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Article

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Markovits on Defining Monopolization: A Comment

Keith N. Hylton*

Abstract
In this comment I focus on Richard Markovits's definition of monopolization in his new book, *Economics and the Interpretation and Application of U.S. and E.U. Antitrust Law* (Springer 2014), and also his assertion that monopolization is distributively unjust. I agree wholeheartedly with his approach to defining monopolization, though I might alter a few details. However, I think the distributive justice effects of monopolization are ambiguous.

Keywords
monopolization, demand curve, distributive justice

Richard Markovits's new book, *Economics and the Interpretation and Application of U.S. and E.U. Antitrust Law* (Springer 2014), is far too long and intricate for me to review it fairly in the short space of this comment, so I have taken only a small part for discussion. My comments relate to Chapter 3, titled "How 'Monopolizing Conduct,' 'Attempts to Monopolize,' and 'Exclusionary or Foreclosing Conduct' Should Be Defined by Economists."

Here is a quote from the chapter setting out Markovits's definition of monopolization:

> I start with the (Sherman Act) concept of monopolizing conduct. A seller is properly said to have committed a monopolizing act (or to have engaged in a more general, monopolizing practice) if and only if its *ex ante* perception of its choice's profitability was "*ceteris paribus* critically inflated" by its belief that the conduct might benefit the seller by increasing the demand curve it would face in the future by reducing the absolute attractiveness of the offers against which it would have to compete.[1]

Elaborating, Markovits holds that

1. Richard S. Markovits, Economics and the Interpretation and Application of U.S. and E.U. Antitrust Law, Basic Concepts and Economics-Based Legal Analyses of Oligopolistic and Predatory Conduct 69 (2014).

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> Monopolizing conduct is understood to be bad both because it is presumptively economically inefficient and because, from any plausible conception of distributive justice, it is unjust.[2]

These statements contain important insights on monopolization, stated with the characteristic force and exactitude of Markovits's writing. I will refer to the first quote as "the definition" and the second quote as the "distributive justice premise."

The Definition

I must start by admitting the feeling that every writer on a topic experiences when he sees someone write something he has thought needed to be written and has often looked for opportunities to write it himself but never found the right moment. The feeling is a slight sense of loss, since an untouched greenfield is no longer there. On the other hand, there is a slight sense of gain from seeing that your early perception was not entirely wrong. Moreover, Markovits's definition certainly offers an invitation for writers to develop it further, both in applications to law and in constructing more useful economic models of monopolization.

I mostly agree with Markovits's definition of monopolization. In my own (never written) version, it was put more simply: I would have said that monopolization ultimately involves changing the demand curve facing a firm, changing it by transforming it from the infinitely elastic "flat-line" demand curve facing a firm in a perfectly competitive industry to the downward-sloping demand curve facing a monopolist.

In order to transform its demand curve from the flat line to the downward-sloping type, a firm would have to eliminate or downgrade some substitutes. There are two general ways to accomplish this goal: (1) improve the consumer's perception of one's own product or (2) downgrade the rival's product supply or the consumer's perception of the rival's product. Examples of the former approach are easy to conjure up: a seller can enhance the quality of its product by increasing the number of useful features the product offers to consumers. The latter approach can easily be achieved by destroying the rival's supply or defaming the rival's product, for example, by blowing up the production facilities of the rival, or persuading consumers that the rival's product is much worse than it really is. Within the downgrade category I also include strategies that make it difficult for the rival to sell competitively, such as raising the rival's cost of supplying the market.

Monopolization according to Markovits consists of the second strategy: downgrading the rival's product supply or the consumer's perception of the rival's product. If I am correct in attributing this view to Markovits, then it is quite sensible. But it does not remove the practical uncertainties associated with the application of a definition of monopolization. Blowing up a rival's plant is easily put into the monopolization category. But what if the firm's conduct is of a sort that is difficult to put into category (1) (improving one's own product) or category (2) (downgrading rival's product supply)?

What about bidding for exclusivity? Is this a case of enhancement or degradation? I think it will depend on the facts of a particular case. And even if you have a lot of the facts it still may not be clear how to characterize the defendant's conduct. The facts are not always sufficiently clear to deliver a neat answer to the characterization question. Bidding for exclusivity could enhance the overall efficiency of supply. On the other hand, bidding for exclusivity could exclude a rival without offering any efficiency enhancement.

