TOWARDS AN ECONOMICS OF
CONVENTION-BASED APPROACH OF THE
EUROPEAN COMPETITION POLICY

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Towards an Economics of Convention-based Approach of the European Competition Policy

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Abstract

Our paper aims at developing an analysis of the European competition law enforcement dynamics based on an economics of conventions' framework. We question the ordoliberal theoretical foundations of the EU competition policy and we assess to what extent the implementation of a more economic approach might pertain to a convention inspired by the Chicago School normative views. We question the economic history, the history of economics thought, and the legal history as we consider that the European courts case law is the main driving force of conventional shifts in matter of competition law enforcement.

Keywords

Competition policy, abuse of dominant position, ordoliberalism, Chicago school competition law and economics

JEL Codes

B52, K21, L41, N44

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The implementation of an effects-based approach has generated a lively debate within the competition law policy field in the European Union for now more than a decade (Bourgeois and Waelbroeck, 2012). This approach consists in the adoption of the consumer welfare standard as the unique criterion for assessing the compliance of a given market practice with competition law. Even if economic criteria and reasoning have been already integrated in decisions in the other competition law fields as merger control and even in State aid monitoring, the debate is all the heated for the EU Treaty Art.102 relative to the abuses of dominant position².

Chicago School economists and lawyers have blamed the US antitrust laws enforcement since the fifties because of its excessively favorable rulings to plaintiff competitors, casting doubt on exclusionary abuse-based suits. According to them, such an enforcement gives way to opportunistic law suits (the famous Posner’s antitrust umbrella (Posner, 1976)) and, in a context of incomplete and asymmetric information, it might lead to false positive decisions (Easterbrook, 1984), decisions potentially more prejudicial in terms of welfare than the symmetric ones (the false negative adjudication) since market forces cannot correct the first one. These criticisms had led to a significant limitation of the scope of application of the Section 2 of the Sherman Act and progressively crossed the Atlantic. The European decisional practice was challenged since the end of the nineties on the basis of its lack of concern for efficiency gains. Some landmark decisions issued by the Commission and by the European Courts (the Court of Justice and the General Court) generated serious criticisms, especially from sanctioned dominant undertakings. According to them, the European decisional practice, excessively form-based and insufficiently effects-based, is prone to lead to false positive decisions and to protect competitors at the expense of consumers.

Fifty years after the Chicago School’s manifesto regarding the antitrust decisional practice related to monopolization cases (Director and Levi, 1956), a report was published by the Commission’s Economists Advisory Group on Competition Policy (EAGCP, 2005) providing a comprehensive roadmap for the implementation of such a more economic approach. Its features may be sum up

² Two main categories of anticompetitive practices have to be distinguished. The first one corresponds to collusion among firms. These anticompetitive agreements among competitors are sanctioned in Europe by the Art.101 and in the U.S. by the Section 1 of the Sherman Act. Such combinations are by far the more harmful in terms of social welfare. Consequently their sanction makes consensus among antitrust lawyers and economists. Nevertheless, the situation is very different for the abuses of dominant position (in Europe) and for the monopolization practices (in the U.S.) for which decisional practices sharply differ across the Atlantic Ocean. The US case law has dramatically narrowed the scope of acceptance of exclusionary claims brought by competitors (see for example the case of the now withdrawn DoJ report on single firm practices (US DoJ, 2008)). Conversely, the article 102 of the TFEU is the privileged levy of the Commission both for high-tech emerging sectors and newly liberalized network industries (Bougette and Marty, 2012).
as follows: i) the burden of proof shall fall on the public enforcer or on the private plaintiff who have to provide a well economics grounded and evidence-based theory of harm; ii) the assessment shall address the outcomes rather than practices; iii) the effect on consumers is the criterion for evaluating the lawfulness of the market strategy; iv) rule of reason model trumps per se reasoning; v) authorities interventions should be mainly confined to removing barriers to entry (Allan, 2012).

