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Research Paper

Covid-19 Pandemic and Opportunism. Short-run Market Vulnerability and Exploitative conduct

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ABSTRACT: *Economic disruptions due to the Covid-19 pandemic have unleashed uncountable litigation between firms on how to enforce their contractual relationships. In this context, the survival of undertakings becomes a real issue when partners in vertical relationships or global value chains behave opportunistically. Should this exploitative conduct be scrutinized also by the competition authorities in full separation from ordinary courts? In this paper, we argue that the opportunism that arises likewise during global crises, and not fully acknowledged by the contract doctrine, constitutes an exploitative conduct to be reintegrated in the antitrust analysis. Such exploitation harms not only firms but also the competition and the consumers' welfare albeit after an intricate analysis. The article advocates such a remediation to fill the gap left by the unfair practice provisions. It deploys an analytical grid to detect the undue transfer of wealth between firms from the decisional discrepancy of contractual and competition viewpoints.*

KEYWORDS: *Covid-19, Opportunism, Exploitative conduct, Competition Law, Contract Governance, Economic dependence,*

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I. INTRODUCTION

Firms could experience periods of vulnerability leading to critical situations, as financial distress, or even to a fatal outcome. According to statistics of the firm demography, the survival rate of Tunisian firms five years after their launch reached 71 % for those created in 2010 (APII, 2017, p. 7). Such a proportion declines to approx. 60 % for French undertakings (Béziau and Bignon, 2017, p. 1), whereas it drops for American businesses (fewer than 500 employees) to less than 52% (SBA, 2019, p. 2). Currently, the sharp economic slowdown and global disruptions of supply chains driven by the global Covid-19 pandemic, primarily for the providers of nonessential products will drop these survival rates despite state interventions. Indeed, "even in countries where governments are in a position to provide support through large and targeted measures, some small businesses and vulnerable individuals in less-stable jobs will likely experience severe financial distress" (Moody's, 2020, p. 3). Many industries are enduring sharp disturbances whether or not they are integrated into global value chains (GVCs), and "automotive, textiles, and furniture manufacturing are among the most vulnerable to the postponement of consumer spending ..." (Metcalfe and Foreman, 2020, p. 2). That is why, due to the Covid-19 crisis, an eminent litigator expects a wave of lawsuits about bankruptcy, insurance disputes, etc. (Jones and Blum, 2020). However, many complaints lodged in this context would not be economically founded. More specifically, competitors but also the partners of a given firm may leverage these vulnerability states, their contingencies, and the turn of events, to serve their own best interest. That is why, in order to appreciate the scale of the "game of economic survival", Shubik (1959, p. 293) designated five types of vulnerabilities, amongst them the "short-run market vulnerability", caused by a change in demand or by another firm. Indeed, it is recognized that "as the relationship unfolds there will be opportunities for one party to take advantage of the other's vulnerabilities, to engage in strategic behavior, or to follow its own interests at the expense of the other party. The actors will, on occasion, behave opportunistically" (Goldberg, 1980, p. 17). This opportunism formulated earlier by Williamson (1975, p. 9) as the "self-interest seeking with guile", is initiated often with the benefit from a surprise element, for instance, a global pandemic, or another extreme event. It represents a

troublesome source of partnership' uncertainty, cancels trust, breaks industrial organizations, and disrupts contractual enforcement (Mahoney, 2018). The exploitation of the firm's vulnerability must be avoided mainly by a framework of the relationship' governance containing safeguard measures against opportunistic ploys. Indeed, Williamson (2002, p. 180) stated that: "because parties to transactions that are bilaterally dependent are 'vulnerable', value preserving governance structures are sought". In this connection, due to its complex rationales, defining opportunism in a consensual way could unnecessarily limit its scope. Indeed, this almost elusive behavior encompasses more than the variety of conduct designated by Williamson as "blatant" opportunism, like lying, cheating, and stealing, but also the "subtle" opportunistic conduct, like misleading, distorting and obfuscating information. Even more, Williamson reminded us that the opportunism went beyond adverse selection and moral hazard associated with *ex-ante* and *ex-post* of the contracting process. The inventory of its tactical aspects deserved so much attention that Williamson (1975, p. 244, note 13) distinguished the "aggressive or assertive" opportunism when the firm' survivability is threatened. Quite aside from its clues, the opportunism success resulting in extorted revenues and/or non-monetized advantages - recognized economically harmful and quite blameworthy-, appears deep-rooted in the contractual relationship.

