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EXPLOITATIVE ABUSE AND ABUSE OF ECONOMIC DEPENDENCE: WHAT CAN WE LEARN FROM THE INDUSTRIAL ORGANIZATION APPROACH?*

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EXPLOITATIVE ABUSE AND ABUSE OF ECONOMIC DEPENDENCE: WHAT CAN WE LEARN FROM THE INDUSTRIAL ORGANIZATION APPROACH?*

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Abstract: This article aims to provide a detailed analysis of the concept of economic dependence and exploitative abuse through their evolution in competition law and economics and in European case law. First, while the theoretical roots of these concepts may be found in economic theory, we show that the issue has long been ignored or only reluctantly considered in competition law enforcement, mainly because of a lack of available and reliable economic criteria. Second, although its primary objective was to measure market power in an oligopoly context, we examine how current empirical industrial organization methodology allows a sophisticated measure of the economic dependence among suppliers and distributors. Third, we discuss the possibility of relying on the industrial organization approach to address these issues.

Keywords: exploitative abuse, abuse of economic dependence, competition law, European Commission, effects-based approach.

JEL codes: K21, L12, L40, L42.

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1. INTRODUCTION

The notion of economic dependence is characterized by a paradox. While its theoretical bases are closely related to the notion of exploitative abuse, which was a crucial dimension in the European Union (EU)'s competition policy as conceived upon its inception, this notion only plays a marginal role – if any – in EU competition law enforcement.

The place of "exploitative abuses" in both case law and the legal literature is also reduced to its smallest dimension, even though eminent scholars in EU competition law in the 1960s, such as Joliet (1970), attached great importance to these issues. The specific case of "abuse of economic dependence" is even more distinctive. While, for instance, French, Italian, German, Portuguese, and Greek[1] competition laws have introduced specific provisions, EU competition law has not.[2] The EU concept of economic dependence stems from the Court of Justice (CJ) case law. The notion made its first appearance in *British Leyland*[3] in 1986, where it was closely related to legal monopoly rights granted to a trade partner. Similarly, although the concept has rarely been used since *British Leyland*, its uses in *Deutsche Bahn* or *Aéroports de Paris* in 1997 and 2000 were also related to legal monopoly issues.[4] In other words, the concept has only been used against firms benefitting from exclusive legal rights, and not against firms that had obtained their market position on the merits. In this regard, the requirements of EU competition law for characterizing an abuse of an incumbent whose market position results from exclusive rights do not involve a demonstration of an anticompetitive effect on the market. As a consequence, even though an incumbent may be sanctioned, competition law does not provide a test that allows for

[1] For the French case, see *infra*, the Italian case, see Fabbio (2006) and Falce (2015). For the German and Portuguese case, see e.g. the OECD's report (1998, pp.55). For the Greek case, see Truli (2017).

[2] For a comprehensive presentation of the legal provisions related to economic dependence issues, see the International Competition Network report published in 2008.

[3] CJEU, C-226/84, British Leyland Public Limited Company vs. Commission, 11 November 1986.

[4] General Court, T-22/94, Deutsche Bahn A.G. vs Commission, 21 October 1997 and T-128/98, Aéroports de Paris vs Commission, 12 December 2000.

the characterization of such an abuse. In market transactions among private undertakings, there are no obvious criteria to deal with these types of practices.

The situation is similar regarding "exploitative abuses." For instance, in a striking opinion issued in the context of a request for a preliminary ruling by the Latvian Supreme Court, the Advocate General Nils Wahl stated that such abuses are rightly considered with extreme reluctance in EU case law because of the risk of *false positive* decisions. [5] In a market with no barriers to entry, no undertaking may be able to maintain extra-competitive prices; according to A. G. Wahl, such a case can only be observed in regulated markets.

The cases of exploitative abuses and abuses of economic dependence may seem contradictory in a time of implementation of an *effects-based* approach. By considering their translation into prices, such abuses can lead to mark-up or mark-down phenomena. The case is rather similar to that of cartel price overcharges, which are commonly evaluated for follow-on actions for damages. Competition authorities nonetheless seem to privilege a formal approach in these cases, by considering the existence of exclusive rights. The present paper questions the tools provided by the Industrial Organization (IO) approach in order to address these practices and explain this unequal treatment.

Against this background, this article also addresses whether the economics-based approach of competition law can shed some light on the contemporaneous issue of economic dependence. This work focuses on the characterization of these abuses and does not encompass the issue of remedies (Këllezi, 2008). Similarly, it does not address the specific case in which an abuse of economic dependence is exerted by a firm with no market power, nor within the context of merger control. For instance, the

[5] Opinion of the Advocate General Nils Wahl, Case C-177/16, Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome, 6 April 2017

european Commission took into consideration these types of dimensions in its assessment of the *Rewe/Meinl* merger case.[6]

The remainder of the paper is organized as follows. Section 2 explores the history of economic ideas to show that the problem of economic dependence has been addressed in different lights with respect to the diversity of economic competition theories (Budzinski, 2008). Section 3 investigates how the current IO approach provides some instruments that could constitute a standard that competition authorities could use within the framework of their current "more-economic approach." Section 4 discusses the possibility of relying on the IO approach to address these issues. Section 5 provides a conclusion.

2. IS THE EXERCISE OF ECONOMIC POWER THE *TERRA INCOGNITA* OR THE LOST CONTINENT OF ECONOMICS?

The first subsection addresses the analysis of abuses of economic dependence (and more broadly exploitative ones) in economic theory, while the second one focuses on their treatment in EU case law.

2.1. Should economic theory address economic dependence?

The case of the difficulties faced by the French agrifood industry illustrates the tensions that can exist between market unbalances and public policies aiming to limit farmers' dependence *vis-à-vis* processors.[7] That there are political pressures to enhance the place of competition law to address economic dependence-related issues is not surprising considering the history of competition law. If one considers the case of the U.S. Sherman Act, the hypothesis advocated by Bork (1966) – according to which the

[6] European Commission, Decision 1999/674/EC *Rewe/Meinl* (1999) OJ L 274/1. See, e.g., Këllezi (2008).

