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The Use and Abuse of Intent Evidence in Antitrust Analysis

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References in recent case law to a firm's 'anticompetitive malice' and 'dreams of monopoly' or to documentary evidence purporting to show a firm's malevolent plans to squash a rival and 'pre-empt the market' may sound puzzling in a modern antitrust world supposedly driven by the objectivity of economic theory. This article discusses the meaning of intent in antitrust analysis and whether this element should be given any role in abuse cases and, in the affirmative, what role should that be. To this effect, it carries out a comparative exercise on the relevance of intent evidence in abuse investigations under US and EU laws. Although it primarily focuses on predation, it also considers other forms of exclusionary conduct where appropriate. It then explores the interplay between the different uses of this standard, the notion of anticompetitive harm, and the goals of antitrust in the two jurisdictions. Finally, it examines the consequences of adopting a given intent rule in terms of policy enforcement.

1. Introduction and Scope

> An act of pure malice is no easier to realize than an act of pure goodness. What is more, it is by no means certain that we could even distinguish between a pure act of malice and a pure act of goodness, since they would have exactly the same structure.
>
> (Zupančič on Kant)

> Nothing is more unreliable than the populace, nothing more obscure than human intentions.
>
> (Cicero)

Courts and public enforcers on both sides of the Atlantic have not been consistent with regard to the relevance of intent in antitrust liability when it comes to the assessment of single-firm conduct. References in recent case law to a firm's 'anticompetitive malice' and 'dreams of monopoly'[1] or to documentary evidence purporting to show a firm's malicious plans to squash rivals and 'pre-empt the market'[2] may sound puzzling in a modern antitrust world supposedly driven by the 'purity' of economic theory.

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[1] See Justice Scalias' expression in *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (U.S. 2004).

[2] See, for example, Case T-340/03, *France Télécom v. Commission* [2007] ECR II-107, paras 198–199.

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