Therefore, in these rough times, should exploitative conduct[1] in firms' interrelationships be deterred and punished by competition authorities or ordinary courts, or by both jurisdictions?

In this article, we investigate how antitrust and contract doctrine have the ability to circumscribe the unlimited class of opportunism fueled also by extreme events and global disasters. In this direction, the paper try to evaluate the limits of the "unfair trade practices" provisions to scrutinize the "lawful" opportunism, i.e. the literal enforcement of the contractual terms to capture undue economic advantages.

In section 2, we discuss the eviction of concerns on exploitative conduct from the antitrust doctrine although it is designated as a threat to the inter-firm cooperation by the transaction cost economy (TCE). In section 3, the tensions hindering the contract doctrine to repress any form of opportunism are examined. In section 4, a hypothetical litigation of two undertakings arose in the context of Covid-19 is simulated to illustrate the discrepancy of opinions on opportunism of a specialist Court and a non-specialist Court. Thus, contrasts of decisions will indicate the relevance (or not) of competition rules to redress welfare and market injuries caused by exploitative practices. As with all analyses of the paper, we discuss both proceedings without reference to a specific economy. Eventually, the reintegration of rules prohibiting exploitative conduct in the antitrust toolbox, and protecting vulnerable parties against (legal) opportunism, are advocated in the concluding remarks.

II. ANTITRUST: MUTATING EXPLOITATIVE CONDUCT FROM A HARMFUL PRACTICE TO A TRIVIAL ISSUE

Competition law doctrine which theorizes monitoring markets and deterring anti-competitive practices will brutally dismiss from any concerns about exploitative conduct conveyed by the upstream and downstream linkages.

II.1. In the Beginning, Was the Bilateral Dependence

In his elegant contribution to the TCE, Williamson investigated through the organizational lens the features of market, hierarchy, and the intermediate form, known as the hybrid mode. Forms that Williamson had associated plainly with the concept of dependence[2]. Firstly, "thick markets are ones in which individual buyers and sellers bear no dependency relation to each other. Instead, each party can go its own way at negligible cost to another" (Williamson, 1996, p. 95).

On the opposite side, hierarchy structures intra-firm relations inasmuch as "the use of formal organization to orchestrate coordinated adaptation to unanticipated disturbances enjoys adaptive advantages as the condition of bilateral dependency progressively builds up" (Williamson, 1996, idem, p. 103). This is understood in the broad sense of a full bilateral dependence between departments or divisions overseen by administrative staff.

[1] Not to be confused with exploitative practices associated in the EU with a dominant firm. Indeed, European Commission clarified that "conduct which is directly exploitative of consumers, for example charging excessively high prices or certain behavior that undermines the efforts to achieve an integrated internal market, is also liable to infringe Article 82 [the current Art. 102 TFEU]" (EC, 2009). EU competition agencies receiving complaints about excessive pricing could prosecute only if the defendant is in a dominant position. On the contrary, the U.S. antitrust law does not prohibit charging high prices nor considers this an anti-competitive practice albeit several States, decrees as illicit the so-called "price gouging" (Cary et al., 2020).

[2] Bilateral dependency (Williamson, 1996, p. 15), one-way dependence (OECD, 2009, p. 153), etc. describe the broad range of firms' economic relationships.

Lastly, the mix of the two polar modes, i.e. market and hierarchy, synthesizes the hybrid form preserving the partners' ownership autonomy but enshrines their dependence through *inter alia* long-term contracts, regulation, bilateral trading, and franchising.

Having regard to the performance of the hybrid mode, the TCE points predominantly to the specific assets that each party implements as its credible commitment to fulfill contractual terms. Such credibility rises when the ability of these assets to be "redeployed to alternative uses and by alternative users without sacrifice of productive value" (Williamson, 1996, idem, p. 105) was lost but crafts the relationship. At this precise instant when the assets became non-deployable, the firm mutated toward a "one-way" dependence *vis-a-vis* its partner. Henceforth, the success probability of the exploitative conduct grew drastically. If the firm did not find a loophole to avoid opportunistic ploys it would fall prey to exploitative abuses. However, such unbalanced relation does imply fatally an evident state of vulnerability only if the firm has a major flaw in its management, like a funding shortfall, a stall of its employee's skills, or a lack of innovative products. Thus, the firm has no other available alternatives than to give up a part of its efforts, subtracted by a biased sharing of the joint revenues. Even if acceptance permits the vulnerable firm to recoup (partially) its specific investments, the bankruptcy threat remains. It is the administrative fiat, present also in the hybrid mode that transmits injunctions, threats, ultimatum, or the final take-it-or-leave-it deal, i.e. the coercive forms of administration, aimed to implement the unbalanced revenue-sharing.

