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SINGLE-FIRM CONDUCT: A DISCIPLINE IN SEARCH OF ITSELF (TRY WITH GOOGLE?)[#]

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ABSTRACT: This paper analyzes US and EU antitrust policies towards abusive unilateral conduct pursued by a dominant firm and strongly criticize them, aiming at finding a more reliable assessment of the basic issues of consumer's exploitation and rival's exclusion. In fact, the discipline of unilateral conduct denounces widespread inconsistencies related to its conceptual foundations. The American side does not recognize exploitation as a form of abusive conduct for the dominant firm: excessive pricing is no issue in the US antitrust environment, and Supreme Court jurisprudence from *Trinko* to *linkLine* makes crystal clear that setting a more-than-competitive price not only escapes prohibition, but is the award reserved for the winners of the struggle in the market arena. Article 82 (a) of the EC Treaty forbids the imposition of unfair purchase or selling prices or other unfair trading conditions, but Commission's case law and policy statements (*e.g.* the 2008 Guidance Paper on Commission enforcement priorities in applying Article 82) have greatly emphasized exclusionary effects, with exploitative effects appearing to be little more than a sideshow. This practical emasculation of the relevant discipline makes little sense either in economic or legal terms, and leaves the overall conceptual picture in a state of complete disarray, with direct consequences on the legal enforcement. The many antitrust issues arising from the Google Books Settlement case are a good occasion to verify the sustainability of the antitrust policy towards single-firm conduct previously discussed: more in details, the risks of future excessive pricing stemming from the approval of the settlement led many commentators, as well as the US Department of Justice, to reconsider the award-of-the-winner theory. The paper also addresses this topic and try to offer a sound overview of it.

JEL CODES: D40; K21; K41; K42; L4.

KEYWORDS: Monopolization; Abuse of Dominant Position; Exploitative Abuses; Exclusionary Abuses; Google Book Settlement; Consumer's harm.

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SUMMARY: 1. Introduction – 2. The American way: some remarks – 2.1. The Google case: a test in real-time – 3. Yet another culture clash, or a simpler joint confusion? – 4. Exploitation v. exclusion: planning the match – 5. Some conclusions (and a modest proposal)

1. INTRODUCTION

A comparative look at antitrust around the world – assuming the workability of a unitarian approach to a mosaic of more than 120 local disciplines, mostly tailored after the two prevailing models, US and EU, and yet capable of exhibiting, particularly at the enforcement level, remarkable discrepancies – reveals a host of unsettled issues. Margins for disagreement surface everywhere, though they do not precipitate serious conflict. But the discipline of unilateral conduct tells a different story.

Bluntly speaking, this antitrust province (a historical component of all regulatory regions) denounces widespread inconsistencies related to its conceptual foundations. Confronting the two pivotal models of competition law, we cannot but observe that the American side does not recognize – at least apparently – exploitation as a form of abusive conduct for the dominant firm, whereas its European standing is, at best, gloomy; on the other hand, the features of exclusionary conduct are hotly contested. To say the least, the area is plagued by overwhelming confusion.

Actually, both monopolization (and attempt to monopolize) in the US and abuse of dominant position in Europe deal with the problematic evaluation of unilateral behaviors. Lack of clarity has been, and keeps being, a long running problem in monopolization/abuse of dominance discipline. Part of the problem lies with the failure to develop a theory capable of rationalizing the case law, under the fundamental constraint that antitrust law should not impose sanctions for the very conduct it is supposed to encourage, *i.e.* a fierce (even murderous for undertakings) competition and the rush to appropriate the biggest gains from it. Drawing the line – that means distinguishing between welfare-reducing conduct and aggressively pro-competitive actions – is admittedly vexing. Just to cite the most blatant examples, low pricing, that benefits customers in the short run and stands as the very gist of a well-temperate competitive setting, may carry the risk of long-term exclusionary effects; whereas conduct exhibiting restrictive short-term effects may support long-term innovation or investment, that would improve consumer satisfaction. Monopolistic conduct is difficult to observe, define, and assess for a number of (obvious) reasons.

So far, the standard representation of a field fraught with severe analytical problems. But this kind of troubled overlapping is tainted by the remark that, much earlier in the course of the analysis – precisely at the level of preliminary taxonomy – the two models appear to part company. The European approach distinguishes between 'exclusionary' abuses (which refer, more or less, to practices of a dominant firm seeking to harm the competitive position of its competitors and producing foreclosure effects on the market, with the problematic specifications that we will discuss in a while), and 'exploitative' abuses, which can be defined as attempts by a dominant undertaking to use the opportunities provided by its market strength in order to harm customers directly (excessive pricing being the standard assumption).[1] No surprise, one would comment, since exploitation is the straightest form of deploying monopoly power. Yet, exploitation, in the vein of excessive pricing, is no issue in the US

1 Just in order to make things easier, a third category of abuses, the 'reprisal' ones, has also been supported, mainly referring to some conducts adopted by the dominant undertaking in order to discipline or to punish a competitor (cf. J. TEMPLE LANG, *Monopolisation and the Definition of Abuse of a Dominant Position under Article 86 EEC Treaty*, 16 *Common Market Law Review*, 345 (1979)). We mentioned it here for the sake of completeness, but we skip this broader taxonomy: as we will try to convince the reader, less is definitely more.

antitrust environment.[2]