[7] For instance, in the conclusions of Estates-General of Food (13 October 2017), French President Emmanuel Macron insists on the necessity to rebalance price negotiations between farmers and distribution.

consumer welfare standard is the sole enforcement criterion – can be challenged with regard to legislative history. Indeed, Lande (1989) argues that the political concerns raised by undue transfers of wealth among market participants were the main drivers of the act. According to this view, the issue was to prevent and to sanction the confiscation of economic surplus of the commercial partners of the trusts, a confiscation made possible by their economic power. Using the wording of European competition law, the situation of the farmers' economic dependence and the abusive exploitation of this situation by the trusts may have motivated the enactment of the Sherman Act. However, according to scholars from the Chicago School, the validity of the consumer welfare standard is not only grounded in an historical interpretation, but is also and mainly based on its administrability with respect to the enforcement of competition law. Using this criterion allows decisions to be based on "objective" grounds that could be enforceable against third parties. Considering a reasonableness test or tackling the issue of economic unbalance leads one to rely on subjective criteria that do not eliminate the risk of false positive decisions (Easterbrook, 1982). Quoting Becker and Salop (1999), the 2008 Department of Justice (DoJ) report on single firm practices stated that in an imperfect and costly information framework, "*decision theory teaches that optimal legal standards should minimize the inevitable error and enforcement costs, considering the probability and the magnitude of harm from each.*"

Indeed, the debates around the Sherman Act echo with two of the main difficulties encountered by competition law enforcers in characterizing situations of economic dependence and in demonstrating exploitative abuse that may affect competition. The lack of clear-cut tests or of a consensual counterfactual makes sanctions on the basis of competition law difficult. If this type of abuse is seldom or never sanctioned, it is mainly because of the impossibility of clearly defining what a fair or a reasonable price is.

The exercise of economic power is not mandatorily a relevant issue for antitrust, even though differences can be highlighted between the US and the EU in this regard.

There are various reasons that may explain the emergence of a dominant position, such as innovation, efficiency, protection, or path dependence. However, while the emergence of economic power cannot – and should not – be prevented,[8] the abuse of an existing power should – and can be sanctioned. In a nutshell, former merits, such as past innovations or past efficiency advantages do not justify the use of economic power to defend and extend market power or to lobby governments and society (Zingales, 2017). The first point echoes with Carlton and Heyer's view (2008) about single firm conduct. While a dominant firm can legitimately extract the surplus created by its own merits, the extension of its market dominance on a basis other than on the merits (e.g., weakening or eliminating competitive pressure) must be sanctioned by antitrust laws.[9] The notion of competition on the merits as defined by the U.S. Supreme Court in Grinnell (1966) provides a means to define what can be seen as outside the scope of such competition on the merits.[10] In contrast, EU competition laws are specific in this respect, considering exploitative prices charged by a dominant undertaking to be abusive irrespective of the origins of its market position.

Implementing competition law resources regarding this issue aims to separate the sheep from the goats, e.g. to protect competition but not competitors by avoiding

[8] Another example of a competition authority's scrutiny in the groceries sector is from the French agency. It gave an opinion concluding that Parisian market is highly concentrated. It suggests a new tool to intervene on market structures: the structural injunction (Autorité de la concurrence, 2012).

[9] The 2008 DoJ report insists on a very relevant distinction to understand the US case law (p.20). The DoJ distinguishes market power from monopoly power. Market power is the unilateral capacity to raise prices above those that would be charged on a competitive market. Monopoly power is defined as "*the power to control prices or exclude competition*" (see US *v* E.I. Dupont de Nemours & Co (Cellophane), 351 US 377, 391, 1956). The mere detention of such a power is not sanctioned by antitrust law. It relies only on the extension on another basis than on the merits.

[10] United States v. Grinnell Corp., 384 U.S. 563,570–71 (1966). The Grinnell decision is the basis of the DoJ 2008 report on Section 2 to define what monopolization is. According to the report, monopolization requires i) monopoly power, and ii) 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 (pp.18).

decisions that impair consumer welfare. However, the apparent lack of economic tests in the current competition law and economics toolbox does not mean that economic theory has always disregarded this issue.

The Chicago School and the concentration of economic power

If one considers the current situation of competition law and the economics literature, and mainly its tools based on the IO literature, one might conclude that abuses of economic dependence and exploitative abuses are outside the scope of economics. The Chicago School has promoted an *effects-based* approach grounded on a sole – objective and neutral – criterion,[11] namely the maximization of consumer welfare. Within this framework, efficiency is the only relevant criterion for economic analysis. According to Chicago School scholars, the main risk associated with competition law enforcement is a "false positive" decision (Easterbrook, 1982). The Chicago approach may be characterized by Director and Levi's analysis (1956) of Judge Learned Hand's 1945 ruling in *Alcoa*. In this margin squeeze case, Judge Hand considered that the upstream monopolist should price the input at a level that allows its downstream competitor to generate a 'living profit'. The living profit criterion may be balanced against the economic efficiency one. Contrary to Hand, Director and Levi refuse to balance efficiency against other social values.

This rejection of market unbalance concerns as being outside the scope of antitrust is symptomatic of a theoretical disdain of market power. The *pro-trust antitrust* orientation of the Chicago School (e.g., Van Horn, 2010) leads to the view that very few market practices implemented by dominant firms may lead to anticompetitive results or cannot be offset by efficiency gains. In terms of antitrust enforcement, this shift has been materialized by the transformation of the treatment of unilateral practices, from a presumption of an anticompetitive nature until the 1960s to a

[11] Lamadrid de Pablo (2017) sums up this Chicagoan school-based conception as follows: "Unlike the concept of fairness (which is typically presented as inherently subjective goal and prone to different and ideological interpretations), efficiency has an aura of mathematical objectivity; it is presented as a measurable benchmark to assess the economic effects of a given practice, the alternative is discretion."

presumption of lawfulness nowadays. This evolution was symbolized by the DoJ report on single firm practices,[12] published in the fall of 2008 (and withdrawn by the Obama administration in the spring of 2009). Considering the risk (and the social cost) of false positive decisions, the DoJ proposed to be more demanding in terms of the standards of proof for plaintiffs, knowing that the burden of proof falls upon them.

This situation contrasts with the 1930s view of the Chicago School concerning antitrust enforcement. In particular, the notion that economic dependence is never addressed by economic theory, and notably by the Chicago School, is just a distortion produced by the shift of economics initiated in the 1950s by the "Second" Chicago School. In fact, the "First" Chicago School (and notably Henry C. Simons) considered that impairing the concentration of economic power is the primary goal of competition law, irrespective of any efficiency matters (Bougette et al., 2015). According to Simons (1948), market power allows for the manipulation of prices at the expense of the overall society.

The old institutionalism approach

This concern was not at that time a novelty in U.S. law and its economics approach. For instance, the link between conflicting interests and the role devoted by the legal system to finding a reasonable balance can be found in the notion of *coercion*. According to institutionalist scholars, coercion is a basic fact of economic life, as any distribution of property rights adversely impacts the bargaining power of economic actors. Coercion is the consequence of an unbalance in the economic powers involved in a transaction. In this framework, an economic power is defined as the capacity to decide unilaterally about price and contract conditions despite conflicts with partners' interests.[13] This power to coerce a commercial partner is based on contractual

[12] DoJ, (2008), *op.cit*.

[13] An abuse of economic dependence is possible as soon as the more powerful agent (the one who has an alternative) dictates the terms of the relationship by threatening to withdraw from the transaction (Emerson, 1962; Casciaro and Piskorski, 2005).

freedom[14] and on property rights, but, according to the old institutionalists, these individual rights may be analyzed as State authorizations to choose from among several available courses of action, without regard to the welfare of others (Commons, 1924). Their enforcement should therefore be monitored by a judge. Therefore, all rulings may be analyzed as a compromise among individual rights.