It is through this mechanism of coordination within the hybrid form that the "lawful" opportunism would be enforced. Indeed, it was described by Williamson (1996, idem, p. 97): "the general proposition here is that when the "lawful" gains to be had by insistence upon literal enforcement exceed the discounted value of continuing the exchange relationship, defection from the spirit of the contract can be anticipated".

Thus, in the conjecture of Covid-19 pandemic or any other abrupt events hindering a weak party to fulfill its commitments, the "strict enforcement [of the contract] would have truly punitive consequences" (Williamson, 1991, p. 273).

Central to all this is that "opportunism that is lawful rather than guileful" (Reyes and Martin, 2019, p. 44) appears more profitable than the relationship continuance. Actually, the classical contract seems not to have attributes of a framework governing the partnership over time.

II.2. Exploitative Abuses: A Pre-Borkian Issue

It is recognized that small suppliers cannot offset the bargaining power of big retailers in supply chains when they establish or renegotiate their partnership contract, even if eminent economists consider price reduction and rebates from providers as a beneficial impact on consumers' welfare (Galbraith, 1952). However, if large distributors or lead firms exercise such a "countervailing power" to obtain a discount, it is not ensured that consumers will recover it in price drops, and will not be reaped, *in fine*, by large buyers. Thus, these providers could be small firms struggling to preserve their (low) profit margins and facing "blackmail": accepting unilateral modifications of prices and characteristics of the contract, or its immediate termination. Yet, the protection of competitors is no longer included in the topics of the Chicago School scholars. It is worth remembering that in its pivotal contribution, Judge Robert Bork (1967, p. 247) notified: "I have talked primarily about the impropriety of the goal of preserving small business under present statutes". Actually, from the seventies, the American Federal Trade Commission (FTC) practically no longer brought cases on behalf of small retailers on the basis of the Robinson-Patman Act (RPA) of 1936, outlawing mainly powerful buyers' requests for non-cost justified price discounts. "The Supreme Court disavowed all interest in the well-being of individual competitors and instead emphasized that economic efficiency was antitrust's principal aim" (Hyman and Kovacic, 2013, p. 2171). Besides, a former Chairman of the FTC recognized that the "FTC's core competition mission for over thirty years- enforcement of the Robinson-Patman Act-had failed by the 1970s when the academy and most practitioners came to consider this enforcement as harmful to consumers" (Muris, 2005, p. 167). That is the reason why the US Antitrust Modernization Commission (AMC), recognizing that although "this provision was designed to address concerns that large buyers would use their buying power to extract lower prices from manufacturers or suppliers [recommends that] Congress should repeal the Robinson-Patman Act in its entirety" (AMC, 2007, p. 314, 317). In this spirit, the US antitrust enforcement downgraded the rank of the protection of the vulnerable economic operators from the competition goals' short-list. Vulnerable in the sense that these small-sized businesses could rapidly plunge into financial distress close to bankruptcy. This change of precedence has weakened the status of small operators facing vertical restraints. It, therefore, follows that "modern markets and antitrust policy combine to create a systemic bias against small business" (Grimes, 2001, p. 233). Stated differently, as exploitative-abuse-of-dependence would not imply an *immediate* reduction of the consumers' welfare on end-user markets, it appears completely off-topic for the Antitrust doctrine. Obviously, when the expropriation of a partner's efforts are not seen as harmful by antitrust scholars, neither for the welfare of consumers nor for competition in (end-user) markets, its relevance in US competition courts is seriously compromised. It is based on the rationale that the "antitrust law principles do not

