but it merely foreclosed not-as-efficient competitors by virtue of an aggressive strategy⁷⁶⁶.

As a corollary, the *Discussion Paper* states that in exceptional circumstances protection needs to be afforded to smaller firms that are not as efficient as the dominant one, but might become equally efficient, where the market shows potential economies of scale or scope, or is characterized by first mover advantages⁷⁶⁷.

Thus, the *Discussion Paper* does not make clear that foreclosure of competitors with no-harm for consumers –in other terms efficient foreclosure- is legitimate competition. In that respect, the ECJ appears to have clarified that foreclosure of competition is not abusive *per se*, but it is up to the Court to discern those acts of foreclosure that have no business nor efficiency justification. Thus, the Court will balance the exclusionary effects and the advantages in terms of efficiency of the conduct on a casuistic basis⁷⁶⁸.

Finally, the *Discussion Paper* distinguishes between horizontal and vertical exclusion⁷⁶⁹. The former concerns exclusion of rivals on a

⁷⁶⁵ DG Competition *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, para. 59.

⁷⁶⁶ DG Competition *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, para. 67.

⁷⁶⁷ Compare *supra* the “equally efficient-test”, para. 5.4.2.3; also, compare the argument in favor of sanctioning above average cost pricing as predatory in A.S. Edlin, *Stopping Above Cost Predatory Pricing*, 111 Yale L.J. 941 (2002).

⁷⁶⁸ *British Airways plc v. Commission of the European Communities*, 15.03.2007, Case C 95-04 P, [2007] ECR I-2331, para. 67.

⁷⁶⁹ DG Competition *Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, para. 69-73; For the identification of anticompetitive foreclosure in the ECJ jurisprudence, compare

horizontal level, whereas the latter exclusion of an input of downstream rivals, being the dominant firms the upstream supplier. Examples of horizontal exclusions are predatory pricing and tying; examples of vertical exclusions are refusals to deal and margin squeezes.

7.3 Discriminatory abuses

Under article 102(c), discriminatory abuses consist of “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”. The provision is extremely broad and gives room to a great deal of uncertainty regarding its extent. Unlike the homologous American anti-discriminatory law, the Robinson-Patman Act, article 102(c) requires dominance as a prior condition for the abuse⁷⁷⁰.

One of the main difficulties in applying this provision is distinguishing the discriminatory nature of the conduct of the dominant firm from other more manifest consequences of the conduct itself, such as its exclusionary effects. In other terms, discrimination is implied in many other abuses that are more discernible for the judge. For example, refusals to deal can be

⁷⁷⁰ Compare Robinson-Patman Act 1936. The Robinson-Patman Act is a 1936 statute (15 U.S.C.A. § 13(a-f) that amended Section 2 of the Clayton Act (Oct. 15, 1914, ch. 323, 38 Stat. 730), which was the first antitrust statute aimed at price discrimination. The Robinson-Patman Act prohibits a seller of commodities from selling comparable goods to different buyers at different prices, except in certain circumstances. The Act contains six substantive provisions:

Section 2(a) prohibits a seller from discriminating in price between two or more competing buyers in the sale of commodities of like grade and quality, where the effect of the discrimination “may be substantially” to “lessen competition...in any line of commerce”; or “tend to create a monopoly in any line of commerce”; or “injure, destroy or prevent competition with any person who grants or knowingly receives the benefit of the discrimination, or with the customers of either of them” 15 U.S.C. 13(a).

The fundamental question, with respect to section 2(a), is the type and extent of injury to competition that can satisfy this standard. The recovery of damages in a private Robinson-Patman Act suit requires showing not only a violation of the Act, but also that the plaintiff has suffered actual injury as a result of the price discrimination at issue. Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (110 S.Ct. 2535, 2551 n. 11. 110) (1990). In Brooke v. Brown & Williamson, the Supreme Court held that competitive injury stemming from a discriminatory price-cutting scheme under the Robinson-Patman Act is “of the same general character as the injury inflicted by predatory pricing schemes actionable under 2 of the Sherman Act. . . . With whatever additional flexibility the Robinson-Patman Act standard may imply . . . two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. . . [Second, the plaintiff must prove] . . . that the competitor had a reasonable prospect, or, under 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices”. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 277, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

investigated under the reach of article 102(b) –exclusion-, but also under the reach of article 102(c) –discrimination-. Likewise, predation can be targeted towards the elimination of a particular rival, and share therefore some commonalities with discriminatory conduct.

In this respect, a judicial trend in policing article 102(c) is adjudicating exclusionary conducts that have discriminatory features are under article 102(c), rather than under 102(b), because ascertaining the discriminatory nature of a conduct is a simpler operation than ascertaining the exclusionary effects of the conduct itself. In fact, proving a difference in treatment suffices in the finding of violation of article 102, without striving to determine the exclusionary nature of a practice, on which aspect European Courts still tend to have a casuistic attitude⁷⁷¹.

There are various examples of exclusionary abuses involving elements of discrimination, most of which can be recollected in the discriminatory predatory price schemes, i.e. when the dominant firm discriminate between its own customers and its rivals' customers by applying selective price cuts, and in margin squeeze practices, when the dominant firm discriminates a vertically integrated incumbent business in favor of its own downstream business. In sum, discrimination is one way in which the exclusionary conduct can be manifested.

The *British Airways* case⁷⁷² draws a distinction between the act of foreclosing and the act of discriminating. British Airways granted a bonus commission to travel agents who would increase their sales of British Airways tickets over a certain period of time compared to a previous reference period. The bonus only depended on the increase of individual sales that each agent had made compared with its past trend and not on the overall increases applicable to all travel agents. The General Court distinguished between the exclusionary effects of the reduction scheme *vis-à-vis* British Airways' competitors, on the one hand, and the discriminatory effects of the scheme on the other agents,

⁷⁷¹ One of the most emblematic examples of the above referred trend of European Courts can be found in *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969, in which the General Court seemed to confuse the act of foreclosing competitors of the dominant firm (exclusionary abuses), with discrimination distorting competition between customers of the dominant firm. In fact, the Court condemned *Irish Sugar's* rebates offered at border areas (the UK and Northern Ireland) exposed to competition as exclusionary, motivating that the rebates were illegitimate because they created differences in treatment with customers from non-border areas.

⁷⁷² *British Airways plc v. Commission of the European Communities*, 15.03.2007, Case C 95-04 P, [2007] ECR I-2331, For a further analysis of the case, see *infra* note n. 236

on the other hand⁷⁷³. In assessing the discriminatory nature of the bonus commissions on competition between agents, the Commission only relied on article 102(c).

The core idea underlying pure discrimination –different from exclusion- is the treatment of two like customers of the dominant firm, being a buyer or a seller, differently, to the extent that the discriminated party is hampered by a “competitive disadvantage” *vis-à-vis* the non-aggrieved party. As said above, even if discriminatory intent is very often implied in exclusionary practices, there is no legal ground to affirm that the consumer welfare rationale, which justifies the intervention in case of exclusion, can prove as a solid test in case of pure discrimination. In other terms, there is no economic or legal foundation that can sustain judicial intervention on discriminatory conducts *per se*.

A tentative argument in favor of including consumer welfare in the analysis under article 102(c) is an *a contrario* argument: discriminatory abuses can actually enhance consumer welfare, for instance by reducing the price for a product applied to some trading parties on the grounds of the dissimilar terms conditions that are applied to them, and ultimately create efficiencies for consumers. In EC law there is no general principle that a dominant firm cannot charge different prices or apply different terms for the same product or service. A contract establishing more favorable terms for some advantaged trading parties is material with article 3(b) TFEU, which prescribes that the EU is competent to establish competition rules only for the functioning of the internal market. In other terms, contracts that have discriminatory terms but create efficiencies for consumers should not be matter of competition law. Contrariwise, those discriminations not resulting in wealth redistribution for consumers could be *a contrario* considered abusive as under article 102(c).

Aside from this argument, the consolidation of the internal market is the sole policy consideration that can sustain an intervention under competition law for discriminatory prices among member states, as it has been argued in the *United Brands* case, together with the caveat that the firm is to artificially partition the markets⁷⁷⁴.

In search of a legal standard for pure discrimination, the issue remains to verify whether in the context of an exclusionary course of conduct some elements of actual discrimination of the dominant firm against its downstream business can be traced. In

⁷⁷³ *British Airways plc v. Commission of the European Communities*, 15.03.2007, Case C 95-04 P, [2007] ECR I-2331, para. 97 (exclusion), para. 108, 233, 241 (discrimination).

⁷⁷⁴ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para 233(a)

that case, it will be less arduous to apply article 102(c) strictly and assert the abusive character of the practice.

Aside from the difficulties of grounding pure discrimination on the consumer-protection rationale, article 102(c) does not play a pivotal role in EC Competition law, for several reasons:

1. The wording of the article requires proof that the aggrieved party has suffered a competitive disadvantage from the price difference;
2. Effectively, it is unlikely in practice that a company charges its customers significantly different prices for similar products, even if customers are from different Member States. To the extent that the dominant firm has done nothing to artificially compartmentalize the member states' geographic markets, charging different prices in different member states is usually lawful⁷⁷⁵.
3. Even if a downstream customer of the dominant firm manages proving the damage suffered from the competitive disadvantage, the dominant firm could still deploy an array of defenses that can justify the difference in price⁷⁷⁶.

7.4 Tying abuses

The last abuse set out in article 102(d) is the tying, i.e. "making the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage have no connection with the subject of such contracts". There are three types of tying: 1) contractual, where the two products are bundled by agreement and the one product cannot be sold without the other; 2) economic, where the price for the two products is so low to make the purchase of a single item inconvenient; 3) technical, where two separated products are integrated as one.

The most divisive case on tying that interested the Commission is the *Microsoft* case⁷⁷⁷, involving the tying of Windows Media Player (WMP) with Windows Operating System (OS), which allegedly caused a harm to other providers of stand-alone Media Players and a competition damage for consumers. The most controversial issues of tying abuses: 1) defining when two products are tied or they can be regarded as stand-alone (particularly in the technological bundles); 2) assessing the anticompetitive effects of a

⁷⁷⁵ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, paras. 228, 232 and 233(a)

⁷⁷⁶ Compare *infra* the defenses available to the dominant firms which price discriminate by means of exclusive dealing terms, loyalty rebates, or target rebates, para. 8.1 *et seq.*

⁷⁷⁷ Commission's Decision 24.03.2004, 2007/53/CE, COMP 37.392, published on the Official Journal, OJ L 32, 06.02.2007

tying; 3) assessing whether the economic efficiencies of a tying outweigh its anticompetitive effects.

7.5 Leveraging abuses and the interface between tying and exclusionary conducts

Another category of abuse falling within article 102, which has not been set out as a separate type of unlawful conduct is the “leveraging abuse”, which occur when the dominant firm uses its position in one market to commit an abuse in an adjacent horizontal or vertical market. There is no leveraging abuse considered isolated, but the idea of leveraging entails the idea of exploiting the dominant position in a dominated market to commit an abuse in a related market.

In practice, leveraging abuses are policed either under article 102(b), when they result into the exclusion of competitors from the related market, or under article 102(d), when they result into tying of a product of which the dominant firm has a monopoly (or quasi-monopoly) to another product in order to gain an anticompetitive rent in the market for the second product, to the detriment of consumers⁷⁷⁸. But the essential requirement in order to state causation between the dominance and the abuse is the ascertainment of an abusive conduct in the dominant market: the dominant firm which merely obtains competitive advantage in a second market absent an abuse in the leveraged market does not violate article 102⁷⁷⁹.

Moreover, pursuant to what affirmed in *Tetra Pak II*⁷⁸⁰, leveraging “presupposes a link between the dominant position and the alleged abusive conduct”, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market. This causality is found where the distinct markets are associated and the effects of the conduct of the dominant firm on the associated non-dominated market can be justified by “special circumstances”⁷⁸¹.

In that respect, the Court found sufficient “associative links” between the aseptic carton market (dominated by *Tetra Pak*) and the non-aseptic carton market (non-dominated) to give the defendant a position “comparable to that of holding a dominant position on the markets in question as a whole and” treat its predation on the non-dominated one as abusive⁷⁸². Put better, the

⁷⁷⁸ The *Microsoft* case is also illustrative of a leverage abuse.

⁷⁷⁹ Report by the Economic Advisory Group on Competition Policy, “An Economic Approach to Article 82”, July 2005, p. 23

⁷⁸⁰ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951 para. 27

⁷⁸¹ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951 para. 27

⁷⁸² The Court took the following circumstances into account to assess the associative links: 1) a substantial portion of *Tetra Pak* customers would purchase

ECJ maintained that purchasers using aseptic machines and cartons very often need non-aseptic materials and machines as well. That sufficed to find the conduct in the related market abusive.

Some scholars have considered the *Tetra Pak II* outcome as an unnecessary stretch of the reach of article 102, on the grounds that the “associative links” test is too obscure to be applied in leveraging abuses⁷⁸³. Conversely, Courts should be able to discern a) situations in which the abuse takes place in the dominated market, but its effects are felt in the related market, b) situations in which the abuse is committed in the non-dominated market in order to preserve the dominance over the dominated one and, finally, c) situations in which the abuse is committed in a separate market, which has close connections to the market the dominant firm is concerned with.

Sub.a) The first scenario is typical of refusals to deal, in which the refusal to supply an essential input on the upstream market has a detrimental effect on the downstream one. In this case, the link between the two markets is manifest⁷⁸⁴. In antitrust parlance, this situation is referred to as “bottleneck” monopoly⁷⁸⁵, in which a firm controls a raw material or an essential facility whereby it restricts entry into the downstream market of other firms.

In the *Bronner* case, the ECJ provided three conditions for forcing owners of an essential facility to grant access: 1) the refusal to access a facility must prevent any competition at all on the applicant’s market; 2) the access must be indispensable or essential for carrying out the applicant’s business; 3) the access must be denied without any objective justification⁷⁸⁶.

Sub.b) The second scenario occurs when the abuse is committed to perpetrate an already existing monopoly. The links between the

both aseptic and non-aseptic cartons; 2) the fact that *Tetra Pak* held nearly 90% shares in the aseptic carton market implied that it also was the favored supplier of non-aseptic cartons; 3) the main producers of cartons operated on both aseptic and non-aseptic markets; 4) *Tetra Pak* was able to focus its effort on the non-aseptic market without fearing a retaliation of rivals on the aseptic market, on the account of its consolidated monopoly on the latter.

⁷⁸³ N. Levy, *Tetra Pak II: Stretching the Limits of Article 86*, 2 Competition Law Review, p. 105 (2005)

⁷⁸⁴ Joined Cases 6-7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvens Corporation v. Commission of the European Communities*, 06.03.1974, [1974] ECR-223. The Court held that refusal to supply raw material to a rival would amount to an abuse pursuant to article 102 if the refusal led to the exclusion of the rival from the market. Elsewhere, the refusal to deal was expanded by reference to the “essential facilities” doctrine.

⁷⁸⁵ A.B. Lipsky Jr. & J.G. Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187 (1999)

⁷⁸⁶ *Oscar Bronner v. Mediaprint*, 26.11.1998, Case C-7/97, [1998] ECR I-7817

two markets is exemplified by the strengthening of the dominance on which the firm is already dominant⁷⁸⁷.

Sub.c) In both the *Tetra Pak II* and the *Microsoft* cases, the dominant position of the defendant in the dominated market allowed the firm to exploit the vertical and horizontal links between its market and the non-dominated market to the extent that it committed an abuse in the second market: that exemplifies the third scenario above referred. The Court found causality between the dominance in one market and the abuse in the adjacent one by analyzing the inherent connection between the two markets. It argued that factors to consider are 1) the structure of supply and demand on the two markets 2) the use –leverage or– of the dominant firm of its market power in the dominated market to penetrate the non-dominant market; 3) the market shares in the dominated and in the non-dominated market. Both cases regarded firms possessing a monopoly on the dominant market and a market share on the connected market that was at the threshold at which dominance is presumed under article 102⁷⁸⁸.

Leveraging conducts are often justified by pro-competitive reasons, among which is the achievement of economies of scope. When it is more economical to produce two products together

⁷⁸⁷ *GVG/FS*, Commission's Decision of 27.08.2003, COMP/37.685 published on OJ L11, 16.01.2004 para.17. *GVG*, a German railway undertaking intended to provide a service from Basel to Milan and back. In order to do so, *GVG* had to enter an "international grouping arrangement" with *Ferrovie dello Stato*, the Italian railway firm that held a legal monopoly over the Italian rail passenger transport system, by virtue of which *GVG* had to be provided with the necessary infrastructure capacity on the Italian market (information of train tickets, train paths, traction to move trains ect.). When *Ferrovie dello Stato* refused to provide the information needed *GVG* complained before the Commission, alleging violation of article 102. The Commission held that: 1) *GVG* had no alternative means to obtain the necessary infrastructure but to address to *Ferrovie dello Stato*; 2) refusal to provide infrastructure was not justified by any particular reason; 3) refusal by *Ferrovie dello Stato* could imply the risk of eliminating competition on the market for railway passenger services. Therefore, *Ferrovie dello Stato* was found to have violated article 102 by strengthening its position on the relevant market on which it was already dominant.

⁷⁸⁸ At the time of the litigation, *Tetra Pak* held 90% market share of the dominant market and approximately 48% market share in the non-dominant market. *Microsoft* had over 95% share of the OS market and 50-60% of the market for work group servers. With regard to the *Microsoft* case, the Commission came to similar conclusions as in *Tetra Pak II*, in connection with the bundling of Personal Computer (PC) Operating Systems (OS) and work group servers and *Microsoft's* refusal to grant interoperability information to rivals. In particular, it stressed: 1) customers that purchase work group servers also need to purchase a client PC; 2) *Microsoft* has a monopoly in the client PC operating system and a leading position on the market for work group servers; 3) technological links exist between the PC-OS and the work group servers. Therefore, the bundling of the two products at issue amounted to abuse.

instead of separately, the leveraging will be justified by the lower price consumers can benefit from.

Moreover, as it has been maintained by the Economic Advisory Group on Competition Policy, the behavior of the dominant firm on the dominated market differs –in which it directly exercise market power- from the behavior of the same firm on the adjacent market, in which it has no market power. The causality between the dominance and the abuse can be very dim⁷⁸⁹.

Furthermore, if the rivals in the adjacent market also were the customers of the downstream business of the dominant firm, the latter would have little incentive in foreclosing the former from competition by raising prices and lose business in the non-dominated market. Conversely, according to an economic result that was developed by Chicago School economists and legal commentators, a dominant firm generally has no such incentive. Because there is no anticompetitive incentive for leverage, it is argued, a dominant firm's decision to integrate into the adjacent market must be motivated by pro-competitive rationales. These rationales would involve either producing a superior product, reducing costs, facilitating entry, or increasing price competition⁷⁹⁰.

This criticism has been developed in the “single monopoly profit” theory, which holds that the dominant firm can extract all of profits available in the first market without vertically integrating the non-dominated market, because in a single chain of production there is only one monopoly profit and the extension of dominance from the dominated market into the vertically-integrated non-dominated one is anticompetitive: a firm with both market power and the ability to charge prices above cost would not increase its overcharge by tying or other forms of vertical integration, but by operating a sort of price discrimination, which permitted to extract more profits, but also to increase output (and decrease price)⁷⁹¹.

Post-Chicago economic analysis has suggested that there are a number of limiting assumptions required for this single monopoly profit theory to apply. There are a number of common market situations in which integration into a second market may raise anticompetitive concerns. These include a) markets in which the first monopoly is regulated, b) markets that are characterized by economies of scale and scope and in which the inputs are not used

⁷⁸⁹ Report by the Economic Advisory Group on Competition Policy, “*An Economic Approach to Article 82*”, July 2005, p. 23-29

⁷⁹⁰ S.C. Salop, R.C. Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 Geo. Mason L. Rev. 617, 623 (1999)

⁷⁹¹ H.J. Hovenkamp, *Harvard, Chicago and the Transaction Cost Economics in Antitrust Analysis*, University of Iowa Research Paper, Number 10-35, December 2010, available at <http://ssrn.com/abstract=1592476>, p. 3

in fixed proportions, and c) markets with multiple types of buyers. In such markets, it is possible for a monopolist to profitably extend its power into a second market and harm consumers⁷⁹².

Having that said, a number of unlawful leveraging practices have been identified in case law, in which a dominant firm has used its dominance to restrict competition or otherwise commit an abuse in a second market: 1) denial of an essential raw material to downstream rivals⁷⁹³, 2) extension of a monopoly in primary equipment into competitive aftermarkets⁷⁹⁴, 3) exclusionary discounting in a non-dominant market which is closely related to the dominant market⁷⁹⁵, 4) extension of legitimate state monopolies into ancillary markets⁷⁹⁶.

8. Pricing Abuses

Within the confines of the present analysis, only those abuses involving pricing issues will be analyzed more in detail. The reason superseding this is twofold: first and foremost, not only are pricing abuses material to the firm's lifecycle –irrespective of its dominance–, but they are also have a significant and direct impact on consumers.

Second, pricing abuses display, more than any other unlawful unilateral behavior, the fundamental political struggle of competition authorities to strike a balance between the risk of discouraging legitimate price competition and the threat to leave unlawful price competition to go unpunished. Economics has shown how consumer welfare will grow when price discrimination leads to a lower price and, consequently, to a redistribution of that wealth, which the firm with market power will not subtract to market forces in the form of deadweight loss.

Moreover, one of the EU Community policy reasons is the fostering of price competition, as one of the inherent goals of the establishment of the internal market⁷⁹⁷. Price competition “favors more efficient firms and it is for the benefit of consumers both in

⁷⁹² L. Kaplow, *Extension of Monopoly Power through Leverage*, 85 Colum. L. Rev. 515 (1985); M.H. Riordan & S.C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513 (1995)

⁷⁹³ *Joined Cases 6-7/73 Istituto Chemioterapico Italiano SpA and Commercial Solvens Corporation v. Commission of the European Communities*, 06.03.1974, [1974] ECR-223

⁷⁹⁴ *AB Volvo v. Erik Veng (UK) Ltd*, 05.10.1998, Case 283/87, [1988] ECR 6211

⁷⁹⁵ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, [1991], ECR I-3359

⁷⁹⁶ *France v. Commission of the European Communities (Telecommunication terminals)*, 19.03.1991 Case C-202/88, [1991], ECR-I 1223, para. 51

⁷⁹⁷ *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*, 16.03.2000, Case C-395/96 and C-396/96, [2000] ECR I-1365. Opinion of the Advocate General Fennelly.

the short and in the long run. Dominant firm not only have the right but should be encouraged to compete on price⁷⁹⁸.

The analysis of price competition allows filtering the idea of *iustum pretium* in competition law. Is there a fair price that would make both business and consumers better off, and that could serve as the threshold at which competition law should intervene to re-balance market forces? Put differently, are competition authorities entitled to police a pricing abuse of a dominant firm by referring to a price that market conditions will indicate as “fair”?

In the realm of contract law, Romans knew the principle “*res tantum valet quantum vendi potest*” (a good is worth the price for which one manages selling it), but this principle was applied within the context of the market: it was the market determining the fair price, and the violation of market standards entitled the party to avoid the contract. In modern contract laws, although theoretically all systems reject a *iustum pretium* doctrine, namely a fair price imposed by law, some grant relief on the mere ground of economic lesion arising out of the contract⁷⁹⁹.

In EC competition law, it has been seen that private enterprise will not be impeded as long as it does not cause harm to consumers. Because low prices virtually always benefit consumers, competition rules should not be too restrictive towards certain forms of pricing behavior and discourage favorable competition for consumers. It is on pricing issues that the statement of clear legal and economic principles and standards is more needed, with a view to avoid *per se* rules that can harm desirable competition.

Earlier economic thinking on price discrimination – in particular that which underlies the enactment of the U.S. Robinson-Patman Act 1936 – relied on two main assumptions⁸⁰⁰.

First, protecting smaller retailers from aggressive competition of bigger ones was deemed to be a viaticum to welfare; in other words, fair competition was guaranteed through the maintenance of equal competitive opportunity for small businesses, since it was assumed that a smaller business is as efficient as a large one and only needed equality of opportunity⁸⁰¹.

Second, rules against price discrimination were necessary to prevent the consolidation of monopolies at the level of distribution. Advocates of this theory argued that, but for the establishing of anti-discrimination rules, large businesses would inevitably attempt to drive small businesses off competition.

⁷⁹⁸ *Ibidem*

⁷⁹⁹ H. Beale, A. Hartkamp, H. Kötz, D. Tallon (eds.), *Cases, Materials and Text on Contract Law*, Oxford, 2002, p. 432

⁸⁰⁰ See Chapter I, para 11.1, the Robinson Patman Act (1936)

⁸⁰¹ D. Ridyard, *Exclusionary Pricing and Price Discrimination Abuses under Article 82 – An Economic Analysis*, 23 *European Competition Law Review*, p. 286-303 (2002)

Consequently, concentration would have caused an increase in prices in the long run; conversely, the presence of more competitors would serve consumers best from a social and economic standpoint⁸⁰².

Nowadays, the above assumptions are no longer valid. The basic theory of perfect competition, for which sellers price at marginal cost to buyers who have perfect knowledge of market conditions, is merely an assumption, since it is acknowledged that all market players price discriminate. In fact, the process of setting prices is far more dynamic in real world markets than the under perfect competition. Prices will usually depend more on the parties' relative bargaining position and skills, demand structure, and the availability of alternative suppliers than on the cost of production. Furthermore, many industries with high fixed costs will fix price above marginal cost in order to recover as much of those costs as possible. Likewise "new economy" industries have marginal costs close to zero –i.e. the cost to produce the last unit of a software-, but high research, development and innovation costs; it is very unlikely that these industries will fix prices at marginal cost.

With the above affirmed, the primary welfare goal of competition law is the distinction between favorable and unfavorable price discrimination. The following points epitomize price discrimination in static economics:

- 1) Consumer welfare is maximized when prices equal marginal cost (the level of the extra cost of producing the last unit of production); such is one of the posits of perfect competition, in which no firm is able to influence the price, but all firms sell at marginal cost.
- 2) The threshold of marginal cost is merely hypothetical, since industries often have high fixed costs they need to recoup to stay in business in the long run; therefore, each firm will charge a price above marginal cost and, for that matter, each one will be said to have some degree of market power⁸⁰³.
- 3) Firms can fix price above marginal cost and recoup all the costs, and it is economically efficient to discriminate between customers which can ill afford to pay for the list price for the product in question, and those who are willing to pay more⁸⁰⁴.

⁸⁰² *Ibidem*

⁸⁰³ Compare the Lerner Index, expressing proportional deviation of price at the firm's profit maximizing output from the firm's marginal cost at that output. Chapter I, para.4.3.

⁸⁰⁴ Compare D. Ridyard, *Exclusionary Pricing and Price Discrimination Abuses under Article 82 – An Economic Analysis*, 23 *European Competition Law Review*, p. 286-303 (2002). The author provides this example: if marginal costs amount to 10% of the list price for the product and a customer cannot afford paying more than 50% of the list price, it is in the interest of both the firm and the customer to grant him a 50% discount off the charged price.

- 4) As long as consumers get an advantage from price discrimination, transactions are economically efficient and pro-competitive, even if they are made at a level above marginal cost.
- 5) Dominant firms should be allowed to charge discriminatory prices consumers to the extent each one can benefit from it.

It has been seen above that the only provision of article 102 that recalls price discrimination is paragraph (c), which bans the application of “dissimilar conditions to equivalent transactions with other trading parties”, in a way to place them at a competitive disadvantage. The provision is broad and paves the way to diverse applications: aside from pure discrimination, which consists of treating of two like customers of the dominant firm differently, four situations of discrimination can be distinguished:

- 1) “Primary line abuses”, where the dominant firm applies different conditions that are conducive to the unlawful exclusion of one (or some) of its rivals⁸⁰⁵; two are the typical scenarios where this kind of discrimination is likely to occur: in the first situation, the dominant firm conditions a price reduction to an exclusive terms for purchasers, which is to buy the product in question only from the dominant firm -the condition at which the discounted price is given is discriminatory, not the mere discount- (“exclusive dealings”, “loyalty rebates”, “target rebates”); in the second situation, the dominant firm offers its product for a predatory price, in order to drive its competitors off competition (“predation”)⁸⁰⁶;
- 2) “Secondary line abuses”, where the dominant undertaking applies to downstream companies not associated and in competition with one another dissimilar conditions big enough to create a competitive disadvantage for those companies aggrieved by the higher prices or the more onerous terms. (“Customer discrimination”);
- 3) “Secondary line abuses”, where the dominant undertaking treats customers differently according to their nationality;
- 4) “Downstream abuses”, where a vertically integrated dominant undertaking controls a raw material or an essential facility whereby it restricts entry into the downstream market of other firms. This situation principally resembles treatment of essential facilities, and not price issues. For the sake of brevity, they will not

⁸⁰⁵ As it has been said above, that exclusionary abuses, which also have elements of discrimination, are policed under article 102(c), rather than under 102(b), because ascertaining the discriminatory nature of a conduct is a simpler operation than ascertaining the exclusionary effects of the conduct itself. In fact, proving a difference in treatment suffices in the finding of abuse under article 102, without having to determine the exclusionary nature of a practice, on which aspect European Courts still tend to have a casuistic attitude.

⁸⁰⁶ G. Faella, *Pratiche di Sconti delle Imprese Dominanti*, Turin (2012)

be discussed in depth in this section; therefore the reader can refer above⁸⁰⁷.

8.1 Primary line abuses

EU competition authorities have identified three main categories of “primary lines” abuses, involving abusive discounting conducts, which are, in turn: 1) exclusive dealing rebates, 2) loyalty rebates and 3) target rebates⁸⁰⁸.

8.1.1 Exclusive dealing rebates

Exclusive dealing rebates in the vertical context involve agreements in which the buyer purchases most or all of a particular type of good or service from one supplier. If the supplier is dominant, exclusive dealing is generally prohibited under article 102, where it is capable of affecting trade between EC Member States, since it has the effect of tying in customers and strengthening the position of the dominant firm on the market.

In the *Suiker Unie* case⁸⁰⁹, the Court found rebates granted by a dominant firm upon condition that a buyer purchased its requirements for the relevant product exclusively from that supplier abusive. Moreover, the abusiveness of such rebates is *per se*, regardless of the fact that the purchasers entered an exclusive agreement or purchased all of the requirements for the product voluntarily: in *Suiker* if customer had made one purchase from another supplier, he would have lost the entire rebate on all its purchase from the dominant firm applicable to one year.

This scheme allowed *Suiker Unie* to control the amount of sugar that its purchasers bought from foreign suppliers. The Court did not verify whether competitors could sell one consignment at a price that gave the buyer a cost saving equal to the lost rebate on a year’s purchases from the dominant firm, but declared the scheme illicit pursuant to article 102, because rebates did not depend on the volume of the purchases, but sought to foreclose other suppliers from the market.

8.1.2 Loyalty rebates

The rationale underlying the ban on exclusive dealing also extends to loyalty rebates, because of their effect of tying-in purchasers to the dominant undertaking to the detriment of

⁸⁰⁷ See in general refusals to deal and “bottleneck” monopolies, *supra*, note n.193 *et seq.*

⁸⁰⁸ Compare H.G. Kamann-E. Bergmann, *The Granting of Rebates by Market Dominant Undertakings under Article 82 of the EC Treaty*, *European Competition Law Review*, p. 83 (2005)

⁸⁰⁹ *Coöperatieve Vereniging Suiker Unie U.A. v. Commission of the European Communities*, 16.12.1975, Cases 40-48, 50, 54-56, 111, 113 and 114/73, E.C.R. 2001-04, paragraphs 502-26

competing suppliers but also, due to their unjustified discriminatory effects in relation to customers⁸¹⁰. Loyalty rebates provide an incentive for purchasers to obtain their entire requirement for the product in question, or most of them, from the dominant undertaking.

In *Hoffmann-La Roche*, the leading case on loyalty rebates, the worldwide dominant manufacturer of vitamins had granted purchasers discounts on the basis of their fidelity: in some cases the discount was conditioned to signing an exclusive dealing agreement for the provision of the requirements, whereas, in other cases, the reduction was conditioned to the actual purchase of all of the requirements for the relevant product from the defendant.

The Court banned loyalty rebates, i.e. “discounts conditional on the customer’s obtaining all or most of its requirements from the undertaking in a dominant position⁸¹¹ *tout court*, on the grounds that they “intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in the dominant position”, in a way to preclude other potential suppliers the access to the market⁸¹². Thus, in case law it is not material to the application of article 102 that purchaser entered the exclusive agreement or bought all of its requirements voluntarily, but the fact that the dominant firm availed itself of these contract to consolidate its dominance, by means of abusive conditions attached to the price⁸¹³.

Moreover, loyalty rebates differ from “quantity rebates”, because they do not depend on a volume of purchases preemptively established for all the purchasers, but on estimates of the dominant firm to provide for the entire requirement of the purchasers⁸¹⁴.

The same approach was followed in the *Irish Sugar* case⁸¹⁵, in which the Court found that the defendant had promoted a rebate strategy among Irish sugar purchasers in order to exclude the expansion of a French brand (*Eurolux*) on the Irish retail market⁸¹⁶. The rebate was subject to the customers’ purchasing of “all or

⁸¹⁰ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461 para. 90

⁸¹¹ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461 para. 89

⁸¹² *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 90.

⁸¹³ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, *ibidem*.

⁸¹⁴ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 100

⁸¹⁵ *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969, para. 194

⁸¹⁶ *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969, para. 198

large proportion” of their retail sugar allotments from Irish Sugar. The Court followed the *Hoffmann-La Roche* reasoning, whereby the granting of loyalty rebates is at odds with article 102 when it is not based on an economic performance that justifies it, such as the achievement of a volume of purchases from the producer in question, but it is only aimed at limiting or eliminating other possible sources of supply for the purchasers and, therefore, foreclosing the market⁸¹⁷.

8.1.3 Target rebates

Similar considerations also apply in the case of target rebates, which not only tie-in purchasers but also imply an element of discrimination, in that the target amounts and discount rates may vary from customer to customer⁸¹⁸. Target rebates are retroactive discounts, which are anticompetitive when are aimed at shrinking the number of suppliers of a product. The dominant undertaking incentives purchasers to buy incremental volumes of the product by offering a retroactive discount on the overall turnover for a certain period of time, tied to a sales target.

The leading case on target rebates is *Michelin I*⁸¹⁹, where the Court affirmed the anticompetitive nature of the rebates of *Michelin* on the Dutch market for tires for heavy vehicles, since these were entwined to annual purchase targets the dominant undertaking had negotiated with each individual dealer, and subject to the purchase of a bigger volume of tires compared with the previous year⁸²⁰. Dealers were not informed on the criteria to calculate the discount rate and the target amount, because *Michelin*'s representatives confirmed these orally, not in writing: the lack of transparency precluded them from confronting the *Michelin* net price with the price of other suppliers⁸²¹.

The Court, therefore, found that dealers were restricted from an effective choice of suppliers by means of *Michelin*'s rebate system, which bound the former to *Michelin* tires. The abusiveness of the practice laid on the fact that the rebate was applied on the 1-year sale amounts (if the dealer achieved the sales target, it received a retroactive discount on its entire year's purchase from *Michelin*), which meant that even a small percentage reduction in the discount rate could affect the dealer's profit margin for the whole

⁸¹⁷ *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969, para. 213-214

⁸¹⁸ *Michelin v Commission of the European Communities* Case C-322/81, 09.11.1983, [1983] ECR 3461, para. 28

⁸¹⁹ *Michelin v Commission of the European Communities* Case C-322/81, 09.11.1983, [1983] ECR 3461

⁸²⁰ *Michelin v Commission of the European Communities* Case C-322/81, 09.11.1983, [1983] ECR 3461, para. 24

⁸²¹ *Michelin v Commission of the European Communities* Case C-322/81, 09.11.1983, [1983] ECR 3461, para. 48

year.

The Court rested on a significant policy argument: “Any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period”⁸²².

In sum, the factors that the Court evaluated are:

- 1) The excessive length of the reference period to which the retroactive rebate was tied (one year);
- 2) The market share of *Michelin*, which controlled around 65% of the market for heavy vehicle tires, whereas the next largest competitor only had 8% shares. According to the Court, this discrepancy forced dealer to inescapably do business with the dominant undertaking, and the risk of losing its discounts discouraged them from buying a smaller amount of product from a smaller supplier, even at a lower price than *Michelin*.
- 3) The lack of transparency around *Michelin*'s rebate system, whereby dealers could not foreshadow the consequences of not achieving the purchase target to obtain the retroactive discount.

All things considered, the Court confirmed the Commission's view that the system was aimed at preventing dealers from being able to select the most favorable offers made by other competitors, and at “making it difficult for other producers to gain a foothold in the market”⁸²³.

The Court applied the same line of reasoning of *Michelin* in the *British Airways* case⁸²⁴. The Court focused on *British Airways*' market share in the UK markets for air transport (42% of the market compared to 5,8% for the next largest supplier). As a result, *British Airways* could offer travel agents larger commission rates based on annual sale targets, defined as a percentage of that agent's sales of *British Airways* tickets in the previous year⁸²⁵.

Because of the substantial amount of the rebate, agents were reluctant to deal with other air carriers, since the risk of not achieving the sale target offered by *British Airways* outweighed the incentive to sell other carriers' tickets even at more attractive prices.

⁸²² *Michelin v Commission of the European Communities* Case C-322/81, 09.11.1983, [1983] ECR 3461, para. 81

⁸²³ Commission Decision N. 81/969/EEC published on the OJ L 353/33, para. 38. This view was confirmed in 2001 in *Michelin II. Manufacture française des pneumatiques Michelin v. Commission of the European Communities*, 30.09.2003, Case T-203/01, 2003, ECR II-04071

⁸²⁴ As for the facts of the case, see *supra*, para. 7.3. *British Airways plc v. Commission of the European Communities*, 15.03.2007, Case C 95-04 P, [2007] ECR I-2331

⁸²⁵ *British Airways plc v. Commission of the European Communities*, 15.03.2007, Case C 95-04 P, [2007] ECR I-2331, para. 30

This practice of the dominant firm was designed to foreclose competition, leaving no choice to travel agents as to the airline with which they dealt.