In fact, the (in)famous *Trinko* decision states, *inter alia*, that "[t]he opportunity to charge monopoly prices, at least for a short period, is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct".[3] This makes crystal clear that, in the US, setting a more-than-competitive price not only escapes prohibition, but is the award reserved for the winners of the struggle in the market arena. "*Finis opus coronat*", as Justice Hand elegantly stated. "Although the result may expose the public to the evils of monopoly, the [Sherman] Act does not mean to condemn the resultant of those very forces which it is its prime object to foster", so that "the successful competitor, having been urged to compete, must not be turned upon when he wins".[4]

Furthermore, in the recent *linkLine* case[5] the US Supreme Court stood still in its restrictive interpretation of price squeeze by expressly relying upon *Trinko* for the upstream markets price analysis, reaffirming at the same time the general principles of that decision about the scope of antitrust.[6] Finally, the Google Books Saga goes on

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2 The first formal announcement can be found in *United States v. Standard Oil,* 221 U.S. 1, 62 (1911), stressing "omission of any direct prohibition against monopoly in the concrete". But this may be considered, as of now, a *locus classicus*: cf., *e.g.*., E. T. SULLIVAN & J. L. HARRISON, *Understanding Antitrust and Its Economic Implications*, 5th ed., New York, 2009, 277. In fact, according to other commentators "even firms with considerable market power are generally permitted by U.S. antitrust law to engage in simple monopoly pricing", although "in jurisdictions other than the United States the principle is not always followed" (D. W. CARLTON & K. HEYER, *Extraction v. Extension: The Basis for Formulating Antitrust Policy Towards Single-Firm Conduct*, 4 *Competition Policy International*, 287 (2008)).

3 *Verizon Communication Inc. v. Law Offices of Curtis V. Trinko,* 540 U.S. 398, 407 (2004).

4 *United States v. Aluminum Co. of America*, 148 F.2d 416, 430 (1945).

5 *Pacific Bell Telephone v. linkLine Communications*, 129 S.Ct. 1109 (2009).

6 The case sparked a lot of commentaries: for a more detailed and comparative

the stage: we will discuss the topic in a while, but let us first develop some remarks in order to (hopefully) better understand the main issues of the whole antitrust drama we are reviewing here.

2. THE AMERICAN WAY: SOME REMARKS

There is something paradoxical in the prevailing American attitude. After all, as perceptively noted by some commentators,[7] exploitation of consumers is the textbook abuse by a monopolist or dominant firm. A part of the consumer surplus is redistributed to the monopolist as producer surplus. This is the so-called price effect: consumers pay too much. Moreover, there is a dead-weight loss which lowers the welfare of the concerned economy. This is the so-called allocation effect: consumers purchase less (and here lies the mythical dead-weight loss triangle).[8]

Monopoly is contrasted precisely for these kinds of effect. And we can also anticipate that foreclosure abuses are prohibited just because they are conducive to monopoly, which in turn will elicit exploitation. This being the original approach – "In the beginning there was Monopoly" – how can it be that, in the eyes of Justice Scalia (and Hand before him) the monopoly evils disappear from the scene and everything boils down to a gracious award for the winner of the competitive contest?

The reasons offered for such a diverging attitude can be sum-

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analysis, see, among others, G. FAELLA & R. PARDOLESI, *Squeezing Price Squeeze under EC Antitrust Law*, November 2009 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1478937).

7 See, *e.g.*, P. AKMAN, *Exploitative Abuse in Article 82 EC: Back to Basics?*, January 2009 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328316).

8 For those interested in the source of the myth, a suggested reading is the article of H. WELLFORD, *Introduction to Harberger's* Monopoly and Resource Allocation – *The Pioneering Article on Deadweight Loss and Empirical Measurement of the Social costs of Monopoly*, 5 *Competition Policy International*, 273 ff. (2009).

marized as follows. First, the law does not condemn dominance in and of itself, since it may very well be the outcome of the superior capabilities of the emerging monopolist: who is expected to behave as a rational profit maximizer, implying that he will be obviously inclining to exploit the advantageous position he conquered outpacing his rivals ("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": again in the language of Trinko).[9] This is why, according to the view we are examining, dominance law should downplay this scenario and seek to operate indirectly by addressing exclusionary or other illegal behavior that enables supra-competitive pricing.[10]

The argument is, indeed, rather opaque (not to mention its

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[9] An intriguing reprise of the same principle has been proposed by Carlton & Heyer with their new distinction among single-firm 'extraction' and 'extension' conducts. Briefly, and apart from more detailed objections raised against some theoretical tenets of the said distinction (see E. ELHAUGE, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 *Harvard Law Review*, 397, 439 (2009)), according to these authors extraction is every "conduct engaged in by the firm to capture surplus from what the firm has created independently of the conduct's effect on rivals", where the surplus capture seems to be a bright reformulation of the good old (and allegedly legitimate) single monopoly profit, whereas extension "is single-firm conduct that increases the firm's profit by weakening or eliminating the competitive constraints provided by rival's products" (cf. D. W. CARLTON & K. HEYER (*supra* note 2), 285). As shown in our conclusions, beyond the appreciable idea that exclusion alone should not be relevant *per se*, the goal is not to introduce new taxonomies, but reduce the existing categories focusing on exploitation as a precondition for assessing exclusion (see *infra*, Section 5).