require intervening on behalf of a particular competitor. It is insufficient, accordingly, for a business to allege harm to itself alone, without taking into account the broader effects on competition within the relevant market" (Swaine, 2002, p. 611). In the same vein as for the US antitrust mainstream, the EU competition rules adopted in 2008 does not protect undertakings against exploitative practices occurring in vertical partnerships. That is, article 102 TFEU is consistent with the goal of deterring only the exclusionary conduct when on the contrary, deterrence of the exploitative conduct would have been designated as "heretical" by the antitrust mainstream. Indeed, Boy (2006, p. 216) reminded that "certain national laws (notably German and French) in an autonomous manner sanction abuse of economic dependence in order to try to limit abuse of domination in vertical relations. This approach would be heretical for supporters of liberal competition law". Even if such a rule is applied in some European countries under drastic preconditions, the "heresy" concerned more the desire to redress the wrongs firms are undergoing, rather than remediating competition in upstream markets. Nevertheless, a slight refocusing of the Antitrust doctrine could prevent a wide spectrum of exploitative practices in vertical relationships inasmuch they plainly reduce consumer welfare at the end-user markets at least in the medium and long-term.

II.3. Exploitative Conduct Reduces Competition and Welfare

In theory, firms involved in vertical relations cooperate for instance in supply-chains, distributional channels, etc. They share a joint profit according to the *pro-rata* of the value created by each participant. In practice, the lead firm organizing the inter-firm' relationships through the hybrid mode "orchestrates" the profit-sharing[3].

In case an undertaking is injured by a biased sharing, it limits its output or the incorporated quality, and reduces its own investments, whilst the firm extorting extra-profits competes against its rivals in a better way. These effects could be perceived no later than the medium term. Indeed, "abuses of economic dependence can potentially affect competition and welfare in a negative way and, thus, should be within the scope of competition law" (Bougette et al., 2019, p. 12). Therefore, not considering exploitative conduct as an anti-competitive abuse, the Chicago School doctrine truncates the economic articulations in assuming irrelevant the distortion of the profit-sharing. Even if "'abuse', a term that arguably is harder to define than any other term in competition law" (Di Porto and Podszun, 2018, p.1), such distortion harms partners and impairs the consumers' welfare. It follows that the definition of the role of Antitrust that consists of "preventing 'unfair' transfers of wealth from consumers to firms with market power" (Lande, 1982, p. 68) should be extended to the movements of wealth between firms themselves. Such an appreciation of Lande, as a renowned theorist of the post-Chicagoan school (Kovacic, 2007, p. 26) could expand the relevance of the antitrust paradigm by monitoring and preventing exploitative conduct.

III. CONTRACT DOCTRINE: CERTAINTY CONCERN, NOT A FIRM'S VULNERABILITY REMEDY

One may wonder why exploitative abuses and, by extension, opportunism should be also ruled in both normal and disturbing times by competition bodies when they are already ruled in non-specialized courts. The fact is that the contract doctrine has its own tensions. Complaints about -real or alleged- exploitative conduct or opportunism are examined under a specific lens by the ordinary jurisdictions inasmuch they consider more appropriate to scrutinize the explicit contracting terms, and not those supposedly implicit. That is, any complaint about exploitative conduct is investigated under the conformity between explicit clauses and their fulfillments. Yet, exploitative behavior does not necessarily breach contracts.

III.1. "Well-Intentioned Rules That Bar Meritorious Claims"[4]

Edwards (2009) reminded that the contractual doctrine faces a century-old trade-off between individual freedom to bargain and social norms such as fairness, equity, respect, good faith, or behavioral integrity. The author indicated that the "courts believed that they had to choose between liberty, which demands judicial restraint, and fairness, which limits the exercise of freedom of contract" (Edwards, 2009, idem, p. 672). That is, jurisdictions must settle a dilemma summarized by the sanctity of the freedom to contract as opposed to social norms, as the fair sharing of common gains. But, in reality, the liberal economies allowed unfurling an umbrella to solve such a tension. When the "society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of freedom of contract" (Kessler, 1943, p. 43), the litigation becomes less critical and the balance tilts distinctly on the side of the freedom of contract. And even if it turns out that social norms are

[3] In a review article, Kano and al. (2020, p. 31) summarize the "orchestration" of the value distribution by the key player in GVCs as follows: "typically, lead firms are argued to capture the lion share of the value, while most peripheral players appear in a subordinate position and under high cost pressures…"

[4] Appraisal excerpted from Grimes (2001, p. 240).

themselves part of the major principles of the liberal nations, and implicitly incorporated in all contracts, judges should ever consider that "implied covenants do not trump express contractual terms" (Meese, 1999, p. 75). Thus, the well-intentioned rule to protect at whatever cost the freedom of contract will bar reasonable claims of a vulnerable party against exploitative conduct. For instance, in the context of confinement due to Covid-19, a chain store of non-essential products could stop paying rents to landlords, arguing that the lease indicated this eventuality when the rented space contains health risks.