8.1.4 Defenses from a *prima facie* claim of violation of article 102(c)

Once “primary line” abuses have been defined in line with the judicial interpretation and expansion of article 102(c), it is essential that the main defenses or justifications which were developed by economic thinking, but which have also been accepted by both the Court of Justice and the Commission, be in turn discussed.

1) First and foremost, quantity rebates are not normally objectionable. In fact, the European Courts and the Commission have not questioned the legitimacy of a discount to all customers whose purchases exceed a certain threshold level, since it would not entail the application of different conditions to similar transactions, pursuant to article 102(c)⁸²⁶.

EC Competition authorities see quantity rebates favorably, when they reflect the scope of creating economies of scale through the offer of anticipated (*non-retroactive!*) cost-savings, based on the purchase of large volumes of a product⁸²⁷. In general, discounts are justified when they are related to purchasing volumes⁸²⁸.

Discounts offered by a dominant undertaking are to reflect cost-savings, and at any rate they are to be justified in an economics perspective; in other terms, quantity discounts are to bear a limited anticompetitive-discriminatory weight and ought not to result in discriminatory pricing⁸²⁹.

Quantity rebates are justified when they have pro-competitive effects, i.e. when they are based on cost savings and do not discriminate among customers. American scholarship dispute this assumption of EC competition authorities, arguing that dominant firms with high fixed cost should be able to charge different prices to different customers in order to recover fixed costs, if price discrimination benefit both parties to the lower price transaction. Moreover, article 102(c) does not oblige the dominant company to

⁸²⁶ J. Temple Lang & R. O'Donoghue, *Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC*, 26 Fordham Int'l L.J. 100 (2002-2003)

⁸²⁷ *Portuguese Republic v. Commission of the European Communities*, 29.03.2001, Case C-163/99, [2001], ECR 3461, paras 6-9. In the *British Airways* decision, the Commission acknowledged that “a dominant supplier can give discounts that relate to efficiencies, for example discounts for large orders that allow the supplier to produce large batches of product”. *British Airways Decision*, O.J. L 30/1 (2000), p. 20, para. 101

⁸²⁸ *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969, para. 173

⁸²⁹ J. Faull & A. Nikpay, *The EC Law of Competition*, Oxford, University Press, p. 246, (1999)

make similar cost savings in other cases⁸³⁰.

2) Price reductions may be given in return for services provided by the buyer: in *Irish Sugar* the Court and the Commission agreed on the fact that the rebates would have been justified if they had been given in return for marketing and transport costs paid by the customer, or for other functions that the customer might have performed⁸³¹. If the dominant undertaking's rebate is solely based on tying-in the customers, it will not be justified.

3) "Meeting Competition" defense: rebates scheme offered to meet the competitors price are generally lawful under article 102; in the *United Brands* case, the Court of Justice affirmed: "the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and ...such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests"⁸³².

Conversely, in the *Compagnie Maritime Belge* case the Court suggested that when discounts are offered to "selectively" match competitors' pricing, they might amount to an abuse⁸³³. However, in this particular case the matching discounted prices were combined with other exclusionary practices, such as loyalty contracts⁸³⁴, which prevent from affirming that the Court sanctioned the matching discount as a single abuse.

Again, the rationale implied in this judicial approach is that EC competition law is a matter of protection of consumers, rather than competitors: to the extent that dominant companies compete in a way to lower prices, and to meet or undercut the competitor's price, to a more convenient level to the consumers, provided that the effect is not to eliminate the only competitor, competition will be encouraged.

4) "New product/new market" defense: price reductions may be regarded as competition on the merits when the dominant firm is

⁸³⁰ J. Temple Lang & R. O'Donoghue, *Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC*, 26 Fordham Int'l L.J. 102 (2002-2003)

⁸³¹ *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969, para. 173

⁸³² *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 189

⁸³³ *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*, 16.03.2000, Case C-395/96 and C-396/96, [2000] ECR I-1365, paras. 117-120. "There is an abuse of a dominant position where an [undertaking] in a dominant position, having a share of over 90% of the market in question and only one competitor, selectively cuts its prices in order deliberately to match those of its competitor".

⁸³⁴ *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*, 16.03.2000, Case C-395/96 and C-396/96, [2000] ECR I-1365, para. 126.

launching a new product or is entering a new market⁸³⁵.

8.5 Unlawful discounting practices in a nutshell

With regard to the “primary line” abuses, discounted prices that remain above cost should presumptively be allowed, because they enhance efficiency on the market, to the benefit of consumers. According to the practices that EC Competition authorities have reviewed, it should be distinguished:

- 1) Discounts subject to the purchase of the entire or the most part of the requirement for a product from the dominant firm on part of the customers usually violate article 102, because they tie-in the latter to the dominant firm and eliminate other sources of supply.
- 2) A dominant firm is normally allowed to grant quantity discounts for all of its customers, in the absence of predation and other anticompetitive conditions attached to them;
- 3) Discounts individually negotiated and subject to the purchase of an incremental volume of product from a dominant firm compared to a certain target (usually an estimate of sales of the dominant firm, or the overall sale volume of the previous year) are unlawful on the account of the fact that customers will be barred from buying from other competitors under the menace of losing the discount on the whole volume of purchases, having the target not been met.
- 4) A dominant firm can grant a discount on the condition that the total quantity exceeds a target figure, since that would have pro-competitive effects, in that the supplier can benefit from a lower non-discriminatory price. Conversely, if the price reduction is individually negotiated and is structured in such a way that incentivises the customers to buy their entire requirement from the dominant firm is illegal, on the grounds that such practice is conducive to foreclosure of competition.

8.2 Secondary line abuses

The second category of pricing abuses is the so-called “Secondary line abuses”, or customer discrimination, where the dominant undertaking applies to downstream companies not associated and in competition with one another dissimilar conditions big enough to create a competitive disadvantage for those companies aggrieved by the higher prices or the more onerous terms.

Although the wording of article 102(c) expressly refers to this type of abuse, when it forbids the application of dissimilar conditions to similar transactions, there is a scarce analysis in the case law of the meaning of “competitive disadvantage between customers”.

Arguably, the most renowned case on discrimination between

⁸³⁵ M. Dolmans & V. Pickering, *The 1997 Digital Undertaking*, 19 European Competition Law Review, p. 113 (1998)

customers is the *United Brands* case⁸³⁶, where the Court found that the defendant had discriminated between wholesaler banana ripeners, in view of the different retail price in each Member State. The Court held that a dominant supplier may not apply geographically differentiated prices, at least where the different geographic areas are all part of the same relevant geographic market and the geographically differentiated pricing policy contributes to the artificial partitioning or compartmentalizing of the market along national borders⁸³⁷. By “artificial” the Court meant measures that are linked to practices that restrict competition, and are not based on precompetitive reasons, such as the need to maintain quality.

According to the ECJ, all bananas marketed under the brand name “Chiquita” had the same geographic origin, belonged to the same variety, and were of almost the same quality. They were unloaded in two ports where unloading costs only differed by a few cents and were resold with limited exceptions subject to the same conditions of sale and terms of payment. Ripeners paid the costs of carriage from the unloading ports to the ripening installations. United Brands charged a selling price that differed appreciably according to the Member State where the customer was established. The Commission found that this practice abused United Brands’ dominant position, in violation of Article 102(c), in a relevant geographic market for bananas consisting of the territory comprised of a number of Northern European countries. On appeal, the ECJ upheld the Commission’s decision, affirming that United Brands had created artificial partitioning of national markets.

In *Aéroports de Paris* the airports had charged different fees to companies providing certain ground services. The Court affirmed that there was no justification for distinguishing between companies doing their own ground-handling and companies providing ground-handling for third parties⁸³⁸.

In the *Portuguese Airports* case, the dominant concessionaire granted discounts on the basis of the number of landings made⁸³⁹. The Court ignored the Commission’s argument that quantity discounts are to be objectively justified by economies of scale, but maintained that a dominant firm can only offer quantity discounts that are linked to the volume of purchases the customers make. By

⁸³⁶ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, Case 27/76, [1978], ECR 207

⁸³⁷ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, Case 27/76, [1978], ECR 207, para. 4

⁸³⁸ *Aéroports de Paris v. Commission of the European Communities*, 12.12.2000, Case C-82/01, [2002], ECR I-2613, para. 210

⁸³⁹ *Portuguese Republic v. Commission of the European Communities*, 29.03.2001, Case C-163/99, [2001], E.C.R. I-2613

adding that “the mere fact that the result of quantity discounts is that some customers enjoy in respect of specific quantities a proportionally higher average reduction than others in relation to the difference in their respective volumes of purchase is inherent in this type of system, but it cannot be inferred from that alone that the system is discriminatory”⁸⁴⁰, the Court implicitly acknowledged the principle that bigger customers get bigger deals; however, in the case at bar the absence of a linear progression in the increase of the discount was evidence of discrimination, which resulted in the fact that discounts were only enjoyed by the two Portuguese airlines. Similarly, the Court said that different landing charges for domestic and international flights were discriminatory. The discrimination resulted from the application of a different tariff system for the same number of landings of aircraft of the same type⁸⁴¹.

In the *Corsica Ferries* case, the duty of shipping companies in the Italian ports of Genova and La Spezia to avail themselves of the mooring service of Italian Companies –which held exclusive rights to provide those services by maritime regulations- had allegedly put the claimant in a competitive disadvantage. In fact, *Corsica Ferries* contended that it had been prevented from using its own staff to carry out mooring operations, forced to bear the costs of these unwanted services, and bear costs which had no relation to the actual cost of the service provided⁸⁴².

The Court, albeit affirming that granting exclusive mooring rights for the supply of mooring services to local mooring groups created a statutory dominant position within the meaning of article 102, countered there was no abuse pursuant as such, since the need to provide a universal mooring service for reasons of safety in port waters justified the monopoly⁸⁴³. Moreover, article 102 is only concerned with the conduct of undertakings and not

⁸⁴⁰ *Portuguese Republic v. Commission of the European Communities*, 29.03.2001, Case C-163/99, [2001], E.C.R. I-2613, para. 51. Compare R. O'Donoghue, *Over-Regulating Lower Prices: Time for a Rethink on Pricing Abuses under Article 82*, in C.D. Ehlermann & I. Atanasiu (eds), *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?*, Oxford Hart Publishing, (2006), p. 132

⁸⁴¹ *Portuguese Republic v. Commission of the European Communities*, 29.03.2001, Case C-163/99, [2001], E.C.R. I-2613, para. 64-66

⁸⁴² *Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl. and others*, 19.06.1998, Case C-266/96, [1998], ECR I-1783, para. 37. The case regards primarily the restriction to freedom to provide services and the free movement of goods, as under article 59 of the EC Treaty, which was alleged by the claimant, and secondarily the infringement of competition community rules, on the grounds that the defendant had been conferred a monopoly position in the provision of mooring services by the Italian public authorities.

⁸⁴³ *Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl. and others*, 19.06.1998, Case C-266/96, [1998], ECR I-1783, para. 45

with law or regulations adopted by Member States⁸⁴⁴. This passage is of particular interest, because the Court acknowledges that there can be restrictions to competition by Member States law or regulations, which may render ineffective the competition rules applicable to undertakings, provided that there is a public overriding interest justifying the granting of a monopoly position.

8.2.1 The conceptual and normative limits of secondary line abuses

Aside from the above applications of article 102(c), “secondary line” abuses are very limited in EC Competition law, and for several reasons. First of all, the aggrieved party is to prove that it has suffered a competitive disadvantage from the price difference. That implies that the downstream customers have no alternative product on the market and are forced to buy a product or a service from the dominant undertaking.

There are very few situations in which these conditions are met, and case law has mostly regarded the course of conduct of State-owned concessionaires of exclusive rights to provide services in airports or railways, which operated in a way to favor national carriers, to the detriment of international operators. Even if in the wording of the outcomes there was no express referral to the protection of national companies, it is evident that the purpose of this discrimination was protection on the grounds of nationality⁸⁴⁵. It is not easy, in practice, to envisage a non State-owned company charging a different price in similar transactions to downstream customers that were in competition⁸⁴⁶.

In other cases, the granting by law or regulation of a dominant position, which put a firm at a competitive disadvantage, has been justified by virtue of overriding interests, such as public safety. The ground to uphold the legitimacy of statutory dominant position rests immanently on the fact that in certain circumstances Member States can create monopolies which, despite falling within the spectrum of article 102, escape the application of EC competition rules, because competition law is concerned with the conduct of the firm, not with the Member States’ legitimate restrictions of competition.

9. Predation – introductory remarks

Predatory pricing is a strategic pricing below a certain threshold of cost with the intent of eliminating incumbent competitors or deterring the entry in the market of new competitors; once the

⁸⁴⁴ *Corsica Ferries France SA v. Gruppo Antichi Ormeggiatori del Porto di Genova Coop. arl. and others*, 19.06.1998, Case C-266/96, [1998], ECR I-1783, para. 35

⁸⁴⁵ Compare J. Temple Lang & R. O’Donoghue, *Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC*, 26 Fordham Int. L.J. 120 (2002-2003).

⁸⁴⁶ *ibidem*

market is predated, the dominant firm would normally raise price in a way to recoup the losses suffered during the predation phase⁸⁴⁷.

Unlike price-cutting aimed at increasing the firm's market share, predatory pricing has its objective in eliminating competition, discouraging new entries, or deterring competitors "with shallower pockets" from competing aggressively, for fear of being driven off competition by a price battle with the dominant firm.

The identification of a measure of cost below which a price is considered predatory is arguably the most arduous task of both American and European competition authorities, and today there is no consensus as to which price strategies involving low pricings should be anticompetitive. The debate has also heated around which analytical framework should be employed to test the predatory nature of a price⁸⁴⁸.

Parallel to that, another current issue concerning this type of abusive practice is whether a price above cost, yet part of a strategy to eliminate rivals can amount to predation. That raises difficult issues: on the one hand, economic analysis of law holds that such a strategy should not be deemed unlawful under competition law, owing to the fact that price would still remain above costs, therefore competitors should be able to compete on the basis of such a price, by achieving the same level of efficiency as the dominant firm⁸⁴⁹. On the other hand, other legal scholars affirm that such a conduct should be deemed unlawful under competition law since, in terms of outcome, it would still lead to a permanent exclusion of rivals, so that the dominant firm would still be able to raise prices post-exit⁸⁵⁰.

The case law of the European Courts has been criticized for not placing sufficient weight on the anticompetitive effects of low

⁸⁴⁷ M. Moura and E. Silva, *Predatory Pricing under Article 82 and the Recoupment Test: Do Not Go Gentle into that Good Night*, *European Competition Law Review* 61 *et seq.* (2009), D. Crane, *The paradox of Predatory Pricing*, 91 *Cornell Law Review* 1, (2005) W.J. Baumol, *Principles relevant to Predatory Pricing*, in Konkurrensverket (ed.), *The Pros and Cons of Low Prices*, Stockholm, (2003), p. 15 *et seq.*, L. Cabral, *Economia Industriale*, Carocci Ed., Rome, p. 328 (2002), J.A. Ordover, *Predatory Pricing*, in P. Newman (ed.) *The New Palgrave Dictionary of Economics and the Law*, vol. III, London (1998), p. 77 *et seq.*, P. Bolton, J.F. Brodley and M.H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 *Georgetown Law Journal* 2239 (2000),

⁸⁴⁸ As for the analytical framework to analyze predation, see Chapter I, paras. 9.2 and 9.2.1

⁸⁴⁹ E. Elhauge, *Why Above-Cost Price Cuts to Drive out Entrants are not Predatory – and the Implications for Defining Costs and Market Power*, 112 *Yale Law Journal* 681 (2003)

⁸⁵⁰ A.S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 *Yale Law Journal* 941 (2002) This applies in cases in which the market is characterized by high entry barriers.

pricing strategies⁸⁵¹, or on the economic reasons why firms need to price their products below cost⁸⁵². It has been often argued that EC competition law enforcement chills vigorous competition, in that it prevents firms for competing on price and sells their products as closely as possible to the minimum profitable price.

9.1 The case law on predation – below-cost and above cost pricing

The leading case on predation is the *AKZO* case⁸⁵³, whose facts exemplify the mechanism of this abusive strategy: *AKZO* was the dominant supplier of various organic peroxides used in the manufacture of certain plastics and also the supplier of a whitening agent for flour. The claimant, *ECS* was a small manufacturer of flour whitening agents, which attempted to enter the plastic sector. In response, *AKZO* started selling peroxides to the claimant's clients for very low prices, compelling *ECS* either to abandon the customer or to match a loss-making price in order to retain the customer; at the same time, the defendant maintained regular prices for the other customers. *ECS* brought proceedings against *AKZO* before the Commission, alleging that the latter had charged prices below costs with the object of eliminating a competitor, contrary to article 102⁸⁵⁴.

AKZO advocated for the application of the *Areeda-Turner* test⁸⁵⁵ for predation, holding that prices below average variable costs are predatory; however, the Commission rejected the idea that predation can automatically be inferred from a price threshold, and argued that any price cutting can amount to predation, when it is part of a strategy to eliminate rivals⁸⁵⁶.

On appeal, the ECJ confirmed the Commission's holding that *AKZO*'s pricing was part of a strategy to eliminate *ECS*, but based its decision on a different *ratio decidendi*: under article 102 a firm cannot eliminate its rivals with methods different from those which come within the scope of competition on the merits⁸⁵⁷.

⁸⁵¹ R.J. Van Der Bergh & P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective*, 2nd ed., London, 2006, p. 294 *et seq.*

⁸⁵² V. Korah, *The Paucity of Economic Analysis in the EEC Decisions on Competition – Tetra Pak II*, 46(2) *Current Legal Problems* 149, (1993)

⁸⁵³ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359

⁸⁵⁴ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 75 *et seq.*

⁸⁵⁵ See Chapter I, para. 9.2, P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 *Harv. L. Rev.* 697-716-718 (1975).

⁸⁵⁶ *Commission decision ECS/AKZO*, Case n. IV/30.698 [1985], *O.J. L.* 347/1, para. 80

⁸⁵⁷ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 70

A price strategy aiming at excluding equally efficient competitors from the market cannot be held as legitimate competition, but in order to distinguish between aggressive competition and illegitimate predation regard should be had to a price below which competition is no longer sustainable for competitors⁸⁵⁸.

The Court recognized this benchmark in a pricing strategy below average variable costs, since they generate a sale loss, that the dominant firm has no interest in applying them but for the scope of eliminating competitors, so as to “subsequently...raise its prices by taking advantage of its monopolistic position”⁸⁵⁹.

The ECJ followed the *Areeda-Turner* criterion, which stands, as said above, as a proxy for marginal costs⁸⁶⁰, on the ground that the latter are not always readily available. Based on the critique that not necessarily does pricing below average variable costs reflect an abusive strategy of the dominant firm⁸⁶¹, the Court rejected a safe haven for prices above average variable costs, and further added that pricing above average variable costs, but below average total costs, can also be abusive pursuant to article 102, when it is part of a plan to eliminate a competitor⁸⁶², meaning that there must be an additional element for above cost pricing to be considered as illegal.

In *Tetra Pak II*, the Court applied and amended the *AKZO* holding, by adding that pricing below average variable costs must *always* be regarded as abusive, no grounds of exculpations being available to the dominant firm, since such pricing “has no conceivable economic purpose other than the elimination of a competitor”⁸⁶³.

Unlike the US Supreme Court, according to which prices above the appropriate measure of average variable costs are considered legal *per se*⁸⁶⁴, article 102 exceptionally applies to situations in which a dominant firm with a very high degree of market power

⁸⁵⁸ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 72

⁸⁵⁹ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 71

⁸⁶⁰ M.J. Salinger, *The Legacy of Matsushita: the Role of Economics in Antitrust Litigation*, 38 *Loyola University of Chicago Law Journal* 476 (2007)

⁸⁶¹ D. Howarth, *Pricing Abuses – Unfair and Predatory Pricing under Article 82 EC: From Cost-price Comparisons to the Search for Strategic Standards*, in G. Amato & C.D. Ehlermann (eds.), *EC Competition Law: A Critical Assessment*, Oxford, (2007), p. 249; R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, p. 218; O.E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 *Yale L.J.* 320 (1977);

⁸⁶² *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 72

⁸⁶³ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951 para. 41

⁸⁶⁴ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

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cuts price above average total costs, provided that the price cut is coupled with other exclusionary strategies and, more importantly, aimed at eliminating the remainder of competition in the market⁸⁶⁵.

In the *Hilti* case, a manufacturer of nail guns put in practice strategies to deter customers from buying nails from competitors, by means of discriminatory pricing strategies and tied sales⁸⁶⁶. In particular, *Hilti* was found to have offered more profitable discounts to customers who purchased both nails and nail-guns than those that purchased the guns from *Hilti* and the nails from the competitors. The prices were not found to be below cost, but the Court nonetheless maintained that the defendant's course of conduct was not a legitimate mode of competition, since *Hilti* was liable to deter other firms from establishing in the market; regardless of that, the Court did not clarify whether the behavior on *Hilti's* part amounted to an exploitative or to an exclusionary abuse⁸⁶⁷.

Irish Sugar is another case in which the General Court condemned a series of discounts by the dominant firm, which were not found to be below cost, but were deemed designed to isolate the Irish market for sugar from imports of sugar produced in other Member States⁸⁶⁸. The defendant had deployed a series of measures, such as selective pricing, price discrimination, rebates to customers located in border areas, as part of a scheme to entrench the Irish market from competing imports. The Court found the rebates illegitimate, without inquiring whether the prices had an exclusionary effect because they were below cost. Instead, as it has been seen, it only focused on the discriminatory partition of the market and on the discrimination between customers: "It follows that, by the applicant's own admission, its economic capacity to offer rebates in the region along the border with Northern Ireland depended on the stability of its prices in other regions, which amounted to recognition that it financed those rebates by means of its sales in the rest of Irish territory...The applicant abused its dominant position in the retail sugar market in Ireland, by preventing the development of free

⁸⁶⁵ J. Temple Lang & R. O'Donoghue, *Defining Legitimate Competition, How to Clarify Pricing Abuses under Article 82*, 26 Fordham Int. L. J. 127 (2003)

⁸⁶⁶ *Hilti AG v. Commission of the European Communities*, 12.12.1991, Case T-30/89, [1991], E.C.R. II-1439, para. 7

⁸⁶⁷ *Hilti AG v. Commission of the European Communities*, 12.12.1991, Case T-30/89, [1991], E.C.R. II-1439, para. 100. The Court merely affirmed that the "The Commission had good reason to hold that such behavior on Hilti's part was improper".

⁸⁶⁸ *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969.

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competition on that market and distorting its structures, in relation to both purchasers and consumers”⁸⁶⁹.

The leading case on above-production-cost predation is, however, *Compagnie Maritime Belge*, in which CEWAL, a Belgian liner shipping conference operating between Democratic Republic of Congo and some European Ports, enjoyed a *de facto* monopoly over those routes (90% of the market in question), which allowed it to carry out the practice of “fighting ships”, a selective price-matching, whereby sailing times are established as close as possible to those of a competing liner and special rates apply for those sailings. The purpose of the “fighting ships” was to get rid of the competitor G&C⁸⁷⁰.

The ECJ rejected the appellant’s argument that selective discount practices are abusive only when they are below price within the meaning of *AKZO*⁸⁷¹, and found CEWAL’s conduct abusive on the grounds:

- 1) The “fighting ships” practice was carried out exclusively to exclude the only competitor of the dominant firm from competition⁸⁷²;
- 2) The dominant firm spread the losses incurred during the discount period between the members of CEWAL conference⁸⁷³;
- 3) The maritime transport market is a very specialized sector, where competition is fettered by the applicable legislation. It is because of the specificity of that market that the Council established, in Regulation No 4056/86, a set of competition rules different from that which applies to other economic sectors. The authorization granted to liner conferences to cooperate in fixing rates for maritime transport is exceptional in light of the relevant regulations and competition policy⁸⁷⁴.

⁸⁶⁹ *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969, para 188.

⁸⁷⁰ *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*, 16.03.2000, Case C-395/96 and C-396/96, [2000] ECR I-1365

⁸⁷¹ *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*, 16.03.2000, Case C-395/96 and C-396/96, [2000] ECR I-1365, paras. 97-115

⁸⁷² *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*, 16.03.2000, Case C-395/96 and C-396/96, [2000] ECR I-1365, paras. 118-119. “The appellants never seriously disputed, and indeed admitted at the hearing, that the purpose of the conduct complained of was to eliminate G & C from the market”.

⁸⁷³ *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*, 16.03.2000, Case C-395/96 and C-396/96, [2000] ECR I-1365, para. 101

⁸⁷⁴ *Compagnie Maritime Belge Transports SA and Others v. Commission of the European Communities*, 16.03.2000, Case C-395/96 and C-396/96, [2000] ECR I-1365, para. 115

The selective price cuts, together with the practice of the “fighting ships” amounted to an abuse, because it was directed to eliminating competition. That, coupled with the structural lessening of competition in the maritime sector and the very high market share of *CEWAL*, brought the Court to declare liability under article 102, regardless of a cost analysis, to ascertain whether the defendant had cut prices below cost.

9.2 The recoupment element

Notwithstanding the lack of a clear standard for predation, one aspect recurring in all the above courses of conduct is the sacrifice of today’s profits for tomorrow’s gains. Once the competitor(s) is eliminated, the dominant firm will recoup the losses incurred throughout the price-cut phase by raising prices at monopoly level to make good those losses. Without the possibility of recouping, the business strategy of the firm is not profit maximizing but, conversely, is beneficial to consumers, because the predator will inflict losses onto himself only⁸⁷⁵.

There is no consensus, however, as to the factors that should be taken into account to verify the possibility of recoupment. American Scholarship has highly influenced the debate on the incorporation of recoupment test in predation cases, and has suggested two tests to distinguish predatory discounts from pro-competitive strategies:

- 3) The *structural recoupment test* seeks to infer the possibility of recoupment from the structural factors of the market, such as high barriers to entry, the excess capacity of the dominant firm, its market position *vis-à-vis* the competitor, and the increase of market shares during the predation phase⁸⁷⁶.
- 4) The *strict recoupment test* seeks to infer predation from an economic quantification of losses and estimated post-predation gains. Only if this information is available, and economic calculus shows that the predator can recoup all the money lost during predation, should then he be held liable for the price-cutting strategy⁸⁷⁷. Post predation gains can be quantified in the form of prices established after the market has been jacked up.

In the wake of the *Brooke Group* decision, the debate on the need of ascertaining the recoupment in EC competition law has reached its momentum up until the *Tetra Pak II* decision, where the recoupment requirement has been rejected *tout court*, because the Court found it not appropriate “to require [in addition to the

⁸⁷⁵ K.G. Elzinga & D.E. Mills, *Testing for Predation: is Recoupment Feasible*, 34 Antitrust Bulletin 874, (1989)

⁸⁷⁶ P.L. Joskow & A.K. Klevorick, *A framework for Analyzing Predatory Pricing Policy*, 89 Yale Law Journal 245 *et seq.*, (1979)

⁸⁷⁷ K.G. Elzinga & D.E. Mills, *Testing for Predation: is Recoupment Feasible*, 34 Antitrust Bulletin 874, (1989)

AKZO rules] proof that the predator had a realistic chance of recouping its losses⁸⁷⁸, arguing that there could be no economic reason for the below-cost pricing other than predation, therefore aligning with the argument of the Advocate General, for which predatory pricing is anticompetitive *per se*, regardless of whether the dominant firm achieves that aim⁸⁷⁹. Despite the doubts on the existence of causation in the case⁸⁸⁰, both the Commission and the Court concluded that *Tetra Pak's* profits in the aseptic carton market allowed it to make up for the losses occurred in the predation phase of the non-aseptic carton market. Moreover, by resorting on the argument of the "associative links" between the two markets the ECJ argued that the pricing policy in the predated market was a logical tool for fettering competition, irrespective of the analysis of the actual chances of recouping losses through post-predation price raising above competitive level⁸⁸¹.

After *Tetra Pak II*, the ECJ partly reviewed its position on the recoupment requirement in the *France Télécom* case: the Commission found that the prices charged by *Wanadoo Interactive*, a company of the French Telecom Group, for high-speed internet access were predatory, since they cover neither variable costs in the short term, nor the full cost for the longer period of time. On the account of that, the Commission deduced that such pricing strategy was part of a plan to eliminate competition on the French market for high-speed Internet services during a key phase of its development⁸⁸², and that recoupment of losses was probable by virtue of the "structure of the market and the associated revenue prospects"⁸⁸³.

The General Court upheld the Commission's decision, confirming that the recoupment is not a general precondition for finding liability in predation claims; the ECJ also argued that an analysis of the chances of the predator to make good for its losses in the post-predation phase might shed light on the economic justifications for pricing below average variable costs, or on the existence of a plan to eliminate competition whereby prices are above average variable costs, but below average total costs⁸⁸⁴.

⁸⁷⁸ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951 para. 44.

⁸⁷⁹ Opinion of A.G. D. Ruiz-Jarabo Colomer, *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951 para. 44

⁸⁸⁰ Compare *supra*, para. 4.3.1

⁸⁸¹ Compare *supra*, para. 7.5

⁸⁸² *Wanadoo Interactive*, Commission Decision, 16.07.2003, COMP/38.233, para. 255

⁸⁸³ *Wanadoo Interactive*, Commission Decision, 16.07.2003, COMP/38.233, para. 335-336

⁸⁸⁴ *France Télécom v. Commission of the European Communities*, 02.04.2009, Case C-202/07 P [2009], ECR I-2369, para. 111

Nevertheless, it went on and affirmed that, absent the possibility of recouping losses, the dominant firm can still lessen competition by eliminating a rival, and ultimately cause a consumer harm as a result of the limitation of the choices available to consumers themselves⁸⁸⁵.

In light of the above, it appears that the ECJ rejected a strict analysis of the gains and losses (*strict recoupment test*), and sustained the application of a *structural recoupment test*, which brings to evaluate the rationality of predation by referring to the market structure, in other terms by referring to the market setting to prove that the low price strategy did not make economic sense, except for exclusionary scopes.

Such a determination does not affect probation, since predatory pricing law only applies to firms that are already dominant, for which circumstances already suggest a large market share, and certain immunity to competition. This dominance may also offer indication that exclusion of a rival by means of a predation scheme will lead to monopolistic prices in the long run and, in all likelihood, to recoupment.

9.3 The relevant cost threshold and the strategies of the firm

With regard to pricing below average variable costs, it also appears that the Court has overcome the *Tetrapak II* approach, by virtue of which pricing below average variable costs must *always* be regarded as abusive⁸⁸⁶, and adopted a more nuanced approach, since the price cut is to concur to eliminate rivals together with a set of strategic circumstances.

Similarly, when it comes to pricing above average variable cost, that can only be considered abusive only when it is part of a strategy to eliminate rivals. Price reductions above average variable cost are anticompetitive if they coincide with an exclusionary policy. The *Tetra Pak II*, *Irish Sugar*, and *Hilti* cases can only be explained on the account of the various practices to drive competitors off the market (tying sales, target rebates, exclusive dealing contracts), coupled with a price reduction that *would weigh minimally on the dominant firm*. These practices incidental to the predation plan are to be regarded as abusive in the first place, in the sense that they are to represent a barrier to entry and cannot be regarded as competition on the merits⁸⁸⁷.

These practices, on top of the low price, may provide evidence of the exclusionary plan; most of all, it would a cumulative pattern evidence of the intent to eliminate rival *per se*, as under the second *AKZO* rule (prices above average variable costs but below average

⁸⁸⁵ *France Télécom v. Commission of the European Communities*, 02.04.2009, Case C-202/07 P [2009], ECR I-2369, para. 112

⁸⁸⁶ Compare *supra*, para. 9.2

⁸⁸⁷ See *supra* the analysis of all price discriminatory practices, para. 7.3

total cost are considered predatory “if they are part of a plan to eliminate rivals”) without actually having to provide circumstantial evidence of the intent⁸⁸⁸. That is also consistent with the wording of the *AKZO* case –“part of a plan”-, and with the fact that firms that are profit-maximizing aim at eliminating rivals by means of price discrimination.

With regard to price cuts below average variable cost, there are a few defenses available to the defendant⁸⁸⁹:

- 1) The company can show that it did not know that its price was unlawful and corrected it as soon as it found out⁸⁹⁰;
- 2) The dominant firm may launch a product in a new market and the first sales, whatever the price charged, will not cover the costs incurred. Else, no companies will not be able to break into any new market;
- 3) The low price constitutes a short term trial offer to attract more clientele;
- 4) The product might be phased out and small revenues to recover fixed costs are better than no recovery at all.

Defenses for pricing above average variable costs but below average total cost are available when such a conduct is not coupled with the intent to exclude rivals⁸⁹¹.

- 1) The dominant firm should be allowed to respond to competitive offers, by undercutting rivals price even below the average variable cost threshold;
- 2) If demand shrinks, the dominant firm should be allowed to reduce its price for cash flow purposes;
- 3) A dominant firm with high capital costs should be allowed to sell at reduced price until it reaches a certain scale of operations and a minimum number of customers in a network industry;
- 4) If a dominant firm is to bear high storage costs, it should be allowed to sell below average total cost to make some saving.

9.4 The Commission’s Enforcement Communication

⁸⁸⁸ Even though article 102 is interpreted objectively, without reference to the subjective anticompetitive intent, some authors have argued that the unlawful element of the price-cut above cost is the subjective intent to injure or eliminate a rival. Therefore, the analysis of the predatory nature of the price cut would shift from the discriminatory effects of the predator’s conduct to the its discriminatory intent. Compare P. Andrews, *Is Meeting Competition a Defense to Predatory Pricing? – The Irish Sugar Decision Suggests a New Approach*, 19 *European Competition Law Review*, p. 53 (1998)

⁸⁸⁹ J. Temple Lang & R. O’Donoghue, *Defining Legitimate Competition, How to Clarify Pricing Abuses under Article 82*, 26 *Fordham Int. L. J.* 145 (2003)

⁸⁹⁰ *Ibidem*; Compare *General Motors Continental NV v. Commission of the European Communities*, 13.11.1975, Case 26/75, [1975] E.C.R. 1367, paras. 20-21

⁸⁹¹ *Ibidem*

Economic thinking of predation has heavily criticized EC case law on predation on the grounds of the lack of an adequate measure of cost⁸⁹², of the difficulties underlying the identification of predatory intent⁸⁹³, and on the reluctance of making the possibility of recoupment a precondition to sanction a pricing policy as predatory⁸⁹⁴.

As regards the lack of a thorough analysis of costs amounting to predation, the main criticism has been addressed to the refusal of a safe harbor for above average variable cost (*Compagnie Maritime Belge*), on the one hand, and to the acknowledgement of an above cost predation qualified by other circumstances, although such prices rarely stand as exclusionary, on the other hand⁸⁹⁵. Moreover, a price cut below average variable cost is generally held abusive, even if firms can price cut below such threshold for various reasons different from predation⁸⁹⁶.

With regard to the intent element, direct identification of the predatory intent raises problems, owing to the inherent profit-maximizing nature of the firm, and to the fact that price competition is the most straightforward way to generate profits by eliminating competitors. The Commission has addressed this issue and affirmed that “it does not consider an intention even by a dominant firm to prevail over its rivals as unlawful”⁸⁹⁷.

Depending on the intent, a price cutting of the dominant firm may either encourage competition, since it will bring competitors to lower their price -or to exit the market because of their inefficiency-, or fetter competition, because it will be targeted to the predation of the market. Evidence of direct predatory intent can be absent in the documents or the statements of the case, and Courts often are to resort to indirect inference to show that the price-cutting is predatory.

The Commission has addressed the above criticism in the “the Enforcement Communication” on December 2008⁸⁹⁸, in which an

⁸⁹² W.J. Baumol, *Predation and the Logic of the Average Variable Cost Test*, 39 *Journal of Law and Economics*, p. 57 (1996)

⁸⁹³ R. O'Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 250-251

⁸⁹⁴ R.J. Van Der Bergh & P.D. Camesasca, *European Competition Law and Economics: A Comparative Perspective*, 2nd ed., London, 2006, p. 299

⁸⁹⁵ E. Elhauge, *Why Above-Cost Price Cuts to Drive out Entrants are not Predatory – and the Implications for Defining Costs and Market Power*, 112 *Yale Law Journal* 727 (2003)

⁸⁹⁶ R. O'Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 283

⁸⁹⁷ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 81

⁸⁹⁸ *Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02

attempt has been made to refine the general *AKZO* rules on predation by means of a more effect-based approach, and to tackle the issue of predation in conjunction with other aspects of unilateral abusive conduct, such as anticompetitive foreclosure,⁸⁹⁹ price based exclusionary conduct⁹⁰⁰, and objective justifications⁹⁰¹. In short, the predation scheme the Commission seeks to sanction concerns the hypothesis in which a dominant firm cuts prices and foregoes profits in the short run with a view to foreclosing one or more competitors and, therefore, causing a competitive harm. Apart from that, the Commission has pointed out circumstances in which the sacrifice of a short run profit is not conducive to foreclosure of competition, but is justified by a legitimate business goal.

9.4.1 The relevance of Average Avoidable Costs

In terms of sacrifice, the Commission has re-defined the price cut relevant to the scopes of article 102, as the one that causes losses that could have been avoided. The Commission benchmark to assess if a price is predatory is therefore the Average Avoidable Costs (AAC), instead of the Average Variable Costs, as in the *AKZO* case⁹⁰².

Compared with average variable costs, average avoidable costs include certain product-specific fixed costs, which are attributable to the single sales and are not caught by the *AKZO* rule. Thus, some authors have argued that, should this benchmark be adhered to, Courts will be stricter in policing predation, since more cases will infringe the sacrifice-criterion⁹⁰³.

