



ethical dilemmas unit 8

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Competing for profit

THE idea that conducting business is, or can be an ethical activity faces two serious obstacles which, if not overcome, would ruin any chance for a meaningful business ethics. These challenges arise naturally through our social conscience, and indeed seem to come from ethics itself.

The first obstacle is the thought that there is something intrinsically wrong with human beings selfishly *competing* for gain – when ethics teaches that we should rather be helping one another and co-operating to make the world a better place. Critics who voice this objection do not usually have problems with the idea of competing for athletic or sports trophies, or indeed for literary or scientific prizes. When you lose a game, or fail to win a prize that may be a blow to your self-esteem but that is (usually) the full extent of the damage. Whereas companies which lose out in the competition for customers go bankrupt, and their workforce face the spectre of redundancy. Our social conscience tells us that we ought to offer succour and support to those in need, and avoid actions which might lead to others being worse off as the result of our gains.

I have argued that there is only way to face up to this challenge: that is to accept fully and without any reservation the implication that in order for there to be a *business arena* there have to be losers as well as winners. We can seek to ameliorate the damage, provide economic or moral support for workers who have lost their jobs or directors who have lost their companies. But risk is the essence of business. If you don't have an appetite for risk, there are many other professions to choose from, where the right qualifications are a virtual guarantee of a secure income. If you

win the contract, you don't feel guilty because someone else lost. On the contrary, you deserve to be congratulated – provided that you did win fair and square and not by cheating or foul play.

It has long been a bone of contention that the many – indeed the majority – who are not in business or the professions do not have this choice. While business magnates take the risks, they face the consequences. This does indeed place a burden of responsibility on both the state and business, one of the issues which we will be looking at next time. The admission of a dimension of *social responsibility* not accounted for by the strict rules of fair play complicates our view of the business arena but does not alter its basic structure.

There is a saying, 'All is fair in love and war.' Some critics would cynically add 'business' to this list. Yet even war is governed by agreed conventions. If we could miraculously succeed in making wars a thing of the past, so long as human beings survive there will still be competition in the search for a mate. This recalcitrant fact so appalled some nineteenth century socialists that they advocated the abolition of marriage and the establishment of communes where men and women would exchange partners freely, casting aside the bourgeois constraints of jealousy and possessiveness. The more acute Marx saw this as nothing more than a feckless attempt to overcome the marriage market under capitalism – a form of 'prostitution' in Marx's eyes – by replacing it with 'universal prostitution'. Even in a Marxist utopia, there will always be winners and losers in the competition for love.

How much profit does a person need?

What about the desire for profit? Is any amount of profit 'too much'? It is by no means clear that the term 'fair' is being used in the same sense when we talk of 'fair competition' or 'fair profit'. Competition is fair when the participants observe the agreed ground rules, don't lie or cheat, and keep their promises. Whereas, the assumption is that in pursuing profit we are seeking maximum return on our investment – the maximum profit

obtainable – whether that investment take the form of our money, our time, or our creativity.

Skill in playing the business game, the conditions of the market and luck determine how much profit one makes. The traditional view is that provided that you have competed fairly, there is no limit on what counts as 'fair profit' – unless it is a limit imported from outside the business arena, imposed on the participants as a result of government policy.

What limits, if any, should be placed on business activity is a matter for political debate. There are fundamental issues in political philosophy at stake: such as the question whether the government has a duty or even the right to use taxation to redistribute wealth. However, it is generally accepted by all but extreme libertarian hardliners that market forces are not a magic guarantee of the optimal outcome. Governments have a duty to ensure that allowing free competition in the business arena serves the national interest and does not just benefit the winners. Once this point is accepted, the extent to which one relies on government intervention or the 'invisible hand' of the market are matters of detail which are best approached with a pragmatic attitude.

