

The transatlantic divide

How the EU and US differ on the assessment of single firm conduct

by **Maria João Melícias***

The ECJ judgment of 2 April in the *Wanadoo* (later *France Télécom*) case confirmed that recoupment is not a necessary precondition for a finding of predation. This decision has highlighted the transatlantic divide when it comes to assessing abuse of dominance or monopolisation, to use the US phrase.

Points of divergence: examples

The substantive standard for a finding of predation under the Sherman Act, as established in *Matsushita* and *Brooke Group*, requires a dangerous probability of recoupment, besides pricing below an appropriate measure of cost. To put it in other words, a plaintiff should show that, after successful predation, the defendant will be able to raise and sustain prices above the pre-existing level long enough to recover its losses. Pure malice or “bad” intent to squash rivals on the part of the alleged predator, no matter how consistent and unambiguous the evidence, is irrelevant when consumer welfare has not been injured. In contrast, the EU test can be satisfied merely with pricing below average variable costs or even below average total costs. In the latter case, there must also be evidence that such pricing was supposedly the result of a malicious plan or intent to eliminate rivals.

Despite the rhetoric of the European Commission’s exclusionary conduct guidance on the point that antitrust law is meant to protect competition and, ultimately, consumers, but not individual competitors, when push comes to shove, proof of consumer harm is not meaningfully incorporated in any test of abusive conduct by the Commission’s enforcement practice.

These are mere illustrations of the EU/US competing approaches on the assessment of unilateral behaviour. Other examples include the margin-squeeze theory, which was unanimously rejected last February by the US Supreme Court in *Linkline*, even though it was the basis of several decisions by the European Commission against telecom incumbents. Following its approach in *Trinko*, the US Supreme Court simply found that, without an “antitrust duty to deal” at the wholesale level or predatory pricing at the retail level, one cannot state an antitrust prize-squeeze claim.

Different theories of antitrust harm

At the root of this dichotomy, there are different theories of antitrust harm or anticompetitive effects.

As a result of the influence of the Chicago school’s perfect competition models, which are often difficult to reconcile with imperfect real world markets, the meaning of the notion of “anticompetitive effects” in the US necessarily implies a negative impact on prices or output. By contrast, in the EU it may just refer to the creation of obstacles likely to impair the ability of rivals to compete effectively on the merits – sometimes called “anticompetitive foreclosure”. EU policy is thus less concerned with efficiency, than with the protection

of the competitive process itself, even if actual consumer harm may not ensue in the long term. Indeed, under settled case law, article 82 EC covers not only practices which may cause damage to consumers directly, but also those which are deemed to be detrimental to them indirectly by impairing an effective competitive structure. There appears to be an inherent belief in the Community Court’s structuralist language that fragmented markets will be better for consumers, by delivering lower prices, quality and innovation.

In contrast, considering the goals of antitrust as a consumer welfare prescription, US law typically places on a plaintiff in a monopolisation claim the burden of showing some type of consumer harm, in the form of reduced output or increased prices. Furthermore, it is logically understood that if a plaintiff is unable to prove short-term consumer harm, it is because long-term harm will almost certainly never occur. The major concern here is to avoid the social costs of false positives. Purported exclusionary conduct, unlike hardcore cartels, is rarely an inherent antitrust evil because it will often also comprise procompetitive aspects or be welfare-enhancing: through rebates, bundling or below-cost pricing, customers are, per definition, offered lower prices. Hence, by mistakenly labelling aggressive price-cutting as unlawful, US courts fear that antitrust may perversely chill the very conduct that it is supposed to encourage: low prices that benefit consumers.

In the light of the above theories of antitrust harm, the predation requirements in each jurisdiction become apparent. In the US, without a dangerous probability of recoupment, no predatory pricing claim can be asserted, since recoupment is viewed as the most accurate proxy for consumer harm, within the meaning explained above. In the EU, as the ECJ affirmed in *Wanadoo*, the possibility of recoupment will only be a relevant factor to the extent that it may help to warrant further antitrust intervention, for example, by “excluding economic justifications [for below cost pricing] other than the elimination of a competitor,” or “assist in establishing that a plan to eliminate a competitor exists”. Therefore, similarly to other legal standards, the recoupment condition is used as a filter against antitrust intervention or, conversely, as a further incentive for public interference in the marketplace, depending on how minimalist or interventionist enforcement policy is in each jurisdiction.

Furthermore, according to the ECJ, even if no recoupment is possible, consumers may still be harmed following the withdrawal from the market of one or more competitors, because this will limit the choices available to them. However, a “wider choice” comprised of inefficient firms, offering less in terms of price, quality and innovation, may be particularly costly for consumers. The risks of such an excessively broad concept of anticompetitive effects and consumer harm have been repeatedly highlighted by legal and economic

* *Maria João Melícias is a senior associate at PLMJ (Lisbon). She may be reached at mgm@plmj.pt*

commentators: as seen above, it may over-deter unilateral conduct that may be harmless or procompetitive. What is worse, in the interests of the competitive process, it may lead to the protection of economically inefficient firms, at the expense of forcing the rest of society to pay higher prices.