The AAC criterion is only the starting point of the analysis, since pricing above cost can be predatory when it implies a sacrifice that led to net revenues lower than what could have been expected to

⁸⁹⁹ *Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, paras. 19-22

⁹⁰⁰ *Ibidem*, paras. 23-27

⁹⁰¹ *Ibidem*, paras. 28-31

⁹⁰² *Ibidem*, para. 64. The Commission applied the Average Avoidable Cost in the *Wanadoo* case, where it regarded certain product-specific fixed costs, such as marketing costs, as variable (i.e. avoidable) costs, considering the peculiarities of the market for Internet services, which allowed the attribution of marketing costs to single sales. The marketing costs could have been avoided had the defendant not offered its services, *Wanadoo Interactive*, Commission Decision, 16.07.2003, COMP/38.233, para 62

⁹⁰³ W. Wurmnest, *Predatory Pricing: from Cost-Price Comparison to Post-Chicago thinking*, in J. Basedow & W. Wurmnest (eds.) *Structures and Effects in EU Competition Law – Studies on Exclusionary Conduct and State Aid*, Kluwer law International, p.122

result out of a reasonable alternative conduct⁹⁰⁴. It follows that the Commission does not fully embrace any economic cost concept that could systematically define conducts as anticompetitive, but rather resorts to a rule of reason, based on the unreasonableness of the sacrifice of the dominant firm⁹⁰⁵, or, in other terms, on the “avoidability” of the sacrifice.

This could transform article 102 into a tool to police business decisions that did not end up being profitable maximizing, and caused a loss that a rational actor could have avoided⁹⁰⁶, on the one hand, and the judicial control as a control of the opportuneness of a pricing decision, rather than on the legitimacy of it, on the other hand.

The Commission strives to overcome this possible impasse by taking into account only economically rational and predictable alternatives that, considering the realities of the market at stake, can realistically constitute a profitable business scheme for the dominant undertaking⁹⁰⁷. In order to assess that, it would be sufficient to rely on documents (where available) showing plans to forego a profit in order to exclude a competitor, to prevent the entry of another firm in the market, or to pre-empt the emergence of a market⁹⁰⁸.

The anticompetitive foreclosure of competitors that are as efficient as the dominant undertaking” is the second mandating requirement to declare a conduct predatory⁹⁰⁹. Judge Posner elaborated the “equally efficient competitor test”, departing from the inquiry whether the dominant firm itself would be able to survive the exclusionary conduct in the event it were the target. The General Court has adopted this test, to the extent that the assessment is solely based on the measurement of the dominant firm’s cost, and not on the subjective intent of eliminating rivals.

⁹⁰⁴ *Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, para. 64

⁹⁰⁵ D. Howarth, *Pricing Abuses – Unfair and Predatory Pricing under Article 82 EC: From Cost-price Comparisons to the Search for Strategic Standards*, in G. Amato & C.D. Ehlermann (eds.), *EC Competition Law: A Critical Assessment*, Oxford, (2007), p. 259

⁹⁰⁶ H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, Cambridge (Massachusetts), p. 166

⁹⁰⁷ *Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, para. 65

⁹⁰⁸ *Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, para. 66

⁹⁰⁹ *Ibidem*, para. 20

In the Enforcement Communication, the benchmark to evaluate whether a hypothetical competitor is able to compete with the dominant firm is whether the dominant undertaking has priced its products or services below LRAIC⁹¹⁰.

The Commission seems to overcome the second *AKZO* rule, for which pricing below average variable costs (AVC) is always abusive, without the need to examine the market effects⁹¹¹, and pricing above average variable cost, but below average total costs (ATC) may be presumed abusive when it is part of a strategy to eliminate rivals. ATC includes all fixed and variable costs, whereas LRAIC is by definition the “cost of producing the predatory increment of output whenever such costs [are] incurred”⁹¹².

Unlike average variable cost, it includes all product-specific fixed costs, “even if those costs were sunk before the period of predatory pricing”⁹¹³. That is, long-run average incremental cost by definition includes both recoverable and sunk fixed costs, making it traditionally higher than ATC. This would make it more difficult to prove the anticompetitive foreclosure than under the *AKZO* rule.

9.4.2 The Commission’s understanding of the recoupment requirement

As regards the recoupment, the Enforcement Communication rejects the idea that it has to be proved strictly, but acknowledges in general that consumers are only harmed if the firm is expected to benefit from the sacrifice, by having a stronger market power once predation is completed⁹¹⁴. More specifically, in order to prove whether the predatory strategy leads to recoupment – and to consumer harm-, it is not necessary to prove that the dominant firm has a concrete possibility to charge supra-competitive prices

⁹¹⁰ *Ibidem*, para. 67

⁹¹¹ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 71.

⁹¹² P. Bolton, J.F. Brodley & M. H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239, 2250 (2000) Long-run average incremental cost has been suggested as the appropriate cost measure in predation claims involving intellectual property; in this case a long-run cost measure is the only one that can account of the research and development cost, which are not encompassed in AVC and AAC. Moreover, after the product is developed and launched, AVC and AAC equal zero. In computer software, for example, once the software product has been developed “the short-run incremental cost of a program downloaded from the Internet is nil”.

⁹¹³ D.W. Carlton & J.M. Perloff, *Modern Industrial Organization* 4th ed., Prentice Hall, 2005, p. 785.

⁹¹⁴ *Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, para. 70

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in the post-predation phase, but it is sufficient to show that a predatory strategy is likely to lead to a “strong foreclosure effect”, through the analysis of structural factors and strategic considerations indicating that predation is a rational strategy to exclude incumbent rivals or deter entry⁹¹⁵.

These factors are the *acquis* of the Commission’s practice and case law and, with regard to the structural factors, are in turn:

- 1) The excess capacity of the dominant firm compared to its competitors’;
- 2) The existence of high entry barriers in the market;
- 3) The extension of the price-cutting and impact of such a strategy on the competitors’ course of business⁹¹⁶.

With regard to the strategic considerations, the Enforcement Communication avails itself of some insight of recent models of predation elaborated by post-Chicago thinking, and in particular by economic game theory, usually referred to as reputation, signal jamming and financial predation⁹¹⁷.

- 1) If the effects of the price-cutting are likely to be felt multiple markets or in successive periods of time, the dominant firm might be seeking a reputation for predatory conduct, whereby it could dampen competition and deter future entries⁹¹⁸.
- 2) If the dominant firm is better informed on costs, or can distort market signals about profitability so as to influence the expectations of potential entrants and therefore deter entry⁹¹⁹.
- 3) The predation scheme can also affect the access of the targeted firms to external financing, and undermine their performance by foreclosing their economic viability and their access to credit⁹²⁰.

⁹¹⁵ *Ibidem*, para. 71

⁹¹⁶ *Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, paras. 71-72

⁹¹⁷ J. Tirole, *The Theory of Industrial Organization*, MIT Press, Cambridge, 1992, p. 372; R. O’Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 243

⁹¹⁸ *Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, para. 68. It appears that in the *Tetra Pak II* case the General Court has applied the reputation predation criterion to censor the conduct of the dominant firm, which used different aggressive pricing strategies across different but related geographic and product markets in order to affect the interstate competition by means of its reputation. *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951, para. 27. Compare *supra* note n. 202

⁹¹⁹ *ibidem*.

⁹²⁰ *Communication from the Commission - Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, para. 73

With regard to the third structural element of predation, the analysis of the objective justifications for the dominant firm's conducts overlaps to a substantial extent with the assessment of both the sacrifice and the anticompetitive foreclosure. The Enforcement Communication encompasses only one type of exculpation, i.e. the efficiency defense⁹²¹. A price may be below cost, yet not exclusionary, when the market is structured in a way that efficiencies can only be achieved in the long run by means of large upfront investments on the one hand, and implies sizeable start-up costs in order to create economies of scale that will reduce costs over time, on the other hand. This defense is applied very strictly, since the Commission purports that low price strategies put in practice by dominant firms are rarely conducive to efficiency gains, but are more frequently a symptom of the creation or consolidation of a monopoly⁹²².

Owing to the above, by no means can this defense substantiate either the creation or consolidation of a monopoly position by the dominant firm. Therefore, in terms of balancing freedom to cut prices to gain efficiencies, on the one hand, with the strive to consolidate a monopolistic position by virtue of the same course of conduct, on the other hand, the protection of the competitive process will prevail, and competition law will intervene on the strong position of the dominant firm, not leaving room for efficiency arguments⁹²³.

A last corollary to this ground of exculpation is that when price-cut strategies leading to anticompetitive foreclosure are limited in time, they will be justified⁹²⁴. It appears that the Commission chose a more nuanced approach than the blunt rule of the *Tetra Pak II*

⁹²¹ *Ibidem*, paras. 130-133

⁹²² *Ibidem*, para. 74

⁹²³ Scholars have argued that the normative prevalence of the need to protect the competitive process by thwarting strong monopoly positions is a direct consequence of the fact that, despite the official parlance that the Enforcement Communication follows a consumer welfare approach (para. 30), the competitive between firms is the essential driver of economic efficiency. W. Wurmnest, *Predatory Pricing: from Cost-Price Comparison to Post-Chicago thinking*, in J. Basedow & W. Wurmnest (eds.) *Structures and Effects in EU Competition Law – Studies on Exclusionary Conduct and State Aid*, Kluwer law International, p.129. In spite of that, the Enforcement Communication does not indicate the threshold when a position close to monopoly is reached. Conversely the DG *Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, December 2005, para. 92 establishes that when the market share of the dominant firm exceeds 75%, the competitive pressure from the other competitors can no longer bar the dominant firm from using indiscriminately its market power

⁹²⁴ *Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, published on the Official Journal, OJ 24.02.2007, 2009/C 45/02, para. 130-133

case, according to which prices below average variable costs are always abusive.

9.5 The law of predation in a nutshell

All things considered, the EC case-law principles regarding predation can be epitomized as follows:

1. Prices below average avoidable costs will generally be regarded as abusive, no evidence of a plan to eliminate competition being required.
2. Prices above average avoidable costs but below average total costs will be regarded as abusive if they are found to be part of a plan to eliminate one or more competitors from the market.
3. It is not necessary to show that competitors have exited the market in order to prove that there has been abusive conduct on a market.
4. It is not necessary to show that a dominant undertaking would have a reasonable prospect of recouping its losses in order for the Commission to prove predatory pricing. This is a breaking point between EC law and US law, in which evidence of recoupment is required.
5. In general, the main ground of exculpation the Commission's Enforcement Communication considers is that predatory scheme will create efficiencies that outweigh the foreclosure effects on competition; moreover, the Commission will consider the claim that low pricing enables economies of scale.
6. Dominant undertakings have no absolute right to align their prices with those of their competitors if such price alignment results in the dominant undertaking engaging in abusive conduct.

9.6 Economic thinking of predation

Leading economic antitrust scholarship agrees that all pricing above average variable cost should be lawful, on the account of the fact that at that threshold firms that are equally or more efficient than the dominant one should be able to compete on the merits. Firms unable to sustain competition on above average variable cost are inefficient, thus their elimination would cause no net welfare loss to the detriment of consumers⁹²⁵

A limited number of scholars is of the opinion that there are cases in which a price can be predatory if the dominant firm prices

⁹²⁵ R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, p. 188: "A seller may want to destroy a competitor, but if the only method used is underselling him by virtue of having lower costs there is no rational antitrust objection to the seller's conduct". Compare P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 706 (1975): "The low price at or above average cost is competition on the merits and excludes only less efficient rivals".

above its own costs but below those of the rival⁹²⁶. The majority of antitrust scholars agree that the economic cost of predation is better captured by the average avoidable cost (AAC), because this threshold provides a better insight of the alternative for the predated firm between continuing to produce or exiting the market. In fact, unlike average variable cost, AAC do not require separating fixed costs from variable costs, nor allocating common costs, which is often arbitrary: whether costs are fixed or variable largely depends on the time frame in which they are taken into account, and in the long run all costs become variable⁹²⁷. Economists also agree that there is no cost threshold above which pricing is legal for it: there is no cost measurement standing as a competitive safe haven, since there cannot be a precise measurement of marginal costs in competition litigation, and all the proxies usually adopted for marginal cost (AVC, AAC, LRAIC) can indicate predation where a pure marginal cost investigation would show the opposite⁹²⁸. Furthermore, an above cost safe haven could only be justified to avoid “false negatives”, namely that pro-competitive practices be condemned⁹²⁹. Rather, price-cost comparisons are to be complemented with the analysis of market realities and of the strategic thinking underlying the conduct⁹³⁰: in that respect, considering reputation

⁹²⁶ A.S. Edlin, *Stopping Above Cost Predatory Pricing*, 111 Yale L.J. 941 (2002). Compare Chapter I, para. 9.2.1

⁹²⁷ L.A. Sullivan & W.S. Grimes, *The Law of Antitrust: An Integrated Handbook*, 2nd ed. St. Paul (Minnesota), p. 167

⁹²⁸ O.E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977)

⁹²⁹ Report by the Economic Advisory Group on Competition Policy, “*An Economic Approach to Article 82*”, July 2005, p.7. American legal and economic scholarship speaks in favor of sustaining an above cost safe haven, owing to the fact that the enforcement of the law lies primarily in the hands of private parties, who suffer directly from a low pricing strategy. The absence of a cost threshold -together with the lack of a definite dominance threshold, with the plaintiff-friendly structure of litigation, and with the possibility of granting treble damages-, may lead to interfere with pro-competitive goals of competition law; therefore, the need for a clear-cut rule is more urgent. Compare *Barry Wright Corp. v ITT Grinnell Corp.*, 724 F.2, 227, 235-236 (1st Cir. 1983). Against the above cost safe haven A.S. Edlin, *Stopping Above Cost Predatory Pricing*, in 111Yale Law Journal 991, (2002). Contrariwise, in the European Union predation allegations are investigated by the Commission or by national authorities –the strengthening of private enforcement of competition law that the Commission has advocated for is still in an embryonic phase-; because the cases in which defendants are condemned for charging unduly low prices are traditionally few in number (the *Compagnie Maritime* and *Irish Sugar* cases see *supra*, note n. 290 *et seq*), the risk of chilling competition is not felt as high to sustain a safe harbor above a measurement of cost.

⁹³⁰ D. Howarth, *Pricing Abuses – Unfair and Predatory Pricing under Article 82 EC: From Cost-price Comparisons to the Search for Strategic Standards*, in G. Amato & C.D. Ehlermann (eds.), *EC Competition Law: A Critical Assessment*, Oxford, (2007),

effects and signal jamming can provide a better insight of whether the price-cut has a foreclosure effect, even though these scenarios are hard to prove in practice. For instance, the dominant firm may cut prices to distort the information about the cost of venturing in the market in order to keep a new entrant from learning about the actual business conditions; the price reduction can be above cost and stand as a normal response to potential competition in the market, yet cause foreclosure in the long run: the predatory scheme in this case is to be supported by strong evidence.

With regard to the foreclosure effect of the predatory conduct, the Commission has refined the AKZO rule that states that only prices capable of driving out competitors “which may be as efficient as the dominant firm”⁹³¹, by indicating that only pricing below LRAIC (long run average incremental costs) is likely to achieve this effect, because this test does not focus on the short-run profits, but tries to account of the profit maximization in the long run, by an estimation of the total cost of supplying the product or service, including the research, development and marketing of the product⁹³².

An eminent scholar has affirmed that the Commission’s approach is too narrow and might bring to an excessive restriction of competition, pointing out a major flaw, in that it focuses on the price/cost analysis without any reference to the market structures, in particular to whether the market is characterized by economies of scale or scope, or network effects. When monopolized market tend to exhibit these features, the dominant firm will produce at lower average costs than its rivals’ -by always producing in greater quantities than the latter-; therefore, practices that might not be capable of excluding an equally efficient competitor, would in fact exclude the only competitors that the dominant firm faces on the market⁹³³.

Moreover, the LRAIC threshold is of little practical value, for it is highly unlikely that a company would disclose all the information about its costs⁹³⁴.

With regard to the recoupment, the general economic take approves of the Commission’s approach, disregarding the strict recoupment test as an overriding requirement to affirm liability

p. 249; R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, p. 259

⁹³¹ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 72

⁹³² R. O’Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 269

⁹³³ H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, Cambridge (Massachusetts), p. 153

⁹³⁴ W. Wurmnest, *The Reform of Article 82 in the light of the Economic Approach*, in M.O. Mackenrodt, B. Conde Gallego & S. Enchelmaier (eds.), *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?*, Berlin, 2008, p. 18

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for predation. Two are the main arguments against a strict recoupment test:

- 1) Foreclosing a competitor might be beneficial even if not all the losses are recouped: if the competitor can avail itself of a better technology than the dominant firm, the latter might be better off driving the former off the market –and sustain some losses- than losing market share in the long run⁹³⁵.
- 2) It is too heavily anchored to the comparison of losses and gains on a market, disregarding the financial gains arising out of reputation effects from other markets. Thus, the recoupment. Recoupment can also take place across several markets whereby the firm can reap reputation rents.

Having that affirmed, the structural recoupment test appears to be more suitable to represent the second stage of the predation strategy. Following the approach that the ECJ had in the *France Télécom* case, factors whereby the possibility of recoupment can be inferred are some structural factors of the market, such as high barriers to entry, the excess capacity of the dominant firm, its market position *vis-à-vis* the competitor, and the increase of market shares during the predation phase⁹³⁶.

A last remark on the *Tetra Pak II* rule, and in particular on the AVC threshold, under which prices are always deemed predatory, can be made with regard to the business justifications for which modern firms price below AVC, AAC, LRAIC for a limited period of time: the acquiring of scale, the gaining of learning experience, the rise of consumer interest are all economic reasons to price below a certain measurement of cost generally considered

⁹³⁵ C.S. Hemphill, *The Role of Recoupment in Predatory Pricing Analyses*, 53 Stanford Law Review 1592, (2001)

⁹³⁶ *France Télécom v. Commission of the European Communities*, 02.04.2009, Case C-202/07 P [2009], ECR I-2369, para 110. The ECJ ruled that “it does not follow from the case-law of the Court that proof of the possibility of recoupment of losses suffered by [France Telecom], by an undertaking in a dominant position, of prices lower than a certain level of costs constitutes a necessary precondition to establishing that such a pricing policy is abusive. In particular, the Court has taken the opportunity to dispense with such proof in circumstances where the eliminatory intent of the undertaking at issue could be presumed in view of that undertaking's application of prices lower than average variable costs”. The ECJ noted that the fact that recouping losses is not a precondition to a finding of predatory pricing in EC law does not prevent the Commission from finding the possibility of recoupment (or the lack thereof) to be a relevant factor in assessing whether or not the conduct in question is abusive. In particular, in cases where prices are lower than AVC, recoupment may assist in excluding economic justifications other than the elimination of competition, and where prices are above AVC but below average total costs, it may assist in establishing a plan to eliminate competition.

P.L. Joskow & A.K. Klevorick, *A framework for Analyzing Predatory Pricing Policy*, 89 Yale Law Journal 245 *et seq.*, (1979)

predatory, and sustain losses in order to stay in the market in the long run.

Economic thinking regards the ECJ's approach in *Tetra Pak II* as too Manichean and too oblivious of those market conditions that may rebut the presumption of predation of the dominant firm, on the account of evidence of a legitimate business strategy.

This call for a more nuanced approach appears not to have gone unnoticed in the *France Télécom* case, where the Court has considered the AVC threshold as predatory only when qualified by circumstances, affirming that such a pricing strategy is to be "considered *prima facie* abusive inasmuch as in applying such prices, an undertaking in a dominant position is presumed to pursue no other economic objective save that of eliminating its competitors"⁹³⁷.

9.7 Final remarks on the EU law of predation

The more economic approach brings to reconsider the traditional take on predation without causing a drastic alteration of the enforcement policy. Modern industrial organization theory has shown that pure price/cost analysis is not always an effective means to distinguish vigorous competition from predation, when it is not supported by an observation of both the objective market conditions and the strategy in which the price cut positions itself.

The three-prong analysis proposed by the EU competition authorities (sacrifice-anticompetitive foreclosure-lack of an economic justification) can be re-read in light of a scrutiny of the circumstances, in a way to reject both the safe harbor of US antitrust law (prices above average total cost are considered legal *per se*) and the strict recoupment test, which also appears overriding in the US jurisprudence.

The stricter standard in the US enforcement of the law of predation is the result of the Courts endeavor to avoid false positives, and discourage temerarious allegations brought by private plaintiffs; conversely, the risk of an over-enforcement implied in the approach to law of predation in Europe might be counterbalanced by the factual absence of private enforcement of competition law and the reduced risk of false positives.

⁹³⁷ *France Télécom v. Commission of the European Communities*, 02.04.2009, Case C-202/07 P [2009], ECR I-2369, para 109

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PART II
COMPARISON AND
EXPLANATION

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CHAPTER III
COMPARISON AND
EXPLANATION OF THE TWO
MODELS

1. Introductory remarks; 1.1 Macro-comparison: common law and civil law attitudes; 1.2 Demarcating the boundaries of the comparative analysis; 1.2.1 The three macro areas of the analysis; 1.3 The rhetoric of the two models; 2. Market power and the relevant market; 2.1 The two-fold dimension of the relevant market; 2.1.1 The relevant product market in the US system; 2.1.2 The relevant product market in the EU system; 2.1.3 The relevant geographic market in the US system; 2.1.4 The relevant geographic market in the EU system; 2.4 The relevant market: a synopsis; 3. The role of market shares in the finding of monopoly or dominance; 3.1 Market shares in the US system; 3.2 Market shares in the EU system; 3.3 Market shares and other structural constraints – the impact of entry barriers; 3.4 Market shares and the relevance of behavioral constraints in the EU system; 3.5 Market shares and the relevance of network effects and economies of scale in the US system; 4. The treatment of anticompetitive conduct; 4.1 The Sherman Act and the early conservative approach: the rule of reason; 4.2 The “structuralist” approach and the *per se* illegality; 4.3 The “Chicago” conceptualization of the offense of monopolization; 4.4 The post-Chicago thinking of monopolization; 4.5 The early enforcement of the European law of abusive dominance; 4.6 the *Hoffmann-La Roche* and *Michelin* seminal outcomes – from “competition on the merits” to the “special responsibility” of the firm; 4.7 Main differences between monopolization and abuse of dominant position; 5. The role of the intent in the two systems; 6. The treatment of discriminatory pricing and the different understanding of the meaning of “competition” within the scope of the Robinson-Patman Act; 6.1 The Robinson-Patman Act and the distinction between primary line and secondary line abuses; 6.2 The reach of article 102(c) of the TFEU with respect to discrimination; 6.3 Other pricing abuses; 6.3.1 The treatment of other discounting practices – primary line and secondary line abuses; 7. The areas of critical divergence of the two systems; 7.1 The treatment of exploitation; 7.2 The absence of a law of exploitative abuses in the US system; 7.3 The European attitude towards exploitative abuses and the difficulties of identifying specific standards; 7.4 An attempt to reconcile the two antipodal positions; 8. The different treatment of predation; 8.1 The requirements for a *prima facie* claim of predation in US system; 8.2 The requirements for a *prima facie* claim of predation in EU system; 8.3 The relevance of recoupment; 8.4 The notion of competition underlying the different treatments of predation; 9. Refusal to deal and the doctrine of essential facilities; 9.1 The European approach; 9.2 The American approach; 9.3 Differences in the understanding of the term “essential”; 9.4 Objective justifications for denying

access to the essential facilities; 10. The offense of monopolization and the abuse of dominant position in a nutshell: open questions; 10.1 The *continuum* between individualism and altruism; 11. Exclusionary standards in light of the main doctrinal and judicial analytical tests: a syncretic approach; 11.1 The consumer harm test; 11.2 The profit-sacrifice test; 11.3 The no-economic sense test; 11.4 The equally efficient competitor test; 11.5 The balance between the gains and the harms of the unilateral conduct; 11.6 The “raising rivals’ costs (RRC)” test; 11.7 The inescapable tension between consumer protection and outcome efficiency; 12. Main policy considerations characterizing the two systems; 12.1 Fairness considerations; 12.2 Market Integration considerations; 13. A possible explanation: the dichotomy between consumerist and ordoliberal policies, or the dichotomy between an efficient and an open market; 13.1 Re-reading the claim: “We protect competition, you protect competitors”; 14. “Rhine” capitalism Vs “Anglo-American” capitalism.

1. Introductory remarks

The following chapter focuses on the comparison between the laws of unilateral conduct of a firm enjoying monopoly power or a dominant position, which have been successively described in the previous chapters. Moreover, some critical conclusions will be drawn with a view to account of the differences of the two models. The analysis will be centered on the main commonalities of the two models, on the one hand, and on the major divergences in the two approaches to the monopoly phenomenon, on the other hand, in search of a *tertium comparationis*, a common unity underlying each model, which can render “the comparison comparable”⁹³⁸, based on the assumption that “in law the only things that are comparable are those that which fulfill the same function”⁹³⁹.

Functionality is the departing point of every comparative science. With regard to the present essay, functionality is the awareness that there is a precise correspondence between the concepts of monopolization and of abuse of dominant position.

Having that affirmed, the comparison consists of bringing the analysis beyond the description of the two models, and of highlighting the legal and political stakes that are more peculiar to one model or that represent both, with the view to ambitiously identifying a minimum common multiple.

⁹³⁸ E. Orucu, *Methodology of comparative law* in *Elgar Encyclopedia of Comparative Law*, Cornwall, 2006, p. 422

⁹³⁹ K. Zweigert, H. Kotz, *An Introduction to Comparative Law*, Oxford, 1998, p. 34

1.1 Macro-comparison: common law and civil law attitudes

Thus, at a macro-comparative level, the two models place themselves on the same sociological, legal and economic standpoint, because they both tackle the same substantive issue, yet under the lens of two different legal families and attitudes.

The Common law attitude is best captured by the adversarial nature of the American model, in which the possibility of both private and public enforcement of monopolization laws makes appellate courts relatively accessible to market players; moreover, the possibility of awarding treble damages in the event of a finding of monopolization makes the enforcement of the Sherman Act slightly conservative, also on the grounds of the *vis expansiva* of false positives.

Conversely, the Civil law attitude is conveyed by the more centralized and administrative features of the European model, in which private enforcement of antitrust law is virtually absent and the European Commission plays the main role in the ascertainment of abusive dominance, owing to the lack of a standing for private bodies to sue at a EU level⁹⁴⁰.

Furthermore, the two above referred attitudes can be emphasized with respect to the substantial treatment of the relevant conduct, whereby the EU model is marked by a *per se* approach and favors the singling-out of proscribed behaviors, whereas the US model shifts towards a *rule of reason*, considering the specific circumstances of each case, particularly in relation to any defenses that may arise. The firm's behavior is relevant when it can reasonably provoke an injury to competition.

The EU treatment of abusive dominance is more administrative and straightforward; the Commission investigates and takes action backed by detailed releases and the delegation of appropriate conduct⁹⁴¹. Conversely, in the US the absence of lists of unlawful acts makes the system more suited to adapting to changing circumstances and to re-interpret entrenched doctrines⁹⁴².

Despite this difference in terms of attitudes, it should be noticed that the judicial formant plays a predominant role in both models,

⁹⁴⁰ The Commission is empowered by Regulation 01/2003 (see *infra*, para 8.3, note n. 130, for an in-depth analysis of both the Regulation and of the powers of the Commission). The Regulation confers the Commission the power to issue structural, behavioral and deterrence remedies. Any Commission decision is appealable to the General Court (the previous Court of First Instance) and the European Court of Justice.

⁹⁴¹ D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, p. 358

⁹⁴² K. Abutbul, *The US and EU approaches to Competition Law – Convergent or Divergent Paths?*, 17 Colum. J. Eur. L. 101 123 (2010)

since the scarcity of the two normative provisions lends itself to be an invitation to the judge to develop a legal framework for the treatment of unilateral abusive practices of firms with market power. In that respect, the role of the judge and of the precedent is more archetypal to the Common law than to the Civil law model.

At a political level, it can be affirmed at first blush that the values of American antitrust law and of European Competition law are similar, in that both models aspire to conduct investigations in such a manner that is more grounded on economic reasoning. Leaving momentarily aside the ongoing debate on whether American antitrust law protects competition in terms of consumer welfare, whereas European competition law protects competitors⁹⁴³, it can be affirmed that the possibility of private standing remains a strong protective force for market players and consumers, which does not characterize the European model. In the US, private enforcement of antitrust law is prevalent than public enforcement compared to the EU (where it is still at an embryonic stage), which helps explain the reluctance of government agencies in intervening in litigation or in directly enforcing the law.

Therefore, the protective rationale rests on a more radical and ostensible call for incentivizing SMEs and consumer considerations, as a stated goal of EU competition law⁹⁴⁴. Accordingly, both systems undeniably afford protection to market players and promote social welfare; however, they operate in two different manners, granting “procedural” protection as regards the US, and “political” protection as regards the EU⁹⁴⁵.

The philosophical underpinning of the two legislations is also different: in the US, it is believed that market forces can self correct market inefficiencies better than the government intervention, and that an excessive intrusion of the latter in economic matters could actually chill competition. This attitude is material with the traditional mercantile inclination of Common law systems, which tend to abstain from a regulation of economic transaction, and to intervene solely against market failures. Thus, the approach of the Courts in the enforcement of § 2 is less interventionist, also on the grounds of the fact that the consequence for an antitrust violation pursuant to § 2 can be much more onerous for the defendant, since Courts can award treble

⁹⁴³ With regard to the main policy considerations inspiring the two provisions at issue, see *infra*, para 12

⁹⁴⁴ See *infra*, para. 12.2

⁹⁴⁵ The political protective concerns of the EU system do not refer to the political process of the European Union, but rather relate to the role of the Commission, as part of the overall development of EU competition law, in the development and implementation of a policy on the application of EU competition law in keeping with the treaties.

damages (generally amounting to three times the actual damages), unlike the EU Courts that can only award single damages.

The more regulatory approach of the EU is also justified by the nature itself of the Union, a confederation of States, each one with national interest that might justify some distortions of competition, such as state monopolies, or the remainder of the central state control over the economy of some newly entrants, former member States of the Eastern block.

1.2 Demarcating the boundaries of the comparative analysis

Following the structure of the previous chapters, the comparison will regard the hypothesis of monopolization as under § 2 of the Sherman Act and the hypothesis of abuse of dominant position pursuant to article 102 of the Treaty on the Functioning of the European Union.

Section 2 of the Sherman Act provides that “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...”. Article 102 rules that “any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member States. It then provides several examples of types of abuse.

These provisions have much in common, being both invitations to courts and competition authorities to develop a body of rules governing the conduct of the dominant firm. Section 2 of the Sherman Act, however, appears to be a remarkably broad invitation, not giving any definition of the substance of monopoly, hence leaving to courts the development of a notion of monopolization, in accordance with the remedy in turn elaborated for the claim at bar.

Conversely, article 102 spells out a detailed list –yet not exhaustive- of the proscribed abuses, thereby leaving less room for the judicial development of the law of unilateral conduct of the firm. From a substantive perspective, while article 102 sanctions the exploitation of a dominant position over a market, not the mere possession of it, § 2 sanctions the mere conduct that creates or attempts to create a monopoly, regardless of a prior finding of a dominant position. Dominance is a mere presumption that certain conducts seek to eliminate rivals.

In spite of this theoretical difference, the development of both provisions has been predominantly left to case law. In this respect, the American experience is illuminating, having begun much earlier than the European venture. The Sherman Act was enacted in 1890, giving more than 100 years of case law interpreting it.

Instead, the case law on Article 102 goes back to the early 1970s⁹⁴⁶.

1.2.1 The three macro areas of the analysis

The analysis of both the act of monopolizing and of the abuse of dominant position has been divided into three macro-areas parallel to the three main subdivisions of monopolization or abusive dominance claims, and in turn concerning the market power and the market dimension relevant to antitrust law -in the twofold perspective of the product and the geographic market-, the market share the firm is to detain to be deemed dominant, and the anticompetitive conduct which Courts found at odds with § 2 of the Sherman Act, and with Article 102 of the Treaty on the Functioning of European Union. As a corollary to the structural elements, a brief comparison of the role of intent in the two systems will follow.

The European concept of discriminatory abuse will also be compared with its American functional equivalent, namely the prohibition of price discrimination pursuant to § 2(a) of the Robinson-Patman Act. It will be argued that the American abuse of price discrimination is situated outside of the law of monopolization, and does not require a monopolistic position on the market to be applied. A parallel will be traced between the other main European primary-line pricing abuses and the interpretation of primary line abuses in the US system.

The comparison of the relevant exclusionary conducts will be drawn with respect to the main economic analytical tests that have been developed by both courts and scholars. The linking of the exclusionary standards to meta-legal tests will show the tension between the achievement of market efficiency and the protection of consumers' interests, on the one hand, and the inescapable economic foundation of the laws of monopoly and abusive dominance, on the other hand.

After the comparison of the structural elements, attention will be drawn to the three parts of the law of the two systems that have revealed a significant degree of divergence, in turn the treatment of exploitative abuses, of predation and of refusals to deal.

1.3 The rhetoric of the two models

Following the comparative analysis, a reflection on the different policy considerations animating the two systems will be outlined, in order to show how the fairness and the market integration considerations that inform the EU are extraneous to the US system, which is solely characterized by the consideration for consumer welfare, or in other terms by the increase of the wealth of the nation. It will be argued that the different policy

⁹⁴⁶ See *supra*, Chapter II, introductory remarks.

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considerations of the two systems reflect opposite rethorical formal modes for deciding substantive issues of private law, ranging according to Professor Duncan Kennedy from an “individualistic” attitude, which favors self-reliance, namely the conviction that someone is entitled to enjoy the benefits of his effort without having to sacrifice them to the interest of others, as opposed to an “altruistic” attitude, which favors solidarity, even when this is exposed to the possibility of non-reciprocity, and enjoins individuals “to make sacrifices, to share, and to be merciful”⁹⁴⁷.

The common view is that law is the eminent domain of individualism, and private legal justice entails the respect for rights, not the performance of altruistic duties. The individualistic slant of law entails the clear application of neutral rules, in a way to allow individuals to weigh their gains and losses in deciding what to do. However, legal institution can also fit “into the altruistic mold”⁹⁴⁸, because virtually all the rules of a given legal regime impose to a certain extent to regard for the interests of the others, which would not be considered if there were no rules.

The concepts of individualism/altruism are complementary, not conflicting, as they capture the “*continuum*” between two ideas of the organization of society⁹⁴⁹.

According to Kennedy, the substantive dichotomy of individualism and altruism manifests itself in the debate about formal private law rules. In terms of formal rules, the conceptualization of individualism is the idea of law as a rigid body of neutral rules that define a legal order based on freedom and property rights, in order to make the intervention of those who enforce the rules as less discretionary as possible.

The conceptualization of altruism is the preference for equitable standards of “reasonable understanding”, producing *ad hoc* decisions, along with the discredit for the idea that a legal order is composed of rules that judges merely apply.

Interestingly enough, Kennedy manages to recollect the rethorical and formal dichotomy in the economic discourse, arguing that the

⁹⁴⁷ D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1717 (1976). Three are the main altruistic duties: first, there exists between parties a sense of communal involvement or solidarity. Second, the duty of solidarity is justified by a sense of moral virtue in the conduct by one party and another. Third, there is a correspondence between sacrifice and the securing of a benefit in relation to the intensity of the sacrifice itself demanded by altruism.

⁹⁴⁸ D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1719 (1976) Tort law is a realm of the law in which some degree of altruism is enforced, because the interest of the injured party must be taken into account by the tortfeasor, who cannot rely on the balance between his gain and losses in deciding what to do.

⁹⁴⁹ D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1720 (1976)

fundamental premise of “economic individualism is that people will create and share out among themselves more wealth if the state refuses either to direct them to work or to force them to share”⁹⁵⁰; thus, the economic rationale of individualism is the guarantee of “rights” through non-intervention, or in other terms the achievement of consumer welfare through *laissez faire*.

Contrariwise, the foundation of economic altruism is the attack on *lassaiz faire*, on the one hand, and the refusal of the idea that those who enforce the rules are not accountable for the allocation of resources that their outcomes produce, but they sometimes enforce their substantive values in particular cases, on the other hand.

More specifically, altruists think that judges have been enforcing their economic biases, and thus challenge the assumption that interferences with the “free market” would make everyone worse off⁹⁵¹, by arguing that no single theory can predict the effects of legal intervention in the economy. The judge must take responsibility for affecting the balance of economic powers by choosing in favor of one side and to the disadvantage of the other side, without paralyzing private economic energies.

In other terms, the legal order should move to regulate “the public interest”, also by virtue of paternalist instruments –such as the enforcement of protective policies-, rather than relying on the assumption that economic actors should never be subject to political restraints or altruistic interferences. In the altruistic view, the normative notion of what is “right” is not construed on strict rules reflecting the abstraction of the concepts of freedom and property, but on standards through which substantive values or purposes of the community.

In this chapter, the dichotomy individualism-rules Vs altruism-standards individual will be utilized to generalize about what form best suits the nature of American antitrust law, on the one hand, and European competition law, on the other hand. It will be argued that the individualist slant of the American system relies on applying rules, whereas the altruist approach of the European system casts rules as standards reflecting more communitarian, regulatory, and –sometimes- paternalist stakes.

The persistence of these attitudes reflects a conflict about the understanding of society and economy in the two models. American individualism is sometimes referred to as “liberalism”, a social order in which players have total discretion to pursue their goals without worrying about the impact of their conduct on others. European altruist justice is sometimes referred to as

⁹⁵⁰ D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1742 (1976)

⁹⁵¹ D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1749 (1976)

“collectivism”, a social order in which ends are shared and in the process of development.

The altruist European judge applies the rules by looking at the results, and he will be driven by both fairness and market integration consideration, as essential parts of the enforcement of article 102. Conversely, the individualist American judge regards legal certainty as a means to bar individuals from accomplishing antisocial ends, in particular when it looks at outcome efficiency as the only stance through which consumer welfare can be maximized.