[10] Proceeding in this vein, the argument fades into the further claim about the standard redundancy of interventions aiming at contrasting a too high level of prices, since such an inconveniency is doomed to be corrected by the spontaneous reaction of the market forces, triggered by the appealing perspective of noticeable profits. But that "excessive prices are self-correcting, because they attract new entry" is a credo for true believers, convincingly disproved by A. EZRACHI & D. GILO, *Are Excessive Prices Really Self-Correcting*?, 5 *J. Competition Law and Economics* 249 (2009), suggesting that: *(i)* the entry decision does not depend on the pre-entry price, but on the expectations about the prevailing price level after entry; *(ii)* the signalling virtues of the pre-entry price are, at best, ambiguous.

discrepancy with both US and EU merger regulation, where the intent of the law is precisely to impede the creation of monopoly power). Nevertheless, it might mean that the virtuous monopolist should be permitted to exploit as he pleases, whereas the malicious one should be constrained in his ambitions. In fact, the now disqualified Report[11] issued in 2008 by the US Department of Justice (hereinafter "US DoJ") stresses the existence of a causal link between the conduct (improper means), contested in view of Section 2 of the Sherman Act, and some form of monopoly power: "Firms with ill-gotten monopoly power can inflict on consumers higher prices, reduced output, and poor quality of services".[12] However, this way of reasoning does not avoid an internal contradiction: would firms, which became monopolists because of their skills, not be able to inflict analogue harms? There is no way out. If the proper goal of antitrust law is to preserve consumer welfare, one should conclude that consumers get harmed in both cases, regardless of whether the dominance was prompted by illegal tools or superior skill, luck and the like.

But the plausible core of the argument lies elsewhere, and is connected with the second reason for absolving exploitation: its contribution to incentivize fierce competition, leading to its end. Why should a firm bother to strive, invest, innovate and risk if, in the case it becomes the unchecked master of the market, it will be impeded

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11 U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act* (October 2008). The announcement of the "withdrawal" of the document, no longer reflecting the views of the DoJ Antitrust Division (since inspired to "extreme caution" dictated by fear of "over-deterrence" and, accordingly, prone to create to many hurdles to government enforcement) was given in a speech of Assistant Attorney General Christine Varney on May 11, 2009. The new trend looks for "balanced analyses", invoking the guidance – so to say! – of precedents like *Loraine Journal* (342 U.S. 143, 1951), *Aspen* (472 U.S. 585, 1985), and *Microsoft* (253 F.3d 34, D.C. Cir. 2001).

12 US DoJ (*supra* note 11), 10.

from enjoying its win? Evans and Hylton,[13] for instance, concede that "the proscribed and permitted activities are not consistent with the view that the antitrust laws are seeking to maximize static consumer or social welfare in a relevant antitrust market (…) greater market power results in consumers paying higher prices, obtaining less output, and receiving less consumer surplus than they would with lesser market power". They also admit that "greater market power also results in lower social surplus since the exercise of market power results in units of output not being produced for which the value of the output to consumers is greater than the cost to society of producing that output". But they do not object to antitrust laws that "provide businesses with wide latitude for acquiring and exercising significant market power" (put in other words: if dominance is permitted, as it is, the dominator should be free to behave rationally, that is, maximizing his profits).

How reconcile this apparent contrast? It is suggested that monopoly can, and should, be seen as part of a dynamic process of competition, though Schumpeter's "perennial gale of creative destruction" is, to say the least, uncommon in the American setting and quite at odds with the approach, mainly geared to short-termism, underlying the prevailing view of the consumer harm test.[14] At any rate, I contend that the emphasis on innovation (and on virtual conflict among IPRs and antitrust enforcement) is a metonymic exercise of specialization, which obfuscates the picture. Couched in more general terms, my claim is that a firm which was until yesterday the best

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13 D. S. EVANS & K. N. HYLTON, *The Lawful Acquisition and Exercise of Monopoly Power and Its Implications for the Objectives of Antitrust*, May 2009 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275431).

14 Further, even more compelling, hesitations stem from the impracticability, denounced already by Demsetz and as of now still unsolved, of *trade-offs* between non-homogeneous value dimensions: cf., recently, J. D. WRIGHT, *Antitrust, Multi-Dimensional Competition, and Innovation: Do We Have an Antitrust-Relevant Theory of Competition Now?*, August 2009 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463732).

contender and behaved exemplarily, nowadays finds itself on the top and alone (a contingency which was not necessarily within the expectations, since an as-efficient rival would have still been there) and reneges the virtues practiced so far. The discontinuity is obvious, so that trading ex-ante incentives with ex-post exploitation, never handed down as a deserved trophy for a contest that did not require a winner, would produce, at best, unintended consequences.

2.1 THE GOOGLE CASE: A TEST IN REAL-TIME

An analysis of the risky trading mentioned above is being carried out by the US DoJ, which opened an investigation into the competitive impact of the Google Books Search Settlement (hereinafter "GBS") that Google Inc., the Authors Guild Inc., and the Association of American Publishers are trying to get approved by the New York Southern District Court in order to settle a class action filed in 2005.

As the story is well known, we will just recall its very basics. Some years ago Google started to digitize a huge number of books, both in- and out-of-copyright, in order to make them available online: it did so by scanning and indexing the texts by means of a new technical process developed for this specific purpose. The main sources for these digitizing activities were provided by the Google Partner Program and the Google Library Program, entered into with some publishers and academic libraries. However, Google also relied upon mass copying without having previously obtained any license from the rightsholders: the delicate issue of the so called "orphan books" (that is, copyrighted works whose rightsholders cannot be located) lies precisely at the heart of this activity.