Consequently, according to this view, conflicts must be settled by the (re)assignment of legal rights within society. Judicial decisions lead to a redefinition of the scope of choices open to each contractor. For instance, judicial settlements might limit the freedom to set prices despite the views of U.S. courts, as expressed for instance in *Berkey Photo v Eastman Kodak* in 1979.[15] This decision was taken in a very conservative area for the Court, characterized by the dominance of the Classical Legal Thought by which contractual freedom and property are seen as fundamental rights. An undertaking, even a monopoly, can set its price at any level. This possibility is both a legitimate reward for past investments and the driving principle of the self-regulating nature (according to them) of the market process.[16] It remains possible to address the issue of excessive pricing through U.S. antitrust laws, even if these prices are set by an undertaking whose position was obtained by its own merits. This possibility relies on Section 5 of the FTC Act. However, the FTC itself seems reluctant to implement this provision in this respect, in view of the risk of appearing as a price regulator and consequently being exposed to political pressures in order to cap prices in some industries (Baker and Salop, 2015).

However, Nachbar (2013) shows that the exercise of market power (particularly an undue or a not challengeable one) raises two cumulative but distinct issues. The first is

[14] According US Supreme Court case law, an undertaking – even a dominant one – can contract at the conditions it decides with its commercial partners and can also refuse to deal. See United States v. Colgate & Co., 250 U.S. 300, 1919.

[15] "[A] pristine monopolist...may charge as high a rate as the market will bear". Berkey Photo Inc. v Eastman Kodak Co.; 603 F.2d 263,297 (2d Cir., 1979) quoted in OECD (2011).

[16] For instance, according to Easterbrook (1982, pp. 2), "*judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.*"

the possible damage in terms of welfare (deadweight loss or consumer welfare confiscation). The second is regulatory damage. The private undertaking that benefits from market power is able to regulate markets, including at times markets that affect public interests. The exercise of market power not only raises concerns in terms of efficiency, but also in terms of market regulation. The firm may be able to frame the terms of the transactions, as a public regulator can do, and determine market dynamics, without any social control.

2.2. EU competition law remedies for abuses of economic dependence

How to explain the long-standing reluctance towards abuse of economic dependence cases?

Even if it was rather indirect, the influence of the German Ordoliberal School on EU competition law has been stressed in the academic literature (Budzinski, 2008; Giocoli, 2009). Although this approach may have participated in 1930s neoliberalism, such as the Chicagoan approach, there remain significant differences between these two schools, especially concerning exploitative abuses (Van Horn, 2010).

The importance of the efficiency criterion draws a dividing line between the two types of neoliberalism. With regard to the Chicago approach, competition law must be focused on this unique dimension. On the contrary, in the view of the ordoliberals, efficiency should not be considered apart from fairness and equity. Guaranteeing equal access to the market, assuring competition on the merits, and preventing powerful actors from abusing their economic power constitute one of the underlying principles of competition law. The concept of exploitative abuses remains closely linked to this concern. Exclusionary abuses reached the top of the agenda in the 1970s, with the 1973 Court of Justice decision *Continental Can*. Schweitzer (2008) illustrating the tension between these two types of abuse of dominance, both in the 1957 German competition law and in the Treaty. However, this historical and theoretical recognition was not reflected in the case law.

The longstanding disregard for exploitative abuses in EU competition law can be summed up with two very meaningful observations. The first is related to the Commission's communication of February 2009 related to its enforcement priorities concerning art. 102. This text is all the more important in that it constitutes a major step in the implementation of its *effects-based* approach. However, the communication only deals with exclusionary abuses, and not with exploitative ones. Obviously, the 'more economic approach' has nothing to do with exploitative abuses. This original type of abuse of a dominant position is no longer a priority in terms of competition law enforcement.

The second observation derives from EC case law. It is possible to find an implementation of abuse of economic dependence in the CJ case law, in 1978 outside of the perimeter of regulated industries. It was related to the oil industry following the 1973 crisis. BP was accused of an abuse, to the detriment of one of its customers (ABG) due to the shortage of oil product. Despite BP's market share (26%), the Commission considered that art. 102 was applicable. This decision was nevertheless annulled by the Court of Justice, on the grounds that the buyer's economic dependence cannot lead by itself to a finding of a dominant position on the relevant market.[17]

One of the very last uses of the concept of exploitative abuse was made in a procedure launched against S&P's for its abusive practices in the market of financial instrument identification numbers.[18] The competition concerns (and not the statement of objections) communicated by the Commission rely on the mandatory buying by firms of additional financial information using these ISIN codes, even if the user does not need them. The alleged exploitative abuse was related to this forced sale.

[17] ABG/Oil companies operating in the Netherlands, Case n°IV/28.841, Commission Decision of 19 April 1977 and Court of Justice, Case n°77/77, Benzine en Petroleum Handelsmaatschappij BV and others v Commission [1978].

[18] European Commission, 2011, Standard & Poor's, COMP/39592, 14 May.

However, two remarks should be made here. The first is that the case was settled through article 9 of EU Regulation 1/2003, i.e. through a negotiated procedure. The case was closed without any decision ruling on the matter, with the Commission only needing to accept the commitments proposed by S&P's. Because of this procedure, the Commission did not have to establish a theory of damage, and the defendant did not discuss this theory or have to develop an efficiency-based defense. The absence of adversarial procedure (in opposition to art. 7 of EU Regulation 1/2003) deprives us of any legal discussion or economic tests allowing a full characterization of exploitative abuse. The available legal knowledge may be impaired by this relaxation of the *struggle for law* (Wagner-von Papp, 2012). A second point should be highlighted as well. We have already noted that the concept of economic dependence has appeared in EU case law only against State monopolies. In this precise situation, one cannot consider that S&P's is a State-owned firm operating a network industry, but rather that S&P's has an exclusive legal right to provide these identification numbers for all securities issued on the U.S. market. Again, we are far from abuses of economic dependence among firms operating on purely private markets.

The EU Commission's overcautious approach on exploitative and economic dependence abuses echoes the alleged silence of IO on this issue. If it was really the case, we may legitimately wonder why economic dependence and exploitative abuses have fallen outside the scope of economics. This paradox may be explained by the hazards of identifying and remedying exploitation (Lyons, 2008). The EC is reluctant to mobilize such theories of abuse because of the difficulties encountered in determining how to characterize an unfair price and how to demonstrate harm to competition (Akman, 2009). Evans and Padilla (2005) illustrate the risk and the costs of false convictions or acquittals that may be induced by flawed decision-making criteria. The third subsection will show, however, that IO-based models may be relevant to this issue.

Are economic dependence cases on the agendas of antitrust enforcers?