This “more economic approach” presents strong links with the Chicagoan views on competition policy. The European Commission enforcement policy (European Commission, 2005 and 2009) may mark a process of convergence toward a new political logic in which economic efficiency (e.g., utility maximization) is considered as the sole purpose of competition policy and consumer welfare as the sole admissible criterion for judges’ decision. However, this Chicagoan influence turns into clash with the traditional theoretical foundations of the European competition policy. This effects-based approach sharply differs from an ordoliberal conception according to which the economic freedom of market actors constitutes the aim of the policy (Akman, 2013). In other words, the first conception is focused on the defence of the market process in itself and for itself while the second is polarized on its outcome. The first approach conceives the competition in agonistic terms. Therefore, protecting competition supposes to keep balancing an unsteady form of market characterized by an effective rivalry between competitors. At the opposite, the second approach does not condemn the dominant position in itself and adopts a very skeptical position on any exclusionary abuse complaint brought by competitors (Van Horn, 2009).

In other words, the economization of competition law enforcement might be all but neutral device. It advocates for paying more attention on what might be at stake for the European competition policy with the current process. We propose, in our contribution, a key to understanding these controversies in terms of competing conventions on competition policy.

Our approach is based on the economics of convention and especially on the concept of convention of the State, developed by Storper and Salais (1997). We propose to extrapolate these ones on the competition policy domain. A convention of competition might be defined as the common consensus or pattern of expectations about the public enforcement of competition laws or as the shared interpersonal views about what is the core purpose of the competition policy. We aim at highlighting the plurality of such conventions and to lay the groundwork for an analysis of their historical dynamics. Our purpose is to explain why only evolutions in the
interpretation of the Treaty the by the Court of Justice of the European Union may set the wheels of a conventional shift in motion.

The case-law of the Court of Justice has crystallized a very specific conception of the competition process. Our purpose in this contribution is to investigate its origin and to question the theoretical economic and political paradigm that underlies the current convention of competition policy. Our main point is to establish that the core difference between this convention and the Chicagoan-inspired more-economic approach mainly lies in the issue of the private economic power and its control by the government through the competition law. The question is all the more important that the recent Post Danmark judgment of the Court of Justice (2012) seems to make a step towards a conciliation between the Commission views and its traditional decisional practice.

We propose to elaborate a reading template of the plurality and the dynamics of such conventions by combining two dimensions. The first dimension deals with government attitude towards the market process and can present three distinct modalities: a *laissez-faire* approach, a definition of the rules of the games, or a direct interventionism. The second dimension holds to its objective regarding the market process. Its main concern might be the equal opportunity to access the market, the fairness of the distribution of wealth or economic power, or welfare maximization\(^3\). The crossings of these variables define several conventions of competition that we propose to characterize by confronting the European case law, economic history, and the history of economic thought.

In this contribution we propose to analyze the dynamics of the conventions of competition within the European context. In a first section, we characterize these conventions. In a second section, we propose to define what would be an ordoliberal convention of competition by highlighting the very specific issue of private economic powers. The third section questions the decisional practice of EU institutions in the light with these conventions and defines what the convention adopted by the EU would have been since the late sixties. Our fourth section presents how this convention is challenged by Chicago-influenced economic and legal scholars and to what extent their views, which constitute an alternative convention, are endorsed by the

\(^3\) We do not discuss the issue of the choice of the most appropriate welfare standard for competition policy enforcement (see Kaplow, 2005). We adopt here the Chicagoan view according to which consumer welfare is the best suited. Adopting a total welfare standard might lead to a convention of competition more favorable to industrial policy.
Commission. Finally, our fifth section considers the plausibility of a reversal of the CJ jurisprudence that may initiate a conventional shift.

I – On the plurality of conventions of competition

We first present our theoretical framework (a) before characterizing the different conventions of competition (b).

a) Dynamics of conventions and jurisprudence

We define conventions as “shared interpersonal logics how to coordinate and to evaluate actions, individuals and objects in situations of uncertainty” (Diaz-Bone, 2009). In a context in which a plurality of possible rationalities might be implemented, “conventions are socio-cultural resources for the coordination between actors” (Diaz-Bone, 2009). A convention may be useful to coordinate and to evaluate action but as well to form some patterns of expectations about public policies.