The Authors Guild, together with other plaintiffs who were not partners of any of the programs boldly launched by Google, filed a class action against the firm for copyright infringement. After this filing, all parties started to discuss a possible settlement that morphed into a joint venture agreement for the merchandising of digitized books worldwide.[15] On the basis of its latest version,[16] the GBS "gives Google default rights to digitalize and make searchable all books published before January 5, 2009" – the date of the first notice of the class action settlement – "and to display and sell digital versions of all commercially unavailable books, unless the book rightsholder chooses otherwise".[17] As a matter of fact, the GBS aims at establishing a global marketplace for books rights, whose exploitation will be provided by Google and controlled by a new legal entity committed to checking and clarifying the copyright status of the items, the Books Rights Registry, with future revenues to be shared among Google, the Books Rights Registry, the publishers, and the authors.

The Google case provides us with a brilliant example of single-firm conduct that fills all the criteria for tracing brave risk-taking, innovation, economic growth (remember what *Trinko* stated), but could at the same time threaten the market's development.[18] In fact, the competitive impact of the GBS has been denounced by the media since the beginning of the agreement's negotiation, as well as by

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15 As already noted by a keen commentator, "[a]bsent the lawsuit by the Authors Guild, Google and interested rightsholders could have crafted a deal very much like that in the settlement agreement and would have implemented that through private contracts. That deal, of course, would be subject to antitrust scrutiny, as it would involve large numbers of otherwise competing rightsholders contracting together with Google. That would not be unprecedented - we have similarly complex arrangements for other copyright collectives like ASCAP and BMI - but definitely worth antitrust attention" (cf. R. PICKER, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, July 2009, 3 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1387582).

16 See www.googlebooksettlement.com.

17 Cf. E. ELHAUGE, *Why the Google Books Settlement is Procompetitive*, December 2009, 1 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459028).

18 A sound market definition for the GBS antitrust assessment is a very delicate issue that we will not address here. For a valuable analysis see E. FRASER, *Antitrust and the Google Books Settlement: The Problem of Simultaneity*, June 2009, 10 ff. (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1417722).

many commentators operating at the (escalating) scholar forefront of the legal battlefield. Moreover, a Statement of Interest recently submitted to the District Court by the US DoJ has stressed the main competition concerns of the case, providing some important hints about how the new US Antitrust administration is interpreting its enforcement capabilities.

According to this document, many features of the GBS "bear an uncomfortably close resemblance to the kinds of horizontal agreements found to be quintessential *per se* violations of the Sherman Act".[19] To sum up, the GBS is plagued by one cartel pricing issue (mainly related to the activities to be carried out by Google as the rightsholder's exclusive agent in setting the price of on-line access to consumers, by means of a secret pricing algorithm), that mixes with a monopolization issue. Moreover, the opt-out structure of the settlement will give Google a default right to digitize orphan books and to include them in its services: by doing, so the GBS will award Google a non-replicable advantage (and consequent market power with correlated market foreclosure) in respect to all other competitors, who will remain exposed to the risk of copyright infringements while attempting to digitize orphan books. Put in very clear words, "competing authors and publishers grant Google *de facto* exclusive rights for

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19 More specifically, the proposed agreement will drive to: "*(1)* the creation of an industry-wide revenue-sharing formula at the wholesale level applicable to all works; *(2)* the setting of default prices and the effective prohibition of discounting by Google at the retail level; and *(3)* the control of prices for orphan books" - those with unknown rightsholders - "by known publishers and authors with whose books the orphan books likely compete". As a consequence, "In the view of the Department, the proposed Settlement raises two serious issues. First, through collective action, the Proposed Settlement appears to give book publishers the power to restrict price competition. Second, as a result of the Proposed Settlement, other digital distributors may be effectively precluded from competing with Google in the sale of digital products and other derivative products to come". See US DoJ, *Statement of Interest of the United States of America regarding the Proposed Class Settlement*, filed September 19, 2009, 17-16 (http://thepublicindex.org/docs/letters/usa.pdf).

the digital distribution of orphan works",[20] *i.e.* products issued by their own competitors. Quoting a statement from *Toy "R" US. Inc., v.* FTC,[21] the US DoJ considered that "such joint effort by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or consumers to deny relationships the competitors need in the competitive struggle" will have "significant anticompetitive potential and may violate the antitrust laws".[22]

By the same token, the end results of the GBS foster the rather interesting conclusion that being sued (and then being able to settle in the way Google and the plaintiffs are trying to do) may somehow be very useful. Prior to the proposed settlement, Google could only rely upon the fair use doctrine for providing the digital consumers with very limited text excerpts without having previously obtained for the permission from the rightsholders. This activity would arguably require impressive legal and organizational efforts for searching for the rightsholders and then negotiating with them. After the settlement, however, Google will have full rights to offer the complete texts of virtually any books published (mainly) in USA before January 2009, together with the related services developed on the basis of their digitized corpus.[23]

Finally, according to the GBS, Google will manage the subscriptions (required both of private users and of institutions, *e.g.* academic libraries) for having access to the entire body of digitized works. In fact, "The settlement also procompetitively creates a brand new product, the institutional subscription, which gives institutions

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[20] US DoJ (*supra* note 19), 23.

[21] 221 F.3d 928, 936 (7th Cir. 2000).

[22] US DoJ (*supra* note 19), 23.

