

Exploitation and fairness

Most of us would see exploiting another person's weakness for personal gain as morally wrong. But it is not when fully informed opponents enter a competitive game with fair rules. It's entirely fair to exploit your tennis opponent's weak backhand. A politician exploiting the poor policy analysis of another is entirely fair.

What about the competitive "game", the market system, that is our main extractor and distributor of the world's resources and advancer of our living standards? Generally, it's fair for a business to exploit a competitor's weakness, say a failure to invest in contemporary technology. We want this to happen to improve products and productivity. Of course, for innocent employees, who have no power in a business's decisions, losing their jobs is not fair. We fix this, though probably inadequately, by providing unemployment benefits. We have some laws to prevent large businesses using market power to stop competition from others, but laws probably need to give better protection to small businesses even though they can be expected to know the rules of the game and be capable of dealing with any asymmetry of information between them and larger businesses.

The other players in the market "game" are consumers whose interests Adam Smith correctly observed are the end purpose of the "game". How well can we reasonably expect them to do in this "game"? Unlike businesses they have to operate in many, many markets. Most can be expected to come to grips with the rules of the game and deal with asymmetry of information in some markets. Some can bargain down prices and in unusual circumstances they can even exploit a seller's information weakness. Very few, if any, can be expected to operate successfully in all markets. Some, children, people with language difficulties and those with cognitive limitations, cannot be expected to operate successfully in any market. And then there are those whose capabilities are compromised by products with psychological effects such as sugar, gambling and status products.

Where we have effectively competitive markets for homogeneous products (perfectly substitutable) or products with pre-purchase easily discernible quality differences, the failure of a proportion of consumers, in some cases even most, to do adequate information searches has not been important. Businesses in this context have generally competed for a share or an increased share of the whole market. However, with the increasing sophistication of data use businesses can tailor marketing to exploit particular groups of consumers or even individual consumers whose data indicate they are not information searchers.

Previously homogenous products like electricity and phone services are no longer, with plans involving price variations depending on quantity used and time of use. These are often complex and difficult to compare. This "confusopoly" is not unintentional on the part of the companies. It is not in their interest to make the information search easy. This immorality could be at least partially fixed by legislating for contracts to be in a standard readily comparable form.

Another intentional immorality is the "brand loyalty tax". Companies know of consumers' brand "stickiness" and exploit this by price discrimination. They ratchet up prices of services for existing customers while discounting for new customers to gain market share.

Our need to focus on the most hazardous products for humans and all other species, fossil fuels, is clear, but there are many others causing great damage. Inherently exploitative products are particularly ethically problematical. Exploiting people who become addicted to products such as tobacco and gambling is beyond the comprehension of most of us. But businesses take unethical advantage of other human behavioural characteristics too. Our liking, similar to other animals, for sweetness, saltiness and fattiness was highly adaptive. Seeking foods high in energy and salt was

important for survival. Particularly egregious are companies like soft drink manufacturers that know full well they are selling to many of us amounts of sugar that cause bad health and thus community cost. Then there is our need to be accepted in society that can lead to over-budget spending on fashion and cosmetic procedures. “Bespoke” services involving large asymmetries of information are especially problematical.

Some consumers can deal effectively with many products, but many are victims of these inherently exploitative products. Few would disagree that businesses should do everything they can to avoid exploiting children and people with diagnosed limited cognitive capacity or some mental health condition that compromised their rational decision-making. For example, it is clearly unethical to have sweets at children’s height at a supermarket checkout. It is clearly also unethical to be selling a complex insurance product for example to a person with an IQ of, say, less than 80.

Few of us as individuals (natural persons) would keep selling to someone we know (gaining benefit from), a product that we know is harmful. There is something different when natural persons operate within a corporate person. Back in the 1970s, Dr H C Coombs observed that the power of such corporate persons “tends to be exercised without personal responsibility, but rather, vicariously and impersonally on behalf of the corporation”. He agreed with 18th century British jurist, Lord Edward Thurlow, who said: “Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?” and added “an entity without compassion to be moved.” Many have echoed his plea that decisions of corporate persons be made not by organisational people but by “whole” women and men. Half a century on nothing has changed.

What can be done? For all inherently exploitative products we can be much smarter about controlling marketing. For some like gambling there seems no good argument to allow advertising at all. For things like sugar we need the same approach as we had with tobacco – increasing taxation as many other countries have done with success, greater marketing restrictions and education programs.

We should have, as European countries do, a general legal proscription of unfair commercial conduct. Perhaps that could be finessed to cover exploitation in general? Then there is the philosophy underlying the legal egg-shell skull principle – the unexpected frailty of an injured person is not a valid defence to the seriousness of any injury when a person is liable for that injury. Businesses are strictly liable, regardless of intent, for physical injury caused by a safety defect if it does not meet the level of safety the public is generally entitled to expect. We could write a law that says they are strictly liable for a loss (injury, illness or economic) a person who has an atypical vulnerability suffers as a result of their products.