The disappearance of these abuses may be explained by a lack of interest in the *effects-based* approach concerning these issues and by the powerlessness of some other theoretical schools to provide clear-cut rules allowing the characterization of such practices. Even though old institutionalism has provided an elaborate taxonomy, this school of thought has failed to provide a predictive theory of contracts and organization and to ground its insights in an empirical research agenda (Williamson, 1985). At the same time, conventional EU views on competition policies are seen as formal, legally based, and at odds with the competition law's *more economic approach* (Géradin and Petit, 2010), which was introduced in 2009 and which was comforted by the *Intel* ruling of the Court of Justice of September 2017. [19]

The very marginal position occupied by abuse of economic dependence cases in the decisional practices of competition authorities may also be explained by a reluctance to deal with issues that may be considered to be more linked to contract law than to competition law. In a nutshell, an abuse of a dominant position is conditioned on the characterization of the dominance in a given relevant market. A *horizontal dimension* is implied, ensuring that consumer welfare is affected by the practice and not only the commercial partner involved in the transaction.

In contrast, at first sight, an abuse of economic dependence involves only a *vertical relationship* between two partners in a value chain. It may not affect any relevant markets and only inflicts harm on a given undertaking. In a narrow sense, correcting market unbalances is outside the scope of competition law. However, such an abuse may indirectly affect consumer welfare. It may induce price increases, impair innovation incentives, and ultimately affect the scope of products available to consumers. In other words, final consumers may be affected even by such vertical practices. However, competition law concerns are also at stake when such abuses may

[19] EU Court of Justice, Judgment in Case C-413/14 P/ Intel Corporation Inc. v Commission, 6 September 2017.

impair firms' capacity to access the market. In this sense, an abuse of economic dependence must be sanctioned on a competition law basis since the freedom to compete in the market is threatened (Bakhoum, 2015).

If such a view makes sense in the framework of EU competition law, such a position cannot be shared in a Chicagoan conception. The risk of protecting firms (even if they are not competitors in a narrow sense) at the expense of consumer welfare cannot be avoided. Furthermore, the risk of false positive decisions in terms of consumer welfare cannot be eliminated, especially if the standard of proof is relaxed compared to in the case of abuse of dominance. Indeed, an abuse of economic dependence does not require a characterization of such a position within a given relevant market.

Furthermore, criticisms raised by the Chicago School against the *impressionistic area*[20] of antitrust law enforcement may be once again be addressed, as the consumer welfare criterion (conceived here as an objective and clear-cut rule for decision-making) gives way to fairness and equity considerations. From a legal and economics perspective, Kaplow and Shavell (2002) advocate for such a view: "*Social decisions should be based exclusively on their effects on the welfare of individuals, and, accordingly, should not depend on notions of fairness, justice, or cognate concepts*." (pp.1) In addition, in a very conservative acceptation of competition law, correcting contractual unbalances may impair the competition process itself if uneven economic powers are the norm and not the exception on the market.

[20] The reference "impressionistic" has been used several times in antitrust case law. For instance, in *United States v. Von's Grocery Co*., "The Court disdains any such effort today. Untroubled by the language of §7, its legislative history, and the cases construing either that section or any other provision of the antitrust laws, the Court grounds its conclusion solely on the *impressionistic* assertion that the Los Angeles retail food industry is becoming "concentrated" because the number of single store concerns has declined" United States *v*. Von's Grocery Co., 384 U.S. 270 (1966) https://supreme.justia.com/cases/federal/us/384/270/case.html

In a strict Chicagoan perspective, taking into consideration such concerns may lead competition law enforcement to turn away from an "economic-oriented approach" (based on the consumer welfare criterion) towards a "social-oriented" one that aspires to balance efficiency concerns with fairness related ones (Bakhoum, 2015). Such a view may be too restrictive, considering both U.S. and European competition law histories. In the European sense, the notion of a special duty of a dominant firm towards the preservation of an effective competition structure shows that an abuse may be characterized even without a demonstration of consumer harm in terms of welfare. In the U.S. case, the enactment of the 1890 antitrust law cannot be understood without a reference to the issue of the concentration of economic power.

In this perspective, "*the concentration of economic powers in the hand of private economic entities affects not only the structure of the market, but also the individual freedoms of market participants,*" as stated by Bakhoum (2015, p.21). In the conventional EU perspective, guaranteeing market access cannot be seen as a non-economic goal of antitrust that can be criticized considering an induced trade-off with economic efficiency. The freedom to access the market is considered as a necessary condition for efficiency.

However, taking these risks into consideration does not lead to a consensus.

A first set of opposing arguments is closely linked to Chicagoan views, especially to the error-cost framework and to that of antitrust modesty. The standard of proof is seen as far weaker than that imposed by the *effects-based approach*. This characteristic may lead to decisions that are not sufficiently grounded in sound economic analysis. The uncertainty about the theory of competitive damage may also lead to inappropriate remedies[21] that may harm consumers (Lianos and Lombardi, 2016). At the same time, correcting the contracting disequilibria among commercial

[21] For instance, retailers may be seen as gatekeepers in order to access the market, leading to queries to activate the essential facilities doctrine (Chauve and Renckens, 2015). Controlling an essential facility may be considered the last stage in terms of exerting coercive power on its commercial partners, as they do not dispose of any alternative.

partners in a vertical value chain implies that competition authorities perform a trade-off between fairness-related concerns and economic efficiency. Since there is no way to balance these conflicting objectives, the risk is to offer excessive room for judges' discretion.[22]

A second set of arguments is related to the assessment of the actual level of competitive damage that is induced for final consumers by this unbalanced market power. We have already pointed out the three channels by which consumer welfare may be impaired: i) increased prices, ii) reduced choices, and iii) limited innovation incentives. These causal links have been challenged by recent assessments performed by the European Central Bank and by the EU Commission. For example, one study has cast doubt on the impact of an increased concentration at the retailing level on prices paid by final consumers (Ciapanna and Rondinelli, 2014). In the same way, the EU Commission report on *modern retail* (2014) challenges the adverse consequences of retailers' concentrations on consumers' spans of choices and on incentives to innovate for producers.[23]

After analyzing the concept of economic dependence through the lens of the history of economic ideas, we will show how modern industrial economics (i.e., the Post-Chicago School or IO – see, e.g., Budzinski, 2011) has been able to provide both theoretical and empirical tools to measure economic dependence in the sense of buyer power and bargaining power.

[22] See, for instance, the views according to which integrating other dimensions than consumer welfare in competition law enforcement may lead to "political economy considerations" and to a "holistic" competition law model (Lianos and Lombardi, 2016, p.25).

[23] One may also note that short-term and long-term effects on consumer welfare may be different and that the three criteria (price, choice, and innovation) may evolve in opposite directions. A pressure on prices exerted by retailers may have adverse effects on the range of the producer's offer in terms of products and on its capacity to finance R&D. The assessment of the net effect depends on the theoretical framework adopted in terms of competition intensity and incentives to innovate. To illustrate, see, e.g., the inverted-U relationship crafted by Aghion et al. (2005).

