An Inquiry Into the Origins of Firm Dominance in EU Competition Law

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GENERAL INTRODUCTION

Modern competition law focuses on significant market power (SMP, dominance or monopoly) and conventionally discovers its existence through using proxies. The most prominent of these proxies is market shares, but others, like barriers to entry, have been incorporated into competition law analysis since the adoption of a "more economic approach". What it is important, however, is that these proxies are fundamentally *static*, and at best provide a "snapshot" description of relevant antitrust markets. They leave little room for the consideration of dynamic or evolutionary processes. This is all the most remarkable given EU competition law is designed to protect the competitive *process*.[1]

The description above is nothing new to those acquainted with EU competition law. Nevertheless, it serves to reveal a missing point: that positive law is barely concerned with the causes of SMP.[2] That is, competition law is not fundamentally concerned with the originating process that led the firm to acquire the position of dominance that it has today. Apparent causes of dominance such as luck,[3] nature[4] or the state,[5] to name a few, have been virtually overlooked by the EU Courts (Court of Justice (CJEU) and General Court (GC)) and the EU enforcement authority (European Commission).

That the causes of dominance are outside competition policy's zone of interest seems to be *a priori* a reason for unease. If competition policy is fundamentally concerned with anticompetitive behavior stemming from dominance, then it appears to be a necessary precondition to understand *why* a firm has a dominant position at all. This thesis proposes that to inquire into the causes of firm dominance is a crucial element in the analysis of anticompetitive effects. This is not just a fanciful inquiry but, as Ronald Coase put it, it "gives

[1] GC, Case T-228/97, *Irish Sugar plc v Commission*, ECLI:EU:T:1999:246, §186.

[2] The terms cause, origin and source are used interchangeably.

[3] Judge Learned Hand called into question the applicability of §2 of the Sherman Act to companies that would have "passively" acquired their dominant positions. *See United States v. Aluminum Co. of America* ("*Alcoa*"), 148 F.2d 416 (2d *Cir.* 1945), §430. *See also* WILLIAMSON, Oliver E. "Dominant Firms and the Monopoly Problem: Market Failure Considerations". *Harvard Law Review* 85.8 (1972): 1512-1531; The Sherman Antitrust Act of 1890, (Sherman Act, 26 Stat 209, 15 U.S.C. §§1-7).

[4] POSNER, Richard A. "Natural Monopoly and Its Regulation". *Stanford Law Review* 21.3 (1969): 548-643.

[5] Communication from the Commission – Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, *OJ* C/45/7, 24.2.2009, p.7-20 ("Guidance Paper"), §82.