[23] In the words of another commentator (E. FRASER (*supra* note 18), 22), "Obtaining permission from orphan works' authors is literally impossible and even obtaining permission from active rightsholders involves tremendous transaction costs. Under the settlement agreement, Google will be able to display full books and charge for the books or the service."

the ability to fully view all out-of-print books that are available for purchase through Google and all in-print books that the rightsholders elect to include in the subscription […] Creating this new product is a huge procompetitive benefit that could not exist absent the settlement. Non-digital technology simply does not permit a book supplier to sell blanket access to millions of volumes".[24]

Critics, however, object that Google will have a monopoly over such institutional subscriptions, and will be able to charge a monopoly price. All in all, and contrary to the premises canvassed in the previous section, most observers look suspiciously at the pricing policy Google will adopt, since the firm could arguably be tempted to charge the consumers high (even exorbitant) service fees in the future, thanks to the digital knowledge monopoly guaranteed by the agreement with the rightsholders provided by the GBS (and in line with what already happened with electronic subscription to scholarly journals).[25] Whether such a suspicion is well founded, whether the competitive-pricing algorithm is exposed to misuse and will work as a smart regulatory tool, whether having a monopolist offer a product is better for consumer welfare than having no one offer a

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24 Cf. *Amicus Brief of Antitrust Law and Economics Professors in Support of the Settlement*, filed September 8, 2009, 21 (http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2005cv08136/273913/275/0.pdf). See also E. ELHAUGE (*supra* note 17), 47 ff.

25 "The most serious and widely shared concern expressed by academic author and library commentators on the GBS settlement is the risk that GBS institutional license fees will rise to exorbitant levels because the proposed settlement lacks meaningful constraints on price hikes" (see P. SAMUELSON, *The Google Book Settlement: Real Magic or a Trick?*, *The Economist's Voice*, November 2009; www.bepress.com/ev). In fact, according to another commentator, Google "could also employ a strategy comparable to the one that proved to be so effective in pushing up the price of scholarly journals: first, entice subscribers with low initial rates, and then, once they are hooked, ratchet up the rates as high as the traffic will bear." (R. DARNTON, *Google & the Future of Books*. *New York Review of Books*, February 12, 2009; quotation from C. SUAREZ, *Proactive FTC/DOJ Intervention in the Google Book Search Settlement: Defending Our Public Values, Protecting Competition*, November 2009 (http://ssrn.com/abstract=1409824), who also shows strong concerns related to Google's future pricing strategy: cf. 22 ff.).

product: all these questions, and the countless others that can be raised, are well beyond the reach of this paper. What really matters, from our standpoint, is that the US Government (and most people with it) has expressed strong concern with regard to consumer harm theoretically stemming from Google's future possible monopolization activities. When it comes to prospective, but tangible, monopoly, the award-for-the-winner enthusiasm withers, and the specter of exploitation surfaces.

Far from what is the design adopted by the parties for the settlement, "the end result [of the GBS] should be a marketplace in which consumers can be assured that they are paying competitive prices for the benefit they receive – in a marketplace in which they have multiple outlets from which to obtain access to works. The benefits of this settlement should not be achieved through unjustified restrictions on competition".[26] Read this line carefully: does it not sound like an alarm-bell against future exploitative abuses by the winning monopolist? Or as a threat of a technological adaptation of Bradbury's *Fahrenheit 451*? *Finis opus coronat*, for sure, but with a new, very puzzling *caveat*.

3. YET ANOTHER CULTURE CLASH, OR A SIMPLER JOINT CONFUSION?

Apart from what the Google search for a settlement solution will fetch the US antitrust enforcement, and coming back to what accounted in chapter 2, additional arguments are being deployed for mistrusting the exploitation perspective. However, they do not longer belong to the American side of the story, which precludes the conclusion that the inconveniency regards exclusively the overseas experience.

[26] US DoJ (*supra* note 19), 4.

It is true, in fact, that Article 82 (a) of the EC Treaty forbids the imposition of unfair purchase or selling prices or other unfair trading conditions; but it is no less evident that the case law has greatly emphasized exclusionary effects, with exploitative effects appearing to be little more than a sideshow. Given the original sin of Article 82 – its lack of clear definitions about the concepts of 'abuse' and 'dominant position' –, such definitions had to be "defined by the ECJ in leading cases thirty years ago. These definitions do not employ 'economic' terminology and sit uneasily with modern economic theory. However, they appear to be set in stone".[27] It is no wonder, therefore, that the European enforcement policy could develop a kind of 'cherry-picking approach' by focusing on the so-called exclusionary abuses. Again, it comes to the surprise of no one that: (*i*), when the ongoing review of Article 82 was launched, Commissioner Neelie Kroes could confidently comment that the enforcement policy should give priority to the exclusionary abuses, "since exclusion is often at the basis of later exploitation of consumers";[28] and (*ii*) the ensuing Guidance on the Commission's enforcement priorities in applying Article 82 (hereinafter "Guidance Paper") devoted the issue one short paragraph, stating that Article 82(a) is, to be sure, still in force and would be applied when necessary. But, on its face, it does not belong to the priorities of the Commission.[29]

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27 A. JONES & B. SUFRIN, *EC Competition Law. Texts, Cases and Materials*, 3th ed., Oxford, 2008, 296.

28 N. KROES, *Preliminary Thoughts on Policy Review of Article 82*, speech delivered at the Fordham Corporate Law Institute on September 23, 2005, 3 (http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=HTML&aged=0&language=EN&guiLanguage=en).