As I write, oil prices are soaring through the roof, crippling world economies. Even though there are grounds for worry about maintaining supplies, the rise is out of all proportion to what would be justified by a clear-headed global assessment of supply and demand. It is a market phenomenon. One commentator has suggested that anyone who wants to buy and sell oil should be required by law to take delivery of their oil and store it. That is hardly a practical idea, but we are urgently in need of an idea for putting a lid on the oil market that is workable and effective.

For the wise judge of business ethics, as we have already observed, 'enough profit is enough'. We compete because we have to, not for the sheer sake of competing. We seek to make a profit because we want to earn a living from the work that we do. The prime imperative of any company is to *survive*.

Periodically in the British press there have been controversial reports over so-called 'fat cats', CEOs hired to turn round the fortunes of large public

companies, attracted by lucrative compensation packages. If you deserve a six figure salary – if you are that *good* – then you have every right to demand it. But why keep the money? Give your children a chance to make their way in the world through their own efforts rather than leading a spoiled and pampered life – is a commendable philosophy.

The rules of competition

Before we consider the rules of competition from an ethical perspective, it would be useful to remind ourselves how rules for war and the Geneva Convention came about. One would have thought that of all human activities, all-out war is the one activity where there can be no agreed rules. Yet, the historical facts show otherwise. A convention that benefits both parties – for example, the ban on the use of nerve gas or biological weapons – is supported by mutual fear of reprisal. Both Hitler and the Allies knew from their experience of the First World War the dire consequences of taking poison gas onto the battlefield. Despite many deadly conflicts over the last sixty years since Hiroshima, no country has yet pushed the nuclear button.

One obvious difference between waging war and conducting business is that in the business arena there are laws enforced by the state. Untangling the strands of the legal and ethical from the merely conventional is by no means an easy matter, however. If you break a convention, even if it is not an ethically grounded convention, is that not in itself an unethical thing to do? Consider, for example, the gentlemen's agreement, 'We will not poach your customers provided that you don't poach ours.' It could be argued that there is nothing ethical or unethical here, but merely the question of whether upholding the convention continues to be to the parties' mutual advantage.

On the face of it, it seems that the only question which one needs to consider is, are you prepared for tit-for-tat reprisal if you break the agreement? If a customer is sufficiently worth poaching, the answer to that question might well be 'yes'.

On the other hand, consider the following scenario. A company aggressively headhunting for executive talent hatches the novel idea of offering to defray the full legal costs of executives who break their employment contracts in order to join them. One would have thought that there ought to be a law against this. But let us assume that you are acting on the best legal advice, and that you have taken great care to ensure that you do not contravene the law of the land. Is your idea unethical? or just sharp game play?

One response to this challenge is to up the stakes: make the penalties of breaking a contract increasingly severe. But this has limits too. A contract to the effect that you forfeit your house and all your possessions if you break the terms of your employment would not be upheld in any court of law – or, at least, one hopes that it would not be. Why indeed stop there? Suppose the rival company offered to pay for the house and everything else. Then the next logical step is to demand limb amputation as a penalty for contract breaking.

In the world of professional sport, for example the British Football League, recognition that individual star players have immense value for the sporting and financial fortunes of a club – measured in many millions – would have quickly got out of hand were it not for the rules enforced by the Football League which has the power to ban players from appearing for a set number of league games, or seasons – or in the most severe cases, for life. No business association or league has that power to remove an individual completely from the arena in that way. In business, the most that can happen is that you get expelled from your professional or trade association – or the stock exchange – and are forced to move into a different line of work.

In the absence of sufficient legal sanctions, or a body with the draconian powers of the Football League, there has to be an ethical dimension, a basis for deciding the limits of acceptable behaviour. But what possible basis can this have? The point of arguing over hard cases in business ethics is to provide a rational justification for our ethical intuitions; for saying, 'such-and-such, but no more, is the limit of what we are prepared to accept.' Otherwise our intuitions are nothing more than our own fallible subjective view.