2. Market power and the relevant market

The American Supreme Court has offered a concise definition of market power in *US v. Du Pont (the Cellophane case – 1956)*, as power to prices or to exclude competition. This notion is vague and does not give guidance as to the actual way of exerting market power. Hence, Economic analysis of law has expanded the formula maintaining that market power consists of a power to set prices above marginal cost, namely a power to raise prices above competitive level without incurring in losses of sales that would outweigh the benefits of the higher price. The monopolist has in fact power to raise the price for a product, thereby causing a loss in consumer welfare. The acquisition or maintenance of monopoly power, namely the action of monopolizing, violates § 2 of the Sherman Act.

Conversely, both the European Treaties and Courts have conceptualized the notion of monopoly as power to price, and adapted it to the rejection of a *per se* prohibition of monopoly. The mere acquisition of dominance is not unlawful for it, because the dominant firm is required to set price “as if” it were operating in a competitive regime⁹⁵²; such dominance infringes article 102 of the TFEU when it is used to dampen competition on the merits.

2.1 The two-fold dimension of the relevant market

In both the US and the European system, the segment of market relevant to the reach of the law of exclusionary unilateral conduct has a twofold dimension, a product and a geographic one. To put it better, the “product market” includes the group of products with which the dominant firm’s product or service effectively competes, whereas the “geographic market” entails the physical area within which the effects of the monopolizing conduct are felt. Most of the case law concerning the offense of monopolization and of abuse of dominant position departs from the analysis of market power in the aforesaid twofold dimension⁹⁵³.

⁹⁵² The approach clearly dates back to the ordo-liberal origins of article 102. See chapter II, para. 1.

⁹⁵³ T.G. Krattenmaker et al., *Airlie House Conference on the Antitrust Alternative*:

2.1.1 The relevant product market in the US system

The first dimension of the market is the product dimension. In the American system, product market is identified by means of three major criteria, of which the first was elaborated by the courts, the second by the scholarship and the third by the Department of Justice and the Federal Trade Commission. The jurisprudential criterion is the “reasonable interchangeability” one, firstly drafted in the *Cellophane* case, and calls for an inclusion in the relevant market of all the products that are reasonably interchangeable according to their quality, their use and their price⁹⁵⁴.

The second criterion is based on the assessment of the demand cross-elasticity of two products, namely the degree to which the change of price/output of a product of a monopolized industry is likely to affect the change of price/output of the alternative commodity. If the change of price determines a shift of consumers to an alternative product, the market of the latter will be considered as relevant.

It has been seen that the cross-elasticity test might end up resulting in an “analytic trap”, insofar as the finding of high cross-elasticity of demand is considered as a *prima facie* proof of monopolization, or, put better, proof that the firm has monopolized the market by raising prices to supra-competitive levels, after which purchasers would divert their preference to fringe products. The cross-elasticity criterion nothing shows more than one of the conditions of the market, namely the responsiveness of purchasers to the charging of a monopoly price; it does not suffice in proving a claim of monopolization *per se*⁹⁵⁵.

The third “diversion” criterion was enshrined in the 1992 Department of Justice and the Federal Trade Commission Guidelines on horizontal mergers and focuses on the Small but Significant and Non-transitory increase in price (SNNIP) of 5% for at least 1 year: if the SSNIP as indicated were to lead a significant number of customers to purchase substitute products, it would not be profitable for the hypothetical monopolist, therefore the market definition should be expanded to include those substitute products that constrain the monopolist’s pricing⁹⁵⁶.

Monopoly Power and Market Power in Antitrust Law, 76 GEO. L.J. 241, 251-52 (1987);

⁹⁵⁴ U. S. v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 381, 76 S. Ct. 994, 999, 100 L. Ed. 1264 (1956)

⁹⁵⁵ Compare the “Cellophane fallacy” chapter I, para. 3.3. L. Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative*, 95 Harv. L. Rev., 1817, 1832-35 (1982). The author has affirmed that analysis of substitution possibilities with reference to prevailing market conditions... “presents a subtle, but most important, analytic trap”.

⁹⁵⁶ <http://www.ftc.gov/bc/docs/horizmer.shtm>

2.1.2 The relevant product market in the EU system

As well as in the US system, the two dimensions of the market relevant to the scope of article 102 of the Treaty on the Functioning of the European Union are the product and the geographic one. The Commission of the European Communities has published a Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law in 1997, in which it has deliberately adhered to the US approach in the market definition.

With regard to the product market, the Notice focuses on two main criteria: first, regard is to be paid to both demand and supply substitutability. The demand-side substitutability is the attitude of consumers to substitute reasonably interchangeable products in the event of a price increase of the product of the dominant firm. The supply-side substitutability branches from the competing firms of non-substitute products, which can produce and place on the market products that are demand-side substitutable of the product at stake, in the event of a price increase for the product of the dominant firm. Both demand and supply substitutability operate as competitive constraints for the dominant firm, which is barred from raising prices above competitive level, thereby shaping the contours of the product market as well.

The second criterion is the Hypothetical Monopolist test which, elaborated by the US Department of Justice and Federal Trade Commission Merger Guidelines⁹⁵⁷, under which a market is defined as a product or a group of products on which a hypothetical firm, constituting the sole producer and seller, could impose a small but significant and non-transitory increase in price (SSNIP). In other terms, the market is the narrowest area on which the hypothetical monopolist could exercise his market power, without consumers substitute the product at stake with any interchangeable products. More specifically, the HMT consists of a three-prong analysis, namely the identification of the “candidate” target market within, the effect of demand-substitution on the profitability of the SSNIP, and the effect of supply-substitution on the profitability of the SSNIP itself.

It can be noticed that the European demand-side substitutability is at all similar to the American reasonable interchangeability of products. Conversely, there is no mention of supply-side substitutability in the American literature regarding monopolization or case law and, as a result, American Courts do not focus on suppliers’ conduct in the narrowing of the product market, unlike the European Courts, which have notably applied the supply-side substitutability test in the *Continental Can* case,

⁹⁵⁷ First Issue on April 2nd 1992, second issue on April 8th 1997. Available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>

widening the product market on the account of the ease of the defendant's competitors to adapt their production and enter the latter's market.

The Hypothetical Monopolist Test entails both quantitative and qualitative inferences since, in order to evaluate the impact of demand substitution on the exercise of market power, Courts resort to both the SSNIP test, and to evidence based on product characteristics, consumer preferences and needs; likewise, in the assessment of supply-side substitution, Courts evaluate both quantitative elements, such as the costs of suppliers in switching production, the number of suppliers switching production, and the economic incentives in doing that, and qualitative evidence that a sufficiently large number of suppliers will readily respond to an increase in price of the dominant firm by "hopping in" the production of that good or service.

It can be noticed that the European Commission employs the American SSNIP diversion criterion as the departing point for the product-market analysis, but intertwines it with qualitative elements that allow Courts to consider the inherent peculiarities of products, regardless of economic data. Put better, the economic argument recedes when the product under investigation shows features that clearly isolate it from other goods or services. The *United Brands* case puts more emphasis on the characteristics of the product rather than on the quantitative analysis of consumer preference: in fact, the Court isolated the banana market as a separate one from the other fruits by virtue of the inherent characteristics of the fruit.

2.1.3 The relevant geographic market in the US system

The second dimension of the relevant market is the geographic one. Parallel to the product market, three criteria have been developed to narrow down the area in which market power is exerted. With regard to the first criterion, as a general rule of thumb Courts tend to identify the relevant market as the area in which the firm and its competitors sell their product and in which their customers buy without a ready access to an outside source of supply; that typically includes the whole of the US territory in the relevant geographic area (*Grinell*), for two reasons: Courts are reluctant to provide any incentive to create localized competition, on the one hand, and to pave the way to separate local litigations on the same issue, on the other hand. This second argument is a so-called floodgate argument: if more litigations were to rise around the same issue, the "flood" of superfluous claims would bring about high and untenable social costs. It goes without saying, however, that the purpose of the Sherman Act is to prevent undue restraints of interstate commerce; thus, the geographic market is to encompass at least two states of the

Union.

The second criterion elaborated by the scholarship is a “diversion” principle based on demand cross-elasticity: the relevant area is the one where market would be diverted if a relevant increase in price for the primary product or service took place. If cross elasticity is high, the relevant geographic market will encompass the areas in which the other suppliers operate⁹⁵⁸.

At any rate, there is no consensus among scholars as regards how to gauge transportation costs in the delineation of the geographic market. Some authors argue in favor of including them as an entry barrier, since have the effect of sheltering local producers from suffering losses in sale in the event they would raise prices⁹⁵⁹. This way, transportation costs will define a geographic market by excluding the entry into the market itself of either external competitors or of external “fringe” products, and therefore by giving the firm a power over the market that can be evaluated accordingly.

Other authors apply the diversion criterion without account of transportation costs, given the mere interest of local producers in setting prices for their product below the cost of external –or foreign- producers, in order to keep the latter out of the market⁹⁶⁰. The geographic frame of reference is therefore shaped by the tendency of local producers to make the entry of external producers unprofitable.

The existence of entry barriers –such as transportation costs- is irrelevant compared to the appraisal of whether an external product has overcome these logistic barriers and entered the domestic market, in a way to expand the geographic area and to erode the market dominance of the local producer. This approach allows to associate local markets on the account of the constant presence on the market for several years of local and external producers, and to include outputs of foreign sellers in the relevant market for American antitrust purposes, in a way to scale down some domestic monopolies.

The third criterion was drafted in the 1992 Department of Justice and the Federal Trade Commission Guidelines on horizontal mergers, and encompasses the region within which the firm selling the relevant product can profitably impose a small but significant and non-transitory increase in price, holding constant

⁹⁵⁸ P. Areeda & D.F Turner, *Antitrust Law*, volume 2, p. 533, (1978), K.G. Elzinga & T.F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 *Antitrust Bull.*, 45 (1973), W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 *Harv. L. Rev.* 963, (1981).

⁹⁵⁹ E.T. Sullivan, *Antitrust and its economic implications*, 5th ed., LexisNexis Publisher, Newark (NJ), p.28 (2008)

⁹⁶⁰ W.M. Landes & R.A. Posner, *Market Power in Antitrust Cases*, 94 *Harv. L. Rev.* 964, (1981)

the terms of sale for all products produced elsewhere⁹⁶¹.

2.1.4 The relevant geographic market in the EU system

As regards the geographic market, the first case-law criterion has been established in *Continental Can*, and is referred to as “homogeneity test”, pursuant to which the relevant area of the interstate Common Market is the one where objective conditions of competition applying to the product in question must be the same. This test is at all similar to the general rule of thumb applied by US Courts. One of the caveats of this approach is that the analysis might be perturbed by factors such as national borders, cultural/linguistic barriers, regulatory barriers and national preferences.

To overcome these limitations the Commission Notice on the relevant market has expanded the homogeneity parameter by focusing on the same constraints used to determine relevant product market, namely a) the demand-side substitutability, b) the supply-side substitutability and c) the function of future integration of the Common Market. The demand-side substitutability implies gathering evidence of whether products of companies located in different areas outside of the putative geographic market constitute a real alternative to the dominant firm’s product, with the result of enlarging the putative market to the areas where they operate. Supply-side substitutability can be used to verify whether suppliers outside of the putative area are able to enter the market in response to an increase in price for the product of the firm in question, including the weight of transportation costs in the definition of the relevant geographic area. Finally attention must be paid to the ongoing market integration process, and to whether it results in a widening of the relevant market from a geographic standpoint.

It can be noticed that the European approach allows the inclusion of transportation costs in the definition of the geographic market. Transportation costs have the effect of isolating a market from the competition of substitutable products; their inclusion has in all likelihood the effect of segmenting the market, which by law is to encompass at least two countries (“interstate market”), but will hardly include the whole of the European Union.

Contrary to that, in *Irish Sugar* the General Court weighed transportation cost, but concluded that their impact did not isolate the Irish market for sugar from the British one⁹⁶². One of the possible justifications underlying the inclusive approach is that the ongoing market integration process, which also binds different geographic markets for the scopes of competition law,

⁹⁶¹ <http://www.ftc.gov/bc/docs/horizmer.shtm>

⁹⁶² *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969, para. 73

counterbalances the segmenting force of transportation costs. Other constraints producing market fragmentation from the geographic perspective, which are absent in the American approach, are the cultural and linguistic difference between territories, the lack of information on the part of potential purchasers, administrative barriers/technical norms. These constraints are related to the inherent nature of the European Union as a confederation of States, whose degree market integration is obviously less penetrating than the US Union.

The market integration stake is also absent in the American approach -given the sameness of the language and the absence of administrative barriers-. This EU policy objective also plays a centripetal force for the scopes of competition law, and stands a qualitative closing test that allows evaluating the individualities of the case aside from the economic data.

In all, aside from the evaluation of transportation cost, whilst the analysis of demand cross-elasticity and the SSNIP test are at all similar to the demand-side substitutability analysis, together with the reverberation of the American reasonable interchangeability in the European evaluation of the characteristics of the product, the market integration objective appears to be the real element of discontinuity, which makes the European approach more interventionist and regulatory compared to the US approach, which seems to be anchored to efficiency goals.

2.4 The relevant market: a synopsis

| Relevant Market | US | EU |
|----------------------|--|--|
| Product dimension | Reasonable interchangeability Demand cross-elasticity SNNIP | Demand-side/supply side substitutability Hypothetical Monopolist test |
| Geographic dimension | Rule of thumb Diversion / demand-side substitutability SNNIP | Homogeneity test Demand-side/supply side substitutability + future integration of EU Market |

3. The role of market shares in the finding of monopoly or dominance

In establishing “monopoly power” under § 2 of the Sherman Act, or “dominance” under Article 102, the U.S. and EU authorities share an approach that is in some degree similar, since both

ground evidence of monopoly power on the calculation of the dominant firm's market shares, but also consider a variety of other factors. The difference is that the EU relevant threshold tends to be lower and that American Courts tend to include other factors in addition to market share, such as excellent technology and innovation⁹⁶³.

Moreover, in the US system the relevance of market shares is inescapably tangled with the inquiry into market power and the commission of an abuse; more specifically, a certain threshold of share becomes relevant if the firm has used its market power to unlawfully attain such threshold. Under the EU approach the evaluation of market shares is the substantive departing point for the assessment of the abuse of dominant position: absent the ascertainment of the relevance of market shares, there is no abuse whatsoever.

3.1 Market shares in the US system

In the *Alcoa* case, according to Justice Hand's formula, 90% of market share is considered enough to constitute a monopoly; it is doubtful whether 60% or 64% would be enough; and certainly 33% per cent is not. Even though the no-fault test has been overruled in the later case law, relevance of this statement is still valid today.

Pursuant to the *Berkey Photo, Inc. v. Eastman Kodak Co.* rule, market shares are not relevant *per se*, but are evaluated in accordance with the commission of an abuse. Therefore, while the a 60% to 90% share of a market is a potentially relevant threshold, the mere share does not suffice to assess monopoly under § 2, but is to be read in accordance with the action of monopolizing or the attempt to monopolize, i.e. it becomes relevant in the presence of an exclusionary scheme. More specifically, under § 2 the firm can be held liable for monopolizing or attempting to monopolize, even when it does not have a market share amounting to monopoly *per se*. Nonetheless, market power and market shares stand as a symptom of the dangerous probability that the firm will monopolize the market.

In *Spirit Airlines v. Northwest Airlines* the Court has tackled the relationship between market shares and the existence of entry barriers. The modern interpretation of market shares is to consider them only as a way of estimating market power, which cannot stand alone without an appraisal of entry barriers⁹⁶⁴. As a general rule of thumb, when a firm controlled nearly 100% of an industry

⁹⁶³ P. Jebsen & R. Stevens, *Assumptions, Goals and Dominant Undertakings, the Regulation of Competition under Article 86 of the European Union*, 64 Antitrust L.J. 479 (1996)

⁹⁶⁴ *Ball Memorial Hosp. Inc. v. Mutual Hosp. Inc.*, 784 F.2 1325, 1336 (7th Cir. 1986)

characterized by easy entry, Courts have declined to infer monopoly power, since either actual or potential entry of rivals is likely to keep prices on a competitive level. Elsewhere, 70% market share in conjunction with numerous barriers to entry the US market has been deemed sufficient to integrate monopolization of the industry pursuant to § 2⁹⁶⁵.

The view on the role of market share has been re-discussed in the wake of *United States v. Microsoft Corp*⁹⁶⁶, in light of both network effects and economies of scale that monopolies in high technological markets are likely to bring about. When network effects and economies of scale characterize the market, high market shares are not inherently detrimental to competition, since consumers might get a more advantageous price for some products or services in accordance with the increase of the number of people using them, on the one hand, and with the increase of the demand for these, on the other hand. Therefore, the traditional idea that the unilateral practices of big businesses unavoidably erode consumer welfare, which has animated the antitrust action from the outset, has given way to the idea that in certain markets the size of the firm can actually be beneficial to consumers.

3.2 Market shares in the EU system

The European reading of market shares sensibly differs from the US interpretation. Under article 102 of the TFEU, the evaluation of dominance is, together with the definition of the relevant market, a basic prerequisite for the assessment of liability. Thus, a conduct that is not abusive if carried out by a non-dominant firm becomes abusive when a firm whose market shares amount to dominance performs it.

The appraisal of market shares functions as a background test for the inquiry of the abuse: unlike the US system, article 102 does not sanction the acquisition of a high market share by means of an abusive course of conduct, but the size of the firm makes the course of conduct abusive. More specifically, a market share amounting to dominance is the essential precondition to declare the firm's conduct abusive, because it is assumed that dominance affords the firm the power to behave to an appreciable extent independently of its competitors.

Pursuant to the *Hoffmann-La Roche* outcome, the calculation of market shares is the most significant component of the assessment of dominance. Nevertheless, holding a significant market share does not represent absolute evidence of dominance, but its relevance varies in accordance with the characteristics of the

⁹⁶⁵ *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 451 (4th Cir. 2011)

⁹⁶⁶ *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001).

market, of the production, of demand and offer⁹⁶⁷.

In the *Akzo* case, the Court purported that “market share of over 70% is most likely to be considered to be in a dominant position. A share of between 40% and 50% raises a presumption of dominance”⁹⁶⁸. Consequently, when market shares are between 40% and 70%, the calculation of the competitors’ market power becomes of capital importance.

In fact, according to how the remaining shares are divided among competitors, the dominant firm’s share can have a different weigh. If the dominant firm has a 50% market share, and the market is characterized by the presence of 10 competitors each holding 5%, the position of the bigger firm can be equated to the dominant one⁹⁶⁹. Likewise, in its *Tenth Report on Competition Policy*⁹⁷⁰, the Commission appeared to accord importance to the reciprocal market shares, with the result that the larger the gap between one firm and its rivals, the more likely the finding of a position of dominance on part of the former.

However, in spite of this programmatically nuanced statement, the *Azko* Court’s appears to have tackled the market share issue in absolute terms, since a 50% market share was deemed to be proof of dominant position *per se*, absent some other perturbing factors that allow to state the opposite. The Court considered a 50% share as “extremely high market share”, which constitute, “save in exceptional circumstances, proof of the existence of a dominant position”.

At least in one case the EU competition authorities have suggested that market shares in the single digits might indicate dominance. Even if a 5 to 10% share is generally an irrelevant threshold, it left open the possibility that these shares might indicate dominance, in particular in highly technological markets, where products appear to the majority of consumers to be readily interchangeable; a high degree of product interchangeability, and the concomitance of “exceptional circumstances” might lead to find dominance even in single-digit shares⁹⁷¹.

⁹⁶⁷ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461 para. 4

⁹⁶⁸ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359.

⁹⁶⁹ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207

⁹⁷⁰ Commission of the European Communities, *Tenth Report on Competition Policy*, para. 150, n. 4 (1981), available at http://ec.europa.eu/competition/publications/annual_report/ar_1980_en.pdf, in which it affirmed “a dominant position cannot even be ruled out in respect of market shares between 20% and 40%”.

⁹⁷¹ In *Metro SB-Großmärkte GmbH & Co. KG v. Commission of the European Communities*, 22.10.1986, Case 75/84, [1986] E.C.R. 03021, para. 86, the ECJ stated that where the undertaking had a market share of between 5 and 10 percent in the sale of electronic equipment for leisure purposes, and of 6-7

That offers an argument to affirm that the EU model is characterized by a stronger presumption of dominance, since a firm by controlling the half of the market is regarded as dominant. Parallel to that, even if the European Union does not appear to be imminently inclined to find single-digit market share undertakings to be monopolists, the approach above described certainly indicates a particular mindset, “one that is almost as interested in the existence of a large producer as it is of the abuse of a dominant position”⁹⁷².

3.3 Market shares and other structural constraints – the impact of entry barriers

Parallel to the US experience, European Courts and Authorities have also analyzed the impact on role of market shares of structural factors; among these, particular significance have entry barriers. Two types of barriers have been identified, the legal and administrative ones inherent in the political configuration of the European Union, on the one hand, and the ones implied in the market structure, such as the control of an essential facility by the alleged dominant firm, or the inelasticity of demand for the product at stake.

The treatment of the control of an essential facility as an entry barrier represents a peculiarity of the European approach, but also has the practical effect of lowering the relevant threshold of relevant shares to infer dominance; consequently, it will be more likely to find a firm controlling an essential facility to have contravened article 102, because the relevant threshold of shares decreases alongside with the position of the firm on the market. In the US, essential facilities are treated in a conservative manner, and the finding of monopoly refusal to deal stemming from the control of an essential facility represent a narrow exception to the freedom of not doing business with rivals. In contrast, the European Court of Justice has been considerably more receptive to the essential facilities doctrine and has not attempted to limit its application to a narrow set of circumstances⁹⁷³.

percent in televisions, it did not have a dominant position. Nevertheless, “the share of the market occupied by an undertaking does not necessarily constitute the sole criterion for the existence of a dominant position”. “It is however proper to conclude that ...shares of the market as insignificant as that held by SABA preclude the existence of a dominant position *save in exceptional circumstances* [emphasis added]”.

⁹⁷² P. Jebsen & R. Stevens, *Assumptions, Goals and Dominant Undertakings, the Regulation of Competition under Article 86 of the European Union*, 64 Antitrust L.J. 483 (1996)

⁹⁷³ D. Geradin, *Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court’s Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=617263

3.4 Market shares and the relevance of behavioral constraints in the EU system

More recently, market shares have been analyzed in light of other behavioral factors. In particular, the Commission has purported that high market shares are not unlawful for it, but become unlawful when avails itself of its share to control the prices or to limit the access to the market. Other factors contributing to confirm the subsistence of dominance are: the preference for the product of the firm, the influence that the firm has on retailers, the higher price of the firm's product compared to its rivals, its technical advantage over competitors, and the strict identification of the product category with the product the firm manufactures⁹⁷⁴. Structural and behavioral constraints disclose the interplay between the firm's behavior and the market structure, together with the assumption that a course of conduct independent of the other firms' behavior is only conceivable if the firm has a sufficient degree of dominance on the market. That has not affected the dependence of the concept of dominance on the market shares of the allegedly dominant firm, by virtue of two arguments: first, there is no case where the Court has found the second biggest firm on the market liable for abusing its position. Second, the European Competition authorities are more prone to identify a safe haven for the sake of a swifter functioning of antitrust procedures; in the words of the Commission "the higher the market share, and the longer the period of time over which it is held, the more likely it is to be a preliminary indication of dominance. If a company has a market share of less than 40%, it is unlikely to be dominant"⁹⁷⁵.

3.5 Market shares and the relevance of network effects and economies of scale in the US system

Unlike in the US system, the European Competition Authorities have not tackled the issue of the impact of network effects and economies of scale relevance on market shares. One possible explanation for this disregard can be found in the different approach of Courts in the two systems. The European approach aims more at a more objective intervention as opposed to the US approach, which is more conservative and reluctant to penalize a firm simply because of its monopoly status. In that respect, the US Courts allow wider scope for efficiency defenses to be asserted, and tend more towards an effect-based assessment of the dominant firm's conduct. Europe, in comparison, prefers to affirm

⁹⁷⁴ *BBI/Boosey & Hawkes*: Interim measures, IV/32.279 – paragraph 10. Commission decision 29.07.1987, published on *OJ L286*, 1987, para. 36

⁹⁷⁵ Commission of the European Communities, *Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases)*, available at http://ec.europa.eu/competition/antitrust/procedures_102_en.html

standards regardless of whether they lead to superior economic results, since the fundamental understanding of article 102 is not only about protecting market efficiency, but also protecting the rights of competitors at the same time.

The error-cost analysis plays a pivotal role in the conservative attitude of American Courts, whose logic is more bound by the threat of issuing a mistaken decision, on the account of the magnifying force of legal errors in Common law. Conversely, the decreased force of the precedent for European judges makes these less inclined to evaluate the magnitude of the harm generated by an error.

4. The treatment of anticompetitive conduct

Parallel to the divergences in the finding an undertaking has monopoly power or a dominant position. The U.S. and EU approaches sensibly differ also in the way they identify the exclusionary standards that must be met before they will impose sanctions.

The United States is much more reluctant to restrict what some perceive as monopoly power abuses⁹⁷⁶; the European Union, devoted to its *dirigiste* tradition, states that the dominant undertaking is under a “special responsibility” towards their competitors and must act accordingly. American courts have never translated § 2 in static precedents, but have resorted to price theories to assess whether a certain restraint was reasonable, scrutinizing the economic consequences of the firm’s conduct⁹⁷⁷. In other terms, the act of monopolization has been interpreted not as a list of forbidden practices, but with a view to the economic conditions surrounding an arrangement.

Conversely, the drafting of article 102 already lends itself to interpret the abuse of dominant position as a list of proscribed practices, given the identification of specific unlawful conducts. Furthermore, the fact the list is not exhaustive allows proscribing all the conducts of the dominant firm that have no competitive effects. That, unlike the US system, shows some regulatory tendencies as regard the treatment of the anticompetitive conduct.

⁹⁷⁶ It has been outlined throughout this essay that § 2 of the Sherman Act has been traditionally enforced in a conservative way, partly because of the risk of awarding false positives, partly because of the deeper influence of economic analysis on Courts than in the EU, partly because of different underlying rationales (see *infra* the American consumer welfare perspective versus the European ordoliberal assumptions as a possible policy explanation of the substantial divergence between the two models). With such different philosophies, a business that might continue to flourish under the U.S. approach may be the object of investigation by EU competition authorities.

⁹⁷⁷ A.J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. Ill. L. Rev. 77, 90 (2003). Compare *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959).

4.1 The Sherman Act and the early conservative approach: the rule of reason

Section 2 of the Sherman Act prohibits both monopolization and attempted monopolization, namely acts aiming at changing the competitive structure of the market. The above analysis has shown that no attempt is made to police the conduct of the firm *vis-à-vis* the consumers, namely proscribing those conducts that are exploitative of the latter. Contrariwise, exploitative abuses are encompassed in the scopes of article 102.

Section § of the Sherman Act does not prohibit the existence of monopolies *per se*, but rather prohibits certain conducts that create or threaten to create a monopoly. The judicial enforcement of this provision has traditionally fluctuated between a consideration for the structural elements or for the conduct elements of the offense.

At the outset of American antitrust law, courts took a conservative approach to § 2, applying the provision to conducts that microscopically seemed to violate it. The most important enforcement of § 2 of the early years is the *Standard Oil* decision, which, despite its vagueness, manages to deliver some basic lessons.

First of all, the Supreme Court adopted the “rule of reason” standard, under which a dominant firm can be found guilty of violating § 2 if it engages in conduct that would violate § 1 if deployed by a combination of firms. Furthermore, the standard requires a finding of specific intent to monopolize, which can be reasonably inferred by an unjustifiable conduct on the basis of legitimate competitive goals, but can only be debunked as an effort to destroy competition⁹⁷⁸. The early enforcement of § 2 is an objective inquiry based on facts, and structured in a way to forbid only the unreasonable restraints of trade.

Second, the mere attainment of monopoly is not unlawful for it, but the prohibition of the action of monopolizing, i.e. destroying competition, was identified as the rationale of § 2. Therefore, the statute was not interpreted as a direct prohibition against monopoly in the concrete⁹⁷⁹, but as a ban of the monopolistic size of the firm that was achieved or maintained through malevolent intent and exclusionary practices, in a way that size achieved by efficiency would not be relevant for antitrust purposes. This understanding of § 2 is still valid in American Law today.

The conservative approach imposed Courts to determine whether the conduct of the monopolist had some pro-competitive justifications for the defendant. Absent any justification, the

⁹⁷⁸ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62, 31 S. Ct. 502, 516, 61-62-65 L. Ed. 619 (1911)

⁹⁷⁹ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62, 31 S. Ct. 502, 516, 55 L. Ed. 619 (1911)

defendant would be found guilty of violating § 2 Sherman Act was thus interpreted as an externality regulation, which can be used to abridge freedom of business only when the latter produces monopoly and harms consumers and society⁹⁸⁰.

4.2 The “structuralist” approach and the *per se* illegality

The conservative approach was overcome in 1945, when Justice Hand delivered his renowned judgment in the *Alcoa* case⁹⁸¹, giving way to the structuralist approach in the interpretation of § 2, which is characterized by the shift from an inquiry of the firm’s intent to an inquiry of firm’s business expansion. Whereas in *Standard Oil* monopoly was proscribed inasmuch as it was the result of a specific intent to restraint, in *Alcoa* the Court concluded for a *per se* illegality of the act of monopolization.

The Court found violation of § 2, simply because Alcoa had obtained and had managed to maintain a vast market share. Alcoa was found liable just for engaging in vigorous competition, merely by meeting the growing demand for aluminum with its superior market capacity⁹⁸². The outcome stopped just short of establishing a *per se* proscription of monopoly, because it did not condemn monopoly “thrust upon it”. The distinction between lawful and unlawful monopoly appears to be grounded on the difference between “unlawful achievement and lawful passivity”⁹⁸³. However, argument appears to be more semantic than substantial, because in practice it was held that a 90% market share achieved without predation or merger is monopoly within the meaning of § 2 and that the firm had inexorably monopolized the market. The achieved monopoly is always unlawful, but it is very unlikely that a firm possesses monopoly without having monopolized.

In light of this plaintiff-friendly judicial attitude, regardless of whether or not a firm with a dominant position has foreclosed competition by virtue of an illicit conduct, it could be held liable of monopolization when it drives competitors off the market by simply defending its superior market position.

The structuralist attitude towards §2 interpretation was criticized as lacking a more vigorous inquiry of the competitive legitimacy and the efficiency of the methods deployed to acquire or maintain monopoly. Courts began to question the rule of reason, arguing that the judgment as to the reasonableness of a conduct

⁹⁸⁰ Compare A.J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. Ill. L. Rev. 77, 88 (2003)

⁹⁸¹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424-426 (2d Cir. 1945)

⁹⁸² *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424-426 (2d Cir. 1945); *U.S. Philips Corp. v. Windmere Corp.*, 861 F.2d 695 (Fed. Cir. 1988). See also *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir. 1952).

⁹⁸³ R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p. 166 (1993)

necessitated a judgment as to the reasonableness of the price levels that the firm had established. However, Courts would not be allowed to set a standard of reasonable price, because there would be too many parameters to factor in such assessment.

Following this line of argument, the *per se* approach was elaborated in response to the inefficiency of the rule of reason⁹⁸⁴. The inquiry of anticompetitive conduct proved vague and arbitrary, because of the lack of unanimity as to whether it was solely grounded on economic ends, or whether political and social considerations were at stake⁹⁸⁵.

In addition to that, there was no consensus as to the values underlying the application of this standard, in particular whether the sole consideration ought to be consumer welfare, or whether the law should acknowledge competition considerations. The simultaneous use of conflicting values rendered the reasonableness approach insufficient for the purposes of the Sherman Act⁹⁸⁶.

United States v. Griffith indicated that antitrust laws may be contravened without a specific intent to restrain trade or to build monopoly, if the restraint of trade or monopoly results as consequence of defendant's conduct, and specific intent in common-law sense is necessary only where the conduct fall short of results condemned by the antitrust laws⁹⁸⁷. A landmark application of the *per se* rule is *United States v. Grinnell Corp.*, in which the Supreme Court stated the prevailing formula that monopoly entails two elements, market power in conjunction with willful acquisition or maintenance of it, irrespective of the finding of the reasonable intent to monopolize⁹⁸⁸.

4.3 The "Chicago" conceptualization of the offense of monopolization

Judicial enforcement of § 2 in the 1970s and 1980s reflected the endeavor of the Chicago School of law and economics to re-conceptualize American Antitrust law, in a way to focus on consumer welfare as the only and ultimate goal of the law. That resulted in a deeper employment of price theory in the evaluation of the firm's unilateral conduct, which had as a consequence a

⁹⁸⁴ T.A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685, 691 (1991)

⁹⁸⁵ R.H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 376 (1965)

⁹⁸⁶ R.H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 Yale L.J. 373, 376 (1965)

⁹⁸⁷ *United States v. Griffith*, 334 U.S. 100, 68 S. Ct. 941, 92 L. Ed. 1236 (1948) disapproved of by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

⁹⁸⁸ *United States v. Grinnell Corp.*, 384 U.S. 563, 570, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)

more permissive approach, based on the assumption that firms with monopoly power would have little incentive to engage in welfare reducing practices. The renowned Areeda-Turner formula for which the relevant conduct is to consist of a “behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way”⁹⁸⁹ started to gain acceptance among Courts, which refused to censor lawful conducts of the dominant firm that were available to its smaller rival, merely on the grounds of the firm’s dominance. In particular, following the *Berkey* case reasoning⁹⁹⁰, the existence of a slight business justification for the dominant firm’s conduct would exclude application of § 2.

Under the influence of the Chicago School, the protection of competition occurs in a quantitative way: Courts would ensure the appropriate amount of competition that protects society from practices resulting in monopoly. Under this assumption, restraining practices were classified as either pro-competitive or anti-competitive, and the defendant was granted grounds to prove that his restraint might have “potentially redeeming value” or “pro-competitive justification”⁹⁹¹. On their part, Courts were barred from conducting their own consumer-welfare test on the dominant firm’s conduct, but could only assert liability for monopolizing when the dominant firm’s conduct had manifestly produced exclusionary effects from an efficiency standpoint.

4.4 The post-Chicago thinking of monopolization

In last two decades, “Post-Chicago” thinking, despite subscribing the view that efficiency is the ultimate goal of American Antitrust law, challenged the under-inclusive approach of the Chicago School, and identified pricing strategies through which dominant firms would harm competition⁹⁹², principally by resorting to the tools of game theoretic analysis⁹⁹³, decision theory⁹⁹⁴ and a greater

⁹⁸⁹ P. Areeda & D.F Turner, *Antitrust Law: an Analysis of Antitrust Principles and their Application*, Little, Brown and Co., Boston, vol. 3 § 651 p. 78 (1978).

⁹⁹⁰ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979)

⁹⁹¹ *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)

⁹⁹² T.G. Krattenmaker & S.G. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 Yale L.J. 209, 236 (1986). See *infra*

⁹⁹³ For an extensive survey game theoretic analysis of monopolization P. Rey & J. Tirole, *A Primer on Foreclosure*, in M. Armstrong & R. H. Porter eds., 3 *Handbook of Industrial Organization*, 2007. Within the confines of the present analysis, the game theoretic interpretation of predation in Chapter I, para. 9.2 will provide an overview of this method, which entails the strategic and relational analysis of the monopolist’s behavior.

⁹⁹⁴ M.S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L.J. 435. In particular, decision theory accounts for the fact that courts will err in implementing any standard. It seeks to maximize the net benefits of antitrust

factual inquiry that may better account for market imperfections⁹⁹⁵.

4.5 The early enforcement of the European law of abusive dominance

The Treaty of Rome entered into force in 1958; nonetheless, article 82 (the original version of article 102) was not applied for over a decade. The first case that reached the European Court of Justice was *Continental Can*, in which the law of abusive dominance was understood in a functional manner: the general scope of EC competition law was to establish a system of undistorted competition in the common market as under article 3(1)(G) EC Treaty was found to be material for the application of article 102⁹⁹⁶. The non-exhaustive list of abuses of article 102 covered both exploitative and exclusionary abuses, for the provision aimed at practices which may cause damage to consumers directly (exploitative abuses), but also at those which are detrimental to them through their impact on effective competition structure, such as is mentioned in article 3(1)(G) of the Treaty (exclusionary abuses)⁹⁹⁷.

The Treaty establishes a common market with real competition. In light of the systemic interpretation of the Treaty, the goals of article 102 are the protection of both the competitive structure of the market for the benefit of consumers, and of residual competition on a market characterized by the presence of a dominant firm for the benefit of competitors. In other terms, the core idea of the law of abusive dominance is to proscribe all those conducts that would lead to a strengthening of dominance of a firm, since they would be detrimental to both consumers and competitors.

4.6 the *Hoffmann-La Roche* and *Michelin* seminal outcomes – from “competition on the merits” to the “special responsibility” of the firm

In *Hoffmann-La Roche* the ECJ embraced an objective notion of abuse –not requiring anticompetitive intent-, as a conduct

enforcement by minimizing the sum of expected costs from false positives (condemning pro-competitive conduct) and false negatives (failing to condemn anticompetitive conduct), focusing on the probability of such errors and the magnitude of resulting harms.

⁹⁹⁵ *Symposium: Post-Chicago Economics*, Editor’s Note, 63 Antitrust L.J. 445, 448 (1995)

⁹⁹⁶ The Court rejected the plaintiff’s argument that article 3(1)(G) EC Treaty was a mere programmatic provision, devoid of legal effect. *Europemballage Corporation and Continental Can v. Commission of the European Communities*, 21.02.1973, Case 6/72, [1973], ECR 215, para. 23

⁹⁹⁷ *Europemballage Corporation and Continental Can v. Commission of the European Communities*, 21.02.1973, Case 6/72, [1973], ECR 215, para. 26

resulting in the creation, extension or maintenance of dominance, and entailing “recourse to methods different from those which condition normal competition” that have the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition⁹⁹⁸. Furthermore, it drew a distinction between lawful “competition on the merits” and unlawful anticompetitive-exclusionary conduct, distinction that has been maintained ever since. The outcome shaped the contours of the abuse, but failed to provide a solid test to identify the anticompetitive conduct, and uncontroversially discriminate it from legitimate competition⁹⁹⁹.