Within the ‘économie des conventions’ theoretical field, we mobilize the concept of conventions of the State, as first defined by Storper and Salais (1997). Such conventions describe the shared expectations about government interventions. Storper and Salais distinguish three conventions. A first one is the convention of the ‘external’ State. Government intervention is not only expected by economic actors but also this one will take place in a very specific position: outside and above the action itself. Government is therefore viewed as a general interest minded actor, all-powerful, all-knowing and benevolent according to the model of traditional public economics. A second convention is the “convention of the absent State”. Economic operators do not expect an external intervention and the government itself acts in order to minimize its interferences with economic transactions among private sector entities. Liberalization policies and the recommendations of the new public economics make sense within such logic. A last convention is the one of the “situated State” in which government interacts with private entities on equal terms. Government is neither superior nor absent. This view corresponds to the concept of the subsidiary State. The government intervenes only if necessary to support the collective interaction, without imposing its own preferences.

In a previous article, we have implemented these conventions in the economics of regulation field, with the concept of “conventions of regulation” in order to explicate the dynamics of
liberalization of network industries (Marty, 2006). The transition from a legal monopoly regime to competition was analyzed through the decisional practice of the French competition authority. We have put into evidence the processes by which the legal resources of action provided by the European competition law and the liberalization directives were mobilized by the stakeholders in order to accelerate the conventional change. According to institutional law and economics methods, we do consider that the jurisprudence embodies a social equilibrium between conflicting views about the objectives of laws or between opposite social interests (Kirat and Serverin, 2000). In a Weberian perspective, we also consider that laws provide resources to economic operators empowering them to engage judicial actions aiming at benefiting of a favorable interpretation of the law or at producing an inflection within the decisional practice. In other words, we propose to analyze the active strategies of actors relative to economic regulation not in terms of regulator capture or lobbying but in terms of legal strategies.

We do not consider institutions and particularly legal rules as external constraints for economic actors. We assume that the sense of a rule and its capacity to shape stakeholders expectations cannot be defined outside and before its interpretation through a judicial (or a controversial) decision. We consequently adopt a Weberian perspective (Raveaud, 2008). Institutions cannot be considered as exogenous factors for the stakeholders but endogenous: “institutions are conceived as enacted by actors and the meaning of these institutions for actors is reconstructed. Economic actors contribute to the interpretative process and to the following enactment of the performative reality of institutions” (Diaz-Bone, 2011).

The choice of this method is coherent with our definition of conventions and our view about their dynamics. We see them both in terms of a social consensus, about the expectations on government interventions or judge rulings, but also in terms of equilibrium among conflicting social interests. We do not consider rules as mechanical devices that apply without uncertainty and in a constant way (as the economic analysis of law too often assumes). The law has to be interpreted by judges though its activation in judicial conflicts. In the competition law field, as many others, their rulings are based on precedents but they are not determined by them, as it could be the case under a stare-decisis framework. The balances conflicting interests and interprets in situations what would be both the legislator intent and the current collective expectations.
According to us, the jurisprudence embodies a kind of crystallization of conventions and its evolution conveys their dynamics. We follow the path of Oliver Wendell Holmes in its first *Lowell Lecture* delivered on November 23, 1880: “The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”

Our purpose, in this article, is to apply this model to competition policy or even more precisely to the enforcement of competition law. Our analysis is mainly based on the decisional practice of the European Union institutions in charge of the implementation of competition policy, e.g. the Commission and the European courts of Luxembourg. Contrary to new institutional economics, we do not consider institutions and particularly legal rules in terms of “constraints” for economic action or in terms “incentive devices” (North, 1993). We do not try to assess, as the economic analysis of law does, the efficiency of a given rule or to evaluate the economic performance of the different competition law regimes. We only try to describe how conventions of competition “inscrib[e] general principles of justice” (Diaz-Bone and Salais, 2011) within the competition policy field and shape patterns of expectations of the economic actors on the interpretation of competition law provisions. We also strive for analyzing the process by which such conventions may evolve in the environment of a predominantly judge-made law. In this sense, we try to answer to one of the research questions opened by the German Historical School of economics about institutions e.g. “when and why do the institutional arrangements of a society change?” (Kocka, 2010).