29 "For the purpose of providing guidance on its enforcement priorities the Commission at this stage limits itself to exclusionary conduct and in, particular, certain specific types of exclusionary conduct which, based on its experience, appear to be the most common". Cf. *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 2009/C 45/02, 2, § 7 (available at http://eur-

In fact, though not banned as in the US, exploitation does not fare very well in Europe either. Beyond the first impression, and taking account of the fact that excessive pricing exploitation has been recognized only in the presence of special circumstances (*de facto* monopoly, impediments to the internal market, and threat to liberalization programs**:** only four cases concluded with condemnation),[30] it has been submitted that the US and EU perspectives on the issue do not necessarily appear far apart.[31] There is widespread consensus on the idea that competition law should not intervene where the market can be expected to self-correct exploitation of contingent, short-term disequilibria; and the European side accepts, no less than the transatlantic counterpart, that an economic rationale for price regulation exists only where non-transitory barriers (such as a government monopoly) exclude competition in the long term. At the end of the day, it is hinted that the difference might boil down to different allocation of competences (implying, however, that the EU Commission is reluctantly vested with some regulatory power).

The prevailing distaste ("benign neglect",[32] that translates into "the lesser, the better") for an approach which rings of regulation is supported by most scholars active in the field. However, beyond the ideological bias against a creeping, yet unacceptable, form of regulation, the concrete reasons for leaving the exploitative abuse in an almost forgotten corner can be grouped, according to a keen comment-

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lex.europa.eu/en/index.htm).

30 See Commission decisions on case IV/28.851 *General Motors*, December 19, 1974; case IV/26.699 *Chiquita* (*United Brands)*, December 17, 1975; case 84/379/EEC *British Leyland*, July 2, 1984; case COMP/C-1/36.915 *Deutsche Post AG*, July 25, 2001 (http://eur-lex.europa.eu/en/index.htm).

31 Cf., also for further references, H. SCHWEITZER, *Parallels and Differences in the Attitude towards Single-Firm Conduct: What Are the Reasons? The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC*, February 2008 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093248).

32 R. O'DONOGHUE & J. A. PADILLA, *The Law and Economics of Article 82 CE*, Oxford, 2006, 608.

ator,[33] around four clusters: *I)* measurement issues, *II)* market dynamics, *III)* multi-sided markets, and *IV)* remedies. Taken together, these problems should explain why we would be better advised to quit any attempt to re-animate an almost agonizing statutory ban.

Little to say on cluster *I)*. Assessing the fairness of prices is inherently more difficult than measuring costs, which is, if not a necessary step in the process, the usual benchmark. Prices, induced by the equilibrium between demand and supply, are not genuinely unfair even when they do not conform to some appropriate level of markup on underlying costs. But daunting as it may be, this difficulty should not be exaggerated.[34] In fact, reckoning the overcharge imposed by a cartel is a routine task for devising damages in actions promoted by the victims of illegal conduct, and not even the most resilient opponent of private enforcement in antitrust would argue that damages are to be denied just because it is difficult to quantify them.

The second point is largely overlapping with the Austrian variation already touched upon with regard to the US debate and the choice not to tackle exploitation. There must be incentives for innovation, and opportunities for investments. But the intangibility of huge monopoly profits grossly oversteps the mark.

As to multi-side markets, it is probably sound to convene, with George Priest,[35] that the existence of network effects requires a change in many of the basic operative presumptions of antitrust law, leading to a new conceptualization of key enforcement problems. Whenever these characteristics surface, we should be prepared to challenge our tenets. But, though important, network effects are not

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33 B. LYONS, *The Paradox of the Exclusion of Exploitative Abuse*, January 2008, 6 ff. (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082723).

34 A kind of roadmap for the excessive pricing assessment has been recently sketched by the Commission: see its decision in case COMP/36.568 *Scandlines Sverige v. Port of Helsingborg*, July 23, 2004 (http://eur-lex.europa.eu/en/index.htm).

35 G. L. PRIEST, *Rethinking Antitrust Law in an Age of Network Industries,* November 2007 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031166).

ever present and do not dominate the field.

Thus, the crux of the matter should be with cluster *IV)*. For unfair prices seem to postulate a remedy which is largely regulatory in nature and is supposed to go beyond the expertise and capabilities of an antitrust authority ("a generalist competition agency – it has been argued – is unlikely to have the skills and resources to do an effective job, it would do more harm than good by setting inappropriate prices, either too low or too high, and encourage regulated firms to waste resources trying to manipulate a weak regulator").[36] A compromise, which is being advanced in the recent literature,[37] is that exploitation is provoked by exclusion, mainly *sub specie* of entry barriers, either structural or accrued over time for want of a timely check to exclusionary practices: get rid of them, of the accumulation of their effects, and exploitation will fade away. True as it may be, this view implies that, whenever it is not possible to tackle exclusion directly, exploitation will stand (and should be reproached). Moreover, even if one wonders about which remedy would turn out to be more effective, this does not undermine the case for inflicting a dissuasive sanction, possibly coupled with proper damages. Some deterrence would probably be attained anyway.

Criticisms do abound. Yet, none seems cogent. The ban of exploitation lacks justification.

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[36] Cf. B. LYONS (*supra* note 33). For a general survey of some excessive pricing cases and the claim that even among competition agencies there is a growing consensus that controlling prices should be limited to exceptional circumstances, see D. GERADIN, *The Necessary Limits to the Control of 'Excessive' Prices by Competition Authorities - A View from Europe*, November 2007 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022678).

[37] "Gap cases", and the necessity of closing previous loopholes, are emphasized by L. H. RÖLLER, *Exploitative Abuses*, in C. D. EHLERMAN & M. MARQUIS (eds.), *European Competition Annual 2007: A Reformed Approach to Article 82 CE*, Oxford, 2008, who pursues the coherence of an enforcement based on the exclusive repression of exclusionary practices.