Another seminal case for the definition of the anticompetitive conduct is *Michelin I*, in which the Court has affirmed the existence of a “special responsibility” of the dominant firm “not to allow its conduct to impair genuine undistorted competition on the Common Market”¹⁰⁰⁰; even though dominance is not unlawful *per se*, some otherwise lawful conducts are deemed unlawful when put in place by a dominant undertaking.

The European Courts have interpreted the concept of special responsibility of the dominant firm as not only banning exploitative abuses, i.e. when the firms levers on its economic power directly to the detriment of consumers, but also exclusionary abuses, i.e. when the firm harms the competitive structure, by lessening the ability of its competitors to compete. That is ultimately material with the reach of *Continental Can*, where the ECJ has maintained that article 102 is directed to both conducts that harm consumers, and that impair the regime of effective competition¹⁰⁰¹.

4.7 Main differences between monopolization and abuse of dominant position

The more recent jurisprudence on article 102 allows emphasizing the main differences with the features of § 2.

First, the ban of abusive position has today come to stand for the broader claim that EC competition law of unilateral conducts protects the competitive structure as such, not requiring direct evidence of harm caused to consumers¹⁰⁰². The protection of consumers reposes *in re ipsa* on the protection of competition, from which consumer welfare itself is deemed to stem. More

⁹⁹⁸ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 6.

⁹⁹⁹ R. O'Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 176

¹⁰⁰⁰ *Michelin v Commission* Case C-322/81, 09.11.1983, [1983] ECR 3461, para. 57

¹⁰⁰¹ *Europemballage Corporation and Continental Can v. Commission of the European Communities*, 21.02.1973, Case 6/72, [1973], ECR 215, para. 27, para. 26

¹⁰⁰² *British Airways plc v. Commission of the European Communities*, 15.03.2007, Case C 95-04 P, [2007] ECR I-2331, para. 107

specifically, competition is held to bring about more efficiency and technological innovation than monopoly; thus, the protection of the competitive process will have favorable repercussions on consumers for it.

Second, the main device to protect the competitive structure is to guarantee market access for competitors. The *actus reus* embedded in article 102 is the foreclosure of competition not supported by any business justification. Foreclosure of competition is not abusive *per se*, but Courts are to balance the exclusionary effects and the advantages in terms of efficiency of the conduct¹⁰⁰³. The abuse is interpreted as an act of foreclosure that bears no relation to the advantage for the market and consumers.

Third, European law of abusive dominance is not merely a matter of protecting outcome efficiency, but also a matter of protection of individual rights of competitors. In both American and European antitrust law, the main challenge is to distinguish those acts that have exclusionary effects from those with legitimate business justifications.

Unlike the US model, EU competition law assumes that individual rights of competitors can be excluded also by means of lawful acts –if perpetrated by a dominant firm, regardless of whether or not such exclusion results in a decrease of efficiency or competition on the market place.

Conversely, in the US the only goal of antitrust is the protection of consumer welfare, whose decrease requires a showing of verifiable effects on the marketplace; thus, the protection of individual liberties places itself outside of the reach of § 2, or, put better, is directly dependent on the proof of a welfare loss. The American approach is more consistent with one of the basic tenets of economics, for which a conduct is proscribed when it is inefficient, whereas the European approach shows some regulatory tendencies as regards the identification of the lawful conducts.

5. The role of the intent in the two systems

Consideration of the intent of the monopolist plays a distinguished role in the two systems. In the US system only general intent (which is presumed and operates as a legal fiction) is required for actual monopolization under § 2¹⁰⁰⁴. Specific intent is required for attempts to monopolize, namely when conduct falls short of results condemned by the antitrust laws. However, specific intent is ordinarily inferred from anticompetitive

¹⁰⁰³ *British Airways plc v. Commission of the European Communities*, 15.03.2007, Case C 95-04 P, [2007] ECR I-2331, para. 67

¹⁰⁰⁴ *United States v. Griffith*, 334 U.S. 100, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)

conduct¹⁰⁰⁵.

Although intent is not expressly a general substantive element of an Article 102 violation, it has been mentioned as an element in predatory pricing claims where the challenged prices are above average variable cost but below average total cost. Intent serves as the tool to discern the exclusionary character of the conduct.

In neither system, intent is a substantive element of the offense; as it has been described above, § 2 sanctions the attainment of maintenance of monopoly by means of a “bad” conduct, not by means of a specific intent to monopolize. It has been seen that some difficulties arise when it comes to inquiring what makes the behavioral element undesirable under § 2, irrespective of any inquiry on the psychological element. Notwithstanding that, someone might argue that *Grinnell* defines monopolization as the “willful” acquisition or maintenance of monopoly¹⁰⁰⁶, which would suggest an evaluation of the defendant’s intent. Courts generally infer this element from the conduct itself, whereby the intent to monopolize follows the determination that the conduct was unlawful¹⁰⁰⁷.

Under the EU model, the disregard for the subjective element is even clearer, because article 102 requires the finding of an “abuse”, singling out the unlawful conducts. Hence, both systems focus on the objective element, making the subjective intention to monopolize existing in the mind of the actor immaterial.

The relevance of the subjective intent is at odds with the objective enforcement of both § 2 and article 102, on the grounds of a further meta-legal argument: because dominance or monopoly alone does not constitute a violation, it is arguable whether an actor can be said to intend to monopolize (or abuse) if the scope of his intent exists only after an *ex post* judicial evaluation of the unlawfulness of the conduct¹⁰⁰⁸. In other words, the defendant can be said to intend to monopolize only after the judge has found that his conduct was unlawful, and from this finding the tortious nature of the intention has derived. That is why the ascertainment of the intent dissolves in the finding that the conduct is unlawful.

6. The treatment of discriminatory pricing and the different understanding of the meaning of “competition” within the scope of the Robinson-Patman Act

¹⁰⁰⁵ *M&M Med. Supplies and Serv. v. Pleasant Valley Hosp.*, 981 F.2d 160, 166 (4th Cir. 1992), “Specific intent may be inferred from the defendant’s anticompetitive practices”.

¹⁰⁰⁶ *United States v. Grinnell Corp.*, 384 U.S. 563, 570, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)

¹⁰⁰⁷ B.E. Hawk, *Article 82 and Section 2*, in ABA Section of Antitrust Law, *2 Issues in Competition Law and Policy*, 875 (2008)

¹⁰⁰⁸ R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, p. 214

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It has been seen that under article 102(c), discriminatory abuses consist of “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”.

The homologous American anti-discriminatory provision is § 2(a) of the Robinson-Patman Act, which prohibits a seller of commodities from selling comparable goods to different buyers at different prices, except in certain circumstances.

The Act was Congress’s attempt to re-balance the difference in bargaining power between the small or medium-size firms and the big distributors, on the grounds that the latter were generally able to obtain their supplies at lower prices than were their smaller rivals¹⁰⁰⁹.

Section 2(a) contains six substantive provisions: prohibits a seller from discriminating in price between two or more competing buyers in the sale of commodities of like grade and quality, where the effect of the discrimination “may be substantially” to “lessen competition...in any line of commerce”; or “tend to create a monopoly in any line of commerce”; or “injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them”.

The main difference between the two provisions is that article 102 requires dominance as a prerequisite for the finding of the abuse, together with a competitive disadvantage and absence of objective proportional justification¹⁰¹⁰. The American treatment of price discrimination, instead, might be conducive to monopoly, but under no circumstances does a monopoly market share represent a prior requirement for the application of the provision. Moreover, even though the Act directs most of its provisions against the discriminating sellers, its premise is that buying power is being misused at the purchaser level, because big chain stores are traditionally capable of obtaining more favorable purchasing prices, which would allow them to price discriminate in a geographic area.

Thus, discriminatory price cuts aimed at retaining or obtaining particular customers, or at driving small competitors off the market, fall out of the reach of § 2 of the Sherman Act, which is only concerned to predatory price reductions, directed to the exclusion of a market player from the market, and resultant into a subsequent raise in price to recoup the losses.

¹⁰⁰⁹ H.C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1113, 1122 (1983)

¹⁰¹⁰ Compare Robinson-Patman Act 1936. The Robinson-Patman Act is a 1936 statute (15 U.S.C.A. § 13(a-f) that amended Section 2 of the Clayton Act (Oct. 15, 1914, ch. 323, 38 Stat. 730). With regard to case law, compare *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2551 n. 11. 110) (1990).

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The issue of the relevance of the element of recoupment in claims of discrimination, however, remains open: whereas in *Utah Pie* the Court found it sufficient to prove discrimination the mere “below cost” reduction¹⁰¹¹, in *Brooke Group* case, the Court rethought of the issue of primary line abuses in light of its proximity with the predation standards, advocating for the ascertainment of the dangerous probability of recoupment, following a price reduction below an appropriate measure of the rival’s cost¹⁰¹².

In other terms, even though both price discrimination and predation share the same core substance entailing a price cut directed to foreclosing competition, and the Robinson-Patman Act takes the simple view that a price reduction equals price discrimination, regardless of the economic definition of discrimination, entailing that two or more similar goods are being sold at prices that bear different ratios to their marginal costs, or that buyers are separated into two or more classes whose elasticity of demand is different¹⁰¹³.

Aside from the ascertainment of dominance, what is the element of discontinuity between §2 of the Sherman Act and §2(a) of the Robinson-Patman Act? Apparently, a different understanding of “injury to competition” than its meaning for the scopes of the Sherman Act. The construction of the statutory language, the reference to injuring, destroying or preventing competition with “any person who grants . . . such discrimination” would equate harm to rivals of the discriminating seller with harm to competition, thereby making the discrimination unlawful. Unlike that, the injury to competition arising out of violation of § 2 of the Sherman Act implies a harm to the competitive structure of the market, aside from the exclusion of less efficient competitors¹⁰¹⁴.

Thus drafted, the element of the discrimination is extraneous to the treatment of predation, even though there are no grounds to affirm that discriminatory cuts are more harmful to small competitors than a general price reduction to the detriment of the competitive structure. Discriminatory price reductions are *prima facie* excluded from the reach of § 2 of the Sherman Act merely on the grounds of the different meaning of “competition”.

¹⁰¹¹ *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 703 (1967). Also Compare *William Inglis & Sons Baking Co. v. Continental Baking Co.*, 942 F.2d 1401 (9th Cir. 1991).

¹⁰¹² *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

¹⁰¹³ G.J. Stigler, *The Theory of Price*, Macmillan 4th Edition, 210, (1987)

¹⁰¹⁴ *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir.), cert. denied, 326 U.S. 734 (1945) The Court found it illegal tended to divert trade to the respondent from its competitors, arguing that “...the lower price must prevent, or tend to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price below what he was charging elsewhere”.

6.1 The Robinson-Patman Act and the distinction between primary line and secondary line abuses

Section 2(a) of the Robinson-Patman Act was adopted as a response to the complaints of “mom and pop” stores that they were being unfairly exposed to the competition of large grocery and chain stores, which were able to obtain their supplies at lower prices compared their smaller rivals.

The substantive foundation underlying the ban of price discrimination at a seller’s level is the same as the prohibition of predation under the Sherman Act¹⁰¹⁵. What § 2(a) adds to this scheme is the requirement of charging two different prices and the diversion of trade to the respondent from its competitors, which probably makes price discrimination easier to verify, based the traditional fallacy of the recoupment test in predation claims.

However, scholars have argued that the Robinson-Patman Act is an unwelcome addition to existing law of predation: since the monopolist already charges the profit-maximizing price in other markets already, he would not be able to raise prices in the other markets to recoup the losses incurred in the low-price market¹⁰¹⁶. Thus, § 2(a) of the Robinson-Patman Act does not confer any further features to the act of price discriminating than predation under § 2 of the Sherman Act does.

Aside from its normative substance, the Robinson-Patman Act applies regardless of whether or not the seller possesses monopoly power. If the seller is competing with active rivals, it is very difficult to assess whether a price cut is a means of injuring competition rather than of creating it. Where there are rivals, no seller is able to persistently discriminate, because his rivals will have an incentive in offering a lower price to the discriminated customers in order to take them away from the discriminating seller. However, the way § 2(a) is construed implies that the loss of sales by a rival constitute a threat to competition in a geographic area in itself, without the possibility of distinguishing between vigorous competition and predation at the seller’s level¹⁰¹⁷.

In the event the discriminating seller possesses monopoly power, no rivals would be capable of underselling him to the disfavored customers. However, it is highly unlikely that the discriminating

¹⁰¹⁵ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 277, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

¹⁰¹⁶ R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p. 386 (1993)

¹⁰¹⁷ In *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) the defendants were condemned solely for having contributed to a decrease in the market price for frozen pies in the Salt Lake City area by means of a non-systematic price discrimination. No evidence was found of an anticompetitive or anti-consumer behavior.

monopolist has the intent of destroying any customer or class of customers, for he would ultimately lose returns, since in order to transfer the lost business from the disfavored customers to other customers he would face higher costs of reaching them to his own detriment.

The Act also applies to secondary line abuses, when the competitors of the seller's customers suffer the discrimination, entailing a selective discount to the benefit of some categories of customers. The same doubts can be raised with respect to this type of abuse: where sellers compete against each other, large customers cannot extract any discounts that are not cost-justified, because if sellers would were cut prices only for some categories of purchasers, they would have to face higher costs of transferring the lost return from the disfavored customers to other customers¹⁰¹⁸.

As antitrust observers have remarked, competition involves business firms attempting to take sales away from their competitors, by undercutting them or surpassing them on the quality or attractiveness of their products. Whenever a firm succeeds in diverting business from one of its rivals, it has "harmed" that rival, but in a way that is beneficial to the competitive process itself. However, Courts found exactly that kind of activity unlawful under the Robinson-Patman Act¹⁰¹⁹.

For these reasons, of price discrimination with a mere price difference is not exempt from criticism, on the grounds that some conducts falling within the reach of § 2(a) can be neither anticompetitive nor anti-consumer, but simply economically detrimental to one or more purchasers.

The drafters of the law have sought to compensate this normative flaw by providing a "cost-justification" defense, pursuant to which a seller is entitled to prove that price differences are not price discrimination because they are justified by differences in cost of manufacture, sale, or delivery. Likewise the defendant can rebut a *prima facie* claim of discrimination by means of a "meeting-competition" defense, namely by showing that his lower price to a purchaser "was made in good faith to meet an equally low price of a competitor"¹⁰²⁰.

6.2 The reach of article 102(c) of the TFEU with respect to discrimination

It has been seen that the Sherman Act falls short of protecting purchasers from price discrimination, namely the practice of

¹⁰¹⁸ *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir.), cert. denied, 326 U.S. 734 (1945)

¹⁰¹⁹ R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p. 389 (1993)

¹⁰²⁰ Robinson-Patman Act, Section 2(b)

selling the same commodity at different prices. The Robinson-Patman Act re-approximates the two systems, but implies that the American law of discriminatory is positioned outside of the monopolization laws. Conversely, Article 102(c) addresses the issue of applying different conditions to equivalent transactions as a typical abuse of the dominant firm.

Contrary to §2(a), Article 102(c) only applies to dominant sellers. Even if it covers both primary line abuses against the dominant firm's rivals and secondary line abuses against the downstream customer market, the proscribed conduct solely regard the behavior of the dominant seller. In that respect the American statute is more far-reaching than its European homologous.

Secondary line abuses, in which customer discrimination is viewed as an artificial application of different prices in different geographic areas not based on precompetitive justification but merely aimed at compartmentalizing the market along national borders, is a major concern for EU competition also on the grounds of the market integration policy mandated the law itself¹⁰²¹.

With regard to the defenses against a *prima facie* claim of violation of article 102(c), they do not ostensibly diverge from their American equivalents: first, the defendant can deduct the pro-competitive effects of quantity non-discriminatory discounts to the benefit of all the customers whose purchases exceed a certain threshold level, if the discounts reflect cost-savings or economic efficiencies¹⁰²²; second, price reductions offered to meet the competitors price are generally lawful under article 102 (meeting competition defense)¹⁰²³; third, price reductions may be given in return for services provided by the buyer¹⁰²⁴.

Whilst both Article 102(c) and the §2(a) are designed to protect buyers from competitively disadvantageous prices, it appears that the two provisions focus on an opposite perspective: Article 102(c) is concerned with the pricing behavior of powerful sellers, whereas § 2(a) of the Robinson-Patman Act is concerned with both the pricing behavior of powerful sellers and the purchasing behavior of powerful customers. In line with that, even though the Robinson-Patman Act directs most of its provisions against the discriminating sellers, its normative premise is that buying power

¹⁰²¹ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, Case 27/76, [1978], ECR 207

¹⁰²² *Portuguese Republic v. Commission of the European Communities*, 29.03.2001, Case C-163/99, [2001], ECR 3461, paras 6-9

¹⁰²³ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 189

¹⁰²⁴ *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969, para. 173

is being misused at the purchaser level, because bigger stores are able to purchase at a lower level in the upstream market.

The American statute proceeds from the idea that price discrimination is a means to injure competitors, and that injury to a competitor results into injury to competition. The European anti-discrimination prohibition reflects the struggle to consolidate the common market.

Overall, the U.S. and European legal and political concerns come close to being juxtaposable: the U.S law represents a historic desire to protect small retail merchants from the competition of powerful buyers, while the focus of the European law is protection of protecting incumbent sellers from the competition of their dominant rivals, with a view to market integration. It is not coincidental that the possible defenses against claims of discrimination are at all similar in the two models.

6.3 Other pricing abuses

By contrast, Article 102(c) applies only to dominant sellers within the meaning of article 102 in general. Therefore, while Article 102(c) and the Robinson-Patman Act are ostensibly designed to prevent buyers from being competitively disadvantaged, the two provisions actually appear to be concerned with the behavior the two different parties to a commercial transaction: Article 102(c) proscribes the anticompetitive discrimination of dominant sellers, while the Robinson-Patman Act is focuses on the discriminatory behavior of powerful buyers¹⁰²⁵.

With respect to the seller's rivals, has been seen that in the US system sellers are afforded protection against discriminatory price cuts to the extent that they amount to predation¹⁰²⁶. In other terms, the discriminatory effects of the conduct of the monopolistic firm dissolve into the ascertainment of its predatory character.

In that respect, the European model appears to be more regulatory, equating the price discrimination with a price difference *tout court*, which causes a disadvantage to a class of sellers, regardless of the ascertainment that the price cut is below a measurement of cost, and that recoupment of the losses incurred in the predation phase has taken place. It has been seen that it is arduous to recollect these types of abuses in a perspective of consumer welfare: price discrimination can actually enhance consumer welfare by reducing the price for a product applied to some trading parties,

¹⁰²⁵ FTC v. Morton Salt co., 334 U.S. 37, 43 (1948) "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability".

¹⁰²⁶ Brooke-Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). Compare the interference between predation and primary line abuse in the case.

and ultimately create efficiencies for consumers. That is why the application of article 102(c) is rather narrow, and the interpretation of price discriminations mainly conveys the concern for the integration of the common market and the prevention from the compartmentalizing of national markets.

However, from a broader perspective, the protective rationales of the two models tend to match, in that they both ultimately seek to shelter small businesses from the aggressive competition of big ones: it has been seen that the core policy reasons of the two disciplines are overlapping, in that both provisions treat the harm to competition as harm to competitors. That appears to be a significantly striking point of contact, on the one hand, and an element of divergence in terms of underlying policies between the law of discriminatory prices and the law of monopolization within the American model, on the other hand.

Moreover, both models acknowledge a non-technical notion of price discrimination, as the mere difference in price, disregarding a more in-depth analysis of the demand elasticity of the discriminated sellers.

6.3.1 The treatment of other discounting practices – primary line and secondary line abuses

With regard to other pricing abuses, it has been seen how the practice of the supplier of offering a discount to the purchaser on the account of the purchase of a certain requirement for the product over a certain period of time, under certain circumstances will fall within the spectrum of the proscribed conducts under article 102 paragraph (c), which bans the application of “dissimilar conditions to equivalent transactions with other trading parties”, in a way to place them at a competitive disadvantage. Contrariwise, these discounting practices are generally deemed lawful in the US system, insofar as the conduct does not integrate a finding of predation¹⁰²⁷.

More specifically, European Law censors “primary line” abuses, where the dominant firm applies different conditions that are conducive to the unlawful exclusion of one (or some) of its rivals, in the form of price reductions conditioned to an exclusive terms for purchasers, being the purchase of a specific target amount over

¹⁰²⁷ Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 894-911 (9th Cir. 2008); LePage’s Inc. v. 3M, 324 F.3d 141, 154-57 (3d Cir. 2003) (en banc); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1058-63 (8th Cir. 2000); SmithKline Corp. v. Edli Lilly, 575 F.2d 1056, 1061-62,, 1065 (3d Cir.1978); Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 920 F.Supp. 455, 466-71 (S.D.N.Y.1996); Virgin Atlantic Airways Ltd. v. British Airways PLC, 69 F.Supp.2d 571, 580-81&nn.7-8 (S.D.N.Y. 1999); J.B.D.L. Corp. v. Wyeth-Ayerst Laboratories, Inc., 485 F.3d 880, 884-86 (6th Cir. 2007).

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a period of time -“target rebates”¹⁰²⁸-, or the purchase of either the whole or of a significant amount of requirement for the product from the dominant firm -“exclusive dealings”¹⁰²⁹, “loyalty rebates”¹⁰³⁰-; in the second situation, the dominant firm offers its product for a predatory price, in order to drive its competitors off competition (“predation”).

U.S. courts have generally been reluctant to condemn these practices, provided that they are not recollectable in the predation scheme¹⁰³¹, and primary line abuses merely regard the discriminatory conduct of a seller, who applies a “substantial and sustained” reduction in price in a local area with the intent of destroying or downscaling a smaller rival and deteriorating competition¹⁰³², regardless of a finding of monopolization for its application. Furthermore, the US Supreme Court has ruled for the legitimacy of functional discounts, given to a buyer based on its role in the supplier’s distribution system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier¹⁰³³. Even if in the US system they are treated as secondary line abuses, functional discounts are at all similar in their substance to the European exclusive dealing arrangements and loyalty rebates, in which the granting of a discount is conditioned to the purchase of either the whole or of a significant amount of requirement for the product.

The European law of primary line abuses is embedded in the law of abusive dominance as under article 102(c), whereas the American notion of primary line abuses marginally borders the law of monopolization as under § 2 of the Sherman Act, if the defendant’s conduct also displays predatory features, or is interpreted as a price discrimination on part of the seller with a view to harming one or more sellers, and absent any finding of monopolization.

Because the seller offering loyalty rebates extends them to some purchasers but not to others, they involve price discrimination. Loyalty and target rebates may generate effects on both the

¹⁰²⁸ *Michelin v Commission of the European Communities* Case C-322/81, 09.11.1983, [1983] ECR 3461

¹⁰²⁹ *Coöperatieve Vereniging Suiker Unie U.A. v. Commission of the European Communities*, 16.12.1975, Cases 40-48, 50, 54-56, 111, 113 and 114/73, E.C.R. 2001-04, paragraphs 502-26

¹⁰³⁰ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461 para. 90; *Irish Sugar plc v. Commission of the European Communities*, 07.10.1999, Case T-228/97, [1999], ECR-2969, para. 194

¹⁰³¹ *Ex multis*, compare *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 129 S. Ct. 1109, 1120 (2009)

¹⁰³² *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891 (3rd Cir.), cert. denied, 474 U.S. 863 (1985)

¹⁰³³ *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (110 S.Ct. 2535, 2542 n. 11. 110) (1990)

upstream and the downstream lines. The EC Treaty seems to focus on the effects on the downstream market, but the Court of Justice has directed much of its attention to their effects on the primary line: it tends to see loyalty rebates, target rebated and exclusive dealing as an anticompetitive weapon directed against competitors of the seller offering those rebates, because they are “intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in the dominant position”, in a way to preclude other potential suppliers the access to the market¹⁰³⁴.

The U.S. cases that have dealt with loyalty rebates have been entrenched in the law of monopolization or attempted monopolization pursuant to § 2 of the Sherman Act, but not under the Robinson Patman Act; thus, loyalty schemes are not commonly understood as discriminatory practices.

Secondary line abuse cases, affecting the downstream market, are rarely tried in the EU, and mostly concern of State-owned concessionaires of exclusive rights to provide services in airports or railways, which operated in a way to favor national carriers, to the detriment of international operators. Even if in the wording of the outcomes there was no express referral to the protection of national companies, it is evident that the purpose of this discrimination was protection on the grounds of nationality¹⁰³⁵.

In the US, aside from functional discounts, secondary line abuses are treated as a corollary of primary line one, since it is assumed that a price discrimination is to take place in the upstream market, which consequences are felt also at a purchaser level.

7. The areas of critical divergence of the two systems

Three are the areas where the two models at stake have proved to stand for a significant divergence, namely the treatment of 1) exploitative abuses, 2) predatory pricing and 3) monopoly refusal to deal/essential facility. These divergences will be in turn scrutinized.

7.1 The treatment of exploitation

The different attitude towards exploitative abuses arguably displays more than any other part of the laws of the two systems the different extent of the law of abusive unilateral practices. Article 102(a) directly pursues exploitative abuse, whereas § 2 does not. It has been argued above that under the Sherman Act, pricing abuses either fall within the scope of the law of predation,

¹⁰³⁴ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 90.

¹⁰³⁵ Compare J. Temple Lang & R. O'Donoghue, *Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC*, 26 Fordham Int. L.J. 120 (2002-2003).

provided that the requirements for a claim of predation are met, or position themselves outside of the scope of the law of monopolization.

7.2 The absence of a law of exploitative abuses in the US system

Section 2 of the Sherman Act does not condemn the possession of monopoly, but the acquisition or maintenance of it, by protecting the competitive structure. If competition is safeguarded, price and output will level off at an optimum level. Ever since the enactment of the Sherman Act, sanctioning excessive price has been regarded as an excessive interference with both freedoms of contract and of enterprise. Hence, monopoly and monopoly price has been traditionally seen as an inescapable phase of American industrial relations that, absent entry barriers, would necessarily call for new entries that would bring back the price down.

Under the assumption that an excessive judicial activism would fetter freedom of business, the Congress -not the judge- was the entity in charge of regulating those monopolies that competition forces would not be able to dismantle. Owing to that, a distinctive peculiarity of the US system is the Noerr-Pennington doctrine, which immunizes from antitrust liability individuals or groups who petition/lobby the federal or state government to take actions, such as pass legislation, that may impose restraints on trade. The *rationale* underlying this doctrine is the same aversion for an extensive role of the judge in regulating the unilateral conduct of the firm. Provided that the action is pursued in *bona fide* and is not a mere sham to cover an attempt to interfere with a competitor's business capacity¹⁰³⁶, individuals are allowed to invest the government to regulate certain conducts by law. In other terms, never in antitrust law history has the judicial power acted as a market regulator: that explains why exploitative abuses have traditionally been excluded from the extent of § 2.

7.3 The European attitude towards exploitative abuses and the difficulties of identifying specific standards

Conversely, the application of article 102 to cases of exploitation of consumers –mainly by excessive pricing- has never been questioned either at a scholarly level or at jurisprudential one. The inclusion of exploitation in the list of abuses derives German Ordoliberal subdivision of abuses into “exploitative” and “impediment” abuses. With regard to exploitative practices, they are identified by means of a hypothetical and ideal standard of competition, the “as-if competition”, which economic thinking could determine with reasonable accuracy: a dominant firm abuses its economic power to achieve a transactional cost that is

¹⁰³⁶ *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S. Ct. 523, 529, 5 L. Ed. 2d 464 (1961) W. Holmes and M. Mangiaracina, *Antitrust Law Handbook*, Thomson Reuters, 2011, § 8:8

significantly more advantageous than it could have achieved under this standard¹⁰³⁷.

As regards the case law, starting from the *United Brands* case, the ECJ established a test for exploitative abuses, confirming the abusive nature of the act of “charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied”¹⁰³⁸. Whether a price meets the economic value of the product is to be established by resorting to a two-prong test: first, the difference between costs actually incurred and price actually charged needs to be calculated; second, if the difference is excessive, it must be determined “whether a price has been imposed which is either unfair in itself or when compared with competing products”¹⁰³⁹.

Both scholarship and competition authorities have claimed that article 102(a) should be applied only when strictly necessary, in order to minimize the risk of false positives. In particular, intervention should be restricted to industries 1) with high entry barriers, 2) where one firm enjoys a substantial market power, and 3) where technological innovation does not play a paramount role¹⁰⁴⁰.

In *General Motors* the Court has further shaped the contours of price discrimination in an objective manner, requiring the existence of serious impediments to parallel imports that neutralize the possibly more favorable price levels applying in other sales areas in the Community –harm to the internal market¹⁰⁴¹. In *Tournier*, the Court affirmed that the discrepancy between the price of the dominant firm and the price for the same product in other Member States is to be justified by the dominant firm by referring to the “objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all other Member States”¹⁰⁴².

Absent such further requirements, the Commission has declared its reluctance to act as a price regulator for dominant firms¹⁰⁴³, on

¹⁰³⁷ D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, p. 92.

¹⁰³⁸ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 250

¹⁰³⁹ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 252

¹⁰⁴⁰ R. O’Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 638. Office of Fair Trading, *Draft Competition Law Guideline for Competition, Assessment of Conduct*, April 2004, para. 2.6

¹⁰⁴¹ *General Motors Continental NV v Commission of the European Communities*, 13.11.1975, Case 26-75, [1975], ECR 01367, para. 12

¹⁰⁴² *Ministère Public v. Jean-Louis Tournier*, 13.07.1989, Case 395/87, [1989], ECR 2521, para. 38

¹⁰⁴³ Commission of the European Communities, *XXIVth Report on Competition Policy*, 1994, para. 207 available at http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-

the grounds of the same reasons underlying the idiosyncrasies of American Courts for addressing exploitative abuses, the fact that it is extremely difficult to estimate the “excessiveness” of a price with a sufficient degree of predictability¹⁰⁴⁴, in conjunction with the threat to innovation and investments implied in the introduction of a regime of price control¹⁰⁴⁵.

Parallel to that, US Courts have argued that “judicial oversight of pricing policies would place the Courts in a role akin of that of a public regulatory commission”¹⁰⁴⁶. With regard to the threat to technological innovation, the Supreme Court has stated as follows: “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. 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”¹⁰⁴⁷.

7.4 An attempt to reconcile the two antipodal positions

Having that affirmed, although the two models have a different perspective on exploitative abuses, at the same time, the distance does not appear unconditionally irreconcilable. Both systems, in fact, share the view that competition law should intervene only when the market is incapable of self-correcting exploitative practices. Furthermore, both systems accept that a price-regulation can exist only if high entry barriers are likely to exclude competition in the long run¹⁰⁴⁸. The systems diverge on the

[/EUR/ViewPublication-Start?PublicationKey=CM9095283](#) . “The existence of a dominant position is not itself against the rules of competition. Consumers can suffer from a dominant company exploiting this position, the most likely way being through prices higher than would be found if the market were subject to effective competition. However, the Commission in its decision-making practice does not normally control or condemn the high level of prices as such. Rather it examines the behavior of the dominant company designed to preserve its dominance, usually directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it. A dominant company therefore has a special obligation not to do anything that would cause further deterioration to the already fragile structure of competition or to unfairly prevent the emergence and growth of new or existing competitors who might challenge this dominance and bring about the establishment of effective competition”.

¹⁰⁴⁴ R. O’Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 622

¹⁰⁴⁵ R. O’Donogue & A.J. Padilla, *The Law and Economics of Article 82 EC*, Oxford and Portland, 2006, p. 624

¹⁰⁴⁶ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979)

¹⁰⁴⁷ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410, 124 S. Ct. 872, 880, 157 L. Ed. 2d 823, 836(2004).

¹⁰⁴⁸ The temporal dimension of price discrimination is relevant in both American and European litigation. In *General Motors*, the Court based its ruling against the Commission opinion that the five-month long price

different allocation of competence as to the regulation of exploitative prices: while the US postulation is that the Congress is the last resort to assess whether a regulatory scheme is necessary, and courts are not charged with the task of policing the excessive price, in the European system the same authorities in charge of the enforcement of competition law (the European Courts and the Commission) can exercise price regulation.

In that respect, the fact that article 102 does cover exploitative abuses –whereas § 2 does not- shows no direct evidence of a different antitrust philosophy of the two models at stake, but simply a different allocation of competences in addressing these type of exploitation against consumers by non-transitory monopolies. Against this view is the part of the scholarship that claims that the inclusion of exploitative abuses in the European law of abusive dominance reflects different ideological objectives, in particular the achievement of a fair redistribution of wealth, as praised by the Ordoliberal Freiburg School¹⁰⁴⁹.

Evidence has shown that both the ECJ and the Commission have manifested the same reservations against assessing the fair price for a transaction as the US Courts and scholars. In that respect, it is unlikely the European Courts will challenge the excessiveness of a price aside from the narrow setting of non-transitory non-technological monopolies protected by high entry barriers.

8. The different treatment of predation

When it comes to predatory pricing, the degree of divergence between the two models is more significant than in the treatment of exploitative abuses. Whilst the two systems agree on the general description of the proscribed conduct, a price reduction seeking to eliminate rivals followed by a post-predation supra-competitive price raise aimed at recouping the losses incurred during the predation campaign.

8.1 The requirements for a *prima facie* claim of predation in US system

With regard to the US system, modern law of predation has found its normative underpinning in the attitude of both the Chicago and the Harvard Schools towards predation. Chicago scholars praised for a less interventionist approach to predation, on the account of the fact that it is a highly speculative scheme and rarely occur. They focused on the firm's substantive conduct and argued that once the price is established above the competitive threshold,

discrimination of the defendant was of minute importance. *General Motors Continental NV v Commission of the European Communities*, 13.11.1975, Case 26-75, [1975], ECR 01367, para. 16-18

¹⁰⁴⁹ M. Gal, *Monopoly pricing as an antitrust offense in the U.S. and the EC: Two Systems of belief about monopoly?*, 49 *Antitrust Bulletin* 346 (2004)

recovery of losses is often hindered by the prospect of new entries: thus, predation should be excluded from the list of proscribed conducts under § 2¹⁰⁵⁰. Harvard scholars, conversely, focused on the administrability of legal rules on predation and the capacity of the institutions entrusted with implementing them. In *Brooke Group*, the Supreme Court endorsed the narrow test elaborated by Areeda and Turner (Harvard School) stating that predatory pricing is to be pondered in economic terms: the plaintiff has to prove that the defendant has set price below cost; the defendant is to have a dangerous probability of recouping the losses incurred during the below-cost sale¹⁰⁵¹.

It is generally acknowledged that proof of strict recoupment (strict recoupment test) is a considerable barrier to plaintiffs trying to establish a predation claim, since failing to show that the predatory scheme has not led to some recovery of the defendant will convey evidence that competitors have offset the anticompetitive effects of the price reduction, or that the market is so lacking of entry barriers that the competitive structure has not been affected by the conduct of the dominant firm¹⁰⁵².

Furthermore, the strict “below-cost” test suffers from the risk of oversimplifying the conduct of the monopolist, because not necessarily does pricing below average variable costs reflect an abusive strategy of the dominant firm¹⁰⁵³.

8.2 The requirements for a *prima facie* claim of predation in EU system

The EU model takes a significantly different approach towards predation, which is not anchored to the recoupment requirement: a firm in a dominant position that sells below average variable costs is presumed to have a predatory intent, because “the only interest which the undertaking might have in applying such prices is that of eliminating competitors [so as to]...subsequently...raise its prices by taking advantage of its monopolistic position”¹⁰⁵⁴.

¹⁰⁵⁰ J.S. MacGee, *Predatory Price Cutting: the Standard Oil (N.J.) case*, 1 Journal of Law and Economics 137, (1958); also compare R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p.154 (1993). “It seems unwise...to construct rules about a phenomenon that probably does not exist or which, should it exist in very rare cases, the courts will have great difficulty distinguishing from competitive price behavior”.

¹⁰⁵¹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)

¹⁰⁵² J. Temple Lang & R. O’Donoghue, *Defining Legitimate Competition, How to Clarify Pricing Abuses under Article 82*, 26 Fordham International Law Journal 143 (2003)

¹⁰⁵³ R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, p. 218; O.E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 320 (1977);

¹⁰⁵⁴ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 71

Thus, despite following the *Areeda-Turner* test in the appropriate measurement of predatory price, the ECJ rejected a safe haven for prices above average variable costs, by further adding that pricing above average variable costs, but below average total costs, can also be abusive pursuant to article 102, when it is part of a plan to eliminate a competitor¹⁰⁵⁵, meaning that there must be an additional element for above cost pricing to be considered as illegal. This appears to be an attempt to address the issue of the strategic reasons of the dominant firm in charging a below-cost price, by means of an inquiry of the firms' anticompetitive intent and of its strategy to pre-empt the market¹⁰⁵⁶, inquiry that is absent in the American test for predation.

In all, unlike the US Supreme Court, according to which prices above the appropriate measure of average variable costs are considered legal *per se*¹⁰⁵⁷, article 102 exceptionally applies to situations in which a dominant firm with a very high degree of market power cuts price above average total costs, provided that the price cut is coupled with other exclusionary strategies and, more importantly, aimed at eliminating the remainder of competition in the market¹⁰⁵⁸.

Contrary to the US approach, the EU model has firstly rejected the recoupment requirement *tout court*¹⁰⁵⁹, save reviewing its position in its later outcomes and arguing that, because the law of predation only applies to firms that are already dominant, dominance may also offer indication that exclusion of a rival by means of a predation will lead to monopolistic prices in the long run and, in all likelihood, to recoupment (structural recoupment test)¹⁰⁶⁰. Put better, both the size of the firm and the below-cost campaign conducive to the establishment of monopoly are *prima facie* elements of the fact that the recoupment will take place.