If the clause is invoked in the case of Covid-19 pandemic -additionally to the common occupational health and safety concerns- to escape from rent payoff, there is a suspicion of subtle opportunism. The chain store violates the relationship as a framework of governance if, in addition, it coerces the economically dependent landlords to renegotiate leases with much-downgraded rents. They could consent to the request to avoid financial distress or even bankruptcy. Yet, they could complain before commercial courts but regrettably, interpreting the clause of stopping rents' payoff to encompass Covid-19 pandemic is possible beyond a reasonable doubt and the chain store must be discharged. More importantly, "it is not the province of courts to require a party acting pursuant to [...] a contract to be 'reasonable,' 'fair,' or show 'good faith' cooperation. Such as assessment would go beyond the bounds of judicial duty and responsibility. [...] Further, it would place the court at the negotiation table with the parties" (Edwards citing a Court opinion, note 190, p. 681-82). That is, ordinary courts cannot forbid undue transfer of wealth arguing that it threatens the survivability of vulnerable businesses. As long as no breach of the terms of the contract is reported, they dismiss lawsuits. Cause or consequence, it is recognized that "courts are ill-equipped to deal with problems of unequal distribution of wealth in society" (Farnsworth, 1969, p. 585).

III.2. Scrutinizing Negligent Conduct, Not the Vulnerability Issue

The previous dilemma of freedom vs. social norms definitely overcome, the contract law yet faces a separate tension, conjugating still the freedom of contracting but with the contract's incompleteness (Hart and Moore, 1999).

In summary, it can be argued that "an incomplete contract will have gaps, missing provisions, or ambiguities, and so situations will occur in which some aspects of the uses of nonhuman assets are not specified" (Hart, 1995, p. 29). It can be stated that *all* contracts are incomplete inasmuch the incertitude about the future creates an irreducible obstacle to anticipate all contingencies. When the contractual clauses are written, counter-measures included are ever insufficient to anticipate devastating calamities that occur only a few times in a century, not to mention other innumerable adverse events. Whilst the courts prefer the examination of litigation in absolute certainty, preserving the freedom of contracting conjugated with the contract's incompleteness may not provide a clear and standardized legal framework leading to stable rulings.

The first direction to reduce such twofold indeterminacy (i.e. freedom of bargaining and contract's incompleteness) was normalizing freedom of contract and disseminating a standardized contract called "black-letter law"[5]. It provides notably a package of reasonable expectations of the contractual parties, but without safeguards in case of adverse contingencies. Indeed the "black letter law" is based on the wrong assumption "that contract rules can be stated without reference to surrounding circumstances and are therefore generally applicable to all contractual relations" (Summers, 1969, p. 566).

The second guidance would circumvent the incompleteness of the contract by steering jurisdictions to a precise issue: was the defendant negligent in relation to its written commitment in the contract? In a plain expression, "negligently engaging in an activity without taking proper precautionary measures could be viewed as an affirmative (intentional) improper action" (Cohen, 1992, p. 30). It follows from the above that the failure to take cost-justified decisions to achieve the fulfillment could be punished, matching perfectly such need of certainty by the jurisdiction.

Thus, convicting negligent conduct, Judges would ensure first and foremost serving certainty, and predictability, even if at the expense of fairness. It has now been made clear that ordinary Courts overlook all other misconducts, amongst them opportunistic ploys, not explicitly prohibited in the contract, i. e. the unique referent. Obviously, negligent conduct is only one facet of opportunism, and its other facets - whether practiced or not in the context of global disasters - are not examined. Indeed, and in reference to the previous example, nothing would contribute to convict the store chain for negligent conduct. Obviously, landlords are free to decline the contract renegotiation and non-specialist Courts shall not be empowered to remedy the vulnerability of a co-contracting party or to mitigate its bankruptcy threat.