Nonetheless, the rhetoric on the potential costs of false positives, so common in US case law, is generally absent from the Commission's decisional practice and the Community courts' jurisprudence. One could thus reasonably question whether the underlying goals of competition law in Europe, besides the traditional objectives of fostering market integration and consumer welfare, are not contaminated by other social trade-offs related to industrial policy, such as ensuring high levels of employment or protecting small and medium-sized enterprises.

The historical background

In any event, the EU and US approaches towards dominant behaviour may be explained by the different historical backgrounds and resulting market characteristics more frequently found in each jurisdiction. Many of today's European dominant firms did not achieve their market power through superior skill, foresight and industry, but simply inherited former state-owned monopolies. Upon liberalisation and privatisation, those companies often endeavoured to keep their market positions at all costs. In some European industries, market shares tend to be stable and entry barriers significant.

In addition, not so long ago, several European economic systems rested on a completely different paradigm, characterised by strong state interventionism and planning of entire sectors of the economy. It was a world where the state often decided each market player's shares and prices, because it was believed that this would bring about desirable market stability. This environment may have helped to ingrain unacceptable habits in some economic agents. Even the European community goal of a common market characterised by "undistorted competition" was initially accepted by many member states only with regard to interstate trade and as an instrument to ensure peace, while their domestic economic systems were, to a large extent, still based on anticompetitive government planning.

This background accounts (at least, in part) for the traditional prejudice that today's European enforcers have shown against dominant companies, insofar as they are said to carry a special responsibility not to let their conduct impair the residual competition still existing in the market. In short, Europe is not yet completely used to its economic freedom. European decision makers are convinced that markets do not work and that true exclusionary conduct may actually occur with great likelihood, because for a long time that was actually the case.

Conversely, US society was largely created without a state, on the basis of the sole effort of its people, in which individuals have been exclusively responsible for determining their own future and, in particular, without being able to rely on a paternalistic state to solve and blame for most of their problems. Its economy has always been supported by a free-market system and the dogma of free enterprise, as fundamental instruments for "the pursuit of happiness" (one of the inalienable rights in the Declaration of Independence). This environment has usually led to robust competition and open markets.

Therefore, one can easily understand its decision makers' trust in market forces, as well as the *Trinko's* court tribute to monopoly profits. In Justice Scalia's words, which would probably give many EU enforcers the shivers: "[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 risktaking that produces innovation and economic growth."

This background may also explain both why the US was the first nation to recognise the need for antitrust intervention – to correct the excesses of economic freedom – and why its (real) economy may be one of the best prepared to overcome the challenges of the current economic difficulties.

The ideological debate

In addition, there appears to be an ongoing ideological debate behind the scenes: between the Schumpeterian idea, on the back of the US Supreme Court's mind in *Trinko*, that monopolistic structures will foster economic growth and thus recommend a permissive approach to the assessment of unilateral conduct, and those, like Kenneth Arrow, who contend that rivalry and non-concentrated market structures provide instead the right incentives for innovation. However, this discussion may be an insolvable one. In effect, while some new technology markets based on permanent dynamic efficiency may require a more laissez-faire enforcement policy, others may call for tighter antitrust or even ex-ante sector-specific regulation – for example, if they are based on technical standards that increase barriers to entry and switching costs for consumers. Moreover, depending on the respective degree of economic and social growth, some societies may prefer low prices over innovative products, while others may crave quality and innovation. Hence, there may be no point of convergence because different industries or different stages of socio-economic development require different approaches to competition enforcement. One size does not fit all.

Conclusion

Markets are neither always contestable, as US courts generally portray them, nor always constrained by high barriers to entry, as EU enforcers prefer to view them, particularly considering the trend towards global dimensions. In order to limit the rate of legal errors in adjudication and avoid sending confusing signals to the marketplace, decision makers should carefully consider the actual industry characteristics to which their decisions are addressed. Although different legal-economic contexts may warrant more interventionist or minimalist approaches to antitrust enforcement, decision makers should have the clarity to know when to distinguish them.

References

- ECJ 2 April 2009 judgment Case C-202/07 P *France Télécom v Commission*
- Matsushita Elec Indus Co v Zenith Radio Corp* 475 US 574 (US 1986)
- Brooke Group v Brown & Williamson Tobacco Corp* 509 US 209 (US 1993)
- Pacific Bell Telephone Co v Linkline Communications Inc* 503 F 3d 876 (US 2009)
- Verizon Communs Inc v Law Offices of Curtis V Trinko LLP*, 540 US 398, 409 (US 2004)