4. EXPLOITATION V. EXCLUSION: PLANNING THE MATCH

Summing up, on this count. Exploitation has never established itself in the American scenario (although the incoming solution of the Google case and its possible antitrust aftermath will arguably provide us very soon with some interesting new topics to be discussed, starting from the apparently intertwined relationships between Section 1 and 2 Sherman Act issues), and plays almost no role in Europe – just a potential threat, which is evoked from time to time as an almost remote Armageddon.

This practical emasculation of the relevant discipline (thus divested of what O'Donogue and Padilla deem to be its very core)[38] makes, in our opinion, little sense either in economic or legal terms, and leaves the overall conceptual picture in a state of complete disarray (though mostly ignored, when not discarded with the intimation that "a revival of exploitation abuses in European competition law (…) is both unlikely and undesirable").[39] Its implications contribute, as will be seen in a while, to further dismembering any attempt to come to grips with some sort of coherent enforcement. As a consequence of the above reluctance (or deliberate renunciation) to prohibit directly exploitative abuses, attention is totally absorbed by exclusionary behavior. But the frailty of the ensuing picture is waiting in the wings and will not be late in blurring the analysis.

Concerning the definition of exclusionary practices, let us be 'fast and furious'. No business conduct can be proscribed simply because it aims to deter entry or force exit of rivals. Every firm would be willing to trash its competitors; if achieved on the merits, such an outcome is not objectionable.[40] Accordingly, 'exclusionary practices'

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38 O'DONOGHUE & PADILLA (*supra* note 32), 637.

39 H. SCHWEITZER (*supra* note 31).

40 The EU position towards this kind of competition struggle has been vividly stated by commissioner Kroes, "I like aggressive competition – including by dominant companies – and I don't care if it may hurt competitors – as long as it

is a shorthand formula evoking conduct which hampers rivals in an anticompetitive way. From this standpoint, the legal concepts of monopolization in the US – which assumes the existence of a causal link between the contested conduct (improper means) and some form of monopoly power – and abuse of dominance in the EU may largely converge.

To be more precise, Section 2 of the Sherman Act has been historically construed as requiring monopoly power, willfully achieved or preserved by means of behaviors which do not pertain to competition on the merits, and thus forbidding all strategies that entail monopolization, and attempts to monopolize the market, including specific means that make it impossible for rivals to engage in fair competition (*e.g.*, deceptive practices).[41] But modern elaboration has consistently held that monopolistic conduct corresponds to acts that: *(1)* are reasonably capable of creating, enlarging or prolonging monopoly power by illegally impairing the opportunities of rivals; and either *(2a)* do not benefit consumers at all, or *(2b)* are unnecessary for the particular consumer benefits claimed for them.[42] At first glance, this approach is wholly echoed by the 'anticompetitive foreclosure' language of the EU Commission's Guidance Paper (as, from the American side, by the US DoJ Statement of Interest in the Google case). The last statement, however, might prove wishful thinking. At a closer inspection, the avowed commitment to protect consumers' interests reveals an astonishing loophole. The Commission's framing of anticompetitive foreclosure hinges on a three-pronged finding: *(i)* foreclosure, *(ii)* anti-competitiveness, and *(iii)* harm to consumers.

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ultimately benefits competitors" (N. KROES, *supra* note 28).

41 See, for instance, M.S. STUCKE, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception,* May 2009 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1395076).

42 The "standard reference", by P. E. AREEDA & D.F. TURNER, *Antitrust Law,* vol. III, Boston, 1978, 78, is echoed by *Aspen Skiing v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 605 and note 32 (1985).

Whilst the first and the third factors are aptly identified, item *(ii)* is left almost undefined or, according to another interpretation, completely absorbed by the prerequisite of harm to consumers.

Both options are unfortunate. Regarding the former, shutting eyes on the traditionally perplexing question about what is bad and what is not, succeeds, at most, in delaying the difficulties, at the price of rendering them more inextricable. That the conduct of the dominant firm creates opportunities "to profitably increase price to the detriment of consumers" does not help make it clear whether, for instance, aggressive initiatives driving rivals out of business should be deemed anticompetitive, simply because of the "special responsibility" (not to mention the one charged to the controversial club of the super-dominant undertakings) preventing it from undertaking conduct allowed to its competitors.[43] Even the introduction of successful (and not readily replicable) innovation by the dominant firm might be suspicious (which is not the case). Lest this kind of reverse discrimination, once passively received but nowadays hotly contested, conquer new luster, one should specify that the conduct triggering the alteration of the market must be contrary to some set of the received rules of the game.

But beware! If, in order to by-pass the problem of indefiniteness, we re-focus (as we were accustomed to doing in the past) on the stigma of anticompetitiveness, a new/old risk materializes: that of endorsing a disguised form of unfair competition devoted exclusively to Big Brothers, but inspired to the common goal of protecting competitors instead of competition. Condemnation might ensue even though, for want of causation, the monopolist's conduct – say, deceit, in the form of product disparagement, concededly immoral – does not impair competition.

This risk (and thus we come to the latter interpretation we

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[43] For some sharp critics about this issue, see J. P. AZEVEDO & M. WALKER, *Dominance: Meaning and measurement*, *European Competition Law Review*, 363 ff. (2002).

were alluding to) is exorcized by the requirement of harm to consumers, charged with the task of separating the wheat from the chaff (foreclosure, by whatever means, is illegal only when it hurts consumers). Or so it should be, since § 21 of the Guidance Paper hints at special cases – conduct which can only impair competition, without creating any efficiency: *i.e.*, when the dominant undertaking prevents its customers from testing rivals' products, or finances the former in order to delay the commercialization of such products (look at the *Intel* case).[44] In such situations, the Commission warns, consumer harm can simply be inferred: a proposal which comes close to stating that prejudice for consumers will be presumed, whether it exists or not (which drives us back to an unfair-competition-like stance).