8.3 The relevance of recoupment

Aside from converging on the average-variable-cost threshold as the first element to assess predation, the US model entirely relies on proof of below cost pricing to assess liability, disregarding the

¹⁰⁵⁵ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 72

¹⁰⁵⁶ Also compare *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951 para. 41

¹⁰⁵⁷ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

¹⁰⁵⁸ J. Temple Lang & R. O'Donoghue, *Defining Legitimate Competition, How to Clarify Pricing Abuses under Article 82*, 26 *Fordham International Law Journal* 127 (2003)

¹⁰⁵⁹ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951 para. 44

¹⁰⁶⁰ *France Télécom v. Commission of the European Communities*, 02.04.2009, Case C-202/07 P [2009], ECR I-2369, para. 112

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element of predatory intent. In the EU, the intent becomes the main criterion to assess liability when the price cut places itself between the average total variable costs and the average total costs.

Furthermore, the recoupment is a strict element of the unlawful conduct in the US model, whereas it can be inferred from circumstances under the EU approach.

The reason why the US Courts have enforced predation in such a strict and objective manner, compared to the more nuanced approach of the ECJ, rests in all likelihood on the strong influence of the school of law and economics in the interpretation of § 2, whereby it is assumed that predatory pricing schemes are “rarely tried and even more rarely successful”, and a false negative in adjudicating a predatory claim would result in an injury to the core interest protected by the Sherman Act, namely competition¹⁰⁶¹. By contrast, the EU case law is based on the assumption that predatory pricing is a rational and profitable strategy for the dominant firm to eliminate competitors¹⁰⁶². The risk of false positives is also expressed in the American under-deterrence of the phenomenon, based on the view that “the mechanism by which a firm engages in predatory pricing –lowering prices- is the same mechanism by which a firm stimulates competition”¹⁰⁶³: if a broader test were to be applied, firms might become to be reluctant to reduce price aggressively, fearing to be charged with predation. That would provoke a chilling in price competition to the detriment of consumers¹⁰⁶⁴.

American scholarship has argued in favor of a narrow application of the law of predation, based on the deterrence effects of private enforcement of antitrust law in the US. As a matter of fact, the possibility of awarding treble damages and the high costs of litigations in the US might bring Courts to interpret § 2 restrictively, and exclude the predatory intent from the test¹⁰⁶⁵.

In the EU, the virtual absence of private enforcement of competition law, and the fact that liability under 102 implies the sanction of nullity, the injunction to restore the situation as prior

¹⁰⁶¹ *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 601 (1986)

¹⁰⁶² J. Temple Lang & R. O'Donoghue, *Defining Legitimate Competition, How to Clarify Pricing Abuses under Article 82*, 26 Fordham International Law Journal 122 (2003)

¹⁰⁶³ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

¹⁰⁶⁴ *Weyerhaeuser Company v. Ross-Simmons Hardwood Lumber Company*, 549 U.S. 312, 127 S.Ct 1069, 1074 (2007). The *Weyerhaeuser* Court applied the same standards of predation as in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*

¹⁰⁶⁵ W.E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 22 Columbia Bus. L. Rev. 54 (2007)

to the infringement, or the imposition of a fine¹⁰⁶⁶, might justify the less conservative attitude of both the ECJ and the Commission towards predatory conduct.

The absence of a strict recoupment test in the EU system shows a different view of the role of competition law. In the US system, the

¹⁰⁶⁶ Article 102 does not single out any remedies for a finding of abuse of dominant position. However, case law has provided a legal basis for private enforcement, establishing that EU Competition Law may be enforced through private action at a national level *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, 20.09.2001, Case C-453/99, [2001] ECR I-06297, para. 23, (article 102... produces “direct effect in relations between individuals and create rights for the individuals concerned which the national courts must safeguard”), and that article 101 and 102 are “a matter of public policy which must be automatically applied by national courts” *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others*, 13.07.2006, Joined Cases C-295/04 to C-298/04 [2006], ECR I-06619 para. 2; thus, in case of a finding of abuse of dominant position, the ‘civil’ remedies available will be the ones that Member States provide, namely the award of damages for the violation of Articles 101 and/or 102 TFEU (either compensatory and/or restitutionary) and injunctions (prohibitory or mandatory) with the aim to terminate the infringement and restoring the competitive process or the situation of the parties prior to the infringement.

In light of the multi-level discipline of the abuse of dominant position, Article 10 of the Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty has set forth the principle of decentralization of EC competition law, establishing a system of close cooperation between the European Commission, the National Competition Authorities (NCAs) and the national Courts, and delegated an active role for local/national actors. Furthermore, it has opened the way for private enforcement of competition law, and encouraged private actors to enforce competition rules before their own domestic courts. More specifically, Article 1 of the Regulation has established that the abuse of dominant position referred to in article 102 is prohibited, no prior decision to that effect being required. Furthermore, pursuant to article 6 of the Regulation, National Courts have the power to apply article 102 directly. Thus, the sanction for the abuse is the nullity, and the burden of proof of the abuse rests on the party or on the authority alleging the infringement. Notwithstanding that, private enforcement of competition law, in the sense of stand-alone litigation independent of the public authority, is still at an early stage in the EU. Compare K.J. Cseres, *The Impact of Regulation 1/2003 in the New Member States*, 6 *Competition Law Review* 148, 2 (2010).

With regard to the powers of the Commission, Regulation 1/2003 has established that competence of the Commission to instruct an administrative procedure, empowering the latter with powers of investigation and decision on an allegation of abuse brought by either Member States or by natural or legal persons (article 7(1)(2) Reg. 1/2003), or on an allegation of abuse raised *ex officio* by the Commission itself. When the Commission finds that there is an infringement of article 102, it may require the undertaking to bring such infringement to an end; it may impose to the undertaking behavioral or structural remedies necessary to end the infringement; it may order an interim measure against the undertaking; it may accept commitments of the undertaking to meet the concerns expressed to them in its preliminary assessment; it may impose a fine, periodic payments, or any other penalty provided for in their national law (article 5 Reg. 1/2003);

predation test reveals that the protection of consumer welfare is the only goal of antitrust action; therefore, if the dominant firm's below cost pricing jeopardizes the business of competitor, but the likelihood of recoupment is thin, the system will not consider such conduct as unlawful, because no consumer harm -in the sense of a welfare loss- will be proved. The type of infringement that antitrust law deems relevant is the seeking of rents to the detriment of consumers, not to the detriment of competitors, which, absent proof of recoupment, will enjoy no protection in monopolization claims. To put it better, the significance between the dominant firm's conduct and the consequences on its competitors is filtered through the assessment of a market outcome, namely the harm to consumers brought about by the price-reduction¹⁰⁶⁷.

In the EU system, the departing point of the analysis of predation is not the protection of a market outcome, but the protection of the competitive process, which inescapably passes through the protection of competitors. The unilateral exercise of market power resulting in a price reduction below a proper measurement, which has the effect of foreclosing competition suffice to integrate an abuse of dominant position. The axiological priority is given to the market foreclosure, rather than to the consumer welfare loss¹⁰⁶⁸.

8.4 The notion of competition underlying the different treatments of predation

Here lies the different understanding of the essence of competition: in the EU, competition is effective when players can exercise their individual liberties, whereas in the US competition is a process that looks directly to consumer welfare. EU competition law is therefore grounded on the need to assure that the lifecycle of the business of all market players depend on their skills, on their business acumen, and on their superior product or service, not on the exercise of market power by a dominant firm. US antitrust law is grounded on the assumption that only those

¹⁰⁶⁷ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993) "Without recoupment, "predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced".

¹⁰⁶⁸ Compare *Irish Sugar plc*, Commission Decision of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty, 97/624/EC: (IV/34.621, 35.059/F-3), published in *OJ L* 258, 22/09/1997 P. 0001 - 0034 para. 134 "The dominant firm must not deliberately attempt to effectively shut out competitors. It has a special responsibility not to diminish further the degree of competition remaining on the market. ... The maintenance of a system of effective competition does, however, require that competition from undertakings which are only small competitors ... be protected against behavior by the dominant undertaking designed to exclude them from the market not by virtue of greater efficiency or superior performance but by an abuse of market power".

conduct that are not economically efficient and consumer friendly an intervention.

The European idea of the law of predation might strengthen the incentives to enter the market, since new entrants –together with competitors- may be afforded more protection than under the US regime; conversely, the American declination of the law of predation might provide firms with more incentives to strive for dominance, since proof of violation of § 2 exclusively depends on the economic calculus of the below cost pricing and of the recoupment, which makes a claim of predation less likely to succeed.

Aside from this theoretical divergence, the fact that in both systems predation is expressed in terms of below-cost pricing shows the same concern for protecting price competition: both systems rely on the same economic theory for discerning lawful competition from illicit exclusion, which can be fully captured by the “equally efficient competitor test”. The theoretical underpinning of stopping at Average Variable Cost is the protection of equally efficient competitors, based on the assumption that firms that are equally or more efficient than the monopolist are able to compete against above average variable cost, and that there is no net welfare loss if less efficient firms are driven off competition¹⁰⁶⁹. In that respect, neither of the two systems seeks to protect inefficient competitors.

Modern industrial organization theory has shown that pure price/cost analysis is not always an effective means to distinguish vigorous competition from predation, when it is not supported by an observation of both the objective market conditions and the strategy in which the price cut positions itself¹⁰⁷⁰.

The three-prong analysis proposed by the EU competition authorities (sacrifice-anticompetitive foreclosure-lack of an economic justification) should be re-read in light of a scrutiny of the circumstances, in a way to reject both the safe harbor of US antitrust law (prices above average total cost are considered legal *per se*) and the strict recoupment test, which also appears overriding in the US jurisprudence.

¹⁰⁶⁹ Compare the *AKZO* outcome as regards the EU system, where the Court affirmed that unconditional price cuts below average variable costs could constitute an abuse when they are qualified as abusive being part of a scheme to eliminate rivals, which are equally or more efficient than the defendant *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 70. Areeda and Turner, analogously, maintain that “the low price at or above average costs is competition on the merits and exclude only less efficient rivals” P. Areeda & D.T. Turner, *Predatory Pricing and Related Strategies under § 2 of the Sherman Act*, 88 Harv. L. Rev. 706 (1975)

¹⁰⁷⁰ P.L. Joskow & A.K. Klevorick, *A framework for Analyzing Predatory Pricing Policy*, 89 Yale Law Journal 245 *et seq.*, (1979)

9. Refusal to deal and the doctrine of essential facilities

The treatment of the so-called monopoly “refusal to deal” and of the “doctrine of essential facilities” is another field in which the two models under investigation diverge to a significant extent.

9.1 The European approach

In the ECJ case law, in order to find that a dominant firm’s refusal to venture together with a competitor constitutes an abuse, a number of narrow preconditions must be met: first, the access to the dominant firm’s facility must be indispensable for the competitor’s business; second, duplication of the facility is virtually impossible (i.e. a railway bridge, a telecommunication network, an electricity net); third, the refusal to the firm controlling the essential facility is to be a monopolist; fourth, the facility is to be available for usage of other firms; fifth, the access to the essential facility is to be denied; sixth, the denial is not supported by any objective justification¹⁰⁷¹. In *Bronner* these conditions were not met: the Court narrowed down this doctrine following what the AG Jacobs identified in his conclusions as the underlying rationale. First, the rights of an entrepreneur to venture with a partner and to “freely to dispose of one’s property are generally recognized principles in the laws of the Member States, in some cases with constitutional status. Incursions on those rights require careful justification”¹⁰⁷². Secondly, “the justification in terms of competition policy for interfering with a dominant undertaking’s freedom to contract often requires a careful balancing of conflicting considerations. ... [At any rate,] the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. Thus, the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it”¹⁰⁷³. Thirdly, “in assessing this issue it is important not to lose sight of the fact that the primary purpose of article 102 is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than to protect the position of particular competitors”. The fact that the dominant firm uses its market power in the upstream market to reserve to itself a part of the downstream market is not in itself an abuse, because “such conduct will not have an adverse impact on consumers unless the

¹⁰⁷¹ *Oscar Bronner v. Mediaprint*, 26.11.1998, Case C-7/97, [1998] ECR I-7817, paras. 37-48

¹⁰⁷² *Oscar Bronner v. Mediaprint*, Conclusions of the Advocate General Jacobs, 26.11.1998, Case C-7/97, [1998] ECR I-7808, para. 56

¹⁰⁷³ *Oscar Bronner v. Mediaprint*, Conclusions of the Advocate General Jacobs, 26.11.1998, Case C-7/97, [1998] ECR I-7808, para. 57

dominant undertaking's final product is sufficiently insulated from competition to give it market power"¹⁰⁷⁴.

Thus drafted, the degree of divergence between the European refusal to deal and the American one is not substantial, because it can be seen that the European intellectual foundation of *Bronner* echoes the US Supreme Court approach in the *Verizon v. Trinko* decision, in which the *Colgate* test was applied to the hypothesis of the refusal to share an essential facility. In *Colgate* it was held that "in the absence of any purpose to create or maintain a monopoly (the *intent test*), the [Sherman] Act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal"¹⁰⁷⁵. On the account of that, in *Trinko* the Court found it unnecessary to repudiate the essential facilities doctrine, because it would not apply in the case: *Verizon* was under no obligation to share its telephone network with its competitors, because the presence of a substantial degree of regulation in that industry (the 1996 Telecommunication Act) did not imply that the Sherman Act could be an independent source of liability. The justices declined to add a new claim by making an exception to the proposition that there is no duty to aid competitors, in particular because there had been no previous course of business between parties, unlike in the *Aspen* case¹⁰⁷⁶.

Duties to share a facility by law are at odds with the scopes of antitrust law on a twofold standpoint, since they might lessen the incentive of the monopolist, the rival, or both, to compete for those economically beneficial facilities, therefore engendering technological innovation for the benefit of consumers, on the one hand, and might facilitate collusion -one of the "supreme evils of antitrust"-, on the other hand¹⁰⁷⁷.

9.2 The American approach

As well as the European Courts, US Supreme Court interpreted this doctrine narrowly, and set forth due justifications for the monopolist's refusal to cooperate with rivals: pursuant to the *Aspen* test, only voluntary and unilateral termination of an agreement under circumstances that suggest the anticompetitive intent to forsake short-term profits to achieve long-term

¹⁰⁷⁴ *Oscar Bronner v. Mediaprint*, Conclusions of the Advocate General Jacobs, 26.11.1998, Case C-7/97, [1998] ECR I-7808, para. 58

¹⁰⁷⁵ *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919).

¹⁰⁷⁶ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411, 124 S. Ct. 872, 881, 157 L. Ed. 2d 823 (2004) The Court refused to extend the essential facility doctrine beyond the facts of the controversial *Aspen* case. Compare note n. 190

¹⁰⁷⁷ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406, 124 S. Ct. 872, 881, 157 L. Ed. 2d 823 (2004)

exclusionary goals violates § 2¹⁰⁷⁸. More specifically, for a refusal-to-deal claim to be viable, there must be a pre-existing and voluntary business relationship, and a decision by the monopolist to sacrifice short-term profits without any economic justification¹⁰⁷⁹.

Outside of the termination of a business relationship with an anticompetitive scope, liability for refusal to deal has been affirmed by resorting to the “essential facility doctrine”¹⁰⁸⁰. The Supreme Court has purported the need to perform a cost-benefit analysis, comparing the benefits of antitrust intervention with the costs that remedying refusal-to-deal situations will entail, namely continuous supervision of Courts of their inference in the requirement to share an essential facility. Mistaken inferences and false condemnations would be “highly costly, because they chill the very conduct that the antitrust laws are designed to protect”¹⁰⁸¹. The high costs and the practical difficulties in applying the essential facility doctrine make its employment in antitrust litigation almost exceptional.

9.3 Differences in the understanding of the term “essential”

Even though both systems have applied tests based on the assumption that the facility in question is essential, the understanding of the term “essential” differs. Whilst in the EU the access must be indispensable for carrying out the applicant’s business¹⁰⁸², in the US the essentiality derives from the fact that it is not economically feasible to reproduce the facility. The interpretation of the essential nature of the facility is objective in both systems, but European Courts do not refer or inquire the competition harm that could stem from a denial of access to a facility; in other terms, there is no reference to consequences for the consumer downstream market of the denial.

Thus, the American concept of essential facility is intended as critical to “the plaintiff’s competitive vitality and the plaintiff is essential for competition in the marketplace”¹⁰⁸³, whereas EU case

¹⁰⁷⁸ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 2859, 86 L. Ed. 2d 467 (1985)

¹⁰⁷⁹ See *infra*, the influence of the no economic sense test on the *Aspen* case.

¹⁰⁸⁰ *MCI Communication Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983) The four elements necessary to infer the duty to share an essential facility are 1) control of the essential facility by a monopolist; 2) a competitor’s inability practically or reasonably to duplicate the essential facility; 3) the denial to the use of the facility to a competitor; 4) the feasibility of providing the facility.

¹⁰⁸¹ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414, 124 S. Ct. 872, 881, 157 L. Ed. 2d 823 (2004), quoting *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 574 (1986)

¹⁰⁸² *Oscar Bronner v. Mediaprint*, 26.11.1998, Case C-7/97, [1998] ECR I-7817, para. 41

¹⁰⁸³ P. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust Law Journal 852, (1989)

law does not require for the monopolist's activity to be essential for the competitive process, but for competitors in general. That might explain why the essential facility doctrine in Europe is mostly treated as an entry barrier for competitors of the dominant firm, whereas in the US it is regarded as an exclusionary conduct, which is capable of causing a loss in consumer welfare. The influence of the Chicago School on the American model is sensible. In spite of this conceptual difference, scholars have argued that the two interpretations might lead to the same results¹⁰⁸⁴.

9.4 Objective justifications for denying access to the essential facilities

Another common element of the two models is the relevance of the objective justification (EU) or valid business justification (US) for justifying the refusal to deal or to give access to the facility in question. Even though neither model offers further elements to define the idea of "justification", in the US the existence of a valid industrial justification always plays out favorably for the defendant, in the sense of constituting a ground for not sharing; conversely, the EU Community law does not explore as in detail the issue of valid business justifications. In *Bronner*, the ECJ merely affirmed that access to the facility is to be denied without an "objective justification", without referring to any industrial/business argument to justify the exculpation¹⁰⁸⁵.

An element of divergence is the perception of the doctrine of essential facility: whilst in the US the doctrine exists but Courts tend to avoid its application, to narrow it down to the greatest extent possible, or to infer violation of § 2 on different grounds, in the EU the borderline between freedom not to venture with a competitor and duty to share an essential facility is blurrier, and there is no reference to the notion of "essential facility" itself. That makes the spectrum of applications wider, as it has been shown that liability under article 102 for denying access to a facility can be established even if no course of dealing between the parties existed prior to the refusal; contrariwise, the US model has proved reluctant to affirm §-2 liability for denying access when litigants had not been in a business relationship prior to the denial. That might explain why the essential facilities doctrine has revealed itself as a valid tool in Europe to liberalize State monopolies,

¹⁰⁸⁴ *Ibidem*

¹⁰⁸⁵ In the *Bronner* Case, the ECJ affirmed that access to the facility is to be denied without an "objective justification": there is no mention of a ground of exculpation based on an industrial/business argument. *Oscar Bronner v. Mediaprint*, 26.11.1998, Case C-7/97, [1998] ECR I-7817, para. 41

whereas in the US it has been regarded as potentially disruptive of the whole antitrust system¹⁰⁸⁶.

In sum, both the Supreme Court and the ECJ displayed the same reservations with regard to an extensive application of the doctrine, but the ECJ shows a slant towards assuring access to a facility in those markets where a market-access-problem had been previously identified by imposing broader duties to deal; in that respect, it is significant that the AG Jacobs refers to the constitutional pedigree of the “right to choose one’s trading partner”¹⁰⁸⁷. Conversely, in *Trinko* the Supreme Court once more demarcated the narrow scope of the doctrine by emphasizing the high costs of false positives, regardless of an assessment of the costs of false negatives¹⁰⁸⁸.

Notwithstanding that, the European way of tackling this issue does not stand the claim that it favors fairness over market efficiency, nor that it serves to protect competitors instead of competition, nor that it shows regulatory tendencies compared to the American model, whereby the doctrine has been imported. In fact, it has been showed that there are more similarities between the two systems than differences; to conclude, the final observation is that the doctrine does exist and its application in both systems is justifiable in certain circumstances, at least when its application is the only tool to remedy actual or potential anticompetitive effects in a given market.

10. The offense of monopolization and the abuse of dominant position in a nutshell: open questions

In sum, the European notion of abuse implies that there must be an undertaking, namely any person engaged in an economic activity, which is to hold a dominant position on a relevant market. The dominance is to affect a substantial part of the common market and is to be used by the undertaking to commit an abuse, which must affect trade between Member States. Mere dominance is lawful, but there is a causative link between the dominance and the abuse. In other terms, a conduct that would be licit if performed by a non-dominant firm is abusive when put in place by a firm with a substantial degree of dominance.

In the US, something more than the mere existence of monopoly is

¹⁰⁸⁶ H. Schweitzer, *Parallels and Differences in the Attitudes towards Single Firm Conduct: What are the Reasons? The History Interpretation and Underlying Principles of § 2 of the Sherman Act and Article 82 EC*, in C.D. Ehlermann & M. Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Oxford/Portland Oregon, (2008), p. 158

¹⁰⁸⁷ *Oscar Bronner v. Mediaprint*, Conclusions of the Advocate General Jacobs, 26.11.1998, Case C-7/97, [1998] ECR I-7808, para. 56

¹⁰⁸⁸ The emphasis on the risk of false positives, and not on the risks of false negatives, is recurrent in the treatment of predation as well. Compare *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 89 L.Ed.2d 601 (1986)

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required, generally some means that are not honestly industrial, through which monopoly is achieved or maintained: in fact, under § 2, the relevant conduct is the action of monopolizing, not the sole attainment of a monopolistic position. Figuratively, under scrutiny is not the status of monopoly, but the steps through which monopoly is attained or maintained. The offense of monopolization is policed in a dynamic way. Thus, monopoly “solely” attributable to economies of scale, natural advantages, patents or legal license, superior skill or accident is lawful, on the grounds of the typical defenses. However, even in such occurrences the monopolist may engage in unlawful exclusionary practices to maintain its monopoly rents; furthermore, once a firm has achieved a monopolist position, a small degree of causative relationship between exclusionary practices and monopoly power might suffice to infer violation of § 2.

Both the laws of abusive dominance and of monopolization are enforced in an objective manner, disregarding the intent to monopolize, but simply focusing of the abusive character of the conduct. Both § 2 and article 102 have structural elements, “monopoly power” and “dominant position”, and behavioral elements, the “abuse” in the EU and the “monopolization conduct” in the US. Neither text provides much guidance in distinguishing acceptable (lawful) conduct from unacceptable (unlawful) conduct. Section 2 simply states that firms “shall [not] monopolize.” Article 82 does not define abuse but recites a non-exhaustive list of examples.

Both the EC and the U.S. courts have formulated general definitions of “abuse” and “monopolize.” In *Hoffmann La Roche*, the European Court of Justice stated that an abuse is an objective concept –not requiring anticompetitive intent–, as a conduct resulting in the creation, extension or maintenance of dominance, and entailing “recourse to methods different from those which condition normal competition” that have the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition¹⁰⁸⁹.

The most frequently cited definition of actual monopolization is found in *Grinnell*: “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident”¹⁰⁹⁰.

The European jurisprudential definition ascribes a normative claim to the concept of normality (“normal methods of

¹⁰⁸⁹ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 6.

¹⁰⁹⁰ *United States v. Grinnell Corp.*, 384 U.S. 563, 570, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)

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competition")¹⁰⁹¹; abusive dominance is a conduct by a dominant firm that (1) hinders its competition and (2) does not reflect "normal competition"¹⁰⁹². Despite that, Courts have not provided a normative test to identify normal conducts, leaving the development of the notion of normal competition (or competition on the merits) to case law.

The *Grinnell* definition is also based on a rather similar criterion, in that it ascribes a normative claim to the concept of exclusionary use of monopoly power as distinguished from growth and development. If, on the one hand this, definition sets more defined boundaries to identify the abuse, on the other hand it leaves the definition of "business acumen" and "superior product" open to the Court development. More specifically, the *Grinnell* Court failed to indicate whether the employment of "business acumen" or the development of a "superior product" is always a ground of exculpation. In other terms, there is always an element of willfulness in the business acumen or in the superior product that can be used to acquire or maintain a monopolistic position, which Courts have not addressed¹⁰⁹³.

As a matter of fact, often firms willfully acquire or maintain monopoly power precisely through business acumen or developing a superior product. It is highly unlikely that a firm really has a monopoly "thrust upon it"¹⁰⁹⁴ without the aid of any

¹⁰⁹¹ The normative relevance of the concept of "normal competition" resembles the American early enforcement of § 2. In *Standard Oil*, the Court noted that the defendant's conduct gave rise "...to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of *normal methods of industrial development* [emphasis added], but by means of combination...with the purpose of excluding others from the trade". Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 62, 31 S. Ct. 502, 516, 75 L. Ed. 619 (1911)

¹⁰⁹² *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 3

¹⁰⁹³ United States v. Grinnell Corp., 384 U.S. 563, 570, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966). Another emblematic example of the difficulty of discerning an anticompetitive use of a superior product can be found in Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), the plaintiff alleged that Kodak had restricted competition by introducing a new film format that was only compatible with new pocket-size Kodak cameras, in order to drive Berkey off competition for amateur camera and photo-finishing equipment. The Court of Appeals for the Second Circuit decided against the plaintiff's claim and countered that Kodak's ability to introduce both the new film and the new camera without pre-disclosure was a function not of its monopoly power, but of its superior business skill, innovation, and integration. Compare Chapter I, para. 5

¹⁰⁹⁴ In the case law, there is a clear-cut distinction between the achievement of monopoly, on the one hand, and monopoly that has been 'thrust upon it', on the other hand, to which the Sherman Act does not apply. United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945).

willful conduct¹⁰⁹⁵. In order to overcome the problems raised by the Grinnell test Courts and commentators have offered other formulations, leaning on the “anticompetitive or exclusionary” character of conduct¹⁰⁹⁶.

The problem remains open: neither the idea of anticompetitive conduct nor the idea of conduct hindering normal competition says much about how to distinguish vigorous competition resulting into the exclusion of a rival from a conscious conduct that excludes competition. This difficulty is reflected in the pre-*Grinnell* structuralist approach in the enforcement of § 2: following *Alcoa*, Courts articulated the test concluding that a firm could be guilty of monopolization even if its conduct was “honestly industrial” and not “actuated solely by a desire to prevent competition”¹⁰⁹⁷.

10.1 The *continuum* between individualism and altruism

That reflects the same crucial question: an honestly industrial conduct, or the use of business acumen, can also have anticompetitive effects, but “the extent to which particular words or categories are regarded as sufficiently “factual” to serve as the basis of formally realizable rules changes through time, is subject to dispute at any particular time, and is a matter of degree”¹⁰⁹⁸. The same idea of “competition” may appear to one lawyer to be likely to generate precise and predictable answers to particular questions of antitrust law, while another may regard it as no more than a non-manageable standard.

Inevitably, the choice of applying § 2 against these arguably anticompetitive schemes will reflect two different rethorical and substantive modes that lawyers use in justifying particular rules of law, which can be epitomized in altruism and individualism,

¹⁰⁹⁵ E. Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 260 (2003)

¹⁰⁹⁶ In *Aspen* the Court borrowed the formulation of Professors Areeda and Turner, defining exclusionary the conduct that “(1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way”. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 2859, 86 L. Ed. 2d 467 (1985)

¹⁰⁹⁷ *American Tobacco Co. v. United States*, 328 U.S. 781, 813-814 (1946) quoting and “welcom[ing] this opportunity to endorse” these statements from *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir.1945). Also compare *United States v. Griffith*, 334 U.S. 100, 105-07 (1948) holding that monopolization could be proven simply by the “existence of power ‘to exclude competition when it is desired to do so’... coupled with the purpose or intent to exercise that power”.

¹⁰⁹⁸ J.P. Dawson, *Unconscionable Coercion: The German Version*, 89 Harv. L. Rev. 1041, 1042 (1976)

as they have been outlined in the introduction to this chapter¹⁰⁹⁹: the core of the individualistic paradigm is belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested. The fundamental idea of the altruistic paradigm is the belief that one ought not to indulge a sharp preference for one's own interest over those of others¹¹⁰⁰.

An individualistic stance will tend to favor the application of clear rules and to guarantee the rights of market players through non-intervention; moreover, it will tend to be defendant friendly by tolerating inequalities of bargaining power implied in monopoly, and more lenient towards profit-maximizing conduct that will have exclusionary effects by ignoring the existence of social duties. Conversely, an altruist attitude will tend to favor the application of standards of reasonable understanding, and censor the structural harm to competition, even when the monopolist's conduct is honestly industrial.

The altruistic attitude is particularly evident when it comes to enforcing the European standard of "normal" competition, or "competition on the merits"¹¹⁰¹, in which the judge will filter political stakes that are already part of the *acquis communautaire*, such as the general –yet not categorical- protection of both consumers and SMEs, as weaker parties to transactions¹¹⁰².

The dichotomy of individualism-rule Vs altruism-standard is also manifest in the two opposite arguments about direct price regulation. The European abuse of excessive pricing is substantially justified in an altruistic fashion, namely as a function of the whole situation of the market¹¹⁰³. Conversely, the absence of a law of excessive pricing in the US system, save the limited reach of § 2(a) of the Robinson-Patman Act, reflects the individualist faith in the idea of efficiency in the adjudication of a claim of monopolization, based on the normative claim that it is not up to the judge to establish a *iustum pretium* in a transaction, but such task is left to the free display of market forces.

In general, American individualism seeks to freeze into the legal

¹⁰⁹⁹ D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1714 (1976)

¹¹⁰⁰ D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1718 (1976)

¹¹⁰¹ See *supra*, paragraph 1. Introduction, the explanation of the dichotomy in adjudication.

¹¹⁰² M.W. Hesselink, *SMEs in European contract law, background note for the European Parliament on the position of small and medium-sized enterprises (SMEs) in a future Common Frame of Reference (CFR) and in the review of the consumer law acquis*, available at

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1030301 (2007)

¹¹⁰³ See *infra*, note n. 166 on the definition of excessive price in relation to the

system the whole structure of *laissez faire*; it follows that antitrust law is only committed to free enterprise, on the one hand, and to the maximization of consumer welfare, on the other hand. Other policies filtered into the enforcement of § 2 cannot but be regarded as a “dangerous” form activism of Courts which, as it has been seen, stand as mere guarantors of individual freedoms.

11. Exclusionary standards in light of the main doctrinal and judicial analytical tests: a syncretic approach

In the narrowing of the relevant conducts of monopolization and abusive dominance, both models resort to open clauses such as “exclusionary conduct”¹¹⁰⁴, “anticompetitive conduct”¹¹⁰⁵, and impairment of “competition on the merits”¹¹⁰⁶. All these clauses have a major flaw, they do not provide guidance as to indicate the point after which a conduct is anticompetitive; the concept of exclusion is particularly ambiguous, because all competitive conducts that maximize profits and increase the firm’s market share also have exclusionary effects for the rivals; likewise, the placement on the market of a technologically superior product will exclude the obsolete products. Generally speaking, one of the needs for antitrust law is to administer the justifiable exclusion of rivals and to proscribe the unjustifiable ones.

The legal argument has availed itself of numerous tests, mostly of economic origins, to fill the above open clauses with meaning, each reflecting a particular policy consideration that the both judicial and doctrinal formants have been attaching to the law of unilateral exclusionary conduct.

Currently, the most discussed tests are consumer harm, profit sacrifice, no economic sense, and efficiency standards.

¹¹⁰⁴ Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S.N.C. 1993)

¹¹⁰⁵ Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S. Ct. 2847, 2859, 86 L. Ed. 2d 467 (1985). Europemballage Corporation and Continental Can v. Commission of the European Communities, 21.02.1973, Case 6/72, [1973], ECR 215, para. 27

¹¹⁰⁶ Compare Aspen, and Spectrum Sports v. McQuillan Et Vir, DbA Sorboturf Enterprises, 506 U.S. 447 (1993), 113 S.Ct. 884, 122 L.Ed.2d 247, with regard to the attempt of monopolizing. Deutsche Telekom AG v. Commission of the European Communities, 14.10.2010, Case C-280/08 P, 2010, para. 192. The “competition on the merits” test was developed through the doctrinal formant (P. Areeda & D.F. Turner, *Antitrust Law: an Analysis of Antitrust Principles and their Application*, Little, Brown and Co., Boston, vol. 3 § 651 p. 78 (1978), but gained success even among the EU Competition authorities. Commissioner Mario Monti, in his press release after the conclusion of the *Microsoft* investigation and the imposition of a fine. “Dominant companies have a special responsibility to ensure that the way they do business doesn’t prevent competition on the merits and does not harm consumers and innovation”. Brussels 24 March 2004, Reference: IP/04/382 Available at http://europa.eu/rapid/press-release_IP-04-382_en.htm

11.1 The consumer harm test

Under the consumer harm test, the conduct is unlawful when the firm increases its market power and causes a net harm to consumer welfare; thus, there is an abuse only if challenged conduct has the effect of raising prices or restricting output, innovation, or quality¹¹⁰⁷.

Resonance of the consumer harm test can be found in the previous Areeda & Turner formula to infer violation of § 2, pursuant to which exclusionary conduct “[C]omprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way”. In 2007, Areeda and Hovenkamp reformulated the test, as acts that: (1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and (2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits¹¹⁰⁸.

Courts have articulated a balancing test under § 2 simply by readapting the rule of reason: in *Microsoft* –arguably the most famous modern monopolization case- the Court ruled that the plaintiff must demonstrate the anticompetitive effects of the monopolist’s conduct. Should he succeed in establishing a *prima facie* claim of monopolization, the defendant might proffer a procompetitive justification for its conduct. If the defendant’s justification stands un rebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit¹¹⁰⁹. However, the practical difficulty of balancing the efficiencies and inefficiencies brought the D.C. Circuit to find violation of § 2 merely on the absence of sufficient evidence of anticompetitive effects (inefficiencies) or of business justifications (efficiencies). The naked quashing of a new technology in a rapidly evolving market sufficed to establish a finding of monopolization, absent an actual balance of harms and benefits, and given the axiological preference for safeguarding technological value from the anticompetitive harm.

¹¹⁰⁷ J. Vickers, *Abuse of Market Power*, Speech of the 31st Conference of the European Association of Research in Industrial Economics, Berlin, September 3rd, 2004, available at http://www.ofc.gov.uk/shared_ofc/speeches/spe0304.pdf

¹¹⁰⁸ P. Areeda & D.F Turner, *Antitrust Law: an Analysis of Antitrust Principles and their Application*, Little, Brown and Co., Boston, vol. 3 § 651 p. 78 (1978). As for the new formulation of the test, compare P.E. Areeda & H. Hovenkamp, *Antitrust Law – An Analysis of Antitrust Principles and Their Application*, Wolters Kluwer Law and Business, New York, § 3 p. 96 (2007).As regards the *Aspen* case, see note n. 211.

¹¹⁰⁹ *United States v. Microsoft Corp.*, 253 F.3d 34, 15-18 (D.C. Cir. 2001)

An intriguing parallel can be found in the approach of the Commission in the European *Microsoft* case, in which the defendant was found to have contravened the second paragraph of article 102, by “limiting production, markets or technical development to the prejudice of consumers”. Interestingly enough, in applying a balancing test, the Commission did not rely on economic elements that would allow a real comparison between the gains and the losses of the conduct, but applied a rule of reason by simply weighing the anticompetitive nature of the tying operated by the defendant.

11.2 The profit-sacrifice test

The profit-sacrifice test implies that the firm is to deliberately forego some profits in the short run in order to induce exit from the market and to recoup the losses in the long term¹¹¹⁰. The cost and benefits of the conduct are balanced, and conduct is unlawful if it is unprofitable for the dominant firm but for the exclusion of rivals and the post-exclusion supra-competitive recoupment.

In both systems the most obvious example of profit-sacrifice conduct is predatory pricing. It has been seen that proof of the recoupment is more stringent in the US, where the strict recoupment is a prerequisite for a finding of predation, whereas in Europe the structural recoupment suffices.

11.3 The no-economic sense test

The no-economic sense test is closely related to the profit sacrifice one and focuses on the objective rationale of the conduct: there is an abuse when the conduct makes no economic sense but for the exclusion of competitors or the softening of competition¹¹¹¹. The no economic sense test avoids some of the criticisms that commentators have addressed to the profit-sacrifice test. If the dominant firm foregoes some profits in the short-run, under the no economic sense test it should be further assessed whether it is rational to make that sacrifice. Besides, under the test it is not necessary for a conduct to constitute a short-run profit sacrifice to be deemed unlawful, because the exclusionary impact of a conduct can be immediate and the anticompetitive gains from exclusionary conduct can be reaped straightaway, without any inquire of the resulting recoupment¹¹¹²: when confronted with a

¹¹¹⁰ A.D. Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct – Are There Unifying Principles?*, 73 *Antitrust L.J.* (2006); J. Ordover & R. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 *Yale Law Journal* 8 (1981)

¹¹¹¹ A.M. Mateus & T. Coelho Moreira, *Competition Law and Economics – Advances in Competition Policy Enforcement in the EU and in North America*, Edward Elgar Publishing (Inc.), Northampton, Massachusetts, (2010) p.190

¹¹¹² G.J. Werden, *Identifying Exclusionary Conduct Under Section 2*, 73 *Antitrust L.J.* 413 (2006)

short-run profit sacrifice, the court should merely evaluate whether it is an act of elimination of competition or it is an act directed to business growth.

