
Witnessing the Birth of a „Qualified Subdominance“?

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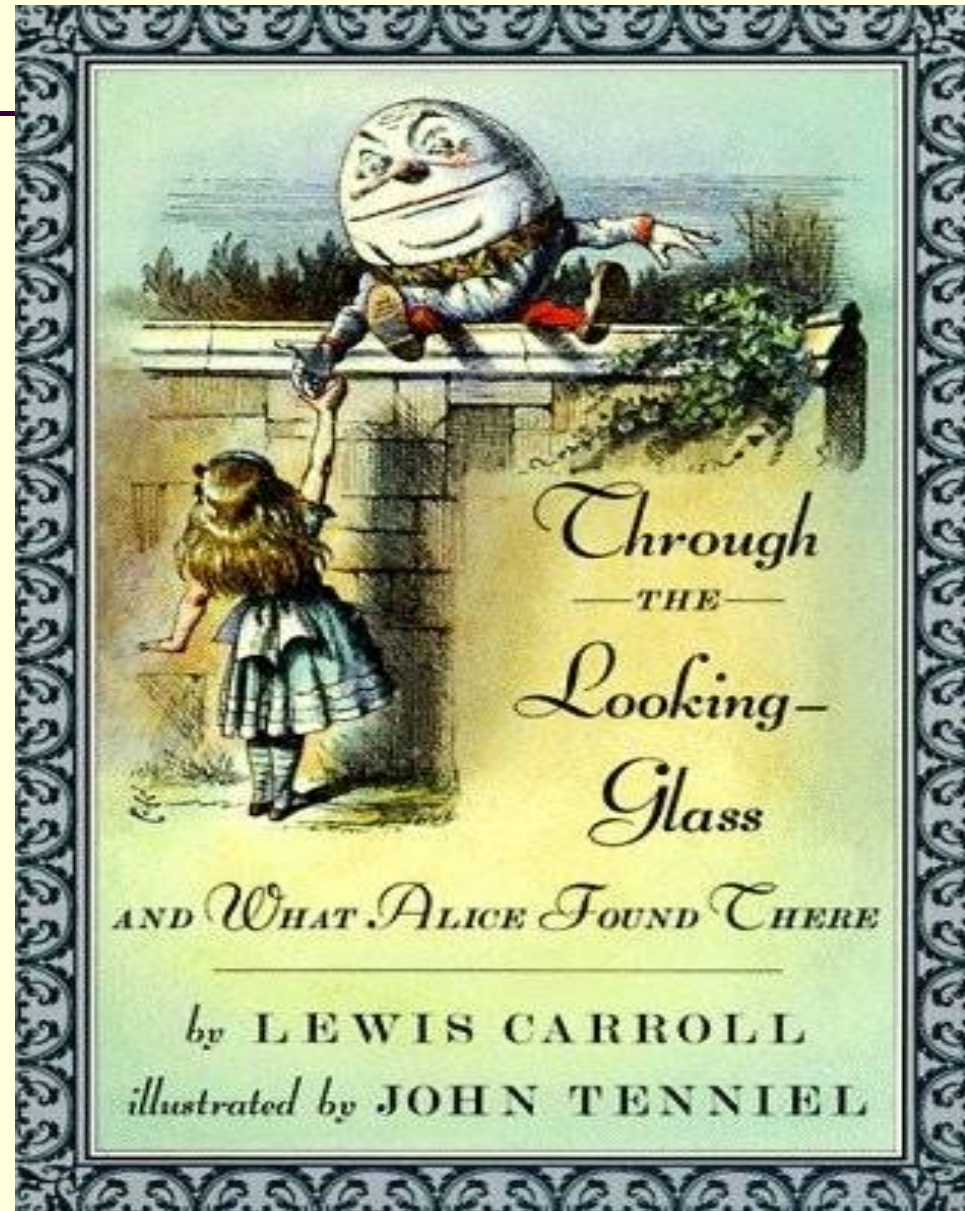
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What Are We Talking About?



What Are We Talking About?

Is anybody
(incl. the legislator)
allowed to attribute
whatever meaning
to whichever word?



Power and Market Power

- Impossible to define power
- Voltaire: „*dependence - not inequality - is a real misfortune*“
- Even a powerful partner doesn't need to matter supposed the other party doesn't depend on him
- Market power (MP, *stricto sensu*) is an explicitly objective concept (related to all rivals or consumers)
- MP (really significant but without this label) > significant MP
(yet not really significant in terms of competition)
- MP => implies bargaining power,
but bargaining power \neq market power

Bargaining Power

- Quasidefinition of bargaining power (BP): intuitive, symptomatic, tautologic
- Special treatment with Buyers' Bargaining Power (BBP)
- Subdominant BBP more controversial than supplier's BP (food and agriculture sector extraordinarily)
- No *a priori* labeling thereof: double-edged weapon
- BBP (unlike MP) relates to particular (specific, individual) contracting suppliers → no absolute concept
- BBP may be both boon (benefit) and menace (threat)
- Countervailing buying power: stimulation of competition on the supply side ↔ endangering of suppliers

Economic Dependence

- Economic dependence is purely relative concept
- Intuitive comprehension: non-existence of reasonable or sufficient alternative for the dependent party
- Economic (commercial) dependence that is
 - objective and
 - lasting:is termed „dominance“ (= Market Power)

Economic Dependence

- Economic dependence even without absolute form of market dominance (*partenaire obligatoire*) depends mainly on:
 - Duration of the commercial relationship
 - Specific technical equipment of the weaker partner dependent on the stronger party's activities
 - Difficulty to swiftly change the stronger partner
 - Turnover share of the dependent party achieved in the business with the stronger partner
- Economic dependence is involved with abuse of MD and stands for one of viewpoints of the assessment thereof