In this vein, in fact, a still more general risk appears to lie in ambush: that harm to consumers could be given, despite the verbal prominence, only lip-service, consisting in taking it for granted, whenever the competitive process is somehow distorted (vaporware might be a typical example, since the bogus announcements will hamper competitors' inroad into the market, without necessarily implying material prejudice for consumers). Actually, Article 82 EC is primarily applied with the aim of preserving open market structures; and preserving an open market structure may, or may not, maximize consumer welfare. Likelihood of harm becomes the magic formula. And if likelihood is easily conceded whenever some kind of remote threat to the competitive process can be conceived of in the long run, as it seems to be the case in Europe, the ever-present temptation to turn the dominance law in a tool protecting self-serving operators comes again to the forefront. Note, moreover, that such an approach, pushed to its extreme coherence, would lead to the unintended but logical consequence that every kind of competitive efforts, in so far as they curb rivals and prompt monopolistic success (with cogent likeli-

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[44] See Commission's decision in case COMP/C-3/37990 *Intel*, May 13, 2009 (http://ec.europa.eu/competition/sectors/ICT/intel.html).

hood of price increase), should be condemned – unless, it goes without saying, one adheres to the *Trinko* rationale.

All in all, among manifold difficulties that postulate further refinements, anticompetitive foreclosure as an antitrust abuse is defensible only if unequivocally based on proof of material damages to consumers; it must provoke, or unequivocally threaten, exploitation. The three factors mentioned by the Commission collapse into a single plot: firms with monopoly or near-monopoly power are likely to injure consumers by improperly preventing rivals (or would-be rivals) from constraining the exercise of that power.

5. SOME CONCLUSIONS (AND A MODEST PROPOSAL)

Thus, we come to a rather perplexing conclusion. In order to gain a distinctive antitrust role, different from the coverage of contract and unfair competition laws,[45] the exclusionary abuse requires exploitation. But exploitation, in itself, is either dropped or ignored by the antitrust enforcement. The logical short circuit could not be any worse.[46] This is why we believe that, despite its believed sophistica-

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[45] European tradition is, under this point of view, rather peculiar, since it exhibits a whole set of apparent examples of aporia. For some short remarks about the subtle relationships among antitrust and unfair competition provisions, see R. PARDOLESI, *La disciplina della concorrenza: uno sguardo d'insieme*, in R. PARDOLESI & R. ROMANO, *La concorrenza e la tutela dell'innovazione*, Giuffré, Milan, 2009, 3 ff.

[46] The paradox becomes, at times, involuntarily grotesque. In re-shaping specularly the usual approach to the less intuitive monopsony frame (and thus reaffirming that "unilateral efforts by a monopsony to force prices downward traditionally do not violate the antitrust laws", whereas, "when collusion is involved […] Section 1 of the Sherman Act has been brought to bear"), two commentators do not hesitate to intimate that "there is nothing to recommend collusive monopsony. The efforts of collusive monopsonists to obtain lower prices do not translate into lower prices for consumers, but only into higher profits for themselves". Just a moment earlier, the single monopsonist had eschewed any reproach (See R.D. BLAIR & J.L. HARRISON, *The Antitrust Response to Monopsony and Collusive Monopsony,* August 2009, 18-24

tion, the discipline of unilateral conduct is in desperate need of being rebuilt from scratch.

As a first step out of this conundrum, and as a modest proposal for revamping the exhausted notion of antitrust injury, it might be argued that pure exploitation should be found abusive, whenever it constitutes more than a contract law problem. On the contrary, pure exclusion, without exploitation, should not be found abusive, in order to avoid protecting competitors rather than competition (with regard to Google and the scenarios depending on the approval of the GBS, we are obviously moving in the hyperuranium of the antitrust hypotheses, but the least we can say is that this issue should be very carefully considered by the US DoJ while trying to assess the future possible moves of Google as the new digital knowledge monopolist).[47] As forcefully argued by Advocate General Mazák in his conclusions about the *Wanadoo* case appeal, if the predator's possibility of recouping losses through supra-competitive pricing is ruled out, there should be, in principle, no antitrust intervention, since consumers suffer no harm.[48]

Accordingly, exploitation should be used as the test of anti-competitive effects on the market: this would ultimately imply, Occam's razor in hand, that there is only one type of abuse. Keep it simple.

(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459163)).

47 Incidentally, and apart from the implications of the case to be better addressed under a public (better, constitutional) law point of view, we opine that the GBS may present two different antitrust issues. The first is a typical cartel one, possibly relevant under Section 1 of the Sherman Act, related to the agreements among Google and the coalition of the willing (settlers). Then, even if Google could also be imagined as a kind of monopolist on commission (with the rightsholder's guilds as instigators: see R. PICKER (*supra* note 15), 15), the second issue should be regarded as a pure Section 2 case, with sole (eventual) relevance of the monopolist's conduct, were he to exploit the consumers by means of a strangling pricing policy related to the so-called institutional subscriptions.

48 Cf. Case C-202/07 P *France Télécom SA v. Commission of the European Communities*, September 25, 2008, Opinion of Advocate General (http://eur-lex.europa.eu/en/index.htm).