Deals and contracts

A business ethics which consisted merely of conventions adopted for prudential motives – like the conventions of war – would not be worthy of the name. But how can we show that there is more to the rules which govern the business arena than the merely conventional? One eminent example would be the idea of the *contract*. In the case of two or more parties entering into a contract, what is at stake is more than any convention, however such a convention might be enforced. A contract is a *promise*. And it is wrong to break a promise, in the same sense that it is wrong to tell a lie. Not wrong just because it has bad consequences, but simply by virtue of the fact that it is unethical.

In Oxford in the 1950's under the influence of J.L. Austin, philosophers turned their attention to the way in which we perform *actions* by means of uttering words. The traditional idea that the central purpose of language is to *describe* the world – to make statements, true or false – overlooks the *performative* dimension. If I give the order, 'Fire!' I have performed an action, no less than if I pulled the trigger myself. The groom who says, 'I do' at the altar is not describing his positive state of mind but making a commitment – equivalent to signing a contract – to love, honour and cherish. Yet there is still a lot of confusion about what it means to make a promise, or what constitutes a contract or deal.

'I thought we had a deal!' is the eternal complaint of the disappointed business person who took their associate's *statement of intention* for a promise. A statement of intention can be truthful or untruthful. If I say that I intend to do such-and-such, when I have no intention of doing such-and-such, then I have lied to you, no less than if I make a factual statement which I know to be untrue. It is wrong to lie. But I haven't 'broken my promise' because I didn't make one. Nor, if at the time I did honestly intend to do such-and-such, can you accuse me of 'breaking my promise' or 'going against the deal' if I later change my mind. Of course, we don't like to have dealings with people who are unreliable. Leaving aside sexist jokes about a 'woman's prerogative', it is a defect in character – a ground for personal criticism – that an individual repeatedly forms all

sorts of plans with the best of intentions which he or she does not carry through.

It certainly shows a lack of *self-knowledge*, to say the least, that a person honestly believes that they will carry out the course of action which they intended, and time and again fails to do so. We have already examined in unit 3 the variety of ways in which we fail to carry out actions which we have been convinced are the right thing to do, as a result of so-called 'weakness of will'. How more easy is it to change your mind, when changes in circumstances make the plan less appealing? That is precisely why we have an institution of promising, and the concept of a legally binding contract.

It is not for nothing that when business people make a deal, even if nothing is put in writing, they perform a ritual action such as shaking hands to signify that they have indeed promised, and not just stated their sincere intentions. When a deal is done, it's done. You had the chance to change your mind right up to the moment when you shook hands, but at that precise moment you voluntarily surrendered that option.

Yet, despite the importance of the distinction between a promise and a statement of intention, there are still grounds for saying that a declaration of intention, in circumstances where you know that other persons will commit themselves to a particular course of action on the assumption that you intend to carry out what you intended, does leave you potentially open to ethical criticism, and not just criticism of your unreliability or lack of decisiveness. There are circumstances where it is wrong to mislead, even if you did not deliberately intend this at the time. You should have taken more care to qualify your statement. The law has nothing to say about this. You haven't broken any promise or contract, but you still bear a portion of ethical responsibility for the consequences, and at the very least you owe the other party a sincere apology.

Professional foul

In unit 5, I described the Sarbanes-Oxley Act, as 'a chilling realization of Carr's prophesy: a state where the law legislates for business ethics, and by

implication anything outside the law is also outside ethics.' In the light of consideration of such a simple but fundamental thing as shaking hands on a deal, it should be clear that the law can never legislate adequately for ethics. One can only hope that more enlightened companies will realize this, and continue to take advice from experts on business ethics and not just rely on their corporate lawyers.