This leads to a heavy epilog: "if the court system is institutionally better equipped to detect and deter negligent behavior than opportunistic behavior, then perhaps opportunism should be downplayed in contract doctrine... Punishing the behavior of which the court is more certain..." (Cohen, 1992, idem, p. 985-986). Either

[5] The elementary principles of accepted standards, rules, and laws summarized in the expression "black letter law" are established, upheld, and unambiguously interpreted.

way, commercial law -and its formal rules and procedures -should be used "to accomplish what, it does the best, dispute resolution rather than contract' governance" (Morgan, 2013, idem, p. 88). Thus, it was previously noted by Williamson that "such a legal rules regime gives way to contract as framework when long-term contracting with dependency relations sets in. The parties here have an interest in promoting continuity in the face of unforeseen disturbances, and hence move to a more cooperative and adaptable contracting form" (Williamson, 2005, p. 377). And he cited the dissenting contribution of Llewellyn (1931, p. 736) introducing the analysis of the contract not as legal rules but primarily as "...a framework highly adjustable, a framework which almost never accurately indicates real working relations... ". That is why competition bodies as specialist Courts could ascertain more sensitively the alleged violation of the framework of governance threatening the survival of fragile partners.

In a nutshell, the "residual" set of opportunistic behaviors other than negligent conduct is not handled by the contract doctrine. One could argue that this reason alone will prompt legislators to adopt new competition rules to preserve the weak and fragile undertakings from short run market vulnerabilities, and by extension, the nation's industrial fabric.

IV. COVID-19 PANDEMIC AND COURTS' OPINION ON EXPLOITATIVE CONDUCT

The deterrence of exploitation, negligent conduct and unfair commercial practices may be differentiated toolboxes to tackle undue transfer of wealth both in normal or confusing times.

Thus, it is useful to simulate a dispute that arose in the context of Covid-19 and threatening the survival of one party. To this end, let us consider two elementary but realistic situations where a supplier complains, on the one hand, for exploitative abuse before the Competition Agency, and, on the other hand, for unfair practices and opportunism, before a non-specialist court. The two jurisdictions examine the same complaint but carry out distinct approaches, i.e. scrutinizing an offense in terms of economics or legal meanings, respectively. The first case concerns ascertained injury from the exploitative conduct of the partner, whereas, the second illustrates a false allegation. To identify opinion convergence or discrepancy of both Courts, the four cells of Table 1 could be useful to the traceability of ruling issuances.

			Commercial Court	
			Lenses: Negligent Conduct and unfair practices	
			Lawful behavior	**Unlawful behavior**
Competition Agency	**Lens:** Exploitative Conduct	**Found**	***A.1.*** ***Similarity***	***A.2.*** ***Discrepancy***
		Not found	***A.3.*** ***Discrepancy***	***A.4.*** ***Similarity***

Table 1. Convergence and divergence of Courts' opinions on an exploitative Conduct dispute

4.1. Scrutinizing *True* Exploitative Conduct

In this example, it is assumed that a supplier is coerced by a powerful lead firm, a hypermarket chain, to concede rebate of 10% of its turnover if not their products will be removed from the outlets and the termination-for-convenience clause will be applied.

Such retention rate modification of the revenues concerns all the providers to offset the demand slowdown due to confinement. Actually, the supplier had not ever reached the monthly turnover of $ 0.5 million

promised in the contract; however, it notified its rejection of the proposal whilst over 70% of its revenues derive from the contractual relationship.

The competition agency agrees that the plaintiff was in a state of economic dependence due to the high rate of its transactions with the plaintiff and recognized that it was coerced to accept lesser gains. It orders the offender to restore the previous revenue-sharing even if the complainant has not reached the minima of the monthly turnover. It recommends further to the defendant not to refuse to deal with the plaintiff for the entire agreed duration of the contract and beyond if the confinement is still enforced. Whilst the first line of Tab.1 reports that opinion, the non-specialist jurisdiction will have two appreciations of the litigation inasmuch the claim could be lawful or unlawful.

4.1.1. Meritorious claim

In cell A.1., the non-specialist Court considers that the hypermarket chain replicating an unfair practice to all of its partners does not assign legitimacy to it and fined the defendant $ 100,000 for unfair practices even if the plaintiff failed to comply with a clause of the contract. Indeed, it reached at least 85% of its promised turnover in the first two months of 2020 and that did not constitute a blatant breach of its commitment, argued the Court.