In the end, I think the goal of the antitrust scholar, and of the courts, is to define rules to help avoid costly errors—that is, error cost minimizing rules. Conduct that is generally beneficial to social welfare will have to be shielded to some extent from the risk of antitrust liability, otherwise, the risk of

2. *Id.* at 70.

erroneous punishment will reduce society's welfare. Conduct that is generally harmful, by contrast, should be put on the fast track to punishment.

The Distributive Justice Premise

I am a bit concerned about the distributive justice claim. As a rule of thumb, I suppose monopolization is harmful to distributive justice because it involves transferring wealth from consumers to the owner of the monopolist. But I am not sure this presumption should be accorded any more weight than viewing it as a rule of thumb.

Take the case of a firm that makes yachts for the extremely rich. The firm monopolizes its market in luxury yachts. Suppose, further, that the firm is entirely owned by its employees, so that the profit gain from monopolization goes directly into the pockets of the workers. Is this a case of distributive injustice? I don't think so.

If this were a case of distributive injustice, then the labor laws would be prime examples of distributively unjust rules. The National Labor Relations Act is designed to facilitate unionization, subject to some important restraints. There are certainly special cases in which labor laws, such as the Davis-Bacon Act, have generated distributively unjust results—for example, by excluding minority workers from certain areas of employment such as publicly funded construction projects. However, the general distributional pattern in the union context has been mixed and surely cannot be described as distributively unjust as a rule. Moreover, the political process puts a constraint on the degree to which unions can implement distributively unjust policies. If unions become distributively unjust as a rule, they will lose support from the majority of the population and eventually lose the legal barriers that have allowed them to survive to some degree in an increasingly competitive market. Thus, distributive injustice would eventually erode the legal groundwork supporting unions.

The distributive justice concern points to additional complications in evaluating the welfare effects from monopolization. Many instances of monopolization will be distributively unjust. However, some instances may generate a more just distribution of resources—again return to my example where an employee-owned maker of luxury yachts monopolizes its market. Of course, all of this begs the question of what it means to generate a more just distribution of resources, but I think this is easy to answer in the short space of this comment. A more just distribution of resources reduces the frequency of instances where individuals are born into, or somehow find themselves through no fault of their own, in impoverished households. Thus, a committed follower of Rawls would be in favor of monopolization where it served to advance a Rawlsian social welfare function. Such a social welfare function would no doubt condemn some instances of monopolization, but not all of them. And if instances of distributive-justice-promoting monopolization were more frequent than the opposite, a Rawlsian might favor a general policy of encouraging monopolization.

Looking at the law, distributive justice plays virtually no role in American antitrust law. The efficiency rationale has dominated the antitrust discourse within the U.S. courts. But it is different in the European Union. The EU does not have antitrust rules that explicitly incorporate distributive justice concerns, but one can read some of the rules as implicitly incorporating distributive justice concerns. Consider, for example, the EU predatory pricing framework, which generally uses average cost as the benchmark against which prices are compared. In America, by contrast, marginal cost is the benchmark. The main effect of choosing average cost rather than marginal cost as the benchmark is that the former effectively shields some less efficient firms from being excluded from the market through vigorous price competition in a market with more efficient rivals. Put another way, a less efficient firm has a good prospect of winning a predation claim in the EU, whereas such a firm has no prospect of winning a predation claim in the U.S. The link to distributive justice is this: shielding less efficient firms means that there will be fewer employment disruptions that result from the competitive process. Employees of less efficient firms will have a greater likelihood of remaining in their jobs, given a

lower likelihood that their less efficient firm will be forced to exit as a result of price competition. In effect, the consumers of such firms, and consumers in the EU generally, are supporting generous employment policies, a form of welfare mediated through the market. The distributive justice rationale appears to be the only somewhat persuasive justification for the average cost pricing standard in EU predation law.

To the general question whether monopolization is distributively unjust, I think the answer is ambiguous, and depends entirely on the comparison between the typical consumer and the typical owner of the firm. If these people are roughly the same, as is becoming increasingly true today, the distributive question becomes incapable of offering up a clear, once-and-for-all answer.

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