There is another, deeper criticism of the idea that one can legislate for ethics. This can be formulated in terms of a further objection to Albert Carr's thesis that in the business arena, any action within the law is acceptable. As we saw in unit 5, Carr likens the business 'game' to poker, where bluffing is an accepted and indeed essential part of the game. If one is being strictly accurate, however, players do not actually tell *lies* in poker; they merely perform actions which imply that they have certain beliefs – e.g. that one holds a good hand – actions which are designed purposefully to deceive. However, this is merely a minor point of detail. There are other card games (such as 'Blagger', or 'Bull' as it is sometimes known) where players explicitly state that they hold certain cards and these statements can be true or false.

But why stop there? Here is a description of how the locals in Marseilles play the game of Belotte, from retired English professor and Pathways student David Faber:

Belotte... is also very popular in Marseilles, I'm told – a sort of street-theatre. Wizened old life-long cheats commonly seen expostulating, scandalised at their opponents' cheating, standing up as if they're about to walk away in disgust, and even starting to walk away, having carefully laid their cards face-down on the table (they know they'll be back), and probably having taken the opportunity to drop one on the ground, so that when the round comes to an end they'll be found to have been dealt one card short, and there'll have to be a re-deal. Appalling to your average Englishman.

**Geoffrey Klempner 'Corporate Social Responsibility and Ethical Dialogue', *Philosophy for Business* Issue 19
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In the aforementioned article, I go on to remark that one could make the case that,

the practice of not a few corporations and businesses is closer to belotte than poker. The rule is not, 'Do anything within the letter of the law,' but rather, 'Break the law whenever you can get away with it, or whenever the consequences of getting caught are sufficiently minor as to be outweighed by the benefits obtained from your misdemeanour.'

In football, the latter is known as a 'professional foul'. As fast as football governing bodies – or government committees – patch up the rules to make it harder to gain any advantage from a professional foul, new forms of professional foul appear which aren't covered by the rules.

(ibid.)

Sarbanes-Oxley has a sharp response to the practice of professional foul. Forget about paying fines. If you break the law which governs business ethics, you risk going to jail. Despite this acknowledged fact, so long as we are only talking about *risk*, then it remains open to the business person looking at all the angles to consider whether in a particular case breaking the law is *worth* the risk. It's just another part of the game, which adds the spice of danger, as well as the promise of great rewards for the individual who knows how to play the business game as it should be played – no holds barred.

In unit 5, I argued that Carr had failed to make the case that permitting the practice of bluffing is 'necessary in order to create a business arena'. However, a defender of Carr could reply that this still leaves open a loophole: bluffing may not be *necessary* but it is still *possible*. In Carr's scarier version of the business arena, the gameplay is more dynamic, more attractive – albeit more risky.

The most effective criticism of Carr's view is that it is logically *unstable*. Carr would like to abandon worries about ethics and occupy the narrow plateau of legality. But to the unethical business person, 'legality' is just another word for 'bad consequences if you get caught'. In other words, it is

a matter of sheer prudence, not ethics. You can't defend legality, as Carr wishes to do, if you are not prepared to harness ethical arguments. In the absence of ethics, anything goes.

Taking fair advantage

Breaking contracts and agreements is one of many ways in which competitors seek to gain unfair advantage. Yet there are many ways of gaining a *fair* advantage. Gaining and keeping an edge over your opponent is what competition is all about.

It goes without saying that there are many situations where it is not necessary to compete, where the outcome is a 'win-win' situation. Not every business deal is a zero sum game. Co-operation is no less important in business than competition. We understandably place great value on a kind of deal where both parties feel that they have benefited to the maximum extent possible, where both 'come out on top'. But this is a case where what happens sometimes could not happen always, so long as human beings are allowed the freedom to pursue their own interests and aims. Human beings don't all want the same things, we don't all see things the same way. Or, alternatively, we do want the same *thing* but one party's gaining that thing – that prize or objective – is necessarily the other's loss, their failure to gain it.

In my article, 'Taking Fair Advantage', I consider the various ways in which a buyer can gain an advantage through exploiting a seller's lack of knowledge, as a result of which the buyer pays less than they would have done otherwise, or less than the going market rate.