In the US system, precisely in the context of refusal to deal, evidence of sacrifice contributed to the Supreme Court's finding of exclusion in *Aspen*, where the defendant's termination of a presumably profitable course of dealing with its competitors was deemed to make no sense but for exclusion¹¹¹³. Furthermore, the Department of Justice and the Federal Trade Commission advocated a no economic sense test in an *Amicus Curiae* for *Verizon v. Trinko*: conduct is 'exclusionary' ... if [it] would not make economic sense for the defendant but for its elimination or softening of competition."¹¹¹⁴. However, the absence of sacrifice contributed to reverse the plaintiff's claim: absent an allegation that the defendant's conduct implied financial sacrifice, and absent an actual sacrifice of short-term profits that makes sense only if it eliminates or impairs competition, the Supreme Court found that the plaintiff was under no obligation aid a competitor by sharing a facility pursuant to § 2¹¹¹⁵.

All things considered, the paradigm of two cases shares some characteristics of both the profit-sacrifice and of the no-economic sense test, in that both Courts leaned on the idea of profit sacrifice with an anticompetitive slant. The bottom line is both the *Trinko* and the *Aspen* Court did emphasize the objective rationale of the monopolist, rather than the effects of the conduct: *Aspen Ski's* termination of a voluntary course of dealing suggested "a distinctly anticompetitive bent"; *Verizon* had never voluntarily engaged in any such course of dealing so its prior conduct "sheds no light upon the motivation of its refusal to deal"¹¹¹⁶.

11.4 The equally efficient competitor test

The measurement of the firm's efficiency has been proposed by Judge Posner through the equally efficient competitor test,

¹¹¹³ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 2859, 86 L. Ed. 2d 467 (1985) the monopolist ought to be "willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival".

¹¹¹⁴ Brief for the Government, *Verizon Comm'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, section n. 16 (2004) "A monopolist's right to refuse cooperation with rivals is not wholly unqualified. If such a refusal involves a sacrifice of profits or business advantage that makes economic sense only because it eliminates or lessens competition, it is exclusionary and potentially unlawful".

¹¹¹⁵ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411, 124 S. Ct. 872, 880, 157 L. Ed. 2d 823 (2004). Whilst *Aspen's* conduct "suggested a willingness to forsake short-term profits to achieve an anticompetitive end", this factor was not present in the *Verizon* claim.

¹¹¹⁶ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411, 124 S. Ct. 872, 880, 157 L. Ed. 2d 823 (2004)

pursuant to which there is monopolization every time an equally or more efficient competitor is excluded¹¹¹⁷. In other terms, the test focuses on the effects of the conduct and disregards the objective rationale of it: when exclusionary effects caused by the conduct are offset by the efficiency produced in terms of consumer welfare the conduct will be lawful, because the exclusion of a less efficient firm is likely to generate a redistribution of welfare to consumers, in terms of a price reduction or a superior product.

It has been seen that, even though the equally efficient test has its roots in the American scholarship, it has arguably had more resonance in the EU, since the Court admitted the test in *AKZO*, focusing on the foreclosure of competition for those rivals who were less efficient than the dominant firm¹¹¹⁸.

This test has also gained traction in a series of margin squeeze cases in the EU¹¹¹⁹, such as *Deutsche Telekom*, where the assessment of the anticompetitive conduct was solely based on the measurement of the dominant firm's cost, and not on the subjective intent of eliminating rivals. Furthermore, in *TeliaSonera* it was held that the economic justification for a price reduction capable of excluding a rival is to be made on the basis of all the circumstances of the case: dominant firm is to prove an increase in efficiency, whereby its low prices are necessary for all the firms in the market to be able to produce or distribute the product, and ultimately bring an advantage for the consumers¹¹²⁰.

¹¹¹⁷ R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, 2001, p. 196

¹¹¹⁸ *AKZO Chemie BV v Commission of the European Communities*, 03.07.1991, Case 62/86, 1991, ECR I-3359, para. 70.

¹¹¹⁹ Unlike the US, under EU competition law, the concept of margin squeeze has recently emerged into abusive-dominance litigation. Margin squeeze reflects a more general concern in competition law related to the issue of the profit sacrifice by vertically integrated companies enjoying market power, which prevent downstream companies from achieving competitive price-cost margins. A margin squeeze -or "price squeeze"- can occur when the firm charges a downstream price that is too low relative to the input price, with the result of driving out some or all downstream rivals, or at least significantly weakening their competitive positions (predation); or when the firm charges a wholesale price that is too high relative to the retail price, and however insufficient to allow for effective competition in the downstream market (vertical foreclosure-refusal to deal). In the last decade, margin squeeze allegations have come under scrutiny of both regulatory and competition authorities worldwide, in particular in those sectors that have transitioned from regulation to competition, such as telecommunications, gas, electricity or postal services. For a more detailed explanation of the phenomenon compare H. Auf'mkolk, *From Regulatory Tool to Competition Law Rule: The Case of Margin Squeeze under EU Competition Law*, *Journal of European Competition Law & Practice*, Vol. 3, No. 2, pp. 149-162, 2012

¹¹²⁰ *Konkurrensverket v. TeliaSonera Sverige AB*, 17.02.2011, Case C 52-09, [2011] I-527, para. 76

11.5 The balance between the gains and the harms of the unilateral conduct

Post-Chicago scholars have criticized the under-inclusiveness of the equally efficient test and have based their analysis on the inquiry of the efficiency of the monopolist's strategies.

In particular, Professor Elhauge proposed a test yet based on efficiency, but not constructed on the balance between the gains and the harms of the unilateral conduct: if the dominant firm has improved its own efficiency in order to make a better or cheaper product, it should be free to sell that product at any above-cost price it wants, even though that may shrink rival market share to a size that leaves rivals less efficient, no balancing of harms being required. If the dominant firm has succeeded in furthering monopoly power by impairing rival efficiency, its conduct should be deemed unlawful¹¹²¹.

11.6 The "raising rivals' costs (RRC)" test

Professors Krattenmaker and Salop propose the "raising rivals' costs (RRC)" test¹¹²². In their seminal article on Raising Rivals' Costs, Salop & Krattenmaker illustrate this basic paradigm with four types of behavior that could raise rivals' costs: (1) a bottleneck; (2) "real foreclosure"; (3) the "cartel ringmaster"; and (4) the "Frankenstein Monster"¹¹²³. Aside from the two illustrations, which involve raising rivals' costs by inducing collusive behavior among the suppliers, the first two behaviors are based on the notion of foreclosing supply of an input, thereby increasing its cost. In particular, a "real foreclosure" technique occurs when the dominant firm can use an exclusionary arrangement with the suppliers of an input in order to force rivals to pay more for the input and therefore raise the price of the downstream product above competitive level. This allows the excluding company likewise to raise downstream prices, capturing the price increase as a monopoly profit.

Similarly, a purchaser can overbuy large amounts of the supply in order to drive up the market price for the rest of the supply of the input. Krattenmaker and Salop have reconstructed part of the Supreme Court's reasoning in *Alcoa* in terms of "real foreclosure": by overbuying excessive amounts of raw materials necessary for the aluminum production, the defendant had raised the price for the remaining inputs, increasing the costs of production for its rivals. Similarly, by acquiring a naked exclusionary right over the

¹¹²¹ E. Elhauge, *Defining better monopolization standards*, 56 Stan. L. Rev. 253, 263 (2003)

¹¹²² T.G. Krattenmaker & S.G. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209, 236 (1986)

¹¹²³ For a further explanation of the Krattenmaker-Salop paradigm, compare Chapter I, para. 5 note n. 185

supply of electricity, it had raised its rivals' prices for electricity¹¹²⁴. The RRC test is eclectic, in that it focuses on the effects of the conduct, which are measured in an objective manner, namely in terms of allocative efficiency, but the act of raising rivals' cost is interpreted in a normative sense, as anticompetitive *per se*. This test suits the structuralist approach characterizing the enforcement of § 2 in the 1940s' and 1950'.

Furthermore, post-Chicago approach is informed to the identification of the strategies through which the monopolist would raise its rivals' cost¹¹²⁵: in *Eastman Kodak Co. v. Image Technical Services* (1992), the Supreme Court focused on the possibility of higher prices being charged to consumers of aftermarket parts because of the defendant's decision to limit the availability to the plaintiff of replacement parts, and of the existence of significant information and switching costs that could create a less responsive connection between aftermarket prices and equipment sales.

Similarly, the RRC test is not significantly divergent from the objective evaluation of the effects of a price squeeze on the downstream market in the European margin squeeze claims of *Deutsche Telekom* and *TeliaSonera*¹¹²⁶.

11.7 The inescapable tension between consumer protection and outcome efficiency

In conclusion, a unifying test does not exist and by no means has one test proved to prevail over the other in qualitative terms. The bottom line is a twofold consideration: one the one hand, all these tests reveal the inextricable interdependence between the law and economics when it comes to policing the phenomenon of monopolization-abusive dominance of a firm; on the other hand, the attempt to identify a fit-all principle to evaluate monopolizing-abusive conducts will always result into an elusive effort, because each of these paradigms will reflect a more liberal or a more regulatory attitude towards the phenomenon. These competing or complementary tests differ in quantitative terms, and both Courts and competition authorities will continue to give axiological primacy to either consumer protection or outcome efficiency, based on different policy considerations and different assumptions.

All things considered, the profit-sacrifice investigation, the Department of Justice and the Federal Trade Commission focus on whether the conduct would not make business sense but for its exclusionary effect, Judge Posner's focus on whether the conduct

¹¹²⁴ *Ibidem*

¹¹²⁵ A.I. Gavil, W.E.Kovacic & J.B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*, p. 679 St Paul, Minnesota (2006)

¹¹²⁶ See *supra*, para. 5.4

excludes an equally efficient rival, Professor Elhauge's standard of conduct that impairs a rival's efficiency without contributing to the monopolist's efficiency, *Microsoft's* rule of reason balancing the precompetitive and anticompetitive effects of the conduct; Krattenmaker-Salop's raising rivals' cost, are destined to become "old bottles for new wine"¹¹²⁷, none of which will capture completely the phenomena at stake.

12. Main policy considerations characterizing the two systems

The divergence between § 2 and article 102 is also grounded on different policy considerations. It has been seen that consumer welfare is the exclusive policy consideration under § 2; conversely, in article 102 the protection of consumer welfare is also qualified by both market integration and fairness considerations.

Even if the European Commission has emphasized the prevalence of the consumer protection rationale over both fairness and market integration¹¹²⁸, it seems unlikely that the last two concerns will be eliminated completely from the political agenda of European competition law, because such objectives are enshrined in the fundamental principles of the EU Treaty¹¹²⁹.

12.1 Fairness considerations

With regard to the fairness consideration, its absence from American antitrust law enforcement has been partly due to the lack of predictable and administrable rules to identify an objective standard of fairness in the monopolist's conduct, partly to the fear of excessively hampering the competitive and innovation process by means of protectionist principles.

In contrast, fairness is expressed as a policy consideration in the prohibition of exploitative abuses, which implies the imposition "unfair purchase or selling prices or other unfair trading

¹¹²⁷ Misquoted Matthew 9:14-17 "Neither do men put *new wine into old bottles* [emphasis added]: else the bottles break, and the wine runneth out, and the bottles perish: but they put new wine into new bottles, and both are preserved". King James Bible "Authorized Version", Cambridge Edition, available at <http://www.kingjamesbibleonline.org/Matthew-9-17/>

¹¹²⁸ Competition Commissioner Mario Monti, *Speech on European Competition Day: Competition for Consumers' Benefit* (Oct. 22, 2004). "I said in my hearing before the European Parliament back in 1999, just before my term as Competition Commissioner began, that I would give "central importance to the consumers", available at http://ec.europa.eu/competition/speeches/index_2004.html

¹¹²⁹ Article 3 paragraph 3 of the Consolidated Treaty on European Union provides that "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance".

conditions”¹¹³⁰. Fairness is promoted to the benefit of both consumers’ and SMEs, as it appears from the German Ordoliberal origins of article 102, under which assumption big businesses should not hamper the activity of small ones.

Aside from the normative origins of the article, there are other historical reasons underlying the condemnation of excessive pricing. Signatories of the Rome Treaty in 1957 may have seen price regulation as necessary or desirable to protect customers until competition developed more fully, together with the establishment of the Common Market¹¹³¹. Chilling effects were disregarded, on the assumption that most dominant undertakings were state (or state-protected) monopolists whose market power would not diminish in the conceivable future.

With regard to “excessive pricing”, the assessment of fairness is particularly controversial, and in all likelihood is the result of policy considerations exogenous to supply and demand conditions, given the impossibility of determining *iustum pretium*, namely a fair price imposed either by law or by the judge. As a matter of fact, in *SACEM II* the Court held that a useful indication to determine whether an exploitative abuse has been committed is the comparison between the dominant firm’s costs and operating expenses and those of its counterparts in other member states provides, implying that a dominant firm that is not as efficient as its counterparts in other markets would be abusing its dominant position¹¹³². This approach has been criticized since it has as its consequence the ascertainment of an artificial efficiency based on exogenous elements rather than on the free display of market forces in that particular marketplace¹¹³³.

At best, Courts can grant some relief on the mere ground of the economic lesion arising out of the anticompetitive conduct. In *United Brands*, the Court defined as “excessive” prices that have “no reasonable relation to the economic value of the product supplied,” by looking at the price charged for the product, its costs of production, and determining whether that price would be unfair in itself or when compared to competing products¹¹³⁴. Once again, judicial enforcement shows how the standard of

¹¹³⁰ Article 102 paragraph (a)

¹¹³¹ M.S. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief about Monopoly?*, 49 *Antitrust Bull.* 343 (2004)

¹¹³² *Lucazeau et al. v. SACEM*, 09.07.1989, Joined Cases 110, 241, 242/88, [1989] ECR 2811, para. 28

¹¹³³ See T.E. Kauper, *Whither Article 86? Observations on Excessive Prices and Refusals to Deal*, in B.E. Hawk (ed.), *International Antitrust Law and Policy*, Fordham Corporate Law Institute, p. 651 (1990).

¹¹³⁴ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, para. 252. The ECJ charged the Commission with the burden of demonstrating the excessiveness of the price set by United Brands.

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reasonableness is a vacuum that Courts can fill with opposite political stakes, ranging –for the sake of brevity– from individualism to altruism. In *United Brands*, the Court has shown an altruistic slant and the tendency to consider the dominant firm's price as excessive because its anticompetitive impact on the market was a function of the whole situation, rather than a function of any general application of economic principles of supply and demand.

At any rate, the appraisal of a “competitive price” can dangerously transfigure in a regulatory tool for the Common Market, and lead to paradoxical results of censoring conducts that are neither anticompetitive nor detrimental to consumers. The degeneration of this altruistic attitude of European law of exploitative abuses might consist of an excessive regulatory intervention of both the lawmakers and the judges, which might paralyze the economic private enterprise.

The above referred risk implied in an extensive interpretation of article 102(a) has led to a narrow interpretation of excessive pricing abuses, which have been often found in markets characterized by high entry barriers (for instance technical standards), based on the assumption that the entry of new players in response to excessive prices would keep prices on a competitive level. Prices should not be regulated unless the excessiveness appreciably restricts competition, or there exists a public interest in lowering them to the benefit of consumers until competition is fully developed, or there is no expectation of new entry.

Contrariwise, in the US the hostility to review exploitative pricing has traditionally characterized § 2's enforcement, on the grounds of the complexity and non-administrability of the tests employed (price/cost comparisons, price comparison with competitive markets, etc). Moreover, monopolists have the capacity of charging supra-competitive prices also through honestly industrial strategies or efficient means: by sanctioning excessive pricing, antitrust law would also chill the incentives to compete.

As opposed to the European system, the American disregard for a law of excessive pricing reflects the individualistic adherence to the economic principles of supply and demand, on the one hand, and the *laissez-faire* praise for non-intervention in the regulation of the economic power, on the other hand. The degeneration of this attitude might consist of an excessive tolerance for the inequalities of market power among players in the name of a complete abstention from enforcing substantial values in particular cases.

The imposition of “unfair trading conditions” is the second fairness consideration, whereby the dominant undertaking leverages on its market power to impose conditions that would not be otherwise imposed absent the market power itself. Here probably lays the most trenchant difference with the US system

because, by linking the abusiveness of the conduct to the firm's size in such an objective manner, EU competition authorities appear to proscribe a course of conduct that in the US may be deemed efficient and advantageous for consumers, namely the application of trading conditions that competitors cannot sustain, because of their less efficient organizational structure.

That shows how one of the policy considerations of article 102 is achievement of fairness, in other terms that firms with market power behave "as-if" the market were competitive. This view was reflected in the need for protection of small and medium enterprises, which were deemed as important to the consumers as the big businesses¹¹³⁵. Thus, some restrictions on the dominant firm's conduct are deemed necessary to reassure fairness.

12.2 Market Integration considerations

The market integration is the second European policy consideration extraneous to the enforcement of § 2. In 1958, the Rome Treaty on the establishment of the European Economic Community integrated into a unified Common Market the separate markets of the sovereign states. Because article 102 (in its old formulation as article 82) has been drafted as a part of the Treaty of Rome, it has been developed within the broader context that Treaty creates; the law relating to competition is also molded by reference to the initial articles of the Treaty, which enshrine the Treaty's basic principles.

The integration goal has informed all the new treaties, including the 1992 Treaty establishing the European Union¹¹³⁶, and the following ones. Article 3(g) focuses on the "institution of a system ensuring that competition in the common market is not distorted"¹¹³⁷. Article 2 requires the European Union "to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it"¹¹³⁸.

These articles have set forth the principles that ultimately must guide the EU authorities in the application of competition rules. Hence, even after the achievement of the Monetary Union and introduction elements of a political union (citizenship, common foreign and internal affairs policy), the consolidation of the Internal Market has never ceased, and the Union has seen the

¹¹³⁵ D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, p. 92

¹¹³⁶ Treaty on European Union - Maastricht Treaty (1992)

¹¹³⁷ Available at http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html

¹¹³⁸ *Ibidem*

increase to twenty-seven member States from the original six¹¹³⁹. Conversely, at the time of the enactment of the Sherman Act, the United States was already a federation of states with an already integrated economy and an integrated internal market.

The consolidation of the Internal Market has traditionally been informing the application of article 102, for instance in the prohibition of artificially discriminatory prices for equivalent transactions among member states that merely represent obstacles to the free movement of goods and a way to compartmentalize the market along national borders, as the *United Brands* case suggests¹¹⁴⁰, or the charging of different fees to domestic and international customers¹¹⁴¹.

Despite that, it is not clear whether the market integration will continue to inform the application of article 102, given that there is no mention of such policy concern in the Commission's discussion papers¹¹⁴².

13. A possible explanation: the dichotomy between consumerist and ordoliberal policies, or the dichotomy between an efficient and an open market

Broadly speaking, both U.S. and E.U. competition regimes resort to the economic principles of competition, and utilize the concept of efficiency as a primary reason to regulate against monopolies. Pricing is the ultimate test for an efficiency-based regime, and plays a significant role in understanding the consequences of transactions and economic practices¹¹⁴³: it has been highlighted

¹¹³⁹ European Community, Article 3 of the Treaty Establishing the European Community, (EC Treaty) 1992, <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html> further provides in part: 1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: (a) the elimination, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) a common commercial policy; (c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital; (d) measures concerning the entry and movement of persons as provided for in Title IV; . . . Article 14 provides in part: 1. The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.

¹¹⁴⁰ *United Brands Company and United Brands Continental BV v Commission of the European Communities*, 14.02.1978, 27/76, 1978, ECR 207, paras. 4 and 232.

¹¹⁴¹ *Aéroports de Paris v. Commission of the European Communities*, 12.12.2000, Case C-82/01, [2002], ECR I-2613

¹¹⁴² DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005

¹¹⁴³ K. Abutbul, *The US and EU approaches to Competition Law – Convergent or Divergent Paths?*, 17 Colum. J. Eur. L. 101 114 (2010)

how deeply the two regimes resort to price analysis in the definition of monopolization and abusive dominance standards¹¹⁴⁴.

The incorporation of the basic price-centered tenets of economics in competition law is to be confronted with the traditional conceptual divide between § 2 and article 102, namely a strikingly different idea of competition enlivening each provision. Section 2 of the Sherman Act departs from a consumer welfarist perspective, which focuses on price and output, efficiency and safeguard of technological innovation. The anticompetitive unilateral behavior is reviewed primarily with respect to whether it will, over the long run, increase consumer welfare. Legal analysis is grounded on economics, with the primary emphasis on efficiency and consumer welfare maximization. Antitrust, in other terms, is about the effects of business behavior on consumers, and the relationship of the firm's conduct with the consumers' well being, because it is understood that the appraisal of impact of the firm's conduct on consumers can be obtained only with basic economic theory.

Conversely, the ordoliberal ideas of safeguard of economic freedom, market access and rival opportunities provided the major impetus for article 102 of the Treaty on the Functioning of the European Union is inspired by¹¹⁴⁵. Thus, the conduct of the dominant firm is analyzed with regard to a broader range of concerns that are not only economic but also social and political, and include the establishment of a Common Market, the approximation of social and economic conditions of Member States, and the guarantee of equal access to the market regardless of the size of the firm. Thus, the Ordoliberal approach disregards welfare as an element of the competition inquiry or, in other words, the analysis of the distortion of competition is not subject to the inquiry of whether this conduct is economically efficient or welfare reducing¹¹⁴⁶. Unlike the US, in EU competition law economic theory is not utilized in a normative sense to determine the ontological contours of a distortion of competition, but rather is a tool supplementing the legal categorization of conducts.

Thus framed, the EU competition law background idea shows bears little resemblance to the American notion of competition as a generator of efficiency, even though one must allow that the Court

¹¹⁴⁴ Amongst other standards, the law of predation of both systems is based on the price analysis of the conduct.

¹¹⁴⁵ For an extensive overview of the Ordoliberal background of European Competition Law, see D.J. Gerber, *Law and Competition in the Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, p. 357 *et seq.* (1998) P

¹¹⁴⁶ T. Eilmansberger, *How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses*, 42 *Common Market L. Rev.* 129, 137 (2005).

and Commission interpretation of the law of abusive dominance appears to be more market-oriented than the treaty provision itself¹¹⁴⁷.

Throughout this essay, it has been argued that the Chicago School of Law and Economics has put the most emphasis on consumer welfare, and has recollecting this policy concern in the overarching antitrust goal of the promotion of efficiency¹¹⁴⁸. In the context of monopoly, a number of welfarist claims drive Chicago School antitrust analysis.

First and foremost, economic efficiency, as expressed in terms of consumer welfare maximization, should be the paramount goal of antitrust laws. Consumer welfare is maximized when economic resources are allocated in a way that guarantees consumer prosperity is satisfied as fully as technological progress allows¹¹⁴⁹. Second, the focus on consumer welfare standard produces more administrable and objective rules, and is particularly manifest in the refusal of including exploitative abuses in the reach § 2; the “consumer welfare” stake has no ethical or redistribution implications, and antitrust law is not a process for establishing who is rich and who is poor. It only seeks to increase consumer welfare by requiring that in transactions the most favorable conditions for consumers be met. In all, consumer welfare is only a synonym for the wealth of the nation. Contrary to that, the reviviscence of the concepts of “excessive pricing” or “unfair trading conditions” as under article 102(a) still characterizes the European role of the judge as a controller of the excessive producer surplus, and as an arbiter of the fairness of market

¹¹⁴⁷ The Commission has called for a more economic approach in the enforcement of article 102, through its Competition Commissioner Mario Monti, who has argued his final speech at the end of his five-year mandate, *A reformed competition policy: achievements and challenges for the future*: “There is now a framework to allow the Commission to concentrate on proper enforcement priorities: Major changes such as the modernization of procedures, *the introduction of an economic approach* [emphasis added] and a careful priority setting have allowed the Commission to move from being an authority mainly processing notifications to an authority focused on prosecuting cross-border cartels and other antitrust infringements of major economic impact”. Centre for European Reform, Brussels, 28 October 2004, available at http://ec.europa.eu/competition/publications/cpn/2004_3_1.pdf. P. Jebsen & R. Stevens, *Assumptions, Goals and Dominant Undertakings, the Regulation of Competition under Article 86 of the European Union*, 64 *Antitrust L.J.* 443 (1996)

¹¹⁴⁸ R.H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 *Journal of L. and Econ.* 7 (1966), R.A. Posner, *Antitrust Law*, 2nd ed. Chicago, University of Chicago Press, introduction ix, 2001; C.F. Rule & D.L. Meyer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, 33 *Antitrust Bull.* 677, 679 (1988) “whether critics like it or not, consumer welfare is today the guiding principle of antitrust law and policy”.

¹¹⁴⁹ R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p. 91 (1993)

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conditions¹¹⁵⁰.

Third, most markets are competitive regardless of the presence of a monopolistic firm¹¹⁵¹.

Fourth, every monopoly tends to its natural dissolution, since the monopolist's charging of a supra-competitive price stimulates new entries into the monopolist's market¹¹⁵².

Fifth, antitrust enforcement should only seek "to penalize conduct precisely to the point that it is inefficient, but to tolerate or encourage it when it is efficient"¹¹⁵³. The overall efficiency of the market determines the level of consumer welfare.

Sixth, entry barriers become irrelevant in a consumer welfare perspective; moreover, some barriers are even desirable on the grounds that they shelter efficient economic activities that law falls short of protecting (i.e. the positive externalities generated by technological innovation)¹¹⁵⁴.

Seventh, efficiency and consumer welfare are simply related to the relationship price-output on the demand curve: the discipline of the market would guarantee efficiency and, overall, maximize consumer welfare.

Contrary to this approach, Post-Chicago School analysis underscores more dynamic economic models and a greater factual inquiry that may better account for market imperfections. Despite "post-Chicago" scholars have criticized the under-inclusiveness of the Chicago doctrines and advocated for a better inquiry of market imperfections and the facts of cases, they have never disregarded the economic analysis of antitrust claims¹¹⁵⁵. It has been seen above how *Eastman Kodak Co. v. Image Technical Services, Inc.* has been perceived as a rejection of some of the more striving assertions of the Chicago School¹¹⁵⁶; however, even if the Court

¹¹⁵⁰ See *supra*, the fairness policy concerns characterizing the article 102

¹¹⁵¹ H. Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 227 (1985)

¹¹⁵² H. Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 227 (1985)

¹¹⁵³ H. Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 229 (1985). Likewise, the statement echoes Posner's equally efficient competitor test, whereby the monopolist's conduct is lawful to the extent that it only drives less efficient competitors off the market, having consumer welfare as the paradigm for the measurement of efficiency see *supra*.

¹¹⁵⁴ E.M. Fox & L.A. Sullivan, *Antitrust Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. Rev. 936, 974 (1987) H. Demsetz, *'Barriers to Entry'*, 72 American Economic Review 1 47 (1982). The author maintains that a barrier to entry is a mere endogenous response to consumers' preferences. For instance, the number of brands may be restricted by the consumers' ability to evaluate alternatives.

¹¹⁵⁵ See *supra*, paras. 4.4, 11.5 and 11.6, on the influence of Post-Chicago School on § 2's enforcement.

¹¹⁵⁶ M.L. Popofsky & M.S. Popofsky, *Vertical Restraints in the 1990s: Is There A "Thermidorian Reaction" to the Post-Sylvania Orthodoxy?*, 62 Antitrust L.J. 729, 751 (1994)

adopted a more nuanced approach, it nonetheless carefully explored issues as market power, pricing, and switching costs, thereby placing a great deal of emphasis on welfare economic theory, which continues to stand as a pervasive element of American antitrust jurisprudence.

Unlike the US model, the EU approach appears to be characterized by a less seamless theory and by less substantive and broader concerns than the mere welfare maximization. In particular, the Chicago school philosophy has been downplayed on the grounds of the overriding market-integration stakes characterizing the EU competition law development. The Chicago approach needs not worry about market integration, which is still an ongoing process in the EU¹¹⁵⁷. Economic analysis and the achievement of efficiency are subsumed into broader goals that shape the contours of article 102, such as the protection the equal opportunities of the dominant firm's rivals. It has been noticed that the ban of excessive prices as "unfair", not as inefficient, together with the proscription for dissimilar conditions that place "other trading parties ... at a competitive disadvantage" imply from the outset that the protection of such other trading parties is an end in itself, unraveled from the fostering of competition¹¹⁵⁸.

Moreover, the mindset of European Courts tends to find indicia of dominance in the presence of smaller shares, which suggests a certain predisposition with respect to the finding of the abuse. As a result, EU competition jurisprudence has developed a more unpredictable law of abusive dominance, with a view to safeguarding rivals' opportunities, even to the detriment of efficiency and success in enhancing consumer welfare.

Furthermore, the dominant firm's market share figures have been interpreted relationally, in relation with those of its rivals dominant firm's share with its competitors (*Hoffmann-La Roche*), particularly with the next largest. That shows a tendency of EU competition authorities to regard a factor, which the US model views as the sheer endeavor of a business to enhance its efficiency, as indicating dominance, in a way to consider the absence of potential competition as the probable "consequence of the existence of obstacles preventing new competitors from having access to the market"¹¹⁵⁹.

In other terms, in the EU model is characterized by the belief –or, to put it better the presumption– that the absence of competition denotes a deficiency of the market structure impairing the equal access to the market for competitors, which justifies the

¹¹⁵⁷ Sir L. Brittan, *European Competition Policy: Keeping the Playing-Field Level*, Centre for European Policy Studies (Brussels, Belgium), p. 3 (1992)

¹¹⁵⁸ See *supra*, the prohibition of exploitative abuses in article 102.

¹¹⁵⁹ *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, 13.02.1979, Case-85/76, 1979, ECR 461, para. 48

application of competition law. The influence of ordoliberal thinking, according to which the role of the State is the creation of a legal environment suitable for the economy, the maintenance of a healthy level of competition through measures that adhere to market principles, and the preservation of the prerequisites of the competitive system is evident¹¹⁶⁰.

Conversely, the US system is more grounded on welfare-based effect analysis: the absence of competition does not necessarily imply the existence of obstacles for competitors, but rather the probable higher efficiency of the dominant firm, which has acquired an advantage over its rivals through its technological lead, its highly developed sales force, or its business acumen; moreover, in reaching economic efficiency, the monopolist has also enhanced consumer welfare. The need for antitrust law is justified only when evidence shows that the monopolist's conduct is a hindrance to rivals' efficient operations.

Other traces of the primacy of the market structure can be found in the very definition of abuse as a "special responsibility not to allow its conduct to impair genuine undistorted competition on the Common Market"¹¹⁶¹, which echoes the ordoliberal idea that protecting the competitive structure is a goal in itself, and that the test for abusive conduct is structural, i.e. grounded on the inquiry of the harm to business and market rivalry. Market players (competitors and consumers) vie with competition as a policy goal, in a way that the relevant conducts under article 102 are also those that have a negative impact on the competitive process¹¹⁶².

The Ordoliberal influence can be inferred by the EU's greater willingness to compel a firm to venture with its rivals, as it has been seen in the different approach to the essential facilities doctrine. This emphasis "on access and 'open' markets seems to trump the possible chilling effects on investment and efficiencies"¹¹⁶³.

Concluding, it can be affirmed that the interpretation of § 2 has evolved in accordance with changes in economic thoughts, but welfare analysis has never ceased to lead the way of Courts, with the result of narrowing down the coverage of the provision, as opposed to article 102, which in comparison appears to be overly

¹¹⁶⁰ J.M. Smits, *The Draft-Common Frame of Reference, Methodological Nationalism and the Way Forward*, *European Review of Contract Law* 3, (2008), D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998, p. 92

¹¹⁶¹ See *supra*, *Michelin I*

¹¹⁶² E. Fox, *Abuse of Dominance and Monopolisation: How to Protect Competition Without Protecting Competitors*, in C.D. Ehlermann & I. Atanasiu (eds.), *2003 European Competition Law Annual – What is an Abuse of a Dominant Position?*, Hart Publishing, 2006, p. 69

¹¹⁶³ B.E. Hawk, *Article 82 and Section 2*, in ABA Section of Antitrust Law, *2 Issues in Competition Law and Policy*, 875 (2008)

broad.

In particular, strict recoupment is required for predatory pricing under § 2, whereas under Article 102 the structural recoupment suffices. Furthermore, American Courts tend to downplay claims based on allegations of unlawful leveraging on a lawfully acquired monopoly, owing to the lack of a unique standard and of administrable rules¹¹⁶⁴. Monopoly leverage claims are more benevolently received under EU law, where they are policed either under article 102(b), when they result into the exclusion of competitors from the related market, or under article 102(d), when they result into tying abuses¹¹⁶⁵. In addition, U.S. courts are more reluctant than those in the EC to mandate access by competitors to a dominant firm's resources¹¹⁶⁶.

The Commission has repeatedly stated that one of the goals of EC competition policy is the enhancement of consumer welfare¹¹⁶⁷. Even if it is fair to affirm that the EU and United States both endorse consumer welfare as a primary objective of competition law, on the one hand, the term "consumer welfare" masks profound differences, on the other hand. The United States and EC take different approaches even when alleging to embrace consumer welfare.

Different historical contexts, policy considerations, and underlying assumptions (economic and juridical) explain the broader scope of Article 102. Differences will remain in light of the enduring fairness and market integration objectives of Article 102. However, the two models are not completely impermeable to one another, for at least two reasons. First, the EC's increasing acceptance of welfare economics may approximate the normative understanding and the judicial enforcement of the two statutes. Second, the meaning of "competition" -as harm stemming from the diversion of trade to the respondent from its competitors- as understood in the Robinson-Patman Act, different from the traditional welfarist slant of American antitrust, which is traditionally indifferent to wealth redistributions among businesses, could result into the embedment of the protection of

¹¹⁶⁴ See Chapter I, monopoly leveraging, note n. 48. Monopoly leverage claims are numerous, but the outcomes are oscillating

¹¹⁶⁵ *Tetra Pak International SA v Commission of the European Communities*, 14.11.1996, Case C-333/94 P, [1996] ECR I-5951 para. 27

¹¹⁶⁶ J. Vickers, *Abuse of Market Power*, Speech of the 31st Conference of the European Association of Research in Industrial Economics, Berlin, September 3rd, 2004, available at http://www.oft.gov.uk/shared_ofst/speeches/spe0304.pdf

¹¹⁶⁷ Competition Commissioner Mario Monti, *Competition for Consumers' Benefit* (Speech delivered in Amsterdam, 22.10.2002), p. 6 available at http://ec.europa.eu/competition/speeches/text/sp2004_016_en.pdf. "I have put consumer welfare at the top of the agenda of competition policy in Europe".

small and medium enterprises into monopolization laws, in a way that is at all similar to the European enforcement of the law abusive dominance.

13.1 Re-reading the claim: “We protect competition, you protect competitors”

Following the above analysis, the writer agrees with the claim of an eminent American antitrust scholar, who rethought of the traditional difference between American and European antitrust law scopes, which can be epitomized with the saying: “We protect competition, you protect competitors”¹¹⁶⁸.

The types of conduct that are actually detrimental to consumers are those implying an artificial output limitation aimed at raising the price for a product, on the one hand, and those seeking to degrade or undermine the market mechanism by blocking competition on the merits, on the other hand. The first hypothesis characterizes the rhetoric of the American model, for which if a conduct is not output-limiting, then it is procompetitive: the law of monopolization is non-interventionist, unless the monopolist conduct is inefficient, in terms of artificial output limitation and price increase¹¹⁶⁹.

The rhetoric of the European model is more informed to the second hypothesis, for which the conduct of the dominant firm is anticompetitive when it forecloses competition on the merits¹¹⁷⁰: the law of abusive dominance prevents dominant firms from unfairly abusing their market power to create artificial obstacles to the non-dominant firms¹¹⁷¹. However, both the output-limitation and the foreclosure of competition on the merits can be recollected in a rationale of protection of competition, not in the dichotomy competition-competitor, because the exclusionary conducts foreclosing competition on the merits can easily translate themselves into an output limitation and a price increase¹¹⁷².

Aside from that, antitrust can also embrace conducts that harm competitors directly, and look to the competitive process as unavoidably fair: it is the case of the antidiscrimination laws of both models¹¹⁷³, in which the meaning of harm to competition is

¹¹⁶⁸ E.G. Fox, *We protect competition, you protect competitors*, 26 World Competition 2 149 (2003)

¹¹⁶⁹ R.H. Bork, *The Antitrust Paradox, A Policy at War with Itself*, Basic Books, Inc. Publishers, New York, p. 123 (1993)

¹¹⁷⁰ E.G. Fox, *We protect competition, you protect competitors*, 26 World Competition 2 152 (2003)

¹¹⁷¹ E.G. Fox, *We protect competition, you protect competitors*, 26 World Competition 2 159 (2003)

¹¹⁷² E.G. Fox, *We protect competition, you protect competitors*, 26 World Competition 2 167 (2003)

¹¹⁷³ Compare *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 703 (1967) as regards the US model, and *British Airways plc v. Commission of the European*

essentially that of harm to competitors. No model *a priori* eschews the protection of competitors as an antitrust goal, in turn the EU prohibiting discriminatory abuses as under article 102(c), and the US prohibiting price discrimination as under §2(a) of the Robinson Patman Act. The American provision is even more far reaching, as it has been seen, even though is positions itself outside of the monopolization law. Both models regard this type of abuses as exceptional with respect to the output-limitation or to the exclusionary standards, for the very fact that antitrust enforcement against a conduct that merely harms competitors, may result into consumer harm, since it is very difficult to find a consumer enhancement rationale in the enforcement of antidiscrimination provisions.

14. "Rhine" capitalism Vs "Anglo-American" capitalism

The differences thus far outlined between the two statutes also display intriguing parallels between two different models of capitalism, the "Anglo-American" or model, on the one hand, and the "Rhine" model, on the other hand. The two definitions were coined by Albert Michel in his 1991 book "Capitalism versus Capitalism"¹¹⁷⁴.

The "Anglo-American" model is based on *laissez faire* capitalism, i.e. on the idea that free market is the most powerful driver of development, and that the government should abstain from regulating the economy. The main goals of this model are individual achievement and the pursuit of short-term profits. Therefore, the interests of stakeholders are subordinate to the interests of both shareholders and management, and the macro-policy is focused on the short run business cycle. Elsewhere, it has been indicated as "stock market capitalism"¹¹⁷⁵.