3. HOW DOES MODERN IO PROVIDE TOOLS TO ADDRESS EXPLOITATIVE ABUSE CASES?

Modern IO analyzes the concept of economic dependence through the lens of a vertical industry framework.[24] Indeed, dependence may be explained by an imbalance in the contractual relationship between a producer and a retailer. While a structural approach introduces this imbalance with a cost asymmetry among suppliers and retailers, a bargaining approach investigates how large firms may have greater bargaining power than small firms in oligopolistic input markets. We focus on the agricultural and food sectors to illustrate our point.

3.1. Theoretical approaches to address economic dependence

Oligopoly vs. oligopsony problems

The structural imbalance stems from two different sources. When there are few suppliers and many buyers, the so-called oligopoly problem arises (see, e.g., Belleflamme and Peitz, 2010). The vast majority of strategic analyses of imperfect competition lies in this first version of imbalance. Market power may be found both at the upstream (concentration of producers) and downstream (concentration of retailers) levels of markets. The second source of structural imbalance, which is less prevalent in the literature, refers to the oligopsony problem – a situation in which there are few buyers in the market (retailers in this case) and a large number of suppliers (producers). In this latter case, a situation of economic dependence may emerge. Table 1 summarizes the different configurations and the types of market power that may result.

[24] For a discussion on the benefits and limits of modern IO to competition policy, see Budzinski (2011).

TABLE 1: ASYMMETRIC MARKET STRUCTURE

	Upstream	*Downstream*
Bargaining power	Few sellers	Many buyers
	(oligopoly problem: retailers face powerful suppliers)	
	Many sellers	Few buyers
	(oligopsony problem: suppliers face powerful retailers)	

Specificities of the agrifood sector

Rogers and Sexton (1994) identify specific structural features in the food sector. First, products are often perishable. They are difficult and costly to store and transport. Packing facilities or processors (*cf. infra*) are located in geographic proximity to farms and may therefore exhibit buyer power over farms located in their vicinity. Second, in many cases, an intermediary between producers and distributors appears, such as processors (e.g., slaughterhouses for meat products). These intermediates are very specialized and may exercise significant market power, ultimately leading to a triple margin on products along the value chain. Third, producers such as farmers need specific assets and thus face high sunk costs. Barriers to entry in such sectors are relatively strong. Finally, new players have emerged to counterbalance the bargaining power in place. For example, purchasing cooperatives or associations of producers have emerged, which can pose their own problems in terms of competition. These four characteristics, Rogers and Sexton (1994) argue, justify the intervention of public authorities to promote competition in the upstream industry and to develop means of countervailing powers.

Processors play a role as gatekeepers and may also enjoy significant market power. These vertical dimensions require an analysis in terms of the global value chain (De Baker and Miroudot, 2014). Within this perspective, also developed by Lianos and Lombardi (2016), the vertical relationship between producers and retailers can be split

into several situations, distinguishing for instance market-based models of governance, relational markets, and captive ones. The last model is the most relevant for our analysis. Contrary to a relational model, the relationship between the producer and the retailer (which has undertaken specific investments) is very precarious and may be regularly called into question. The importance of criteria as to the origins of the dependence and the requirements in terms of compulsory notice and the stand-still periods prior to putting an end to the relationship (see Vogel (2016) for examples from distribution agreements) might be explained in such a framework. According to Vogel (2016), the challenge is to separate legitimate competition law enforcement from the incorporation of concerns based on the requirements of contractual protectionism.

Buyer power through bargaining power

Returning to Table 1, the buyer power that results from oligopsony is a first theoretical key for modeling economic dependence (we will see empirical evidence below). A precise definition of buyer power corresponds to the capacity of firms to reduce their demand aiming to lower prices for their inputs. This market configuration does not result systematically in an anti-competitive outcome. Indeed, pro-competitive effects are present whenever upstream competition is weak.

Another strand of the economic literature refers to vertical bargaining games. The joint negotiation of price and quantity (which may also include other terms in the contract) is modeled with bilateral Nash-bargaining between manufacturers and retailers (see first paper by Horn & Wolinsky, 1988). For instance, an input supplier negotiates with a downstream producer. If an agreement is reached on a market, a fixed benefit of cooperation is divided between the negotiating parties. In such a framework, Chae and Heidhues (2004) analyzed buyers' incentives to form alliances among small and medium-sized firms.

With respect to vertical bargaining, a growing body of literature has emerged that analyzes the effects of buyer power on prices and welfare (von Ungern-Sternberg,

1996; Dobson and Waterson, 1997; Inderst & Wey, 2007). This literature shows the existence of countervailing power in terms of lower input prices. This is in line with John Kenneth Galbraith's work, which was the first to address the countervailing power hypothesis. "*In the typical modern market of few sellers, the active restraint [on the exercise of private economic power] is provided not by competitors but from the other side of the market by strong buyers,*" Galbraith wrote in 1952. To benefit consumers and improve welfare, buyer power needs strong competition in the downstream retail market. Therefore, a decrease in the number of retailers has beneficial effects for consumers, since larger retailers can extract lower prices from their suppliers. Unlike previous papers that assume a linear form of demand, Gaudin (2017) shows that countervailing buyer power arises in equilibrium for a broad class of demand forms, and its magnitude depends on the degree of product differentiation. In addition, buyer power may also strengthen suppliers' incentives to invest in capacities or to adopt new technologies with lower marginal costs.

Chen et al. (2016) show that buyer power and downstream competition can be viewed in fact as substitutes for one another. They model downstream competition with only one large retailer. Consumer welfare improves following an increase in the buyer power of the large retailer. Increased competition among retailers forces the large retailer to bargain harder with its supplier to obtain a lower input price, which reduces retail prices even further. In addition, Mérel and Sexton (2017) show that entry into the input market and social welfare are more likely to increase with a greater extent of concentration in the downstream market. The more inelastic the supply of the input, the more elastic the demand for the output produced from that input, and the greater the ex-ante degree of concentration in the industry. Agricultural product markets often represent such settings.

What if retailers are merging? Assuming that retailers are local monopolists operating in separate markets, Inderst and Wey (2003, 2007) show that a downstream merger will increase upstream firms' incentives to reduce their marginal costs. Asymmetries between retailers, with some large buyers and some smaller ones being

simultaneously active and facing different input prices, may lead to a "waterbed effect" (Inderst and Valetti, 2011). If a large firm exercises its bargaining power, the terms for its competitors may be deteriorated enough so as to eventually increase the average retail price, which in the end harms consumers.[25]

A more flexible alternative to merging is to form an alliance. Caprice and Rey (2015) study precisely the effects of forming buying alliances.[26] Downstream firms enhance their collective bargaining position at the expense of their suppliers. With regard to retailers, two advantages stem from this "alliance strategy." First, firms benefit from associated economies of scale. Second, they can make a joint delisting decision (i.e., removing goods from the shelves). Such a delisting threat significantly increases their bargaining power, and in fact retailers do use delisting as a bargaining strategy: the risk of a manufacturer going bankrupt if delisted by a large supermarket is real. Caprice and Rey (2015) show that joint delisting decisions increase the bargaining position of a group's members.[27] This better bargaining position may place suppliers in a position of economic dependence, and does not favor consumers since delisting decisions do not necessarily lead to lower retail prices. Florez-Acosta and Herrera-Araujo (2017) examine empirically the effects of product delisting on consumer shopping behavior when consumers may source multiple stores. Based on scanner data on grocery purchases by French households in 2005, their results mitigate the use

[25] See Allain et al. (2017) for empirical evidence of increased prices following mergers in the French grocery retail sector. These theoretical insights are challenged by the results of the EU Commission *Modern Retail* enquiry (EU Commission, 2014). Actually, the concentration level in the retail industry is mitigated by considering the difference between the concentration at the level of the relevant national market and the concentration at the local retail market. In addition, the Commission highlights that the Herfindahl-Hirschman Index (HHI) has actually decreased in 16 out of the 26 Member States studied.