Significant Market Power

- „Significant“ market power: paradoxically less important than „simple“ market power“
- Subjective or objective concept?
 - Objective one seems to prevail: buyer´s potentially exploitable market position meaning generally (!) for the sellers an important distribution channel for their supplies to the consumers
 - Applied e.g. in GB, H, LT, CZ, unlike subjectively assessed economic dependence (D, § 20/2 GWB, analogy to MD)
- Significant market power (in objective terms) ≠ bargaining power, market power, buying power, economic dependence either
- SMP as a kind of „qualified subdominance“ or „small dominant position“

Significant Market Power and Competition

- The aim of the concept of abuse of SMP: do we protect competitors or competition?
- Is the subdominant market power capable of endangering, distorting or excluding competition at all?
 - Czech law on SMP presupposes even substantial distortion of competition (BTW, by a substantially subdominant distributor)
- Protection of a weaker party by public law means, as a supplement to private law ones
- „Weakness“ legally bound to the position (supplier) and/or to the branch (food and agriculture industry)

Significant Market Power and Competition

- Strong buyers are not inevitably detrimental to consumers
- Subdominant buying power (still not reaching the threshold of dominance) may be very procompetitive
- Any successful bargaining on price means that there is still a space on the seller's side to bring down the price in favour of the consumer. Sellers still afraid of losing connection...
- Possible bumerang-effect: lowering the quality by the seller in order to avoid losses due to enforced lower price and given costs
- Quality erosion eased by private labels without reliable quality control compared to brand goods - should the AA be the quality checker?

What Is Necessary to Be Protected?

- Individual protection of small and middle-sized suppliers?

OR

- Institutional protection of:

- Competition among small and middle-sized suppliers?
- Competition among great distributors?
- Consumers ?

OR

- Particular group interests?

OR

- Fairness?...Freedom of contract?....Or even all together?

What Is Necessary to Be Protected?

- Is there an equivalent of „special responsibility“ of a dominant undertaking - „more special responsibility“ of a subdominant undertaking (yet having SMP)?
- Even more strictness to be applied to a subdominant with SMP than to a dominant?
 - So called UTT – e.g. contracts in writing – clumsiness and transaction cost for both parties because of easy investigation? Substantial imbalance in rights and duties assessed by AA. Other undue limitations of freedom of contract
- Public law protection against unfair competition as an additional amplifier thereof?
- An attempt to regulate a subdominant position that is used to achieving someone's own profit to the detriment of rivals?

What Is Necessary to Be Protected?

- Fierce competition (as a consequence of unequal bargaining power) is not fair because someone is better off?
- What's actually the difference between fierce competition and abuse of buying power ?
- Creative destructivity of competition not welcome?
- An attempt to overbridge these inconsistencies and to confess that none competition at all but rather fairness is at stake?
- Group interests (battle on the surplus between producers and merchants (consumers) under the outdated and uprooted guise of competition (formerly), and under a new guise of fairness (recently)?
- Excessive egoists forced to share their egoism with new would-be egoists that were ignored so far

What Is Necessary to Be Protected?

- Would not be prevented the competition among suppliers by means of trade terms from which consequently the consumers may be better off?
 - Czech distributor without MP (market share 10-12%) may be supposed to infringe competition by his conduct to a particular supplier only because the distributors' turnover is above 5 bil. CZK (approx. 185 bil.€)
- Hypocrisy or pretence? Simultaneous pursuing contradictory goals of public policy: wellness of well-lobbied farmers (and food producers respectively) and of the consumers
 - Czech AA: „public interest on fair conduct prevails over freedom of contract....“

What Is Necessary to Be Protected?

- Special case of „public choice“?
- Genuine public policy justification rather mythical than real
- Distributive fairness imported into the commercial relation from outside because the corrective fairness created in an interaction of the parties to a private law contract does not work (factual dictate behind a contractual veil)?
- Is an administrative body like AA and the applicable administrative proceeding really best adjusted to find such a delicate balance?
- And doesn't AA deviate from its legally anchored competence (protection of competition as a public good)?

What Is Necessary to Be Protected?

- After all, selective and discriminatory regulation on a substantially subdominant level may infringe or distort **competition and consumer welfare** (any of the 3 biggest distribution chains in CZ doesn't amount to 12% share in the retail food market and the joint share of 8 biggest doesn't exceed 63%. None of them has MP. Isn't it a rather nice competitive market?)
- Green Paper of the EC on Unfair Trade Practices in the B2B (food and non-food) Supply Chain from 31. 1. 2013
- GP - no legal act but at least an expression of a legal policy intention to administratively control the content of contracts beyond food- and agriculture sector and beyond market autoregulation

What Is Necessary to Be Protected?

- Envisaged applying does not take into account „economic dependence“, sector (industry) or structural limitations (not intended only for suppliers), market shares of the parties or absolute turnover figures either
- Several unfair practices are indicated
 - e.g. retroactive misuse of unspecified, ambiguous or incomplete contract terms;
 - excessive and unpredictable transfer of costs or risks to the counterparty;
 - unfair use of confidential information;
 - unfair termination or disruption of a commercial relationship

What Is Necessary to Be Protected?

- This attempt to safeguard the fairness and proportionality of commercial terms by means of centrally aimed, EU-wide and across-the sectors intended public law measures deserves criticism
- Public law means should be used in protecting competition and consumers
- The protection of generally weaker party should be accomplished by private law means

What Is Necessary to Be Protected?

Making a mountain out of a molehill?