Even if the non-specialist jurisdiction does not acknowledge the expression of "economic dependence" inasmuch as the supplier chose freely to deal at a critical level with the supermarket chain, both Courts' opinion issuances converge. They are also complementary inasmuch the hypermarket chain could apply the termination-for-convenience clause, in case of the inexistence of the competition body, worsening the complainant's economic situation.

4.1.2. Unfairness and negligent conduct not found

In cell A.2., the ordinary Court dismisses the complaint insofar as the charges were not substantiated against the defendant. It argued that the modification of the retention rate for all suppliers' revenues constitutes neither an unfair practice nor discrimination when it is restricted to the pandemic context.

Both Courts' opinions diverge but are complementary. If the competition agency had not existed, the plaintiff in a state of vulnerability - due to dependence and the pandemic - could not escape the exploitative conduct. In such a case, he has to accept the revenues cut, otherwise, he undergoes an immediate contract termination.

4.2. Scrutinizing *False* Exploitative Conduct

In this second example, only slight modifications are introduced to the previous case. The hypermarket chain launched a new platform-to-business dedicated only to its partners but refused access to a supplier of non-essential products in this period of a pandemic.

But if it pays $50,000 as a contribution to the costs, it will accede as a premium brand in the online portal. Actually, the supplier did not breach any contractual term but again over 70% of its revenues derive from the contractual relationship. The Competition Agency agrees that the plaintiff is in a state of economic dependence but rejected its allegation of exploitative conduct that the defendant is opportunistically taking advantage of the Covid-19 pandemic.

It rejects the claim; nonetheless, it recommends the continuance of the contract at least beyond the lift of the restrictions owing to the pandemic.

Both cells of the second line of Table 1 report the dismissing of the complaint by the Competition Agency and, identically to the previous illustration, the non-specialist jurisdiction will rule on the complaint with opposed opinions.

4.2.1. Pretentious claim but lawful opportunism

In cell A.3., the non-specialist court endorses the claim of the plaintiff from unfair practices inasmuch as "non-essential product" is an ad-hoc and unenforceable category. It fines the defendant $ 25,000 as damages and orders full access to the platform-to-business without any additional costs until the end of the relationship with the complainant.

Indeed, the plaintiff argued before the Court that its opponent did not specify in the contract an ex-ante clause that assigns risks of such a contingency to one of the partners (distinction of products, extreme weather events, pandemic, etc.). Without having in any way breached the contract, it is not licit that losses of the defendant fall upon it, argues the plaintiff.

Indeed, Posner and Rosenfield (1977, p. 114) state that "if one party is a superior risk bearer, the entire loss should be placed on him... ".

Such lawful opportunistic claims tie-up with the neoclassical contract doctrine stipulating that a partner must perform the (positive) contract or pay damages for not doing its tasks.

The non-specialist Court charging and fining the defendant falls prey to the "injustice" identified by Williamson (1991, idem, p. 273) emphasizing that the strict enforcement of a contract could harm unfairly a party, in this case, the hypermarket chain. Obviously, in the present illustration, the supplier does not practice guiles to obtain undue gains but acts legally to recover a damage award.

Thus, Reyes and Martin (2019, p. 44) pointed out that "entitlement is to lawful opportunism what guile is to blatant opportunism". In such an assumption, the termination-for-convenience clause demonstrates its preciousness as a safeguard measure for the harmed party.

4.2.2. Pretentious claim and neither unfairness nor negligent conduct found

Cell A.4. corresponds to the rejection by the non-specialist court of the complaint inasmuch no evidence of unfair practices or negligent conduct was demonstrated by the complainant and discharges the hypermarket chain. Under the grounds that pandemic and other calamities inject impracticability in arbitration, the hypermarket chain has been impeded to perform what it promised to its providers: the full access to the consumers in the end-user markets, argued the jurisdiction. The launch of the platform-to-business constituted only a mere business proposal that did not interfere with the "physical" access in the outlets and did not modify the previously agreed contractual terms.

This final cell also reports the discrepancy of both Courts' opinions but also their complementarities. The plaintiff even in the state of vulnerability - due to dependence and Covid-19 pandemic consequences-, was never under exploitative conduct. However, if the competition body had not existed, the complainant will undergo the threat of immediate contract termination from the distributor and that will worsen further its financial statute.

