

# The Paradox of the Exclusion of Exploitative Abuse

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## BACKGROUND

- Exploitation of consumers is the textbook abuse by a monopolist or dominant firm. Because consumers cannot easily switch to an alternative source of supply, the dominant firm can raise price to enhance profit. Consumers lose out by having to pay more and buy less, and there is a consequent distortion in the allocation of resources. This provides a major justification for competition policy. High prices are the most direct form of abuse, and are the most frequent in antitrust cases.
- There are two ways in which a dominant firm might abuse its market position. *Exploitative abuse* refers to the direct harm the firm may do to its customers; for example, by raising prices or limiting the effort to lower costs or develop new or better products. *Exclusionary abuse* refers to the adoption of strategies that exclude rivals from making an effective challenge to the firm's dominant position; for example, by predatory pricing, product bundling, exclusive contracts or refusal to supply.
- Formal EC law covers both types of abuse, and provides little guidance on whether exploitation or exclusion should be the greater concern. However, the case law has greatly emphasised exclusionary effects, with exploitative effects appearing to be little more than a sideshow.

## METHODOLOGY

- The author identifies a paradox: the implied welfare loss of exploitative abuse justifies a whole range of competition policy towards cartels, mergers and regulated industries; yet there is widespread hostility to prosecuting the same exploitative abuse in the textbook monopoly case (that is, under Article 82EC).
- The author seeks to understand the distaste for prosecuting direct exploitation - in particular, why this position is held and its limitations. The analysis is focused on four issues associated with exploitative abuse: measurement, market dynamics, multi-sided markets and remedies.

## KEY FINDINGS

- Four key themes underlie the paradox of the exclusion of exploitative effects:
  - i. Exploitative effects are naturally shorter lived and more dangerous to remedy (Type 1 error). By comparison, the remedies for exclusionary abuse tend to be less dangerous to the competitive process.
  - ii. Exploitative effects are possibly mainly due to strategic (as against/structural) entry barriers. If all barriers to entry were strategic and readily prohibited by a focus on exclusionary effects, then exploitative behaviour could not last long.
  - iii. Exploitative effects are harder to prove to the standard required by the Court. In contrast, it may be easier to prove that rivals or potential rivals are being harmed by some exclusionary practice *and* to identify the expected direction of effect on customers (and so eventually on consumers).

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- iv. Exploitative effects are politically more difficult to deal with. While the business sector gains broadly by 'exploitation', rival firms are hurt by exclusionary abuses and so support their prohibition.

- There is some justification for a continuing focus on exclusionary abuses. However, there are likely to be some cases of exploitative abuse that can be remedied without fundamentally harming market dynamics. Proof may be difficult, but it is not impossible. Most importantly, some barriers are structural, or the result of a history of unnoticed, unprosecuted or ineffectively prosecuted exclusionary practices; it is for these cases that provision under Article 82 for exploitative abuse should be maintained.
- For some sectors, there may be strong *ex ante* grounds for regulation, but other cases will be marginal. It will be less restrictive if the latter are given the benefit of the doubt with the knowledge that they can be picked up *ex post* if prices become exploitative. The alternative is to set up regulators whenever there is doubt or in response to political pressure.
- With respect to consistency, there is an increasing appreciation that state aid rules should be interpreted by the Commission in terms of economic effect.
- Overall, there is much at stake in maintaining the sound principle that exploitative high prices are an abuse of dominance under Article 82. They are integral to an economic effects-based competition policy but, because of the hazards of identifying and remedying exploitation, they should be prosecuted only with the greatest caution.

## POLICY ISSUES

- While there are important problems with prosecuting Article 82 exploitation cases (because of problems relating to measurement, market dynamics, multi-sided markets and remedy issues), it is important to keep open the possibility of prosecution, for example, in the forthcoming Article 82 Guidelines.

## THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

## FOR MORE INFORMATION

The full working paper (CCP Working Paper 08-1) and more information about CCP and its research is available from our website: [www.ccp.uea.ac.uk](http://www.ccp.uea.ac.uk)

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