[26] For further details on the French case, see the 2015 opinion of the French Autorité de la concurrence, *Avis n°15-A-06 du 31 mars 2015 relatif au rapprochement des centrales d'achat et de référencement dans le secteur de la grande distribution*.

[27] For a survey of different buyer power abuses and their effects on suppliers, see the report of Nicholson and Young (2012, p.6). Threats of de-listing constitute an abuse among others. Large retailers may also ask for slotting fees, retrospective discounts, or after-sale rebates.

of delisting as a credible strategy. They show that delisting a product when costumers are loyal to the brand can be detrimental not only for the manufacturer, but also for the supermarket. If consumers can readily find an alternative store supplying the missing product, the retailer will possibly suffer the most from its own strategic decision.

3.2. How to assess economic dependence?

The risk rate as a first screen

Given the contractual structure, the first instrument to measure economic dependence is the risk rate. For a given retailer, the risk rate is defined as the share of its turnover related to the distribution of a product by an upstream producer. The higher the risk rate, the more it will jeopardize that producer's viability in the event of a breach of contract. Indeed, the producer will be economically dependent since it may have trouble switching from one retailer to another, particularly in the case of large orders.

In French competition law, two conditions need to be met in order to characterize a situation as one of economic dependence: i) the supplier's production factors cannot be used or adapted for the production of other goods at an economically acceptable cost; (ii) for a given supplier, there are no other comparable retailers for the goods it offers. Additional demand from other retailers amounts to a small share of this supplier's demand, which does not allow the covering of costs. These criteria refer to capacity investments that suppliers are required to make for supply distributors.

A definition of economic dependence of an independent supplier with respect to one retailer can use the concept of specific assets (Williamson, 1985). The criterion for economic dependence is the redeployable nature of the technology for another product or volume, or for an order from another client. Independent suppliers invest in order to have the ability to supply large distributors. When it is designed as part of a bilateral contractual relationship, this investment exposes the supplier to opportunism from the retailer who can exploit an addiction introduced by mutual specific assets.

This risk rate is also called the *threat rate*.[28] For any supplier, it is then possible to calculate a series of risk rates. As with the Herfindahl-Hirschman Index in merger control, the use of the risk rate allows for a first screen to detect and justify situations of economic dependency. It cannot, however, grasp the complexity of the different contractual situations and the industry dynamics. Delors (2007) uses the above methodology to analyze the possible economic dependence of SMEs, particularly when they produce private label products for large retailers. In this case, the majority of such products are poorly differentiated with a weak innovative element, which makes suppliers' bargaining power relatively small.

Delors (2007) evaluated economic dependence by looking at the diversification of outlets of independent suppliers. Their database was composed of 942 private label French products from the year 2004. The data limitations included the impossibility of assessing alternative technical and commercial solutions and the calculation of costs and time to find a new retailer. Thus, the evaluation of economic dependence was focused on the outlets' diversification of independent suppliers. The variety of outlets provides an indicator of SME economic dependence that is reduced when each contract occupies a smaller share in the independent supplier's turnover. The results show that in terms of the number of contracts, independent suppliers are mainly in a strategy of outlet diversification, which should protect them from economic dependence.

Testing oligopsony power

In early 1980s, the New Empirical Industrial Organization (NEIO) approach, pioneered by Appelbaum (1982), Bresnahan (1982), and Lau (1982), tried to assess the degree of market power of a specific industry on the output market under specific assumptions regarding demand, cost functions, and strategic interactions among firms. An index close to the weighted Lerner index was assessed in certain industries. The first studies

[28] The notion of threat points allows the different parties to the transaction to find a *best alternative to a negotiated agreement* (BATNA) and was used by the Bundeskartellamt (2014) in its study on the food retail sector to assess bargaining power.

concerned oligopoly settings. Empirical work then emerged on oligopsony power in the retail food industry. To mention just a few: Just & Chern, 1980 (tomatoes); Love & Murniningtyas, 1992 (wheat); Wann & Sexton, 1992 (pears); Cakir & Balagtas, 2012 (milk). Most empirical work shows some presence of oligopsony power.[29]

Gohin and Guyomard (2000) were the first to apply NEIO methods to the retail grocery sector, focusing on food products, namely dairy products and meat products. Based on the assumption of quantity competition, they found that French food retailers do not behave competitively. Furthermore, they show that more than 17% of the wholesale-to-retail price margins for dairy and meat products can be clearly attributed to oligopoly-oligopsony distortions. Another study stressing the specificities of the agrifood sector is Richards et al. (2001). They analyzed the frozen potato processing market in Washington DC and showed that potato processors behave as an oligopsony in acquiring raw potato stock. Furthermore, "*processors are able to collude and offer potato prices below the competitive level and, somewhat perversely, suggest that the bargaining process may indeed be a facilitating mechanism for this collusion*" (Richards et al., 2001, pp. 269). The presence of the oligopsony-colluding market structure for processors reduced the growers' surplus by approximately 1.6% of market revenue per month.

Competition authorities have been also interested in assessing market power in the grocery retail sector. In 2008, the UK Competition Commission launched the 'Groceries Market Investigation.' The authority analyzed prices negotiated between supermarkets and suppliers. They found that buyer power is absent for branded products, where there is a single supplier, but that it is present for private label products, where

[29] A technical and thorough survey of market power estimation is beyond the scope of the present article. See, for instance, Perloff et al. (2007), who present the different approaches for modeling and assessing market power.

suppliers compete. What matters is the combination of buyer size and the choice of suppliers, rather than buyer size alone (Davis and Reilly, 2010).[30]

4. IS THE EFFECTS-BASED APPROACH APPROPRIATE FOR CHALLENGING ABUSES OF ECONOMIC DEPENDENCE?

Contrary to conventional wisdom, economics and more particularly IO gives insights into abuses of exploitative and economic dependence. Some economic tests are available to help plaintiffs provide evidence of such abuse or to ensure conviction by a judge. However, one may wonder whether this logic of *effects-based* tests is really sufficient to tackle this issue. The main points to consider are whether there are clear-cut decision-making criteria to define such abuses, the trade-offs between *per se* rules that may lead to false positive judgments, and the role of reason-based approaches that may lead to false negative judgments.