I have heard it said that the ideal outcome of any sale is one where no-one 'loses' and buyer and seller are equally happy. That may well be so. But the point is that such an outcome cannot be guaranteed or enforced. The price of making 'equal gain' a necessary condition for taking part in the game of buying and selling would make the game impossible to play.

Geoffrey Klempner 'Taking Fair Advantage'
Philosophy for Business Issue 39
www.isfp.co.uk/businesspathways/issue39.html

Of course, a seller can be 'happy' in their ignorance. But we are not talking about this. We are considering whether, *in fact*, the buyer and seller have benefited equally from the deal regardless of whether the seller is aware of this or not. In the case where the canny buyer takes fair advantage over a less canny seller, the seller would be *less* happy on discovering this fact than they were before. However, for players in the business arena this should not be a cause for resentment, any more than in the case of the sports person who recognizes that they have been beaten fair and square. (In the article I make an exception for the case where a professional buyer takes advantage of an amateur seller's trust – the world of antique dealing is one notorious example.)

It is interesting to investigate why our intuitions see the reverse situation – where a seller takes advantage of a buyer – somewhat differently. While getting a bargain is regarded as something to be proud of, we are generally critical of sellers who overcharge for an item. Companies who take advantage of scarcity to put excessive markups on their products are accused of 'profiteering', or even 'racketeering'. But how exactly is this unethical? Why the disparity?

One of the main reasons arises through the perceived inequality of power between companies – especially large companies – and individual consumers. Consumer associations exist partly to reduce this inequality but they cannot remove it completely.

For example, you always have the choice to refuse to pay for a new Apple laptop and go for a cheap PC instead. But if you want Apple, then you have to pay Apple prices. Apple would argue that they have invested heavily in promoting the Apple brand over many years, and have acquired a deserved reputation for the quality of their products as well as praise for their designs. However, the main reason why Apple are able to maintain the large markup in the personal computer and laptop market is their long-time policy of refusal to license their operating system to other manufacturers (apart from one brief period where Apple 'clones'

appeared). In the past, this marketing decision cost the company dear in their competition with Microsoft. Now Apple, buoyed by the success of the iPod, are belatedly reaping the rewards.

There is a world of difference between the high profit margins of companies marketing prestige brands, and the profits made by the slum landlord, or food suppliers who take advantage of scarcity to hike their prices. But, once again, is this really a question of *business ethics*? We have said that 'enough profit is enough'. But what is enough? and how are we going to enforce our view of what is 'enough' against competing views?

If you are an individual or a company, you have the ethical *right* to sell an item at greater than the market rate just as you have the right to purchase an item at less than the market rate. From the point of view of logic, there is no difference here between the two cases. However, what we do with 'right' is not always commendable or praiseworthy. There are plenty of cases where very bad things are done within the letter of the law. The problem for business ethics here is that we are not dealing – as in the case of truthfulness or promising – with a case of *principle* but rather with a matter of *judgement*. There is no precise point where greediness for profit shades into racketeering, or whether excessive zeal in pursuit of profit shades into greed. Yet we all know a case of racketeering when we encounter one.

What these considerations show is that in laying the foundations for business ethics we need to reckon with a broader notion of *responsibility*, based on an evaluation of the consequences of one's actions. It is an area which governments have a duty to take the lead for the very reason that where there is no identifiable point of principle, we need an authority to set acceptable standards and enforce them.

It is often quite clear when someone has broken a contract, and the party with whom they had the contract can go to law in order to seek compensation. In a case like rent racketeering, on the other hand, something more elaborate is needed: such as in the UK which has a system of rent tribunals and fair rent officers backed with the sanction of law. As we shall see in the next unit, the umbrella of ethical 'responsibility' is very wide, including all the issues covered by the terms 'corporate social

responsibility', 'corporate citizenship' and environmentalism: all questions which governments need to show leadership in developing an effective framework for compliance.