V. CONCLUDING REMARKS

The economic dependence of a firm as the premise of exploitative conduct is not retained by the orthodox competition doctrine even if such an abuse reduces in fine consumers' welfare

Yet, no doubt those opportunistic vertical restraints conveyed by upstream and downstream linkages or supply chain networks may deplete firm endangering its survival. Although not appreciated in the contract doctrine, vulnerability could be a pertinent competition issue.

To this end, and to overcoming opportunism and contractual incompleteness, consubstantial to the hybrid mode, Frydlinger, and al. (2019) suggest to economic partners, the adoption of the "Vested" approach of the contractual relationship to prevent the hazards not anticipated in the (neoclassical) contract. The approach proposes a contract formalizing guiding principles assisting dispute resolutions. Clearly, the contract would be mutated to "a framework of governance" upgrading implicit covenants of the social norms -such as equity, and loyalty -into explicit ones. Thus, it introduces expressions as "we will treat the other party's interest as having the same importance as our own" (Frydlinger and Hart, 2019). The authors state that it deters socially reprehensible conduct inasmuch "...parties will be more reluctant to commit a breach if the guiding principle is formalized"[6]. Unfortunately, this deterrence could be challenged when huge and persistent economic shocks open the "game of economic survival", studied by Shubik. When bankruptcy threatens the undertakings and not only the most dependent of them, the competition authorities could have more competencies to evaluate survival concerns than other courts. It should be noted that public authorities have the supreme power to adjust or to suspend competition law enforcement according to economic perspectives. Thus, European Commission allowed Member States "to meet acute liquidity needs support companies facing bankruptcy due to the COVID-19 outbreak" (EC, 2020, p. 9) showing flexibility with the procedures of State aids. It relaxed also articles 101 and 102 TFEU, prohibiting *inter alia* concerted practices and exclusive dealing in the Covid-19 context. Indeed, "the ECN [European Competition Network] understands that this extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers. In the current circumstances, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply" (ECN, 2020, p. 1). Beyond the unprecedented upheaval of the economic activity generated by the Covid-19 pandemic, the ECN suggestion illustrates the possible adaptation of the competition doctrine to a variety of economic contexts. That viewpoint is rarely observed in other jurisdictions. That is why we believe that the enactment of competition rules could mitigate the lawful opportunism and provide a "safety net" to firms enduring a short term market vulnerability conveyed by the contractual relationship. Whilst the rules would fill the "grey zones" left by the corpus of rules, provisions, and regulations against unfair practices, firms in survival mode have an ultimate recourse against

[6] Frydlinger et al. (2019) consider paradoxically the approach necessarily limited. "Formal relational contracts will never completely replace traditional transactional contracts. Nor should they. But the process we have outlined should be part of the contracting tool kit to govern highly complex relationships that demand collaboration and flexibility".

exploitative conduct. Indeed, competition courts, as specialist bodies, set up multi-criteria expertise of alleged anticompetitive practices, among other yardsticks, the survival capability of both opponents. Indeed, the board members of these agencies are for the most part senior judges or experienced practitioners in competition and market structures. One would expect that they ensure the appropriate use of the wide discretionary power allowed by anti-exploitative rules. Obviously, when the principles of legality-independence-transparency-effectiveness-responsibility drive agency design and actions (Ottow, 2015), the irregularity risk would be curbed. It should be recalled that vulnerability rules could genuinely complement the enforcement provisions against unfair trade practices by other Courts. The new rules will strengthen the protection of vulnerable businesses.

That is why the US Congress did not repeal the RPA, as requested by the AMC from more than a decade. Indeed, despite the suspension of its enforcement by the antitrust community, the elected representatives of the US nation are unwilling to betray the historical commitments of 1936. Politically, it sends the message that protecting competition and competitors are not to be mutually exclusive or substitutable goals. Case law studies are necessary to assess how specialist and non-specialist courts will have really dealt with claims of exploitative conduct during the Covid-19 pandemic. To this end, in a next study, we will assess how the abuse of the state of economic dependence, a rule repressing exploitative conduct, adopted in Tunisia and some European countries was enforced during Covid-19 (or not) to support firm survival.

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