We first assess to what extent competition authorities are reluctant to sanction this type of abuse. Second, we detail the reasons for which economic unbalances can be within the scope of competition policy.

4.1. Why competition authorities may be reluctant to sanction this type of abuse

IO models demonstrate that vertical restrictions may have horizontal consequences on downstream markets. It is not only a question of wealth transfer among vertically-related undertakings, but is also an issue of consumer welfare. The impacts of such exploitations of economic power can be defined in terms of mark-ups (oligopoly power) or mark-downs (oligopsony problem). There is no difference in terms of economic tools with the calculation of cartel price overcharges. This last type of

[30] Another example of scrutiny by a competition authority in the grocery sector is from the French competition agency, which gave an opinion concluding that the Parisian market is highly concentrated. The authority proposes a new instrument to intervene on market structures, i.e. the structural injunction (Autorité de la concurrence, 2012).

economic evaluation plays, nevertheless, an essential role in the private enforcement promoted by the EC. With regard to theoretical questions, there is no more of a risk of false positives or over-enforcement for exploitative abuses than is the case with follow-on suits seeking compensation for competitive damages.

However, the reluctance to implement the provision of Art. 102 and the confinement of abuse of economic dependence cases in Member State legislation to the field of restrictive practices should be questioned.

A first explanation may rely on a common feature that characterizes the entire *effects-based* approach. In Nicola Giocoli's words, this is an *Old Lady Charm* (Giocoli, 2015). Despite the rise of IO models for more than thirty years now, the old-style Chicagoan models still rule the economic assessment of market practices in antitrust rulings. If the Chicagoan models have shown themselves to be as strong as ever, it is mainly because they readily provide clear-cut assessments regarding the compliance of a market strategy with competition law. Competition authorities rely not only on economic expertise to assess the impact of a given practice on a market, but also on economic reasoning in order to explain a firm's strategy in the market and to assess if it is participating from a logic of competition on the merits. It is not an issue of substituting the consumer welfare test with the no economic sense test (Werden, 2006), it is just a recognition that the first step in the economic treatment of a competition case is to assess the plausibility of an anticompetitive explanation for the market practice. The assessment of its consequences in terms of consumer welfare is implemented only in a second step, mainly to assess a possible efficiency-gains based defense or to evaluate the adequate amount of a fine.

In such a context, IO models may be disregarded, as they rely on what Fisher (1989) defines as an exemplifying theory. They propose a case-by-case analysis of a market practice, mainly based on game-theoretical approaches. As their results are dependent on their hypothesis or their chosen parameters, they can be considered cautiously by judges. While they are indubitably dominant in the economic theory field, they may appear to be too contingent to win the day in the case law. In other

words, the idiosyncratic nature of these models makes them more ready for classrooms than for courtrooms. It is not only a question of the complexity of the involved economic reasoning (Baye and Wright, 2011), it is also an issue of the robustness of the judicial adjudication. The main risk for a judge is to see his or her decision overturned by an appeals court. Economic expertise plays a different role in antitrust cases than the role played by medical or technical expertise in other types of litigation. Its judgment in terms of efficiency determines the decision itself. Therefore, an 'it depends on circumstances' conclusion may lead to a rejection of the model, just because of the judicial uncertainty that it creates. In addition, in a controversial procedure each side may select, from the range of available models, the one that is most favorable to their strategy and may perform a fine tuning of the parameters in order to support their position. Such cherry-picking strategies may enhance a judge's distrust towards this kind of model. As Werden (2008) states, "economics has no well-established standards governing the selection and application of particular models and methods."

The highly assumption-sensitive nature of IO models and the failure of economists to provide courts with a method to select from among competing models may lead U.S. courts to reject economic expertise on the basis of the Daubert criteria[31], according to which expert testimony must be "relevant" and "reliable" (Giocoli, 2017).

A second explanation is the following. Competition authorities are all the more reluctant to sanction these types of abuses in that they appear to be mainly related to welfare transfer issues and not to efficiency ones. As seen above, according to the Chicago School's logic, issues of welfare transfer remain outside the scope of economic theory. Considering any other purposes may create a margin of discretion for the judge, allowing him or her to rely on them in a discretionary way. Again, it is not only an issue of taking into consideration the risk that a given judge may promote his or her own values or preferences, but is mainly a risk of seeing a ruling superseded in the appeals process.

[31] Daubert v. Merrell Dow Pharm. Inc., 509 US 579 (1993).

4.2. Why economic unbalances can be within the scope of competition policy

The separation between efficiency and wealth distribution is not so obvious.

First, if one considers legal and economic history, the origin of U.S. antitrust law does not correspond to Bork's view. Lande (1989) demonstrated that undue wealth transfers resulting from unbalanced market powers were the main drivers of its enactment. The 2nd industrial revolution trusts did not raise concerns in terms of production efficiency. Political pressure and theoretical debates (if one considers the case of the old institutionalist scholars) were mainly focused on the exercise of coercive powers in transactions. The issue of economic power was not limited to consumer harm. It was also related to the capacity that economic power may provide in terms of framing economic transactions, constraining the economic strategies of counterparts, or unilaterally deciding prices, investments, etc. An unconstrained exercise of private economic power may induce a regulatory harm that is distinct from the welfare harm in itself (Nachbar, 2013). Such a consideration may be linked to the current legal and economic literature, which considers economic power to be an issue in and of itself (Kahn and Vaheesan, 2017). Such a conception echoes with ordoliberal views, according to which the concentration of economic power is the main issue of competition law, but as noted earlier is at odds with the Chicagoan analysis. The concentration of economic power raises no concerns since the market is not protected by barriers to entry. Such barriers cannot be technological or financial, they may only be regulatory. The opinion of AG Wahl quoted in our first section must be read in this context: there is no possibility of exploitative abuse in a market that is not protected by exclusive rights.

Second, IO models show that restrictive vertical practices cannot be considered to be neutral in terms of consumer welfare. A vertical distortion has an impact on horizontal competition. In this respect, competition laws allow vertical contractual unbalances to be taken into consideration. In addition, the concentration of economic power may have a significant impact on welfare. For instance, empirical studies performed on U.S. data has demonstrated that mark-ups decreased from the 1950s

until the early 1980s and started to rise thereafter (De Loecker and Eeckhout, 2017). In 2014, the higher the market share of an undertaking was, the higher were its mark-ups. It was the contrary in the early 1980s. Over the last 35 years, the mark-up increase represented a yearly rise in final consumer prices of 1%. This increased market power has allowed the productivity gains (3 to 4% per year) to be bypassed in terms of lower prices. This has led to wealth transfers between consumers and firms that may cause macroeconomic unbalances, as Piketty (2014) and Kahn and Vaheesan (2017) have stressed. Interestingly, these were already seen as an inducer of the 1929 Great Depression by Harberger (1954).