In the "Rhine" model, collective achievement, social solidarity and public consensus are intended as the keys to long-term success. Moreover, the building of consensus among stakeholders is the key element of the action in pursuit of long-term economic and social goals, with the least amount of government intervention possible. Elsewhere, it has been indicated as "welfare capitalism"¹¹⁷⁶.

The Rhine model implies a minimum regulation of the market in a

Communities, 15.03.2007, Case C 95-04 P, [2007] ECR I-2331, as regards the EU model. With regard to the European model, compare chapter II, para. 7.3, discriminatory abuses, and the difficulties of separating a pure discriminatory conduct from one that is also exploitative, on the one hand, and the difficulties of recollecting pure discrimination in a consumer welfare perspective.

¹¹⁷⁴ M. Albert, *Capitalism versus capitalism*, London, Whurr, Business Economics, 1993. In 1991, the book was firstly published in French, *Capitalisme contre capitalisme*, Paris, Editions du Seuil.

¹¹⁷⁵ R.P. Dore, *Stock Market Capitalism - Welfare Capitalism*, Oxford, 2000

¹¹⁷⁶ R.P. Dore, *Stock Market Capitalism - Welfare Capitalism*, Oxford, 2000

way to strike a balance between the rights of private capital and the long-term social needs of the economy. The model is inspired by the social welfare provisions distinctive of the German Social Market economy (*Sozialmarktwirtschaft*), which in turn derive from the two fundamental principles of the Freiburg School creed (*Weltanschauung* – “vision of the world”): 1) the dynamism of the economy is grounded on the dynamism of the market structure, not on the market outcome efficiency; thus, the swift functioning of the market is the main goal of state intervention, 2) The proper functioning of the market does not suffice in regulating the whole of social and economic life, but necessitates exogenous balancing elements.

It follows that the State has the right to intervene in the economic and social issues only when the proper structural conditions of competition are distorted, on the one hand, or when social problems arise out of the economic organization, such as the need to improve the working conditions or “humanize” the production cycles, on the other hand (the German State of the 1949 Weimar Constitution professed to be a welfare state)¹¹⁷⁷.

The “Anglo-American” model is characterized by a generalized lack of social protection (no welfare state). One of the tenets of the model is the abandonment of the Keynesian model, based on the stimulus of demand and on the budget deficit, put in place by President Reagan administration in favor of a policy based on supply-side economics and theorized by Milton Friedman, who argued in favor of a substantial tax reduction, of a central control of the money supply in the system, of deregulation, of privatization¹¹⁷⁸.

The long-term view of the Rhine model is grounded on a sense of solidarity that is reflected not only in cooperative labor-management relations but also in the proneness of the wealthier classes to be taxed more in order to contribute to a more generous system of social security. That implies a lesser economic rigor, a dichotomy between social needs and financial strength, which makes the model appear “vaguely amateur”¹¹⁷⁹.

The Anglo-American model, in contrast, creates the possibility of rapid increases in wealth by individuals, is more rigorous and intransigent towards the less successful people. The Rhine model aspires to be “capitalism with a human face”¹¹⁸⁰, whereas the Anglo-American capitalism is the “law of the jungle”, with some

¹¹⁷⁷ M. Albert, *Capitalism versus capitalism*, London, Whurr, Business Economics, p. 132, 1993

¹¹⁷⁸ M. Albert, *Capitalism versus capitalism*, London, Whurr, Business Economics, p. 36, 1993.

¹¹⁷⁹ M. Albert, *Capitalism versus capitalism*, London, Whurr, Business Economics, p. 222, 1993.

¹¹⁸⁰ *Ibidem*

built-in antidotes for its own shortcomings: a meticulous legalism, a high sense of morality of religious descent, a high civic spirit and a high spirit of association¹¹⁸¹.

The declination of economic democracy brings to regulate the market with a view to the emancipation of individuals. In the Neo-American model, the overriding goal is the achievement of outcome efficiency, which calls for simple, unconditional protection of property rights. In the Rhine model, the emancipation of individuals is possible when markets are regulated and citizens share values regarding the idea of equality and solidarity.

The two models of capitalism substantially diverge on the role of the market and, more specifically, on lays on the axiological priority assigned to goods market in the Anglo-American model, and of the priority of mixed goods market in the Rhine model. Both goods market and mixed goods market are subject to the rules of free market, but the latter is partly dependent on the State initiative. In this framework, the firm is considered as part of the goods market, as like as its products, in the Anglo-American model, whereas it falls within the mixed goods market in the Rhine model, more precisely it positions itself between a community and a commodity. Salaries are more and more dependent on the contingencies of the market in the Anglo-American model; conversely, in the Rhine model, salaries are untied to the worker's productivity, and related to other factors, such as education, length of service and collective bargaining.

The difference is striking and sheds light on the idea of competition characterizing American law of monopolization, in which even the basic structure of the firm is subject to the laws of free market, in which antitrust intervention is minimal and plausible as long as there is harm to efficiency, as represented by an artificial limitation of output and raise in price. This is the only harm to consumers that make antitrust regulation acceptable as opposed to the free display of market forces.

The consumerist dimension of European citizens conveys the idea of a citizen-stakeholder, whose public dimension, in the sense of the stakeholder theory itself¹¹⁸², is better expressed by the representation of stakes than by the suffragist representation. This dimension is reflected in the treatment of the abuse of dominant position: as a stakeholder, the citizen has the power of influencing the outcome of the productive process. Therefore, harm to

¹¹⁸¹ *Ibidem*

¹¹⁸² The stakeholder theory was elaborated by R. Edward Freeman in the book *Strategic Management: A Stakeholder Approach*, Boston: Pitman, (1984), who argued in a nutshell that aside from the shareholders, there are other "stakeholder" involved in the management and governance of a company, whose interests deserve regard.

competition includes harm to the competitive process, and the best way to protect consumers, along with the interests of producers, is to guarantee the openness of the market.

The process of shaping and fostering of the Internal market, together with the creation of the European Union, has identified from the outset at Social Market Economy as a fundamental guiding principle¹¹⁸³. Social market economy is also enshrined in the first paragraph of article 3 of the Treaty on the European Union, which states: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive *social market economy* [emphasis added], aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment"¹¹⁸⁴.

To quote the EU Commissioner responsible for Employment, Social Affairs and Inclusion László Andor, the Freiburg School's "social market economy" resembled the struggle "to find a halfway house (hybrid, cocktail etc.) between a laissez-faire market-based economy and one that was centrally planned and State-directed. was the compromise term selected.... The social market economy is based on two clearly distinct but complementary pillars: on the one hand, the enforcement of competition, and on the other, social policy measures to guarantee social justice by correcting negative outcomes and bolster social protection"¹¹⁸⁵.

¹¹⁸³ A. Somma, *L'economia sociale di mercato / 1. Il fascino della terza via: torna di moda un passato mai passato*, in XLIV "Biblioteca della Libertà", 195, 2009, p. 44

¹¹⁸⁴ Article 3 paragraph 3 of the Consolidated Treaty on European Union.

¹¹⁸⁵ EU Commissioner responsible for Employment, Social Affairs and Inclusion László Andor, *Building a social market economy in the European Union*, Speech delivered in Manchester, 20 October 2011, available at http://europa.eu/rapid/press-release_SPEECH-11-695_en.htm

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EUROPEAN UNION: COMPARATIVE LEGAL AND ECONOMIC ANALYSIS

PART III CONCLUSION

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CHAPTER IV

EPILOGUE

1. Introductory Remarks; 1.1 Comparative institutional analysis; 1.1.1 The adjudicative process; 1.1.2 The political process; 1.1.3 The market process; 1.2 The participation-centered approach; 1.3 Summary: comparative institutional analysis and participation-centered approach; 2. Comparative institutional analysis of monopolization laws; 2.1 The policy goals of the two models; 2.1.1 The impact of the adjudicative process on the question of monopolization; 2.1.2 The impact of the political process on the question of monopolization; 2.1.3 The impact of the market process on the question of monopolization; 3. Conclusion.

1. Introductory Remarks

The following chapter has a twofold purpose. First and foremost, an attempt will be made to conceptualize the differences emerged in the descriptive and comparative part, and to re-collect the two legal models into a general framework for legal analysis, which has been elaborated by professor Neil Komesar in his seminal books “Imperfect Alternatives”¹¹⁸⁶, and the later “Law’s limits”¹¹⁸⁷, and is known as “comparative institutional analysis”. This approach entails making an “institutional choice”, namely identifying the process that can best reconcile the juxtaposition of various interests among those that participate in the molding of the laws of monopolization and of abusive dominance. Thus, the fundamental question of this section will be: is there an institution that best tackles the monopoly-abusive dominance phenomenon, by representing all the interests at stake?

A *caveat* applies to institutional choice: the processes influencing the phenomena under investigation -the adjudicative, the market, and the political process- are “imperfect alternatives”, namely no institution can take account of the dynamics of all the available interests in a perfect manner, and no institution can in itself achieve the policy goals embedded in the legal question under investigation. Accordingly, the above question will be answered adversely, for there is no institution can operate independently of the others in the regulation of the issue. At any rate, the comparative institutional analysis will account for the various forces, the judge, the government and the market, which weigh on American antitrust and European competition regulations.

Thus, despite the imperfections and the highly speculative nature of institutional choice, the purpose of this attempt will be to give an insight of the fact that the law in general, and the laws of

¹¹⁸⁶ N.K. Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, (1994)

¹¹⁸⁷ N.K. Komesar, *Law’s Limits: Rule of Law and the Supply and Demand of Rights*, Cambridge University Press, (2001)

monopolization and of abusive dominance in particular, are the consequence of decisions, and the decision-making process is not the static product of an omniscient law-maker, or an omniscient court, but is a dynamic result stemming from a mass of conflicting stakes and diverging processes.

The second broad scope of the chapter is to draw some brief speculative conclusions that will complete the essay by displaying the interrelation among the court's activity, the political process and the market forces in the shaping of the discipline of monopoly, bearing in mind that the critical conclusions, those pertaining the comparison of the two model, can be found in the second part of chapter III.

1.1 Comparative institutional analysis

With regard to the first scope In the first sentence of his book "Law's Limits", professor Komesar cannot better describe the essence of law and his approach to a comparative institutional analysis: " the essence of law does not lie in disembodied principles and abstract values. What law is, can be, or ought to be is determined by the character of those processes that make, interpret, and enforce law. The interaction of these processes molds the supply of and demand for law"¹¹⁸⁸.

The molding of law depends on the positions of who decides; the essence of law making is the interaction between institutions. Institutions to Komesar are large-scale social decision-making processes. In broad categories, decision-making involves the market, the political process and the adjudicative process, i.e. the courts. These institutions are alternative means through which societies determine their goals. Parallel to that is another postulate of comparative institutional analysis: when an institution functions properly and determines a legal rule for a question, its performance has normative validity.

More specifically, the choices between markets, courts and political process pervade law and public policy at all level. According to Komesar, the decision of who decides is an "institutional choice", meaning that the "decisions of who decides is actually a decision of what decides"¹¹⁸⁹. In law, the decision makers are not individuals, or groups of individuals (such as the political parties), but processes, such as the political process, the market process and the adjudicative process. Individuals play a role in the shaping of law through the filter of the "institutions".

Institutions tend to move together. When one institution is at its best or worst, the alternative institutions are often at their best or

¹¹⁸⁸ N.K. Komesar, *Law's Limits: Rule of Law and the Supply and Demand of Rights*, Cambridge University Press, p. 3 (2001)

¹¹⁸⁹ N.K. Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, (1994), p. 3

worst as well¹¹⁹⁰. To explain this movement, Komesar focuses on two factors: the number of relevant parties and the complexity of the decision. The market process and adjudicative process both function well when the number of parties affected by the relevant decision is small and the complexity of the decision is low. However, when numbers and/or complexity increase, the functions of both institutions deteriorate¹¹⁹¹. Nonetheless, the question is not whether the market process or the adjudicative process performance improves or deteriorates with a certain numbers and complexity, but whether an institution works better or worse than the alternatives. It is unavoidable that in each case, the considerations of the court involve a choice between alternatives.

1.1.1 The adjudicative process

The functioning of the adjudicative process raises three institutional considerations: the competence, the scale, and the dynamics of litigation. By competence, Komesar means the ability of judges and juries as decision makers, to investigate, understand highly technical issues and make substantive decisions¹¹⁹². By scale, the implications of increasing or decreasing the physical capacity of an institution are intended, namely the resources of budget available to the judiciary in relation with the expansion of the other institutions¹¹⁹³.

The dynamics of litigation are the consequence of the distribution of stakes in the adjudicative process. Uniform low stakes mean both dispersed defendants and dispersed plaintiffs, which implies the probability of inaction¹¹⁹⁴. Uniform high stakes mean a small number of actors with high per capita stakes, which implies concentrated litigation¹¹⁹⁵. Skewed stakes mean concentrated potential defendant and dispersed potential plaintiffs, and the probability of action depends on the availability of a class action procedure¹¹⁹⁶. These three considerations interact with each other and with factors such as numbers and complexity to determine the performance of the court.

Compared to the market process, the adjudicative process exhibits three distinctive structural elements that define its function: higher threshold costs for participation, limited scale, and more independence of judges from the general population than their

¹¹⁹⁰ *Ibidem*, p. 23

¹¹⁹¹ N.K. Komesar, *Law's Limits: Rule of Law and the Supply and Demand of Rights*, Cambridge University Press, p. 4 (2001)

¹¹⁹² N.K. Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, (1994), p. 138

¹¹⁹³ *Ibidem*, p. 142

¹¹⁹⁴ *Ibidem*, p. 128

¹¹⁹⁵ *Ibidem*, p. 129

¹¹⁹⁶ *Ibidem*, p. 132

market or political counterparts¹¹⁹⁷. The interaction between the elements of the institutions and the factors such as numbers and complexity suggest a predictable shift in the choice of institution as numbers and complexity increases¹¹⁹⁸.

When numbers and complexity are low, the adjudicative process has the scale and competence to make judgments, sending more complex issues of balancing to the market. The adjudicative process should not balance the benefits and costs when the market process can accomplish the balance. As numbers and/or complexity increase, the market process will show systemic pressures and the dynamics of litigation will restrain the adjudicative process¹¹⁹⁹. Despite the fact that the functioning of the adjudicative process will also deteriorate, its judicial independence makes it a better determiner than the market process. As numbers and/or complexity continue to increase, the court suffers more supply constraints that limit its ability to meet the demand for law¹²⁰⁰.

It has been seen that theories of law and public policy underlying the two models focus on different social goals and values. With regard to the US system, the solely consistent policy goal is the increase of consumer welfare, or the increase of the nation's wealth. The overriding social goals that appear to inspire the European model are the safeguard of fairness in transaction, the fostering of the internal market.

1.1.2 The political process

The analysis of the political process is the first step of comparative institutional analysis. The author proposes an alternative approach to understanding the political process, the two-force model of politics with majoritarian and minoritarian biases as twin sources of political malfunction, and the premise of cross-institutional complexity, according to which increasing numbers and complexity similarly hamper all alternative institutional arrangements, greatly complicating institutional-choice decisions. The political process simply malfunctions because legislation is always biased in either in favor of majority or of minority. These shortcomings may be overcome by countervailing majoritarian and minoritarian influences in the political process: the majority has lower per capita stakes, but a greater number to dominate the political outcome, whereas the losing majority does not have the

¹¹⁹⁷ *Ibidem*, p. 123

¹¹⁹⁸ N.K. Komesar, *Law's Limits: Rule of Law and the Supply and Demand of Rights*, Cambridge University Press, p. 19 (2001)

¹¹⁹⁹ *Ibidem*

¹²⁰⁰ *Ibidem*

incentives to recognize that it has been harmed¹²⁰¹. Conversely, the minority has higher per capita stakes, and it is more likely that the members of the interest group understand better the issue at stake in the process¹²⁰². If the capital benefit exceeds the cost of political participation, the affected group will contribute to the process, unless the incentive to free ride will induce the latter to allow others to bear the costs of political participation¹²⁰³. The smaller an interest group is, the higher the capita stakes and the less likely to face free-riding problems.

Moreover, the degree and form participation in the political process for both small and big groups depends on the per capita benefits of political action, “including the mean, variance, and skewness of that distribution”¹²⁰⁴, on the one hand, and the costs of political participation (costs of overcoming the free riding problem and information costs of identifying others who are in a similar position), on the other hand.

In sum, the results of the political process can be traced to variation in the strength of the majoritarian and minoritarian influence, on the one hand, and to the distribution of stakes and the cost of information and organization. The voting system is the means to translate larger numbers into majoritarian influence¹²⁰⁵. In democracy, majorities gain their influence over minorities simply by number, whereas minorities gain their influence over minorities where the distribution of stake-interests is uneven or skewed. Even if systems have in general majoritarian biases, the more concentrated the minorities’ interests are the more likely they will prevail over dispersed majoritarian interests. In fact, if the interest is skewed, a concentrated minority may prevail over a dispersed majority and seek rents on the functioning of politics. Rent seeking is a means to subject the political process to minoritarian biases¹²⁰⁶.

1.1.3 The market process

The market process serves a function complementary to the political process, as a means parallel to the government action to achieve social goals. The market participation in the shaping of law takes place through transactions, by virtue of which society’s

¹²⁰¹ N.K. Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, (1994), p. 65

¹²⁰² *Ibidem*, p. 68 The author argues that the members of the losing majority – often consumers and taxpayers- do not have the incentives to recognize that they have been harmed. Thus, legislation is sometimes protective with respect to them.

¹²⁰³ *Ibidem*, p. 69

¹²⁰⁴ *Ibidem*, p. 71

¹²⁰⁵ *Ibidem*, p. 74

¹²⁰⁶ N.K. Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, (1994), p. 116

scarce resources are allocated. In the market process the social results are setting market prices and output, whereby determining the distribution of wealth. The transactions are atomistic, but contribute to determine an aggregate result. The dynamics of market participation imply the evaluation of costs and benefits of participating in a transaction.

The two constraints applying to the market process are the “market failures”, which demonstrate that the market is far from being perfect, on the one hand, and the costs of market participation (transaction costs), which play a significant role on how social income, welfare and opportunities are distributed, on the other hand¹²⁰⁷.

Market participation produces far less than ideal results in terms of social goals and resource allocation efficiency, on the accounts of a misinformed participation and higher transaction costs inherent in the bargaining. Thus, the government, or the political process in general, can also serve to impede the transacting costs and to foster the achievement of social goal associated to the market process, such as resource allocation efficiency¹²⁰⁸.

1.2 The participation-centered approach

When it comes to identifying a method for the actual comparative institutional analysis, Komesar proposes participation-centered approach. One of the tenets of this approach is that the changes in the institutions will not occur if interested parties do not thrust upon them. Stakeholders can influence the political process by voting for those politicians who share their same interests, or by propaganda¹²⁰⁹, buyers and sellers can foster market change by transacting in ways that achieve the change itself, or litigants can affect the adjudicative system by bringing cases to court.

¹²⁰⁷ *Ibidem*, p. 104. The analysis of the market process and of the role of transaction economics owes, by explicit admission of the author, a significant debt to the work of Ronald Coase, who used transaction costs to explore the source and the extent of externalities (R.H. Coase, *The problem of Social Costs* 3 J.L. & Econ 1 (1960). Information costs are the primary externalities -they are not internalized in the process of transaction-, and have a significant economic impact on the market process. Komesar shares the heuristic value of the renowned Coase theorem, for which at zero transaction costs an efficient allocation of resources would occur whatever the initial assignment of property rights. The role of government in supporting market is to reduce transaction costs. Therefore, the state is an essential complement to the market. Unlike Coase, according to Komesar the analysis of the market process does not only depend on understanding its costs, but also on understanding its benefits. The market, for instance, can complement the adjudication process, when the latter cannot envisage any efficient solution for a dispute.

¹²⁰⁸ N.K. Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, (1994), p. 114

¹²⁰⁹ N.K. Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, (1994), p. 64

Participation in the institutions, however, will not occur if the benefits do not outweigh the costs of it. Thus, the nature of the participation depends on this interaction between benefits and costs of it. With regard to the benefits, the dynamics of each process depends on the average per capita stakes and on the differential of per capita stakes between the parties. The higher the stake of the party, the more change in that favored direction will benefit the party.

With regard to the costs of participation, they entail transaction costs and litigation costs, in the adjudicative process, the costs of acquiring information about the current legal rule and the costs to change it, as well as the costs of organization in the political process¹²¹⁰.

The characteristics of participation costs and benefits are the same for every institution. In general, the central determinants of the costs of participation include the number of parties and the complexity of the participation¹²¹¹. The more diffuse an interest is among a group of people, the lower each person's stake in the outcome, and the less incentive of parties to promote that interest. Parallel to that, a diffuse interest will be harder to identify, on the grounds of the information cost of identification of such interest and the free riding of non-participants¹²¹².

In addition to that, each institution creates its own costs that produce an aftermath on participation: the access costs to courts is significantly high regardless of the nature of the interest, but lower than the access cost to the political process (voting for the law-makers that share the same views). Access costs to the market process depend on the extent of transaction costs, and whether the latter do not exceed the benefits of market participation¹²¹³.

In order to apply the participation-centered approach a three-prong test should be deployed: first the social goals that the legal question intends to promote should be identified; second, the groups affected by a legal change should be identified; third, the cost of participating in each institution should be compared with the benefits of using the institution itself¹²¹⁴. The purpose of this analysis is the evaluation of how each institution performs with regard to a legal question compared to the others.

Regardless of the comparison, each institution has also a vision of good performance.

With respect to the political process, the Congress will perform poorly when it is subject to the over-representation of one group

¹²¹⁰ *Ibidem*, p. 8 and 71

¹²¹¹ *Ibidem*

¹²¹² *Ibidem*, p. 69

¹²¹³ *Ibidem*, p. 125

¹²¹⁴ H.S. Herlanger & T.W. Merrill, *Institutional Choice and Political Faith*, 22 *Law and Soc. Inquiry* 959 (1997)

and the under-representation of another group. Moreover, if the interest is skewed, a concentrated minority may prevail over a dispersed majority and seek rents in the functioning of politics. This way the process may be subject to a minoritarian bias¹²¹⁵. Such is the case of rent-seeking –mainly obtained through lobbying- of producers to obtain monopoly positions by excluding competition through tariffs, or monopoly regulation. The task of the analyst is to assess whether one group has disproportionate influence with respect to the social policy goal to pursue, and whether the group's interest is conducive to a legal change that affords the group itself more benefits than are efficient for society¹²¹⁶.

With respect to the market process, transaction costs are the externalities that most affect the performance. If transaction costs outweigh the benefits of contracting on the market, the market cannot provide indication as for the legal change¹²¹⁷. Under the participation-centered approach market functions when transactions reflect the bargaining by informed parties. As an example, transactions of consumers with very low per capita stakes and less information may be affected by the rent-seeking of smaller groups, such as the producers, often achieved by advertising¹²¹⁸.

With respect to the court, the performance evaluation functions the same way as for the other institutions. Litigants adhere courts only if the expected benefits outweigh the access costs. If the cost-benefit analysis suggests that the court is not the appropriate institution to give a legal rule to the question, either other institutions will operate the legal change, or the question will remain undecided, or it might be decided on the account of the one case that makes it to court. If the interest is diffuse and parties have a small per capita stake, they may ignore the rules resulting from the precedent. Owing to that, rent-seeking in the adjudicative process is more limited.

All three processes rely on a cost-benefit analysis of participation. Moreover, each process has some constraints or peculiarities affecting the respective performance.

1.3 Summary: comparative institutional analysis and participation-centered approach

In sum, participation in the political process may either consist of voting or of lobbying, depending on the nature and variance of the interest. Participation in the market process means

¹²¹⁵ N.K. Komisar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, (1994), p. 116

¹²¹⁶ *Ibidem*, p. 76

¹²¹⁷ *Ibidem*, p. 111-112

¹²¹⁸ *Ibidem*, p. 116

participating through transactions, bearing in mind that transaction costs best capture the dynamics of market participation and the benefits and costs of such participation. Participation in the adjudicative process means participating as litigants, considering the litigation costs caused by the dynamics of litigation.

The participation-centered approach involves the identification of the different groups interested in a legal rule and the cost-benefits analysis concerning the participation in any of the three institutions.

The comparative institutional analysis entails the identification of a social policy goal and the evaluation of the comparative abilities of each institution to achieve it, on the account of the level of participation of each stakeholder group.

2. Comparative institutional analysis of monopolization laws

In the following section an attempt will be made to apply the Komesar comparative institutional analysis to the two models previously described and compared, in order to evaluate the impact of the three institutions –market, politics, courts- on the legal question at issue. Thus, an attempt will be made to make an institutional choice on which of the processes above described can best pursue the social policy goals embedded in turn in the American law of monopolization and the European law of abusive dominance.

Preliminarily, it should be reaffirmed that the preponderant role of the judicial formant in the treatment of the monopolization-abusive dominance is familiar to the common law family, as it has been seen that the development of the principles and identification of abusive conducts has been largely left to the courts' activity –or, in institutional choice jargon-, to the adjudicative process.

Although article 102 singles out a list of proscribed conducts, the non-exhaustive nature of such list has allowed the ECJ and the Commission to develop a praetorian law of abusive dominance. In the US system, § 2 of the Sherman Act merely proscribes the act or the attempt of monopolizing an interstate market and defines a sanction for the unlawful conduct. The American provision is even less regulatory and has allowed courts to be a mouthpiece for the identification of monopolization conducts to a further extent than the European Courts and authorities.

2.1 The policy goals of the two models

In the previous chapter, it has been argued that the policy concerns of the two models are sensibly different: the US law of monopolization is exclusively a matter of protection of consumer welfare, whereas the EU law of abusive dominance is influenced

by fairness and market integration concerns. The American system seeks to enhance consumer welfare through a thorough adherence to the economic principles of supply and demand, on the one hand, and the *laissez-faire* praise for non-intervention in the regulation of the economic power, on the other hand. This policy goal is thus cast in terms of resource allocation efficiency.

The European system seeks to promote fairness, in terms of protection of consumers and small businesses, on the one hand, and to consolidate the internal market, in terms of guaranteeing competition on the common market. The fairness concern is not expressed in normative terms, but emerges from the systemic interpretation of article 102, in accordance with its ordoliberal roots and with the *acquis communautaire*, which is in general focused on the establishment of equal market conditions for all market players¹²¹⁹. Conversely, the market integration concern is expressed normatively (Article 3(g) of the 1992 Treaty Establishing the European Union).

Thus, the European judge applies the rules by looking at the results, and he will be driven by both fairness and market integration consideration, as essential parts of the enforcement of article 102. Conversely, the American judge regards legal certainty as a means to bar individuals from accomplishing antisocial ends, in particular when it looks at outcome efficiency as the only stance through which consumer welfare can be maximized.

2.1.1 The impact of the adjudicative process on the question of monopolization

In the context of monopolization, the interest groups are the monopolistic firm, the competitors, being either small or big businesses, and the consumers. The latter is largest interest group that is almost never directly represented in either the political or the adjudicative process, due to the dispersed character of their interest. Likewise, small businesses have also a dispersed interest, compared to big firms that are more affected by the monopolist's conduct and can afford accessing the adjudicative process to vindicate their interests.

Despite the deep influence of the judicial formant in the development of the law, it has been seen that in both models antitrust authorities are far from optimal decision-makers. The monopoly phenomenon is extremely complex and impacts a large number of people and business entities that are affected by the arrangements of the dominant firm. In both models, judges often lack technical expertise to police the issue of monopolization and to make decisions that are material with the policy goals

¹²¹⁹ F.A. Schurr, *What Role does Competition Law play in the Genesis of a Harmonised European Private Law*, 14 *Revue Juridique Polynésienne* 14 (2008)

overriding the systems.

In terms of dynamics of the litigation, in the US the possibility of private enforcement of antitrust law, on the one hand, and of awarding treble damages, on the other hand, makes court only virtually accessible to parties that have a dispersed interest, absent an efficient class action. The class action, as a matter of fact, implies a balance between the benefits of a single institutional response to the members of the class, and the reluctance of courts to open themselves to aggregate claims¹²²⁰, also in light of the risk of awarding false positives. Thus, the exclusion of dispersed stakes and the absence of small claims are almost embedded in the dynamics of the adjudicative process. At any rate, compared to the European process the possibility of private standing remains a strong protective force for market players and consumers, which does not characterized the European model.

In the EU model, the virtual absence of private enforcement of competition law virtually excludes the participation of dispersed interest to direct litigation, but the administrative powers of the Commission of inquiring into competition distortions¹²²¹ and of setting the enforcement priorities of article 102 may compensate this embedded exclusion with a view to achieving the policy goals of fairness and promotion of the internal market. Unlike other administrative agencies that are bent by the incentives from political sources that are one-sided, the Commission is part of the overall development of EU competition law developed and implemented a policy on the application of EU competition law in keeping with the treaties¹²²². Moreover, the independence of the Commission from the other political bodies of the EU makes it less permeable to the one-sided incentives from political sources, which often symbolize the lobbying activities of concentrated stakes.

With regard to the protection of consumer welfare, it is doubtful on the account of the above said that the American judge would be able to perform a precise economic calculus to assess whether the monopolist's conduct is detrimental to consumers.

With regard to the consolidation of the internal market, the adjudicative process could be a valid mechanism to filter this normative goal into the regulation of abusive dominance. It is doubtful that courts could efficiently police the fairness of a transaction, on the account of the impossibility to judicially

¹²²⁰ N.K. Komesar, *Law's Limits: Rule of Law and the Supply and Demand of Rights*, Cambridge University Press, p. 51 (2001)

¹²²¹ Pursuant to article 7(1)(2) of the Regulation /12003 the Commission has the competence to instruct an administrative procedure, empowering itself with powers of investigation and decision on an allegation of abuse brought by either Member States or by natural or legal persons

¹²²² http://ec.europa.eu/competition/antitrust/overview_en.html

determine a fair price, on the one hand, and the absence of a normative or political endorsement of fairness in competition law, on the other hand¹²²³. The only claim that can be made to include fairness among the normative contours of EU competition law is by leaning on the argument that the establishment of equal market conditions for all market players is a traditional *acquis* goal: such objective can also be interpreted as the need to promote fairness. In terms of complexity and costs, it has been seen that the dynamics of litigation often imply very high costs and are often characterized by minoritarian biases, in that high stake players invest significant amount of money in litigation compared to the larger groups that have a more dispersed interest (consumers). In both systems, the complexity of the litigation hampers the ability of judges to make substantive decisions directed to the policy goals that the laws of monopoly and abusive dominance intend to achieve.

2.1.2 The impact of the political process on the question of monopolization

The political process could gather more technical information to discipline the legal question, on the one hand, but could be conditioned by biases or one-sided information coming from the powerful parts of the public that public officials are to acknowledge if they want to remain in office. In other terms, since political officials are often the expression of the majoritarian interest groups, they might be influenced by distorted views of public needs, especially if the distribution of the counter-interest is skewed and the participation costs for those who have a lesser impact on the political process is high, such as the interest of consumers in having a lower price, or the costs of lobbying for consumer associations, as opposed to the stronger impact of producers on the political process.

Contrary to that, judges are more insulated from biased information and make decisions based on how litigants represent their positions in an adversarial framework, which guarantees –at least formally- that parties deliver information equally. Courts' independence in adjudicating monopoly cases is the tradeoff for the integration of far less information in the process than the political institutions. As Komesar puts it, the tradeoff between evenhandedness and information is one of the most difficult issues in institutional choice¹²²⁴.

Consumers' interest is dispersed and their per capita stakes are very low: as a result, it is unlikely that they have an incentive in participating in litigation in the form of a class action. Both

¹²²³ See *supra*, para 2.1

¹²²⁴ N.K. Komesar, *Stranger in a Strange Land: An Outsider's View of Antitrust and the Courts*, 41 Loyola University Chicago Law Journal 443 446 (2010)

American and European Courts evaluate whether a conduct is pro-competitive or anticompetitive –or if the conduct is competition on the merits–, often bereft of the analytical tools and the information necessary to assess the impact of a conduct on consumers. The outcomes may represent a matter of politics rather than precision; however, it goes without saying that courts are barred from making political decisions, because of the chiasm between political sphere of any legal order, pertaining to the activity of the government (*gubernaculum*), in which decisions are made free in their ends, and the jurisdictional sphere pertaining to the courts' activity, which filter the political objectives through the substantive and procedural legal rules (*iurisdictio*)¹²²⁵.

Moreover, the configuration of stakes (concentrated as regards the monopolist and the other businesses, skewed/dispersed as the regards the consumers) renders the high per capita stake actors influential in both the political and the market process. That shows how the question of monopolization-abusive dominance is deeply affected by minoritarian biases: the political influence of big businesses, by means of their lobbying activity, is likely to prevail over the losing majority of consumers, whose dispersed interest can also prevent them from influencing the voting procedures.

From a European perspective, the political process is arguably more suitable than the adjudicative and the market process to favor the achievement of fairness and the consolidation of the internal market in Europe, as it has been seen how fairness can hardly be evaluated by a court in claims of abusive dominance, on the one hand, and the free display of a monopolized market can hardly produce a fair outcome.

2.1.3 The impact of the market process on the question of monopolization

With regard to the political process, it has been seen that the more concentrated the minorities' interests are the more likely they will prevail over dispersed majoritarian interests. Because consumers and small businesses' interest is skewed, there is a risk is that a concentrated minority represented by the monopoly-sized firms may prevail over a dispersed majority and seek rents to influence the political process¹²²⁶.

Likewise, if the legal question of monopoly were to be left to the free display of the market forces, that might provoke an excessive

¹²²⁵ The dichotomy between *gubernaculum* and *iurisdictio* was firstly drafted in the XIII century by Henry de Bracton in his *De Legibus et Consuetudinibus Angliae*, the second treatise on English laws and customs. Compare H. Brunner, *The Sources of English Law*, Little, Brown, and Company (1908)

¹²²⁶ N.K. Komesar, *Imperfect Alternatives – Choosing Institutions in Law, Economics, and Public Policy*, University of Chicago Press, (1994), p. 116

tolerance for the inequalities of market power among players in the name of a complete abstention from regulating the issue. In the market context, the discrepancy between the high per capita stakes of big businesses and the low per capita stakes of consumers and SMEs might provoke an even less efficient allocation of resources. Producers might seek rents over the market in order to apply less favorable transaction conditions to the detriment of consumers, which would be bound by their rationality and the lack of information to accept them. With respect to smaller competitors, the market power of the monopolist-dominant firm might hamper the entry opportunities of the former, since their less efficient structure would not enable them to react to an anticompetitive conduct by means of an effectively opposing practice.

Market failures are often associated with information asymmetries and monopolistic structures of demand. It has been seen that a monopolized market inescapably implies social costs (deadweight loss), which affect both competitors and consumers. Market failures often call for government interventions, a signal that under certain circumstances the market is incapable of self-correcting.

As regards the information asymmetries, in a monopolized market neither can consumers bear the cost of making an informed decision in a transaction, nor does their rationality enable them to evaluate the cost and the benefits of a transaction whose counterpart is often a big powerful business, holding the critical mass to impose its bargaining conditions unilaterally, by means of advertising campaigns or, worse, by eliminating competition.

In all, the free interplay of market forces, absent any judicial or governmental intervention, does not prove as a persuasive tool to regulate the question of monopoly-abusive dominance with a view to encompassing all the interests at stake. The risks of market failure inherent in the asymmetry of information and in the market power difference among interest groups is a symptom of the need to approach the legal question of monopoly with a direct involvement of the political and adjudicative process.

The market process can shed light on what is the efficient level of resource allocation, and, therefore, provide guidance as to how to measure the social costs of monopoly in terms of consumer welfare. This is especially relevant for the US system, whose sole policy goal is the achievement of allocative efficiency, based on the laws of supply and demand. The market process, on the other hand, is unsuitable for embedding the EU policy goals of fairness and market integration in the treatment of abusive dominance. Nor is it able to self-correct its distortions.

3. Conclusion

A worthwhile conclusion to the above speculation would reaffirming the imperfect character of institutional choice, and acknowledging that comparative institutional analysis applied to the laws of the two systems does not provide a clear-cut answer to the question of whether the legal questions above referred should be left to solely the regulation of the courts, or of the government or of the market.

The attractiveness of comparative institutional analysis rests on its nuanced character; more specifically, it conveys the idea that no institution can absolutely prevail over the others in the discipline of monopolization-abusive dominance. At the same time, institutional choice reflects the dialectic juxtaposition of the three processes that, to various extents, all participate in the regulation of the issue. Moreover, comparative institutional analysis reveals the fact that the law in general, and the laws of monopolization and of abusive dominance in particular, is not the result of a static procedure, but is the product of a dynamic mechanism, in which the interests of the various stakeholders can be defended by different institutions.

In conclusion, and in non-technical terms, both the law of monopolization and abusive dominance are the result of the interaction of courts, politics and market. Understanding the interplay of this three forces means to enrich the analysis of a broader perspective, which can better capture the nature of monopoly, not as a mere economic phenomenon requiring regulation, but as a socio-political-economic incident in which the three institutions are at stake.

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¹²²⁷ The approach to legal citation for the present essay has been established by reference to the general principles of the “Bluebook” – A Uniform System of Citation, compiled by the editors of the Columbia Law Review, the Harvard Law Review, the University of Pennsylvania Law Review and The Yale Law Journal, published and distributed by the Harvard Law Review Association, Copyright © 2010. Therefore, a list of the abbreviations for the cases, legislative materials, books and periodical materials can be found in the Bluebook itself. Furthermore, in the body of the text the references to both cases and periodical materials have been underlined, whereas the references to books have not, in order to highlight the difference among the types of sources. With regard to the citation of the jurisprudence of the European Court of Justice, the principles of citation contained in the Bluebook have been applied in general, with the addition of the date of the award of the outcome, with a view to making the research on the website www.europa.eu swifter.

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