Therefore, antitrust law enforcers must consider the issue of the concentration of economic power and its exercise as a relevant issue for competition law. As the ordoliberal scholars have stated, competition law must protect the competitive process in itself and for itself. This protection may be relevant even though there is no clear direct impact on consumer welfare. The notion originating in EC case law of the dominant undertaking's special responsibility regarding the maintenance of a structure of effective competition can be re-assessed in view of this issue.

It follows from the above that the responses of competition law enforcement to exploitative abuses or abuses of economic dependence positions must not be limited to these strictly efficiency-related considerations. Such practices may compromise consumer welfare in the long run by impairing the access to market for current and potential competitors.[32] Meanwhile, the exercise of such powers conflicts with the underlying principles of competition law, i.e. the principle of free and undistorted competition based on the merits. As a consequence, such abuses must be sanctioned

[32] One may weigh short-term and long-term antitrust concerns, to balance a tradeoff between static and dynamic efficiency. The French National Assembly 2016 proposal of a law concerning the abuse of economic dependence illustrates this tradeoff. The proposal tends to require the *Autorité de la concurrence* (the French competition authority) to consider the consequences of such abuses not only in the short term but also in the medium one. One may also consider that in the long run abusive strategies lead to an erosion of the "moral of the market" and may produce a loss of faith within society regarding the acceptance of markets and competition as coordination mechanisms.

not only through restrictive practice provisions (which do not request an assessment of the effects on consumer welfare, as underlined above). It should also be, and it can be, sanctioned through Article 102 of the Treaty. Competition laws that protect competition order have something to say about contractual unbalances not only on efficiency grounds but also based on concerns of reasonableness and of fairness-related dimensions.

5. CONCLUSION

As a conclusion, a "pure" effects-based approach (in a narrow Chicagoan meaning) may not be optimal to manage abuses of economic power. While a better option may involve the integration of modern IO tools, their complexity and their inability to provide clear-cut and valid results, regardless of the case and the circumstances, are problematic. A rule-based approach with theory-driven, rebuttable presumptions protecting economic-dependent players might be a valuable second best option. Even if a *per se* rule never leads to an initial best result, it might be a reasonable way to reduce the prospects of abusing economic power considering the difficulties in characterizing such abuses and the risk of irreversible competitive damages.[33] In order to avoid the pitfalls of such an approach,[34] it may be reasonable in specific cases to favor the implementation of an effects-based approach, but allocating the burden of evidence to the powerful players.

Nevertheless, two dimensions have to be kept in mind. The first is symmetrical to the difficulty for plaintiffs in characterizing anticompetitive conducts. We have to consider the risk that the defendants may engage in cherry-picking among economic

[33] The US DoJ 2008 report also considers that per se illegality rules may make sense in terms of optimizing administrative costs of the competition law enforcement agency "*when experience with conduct establishes that it is always or almost sufficiently pernicious to that it should be condemned, without inquiry into its actual effects in each case*" (p.17). However, such a rule grounded in experience cannot be accepted in the case of emerging markets, nor with digital ones.

[34] See the US Supreme Court Brown Shoe decision (Brown Shoe Co. Inc v. United States, 370 US 294, 1962) as a counterexample.

models, searching for a pro-competitive explanation of their market behavior. The debates related to the platform economy (and the criticisms leveled against two-sided approach results as an easy way to find efficiency-enhancing rationales for anticompetitive practices[35]) may be highlighted. The second dimension lies with the difficult but necessary objective to comply with fairness expectations of society (and not of individuals). Competition law enforcement is not only a matter of technique but is mainly an expression of a social choice among different efficiency – distribution pairs that are seen as reasonable to society. The role of legal rules (e.g., institutions) is to balance the different values and objectives to find such an equilibrium. A comprehensive competition economics approach, embracing not only IO but also institutional, behavioral, and evolutionary economics, may create a sound framework for competition policy (see Budzinski, 2010, in the context of merger control).

Finally, even though competition laws aim at protecting competition and not competitors,[36] they may address the concentration of economic power and they should counteract contractual unbalances among heterogeneous firms in terms of market power in order to prevent undue wealth transfers or irreversible competitive damages.

Considering the arguments against the integration of economic dependence concerns in competition law enforcement is very interesting from an economic point of view. Some arguments rely on Chicagoan-based views according to which taking into account any criterion other than consumer welfare may yield judicial uncertainties that are ultimately detrimental to final consumers. We have stressed that such a position may lead to false negative decisions and limit economic concerns to efficiency, by considering fairness or reasonability as a non-economic dimension. A second set of arguments leads to the proposition that such issues could be addressed by civil courts, which are better equipped than competition authorities to deal with contractual disputes. Again, such a view is relevant to the extent that vertical

[35] See Aueur and Petit (2015).

[36] See the US Supreme Court in Brunswick Corp *v* Pueblo Bowl-O-Mat Inc., 429 US 477, 488, 1977.

restrictions have no horizontal consequences on the downstream market. The difficulty is to reconcile sound economics-based competition law enforcement with sanctions for vertical abuses that may lead to competitive damage. Jenny (2008) suggests several avenues to explore how a competition authority may take charge of this issue:

- Considering mainly *objective* or *ex ante* dependencies
- Assessing the damages for suppliers if the threat is exerted by the coercer before deciding to intervene
- Conditioning the intervention to cases that potentially induce significant negative externalities in the downstream market
- Taking into consideration the fact that when the coercer enjoys upstream market power, its coercion by its downstream partner may be welfare enhancing.

However, this promising roadmap does not integrate efficiency-related purposes of competition law enforcement regarding the preservation of market access (see Bakhoum, 2015) or the promotion of reasonableness in market behaviors (Commons, 1924). With current social concerns about the role of competition policy, a focus is emerging on economic power imbalance and on the growing inequalities produced by the market process. A *more economic approach* must certainly be an *effects-based* approach (even if these effects may be hypothetical at the time of the decision) but must not be strictly based on an allocative efficiency approach. In other words, the modernization of competition law enforcement should not inexorably involve limiting the objective of competition policy to the maximization of total welfare. The *more economic approach* could be extended to order to embrace diversity (Budzinski, 2008). As Lamadrid de Pablo (2017) states, fairness is not a standalone purpose but constitutes one of the natural outcomes of the competition process, as long as the competition policy guarantees undistorted access to the market, ensures a competitive rivalry based on the merits, prohibits all types of exploitative abuses, and requires undertakings to reserve a fair share of the efficiency gains for the consumer (see for

instance the concentrations control of the Article 101(3) provisions). In the EU Commissioner for Competition Margaret Vestager's own words, "[...] *competition enforcement also sends a message of fairness. That's what President Juncker referred to last week as the social side of competition law*.[37]"

[37] See Margaret Vestager's speech "Competition for a Fairer Society", 10th Annual Global Antitrust Enforcement Symposium, Georgetown, 20 September 2016. https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-fairer-society_en

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