**b) The conflicting conventions of competition**

We propose to distinguish between different possible conventional fields in matters of competition policy through two dimensions. The first one is defined by the possible attitudes of government towards the market process and a second one defines the objectives assigned to the competition policy.
The models of intervention take three different forms. A first one corresponds to a *laissez-faire* approach. A second lies on an intervention aiming at defining the rules of the game in order to maintain a free and an undistorted competition and to provide guarantees against the concentration of economic power. A third is a direct intervention on the economic process in order to implement governmental objectives.

The second dimension deals with the objectives of competition policy and to some extent with the expectations about the result of the competition process. A first objective consists in ensuring equal opportunities for all economic actors, for example in terms of market access. A second one deals with justice concerns. Among the objectives of the competition policy, the fairness of the distribution is taken into account. The role of the competition law might be also conceived in terms of re-equilibration of economic powers (see, for example, the notion of abuse of economic dependence situation). The objective is more far reaching than the first one. Removing barriers to entry do not longer appear as sufficient. The objectives of the competition policy may be defined in terms of market structure or of dispersal of economic power. The last modality is certainly the more obvious: the purpose assigned of the economic process (and of the economic policy as a whole) is to maximize the social or the consumer welfare.

Crossing these different modalities lead to define several conventions of competition.

The intersection of a *laissez-faire* policy and a welfare maximization objective defines a manchesterian convention of competition. This one is closely linked to the convention of the absent State. We have to note that an Austrian economics based view about competition policy might be linked to this configuration. Contract law and civil law provisions might be considered as sufficient to protect the market process. No specific set of rules and no dedicated government interventions are needed according to this theoretical perspective. We will see as well that contemporaneous Chicago antitrust law and economics converges towards this convention.

On the contrary, if we still consider the welfare maximization as the main purpose and if we admit an intervention on the market process, we might be closed of planning system logic. If the purpose is to obtain a given industrial structure or to reach a given distribution within the society, the convention at stake echoes back industrial policy logic. Within this convention, the government is not an impartial arbiter or a regulator but an active and dominant player
that defines collective priorities (Warzoulet, 2008). The convention of the external State underlies this logic.

A last configuration, in which a direct intervention on market process result might be envisaged, corresponds to an objective in terms of freedom to access or in terms of undistorted competition. It may be representative of the current European competition policy. The competition enforcement may go as far as counteract the result of the market process and support an economic actor in order to protect a given structure of competition. The competition policy might lead to an asymmetric regulation of competition to the detriment of the dominant undertaking. The activation of the essential facilities doctrine in the EU competition case law, at the opposite of the US practices, is emblematic of such a convention (de Hauteclocque and al., 2011). As we will see, an ordoliberal convention might be quite different as government intervention is rather limited to edict general rules and to guarantee an undistorted access to the market. This kind of convention supports an enforcement policy whose final objective consists in maintaining a given structure of the economy or implementing ‘redistributional’ policies, in terms of market power. It was for example the case for the US antitrust policy during the second term of J.D. Roosevelt. As we will see, the Alcoa decision of 1945 is the more striking example of such a convention. In addition, such a convention was not so far from the position of the First Chicago School of Antitrust, led by Herbert Simmons, as we will see.

The last conventional scheme can be obtained by crossing an intervention on the rules of the game and a focus on the sole welfare dimension. This convention undoubtedly echoes back the case of the Second Chicago School of Antitrust. It differs from its predecessor mainly by its lack of concern about distributional issues and its polarization on the consumer welfare maximization. Indeed, the Second Chicago School, renouncing to the Henry Simons’ heritage (van Horn, 2010), considers that the market behavior of a dominant undertaking, even a monopolist, has only to be sanctioned in very specific situations. Implementing a price mark-up is not only considered as legitimate but also as welfare-enhancing for the whole economy. As markets are considered as self-regulating, such a practice both awards the initial investments realized by the current dominating firm and incentivizes its competitors, who ambition to conquer such a position in the future, to invest and to innovate. In addition, according to Chicagoan scholars, natural barriers to entry are very uncommon. In most cases, they are view as the artificial product of government regulations, resulting from capture strategies (Hovenkamp, 1985). The Chicago School-influenced lawyers and economists are also skeptical about leverage strategies by which a dominant firm on a
given market has both the possibility and the interest to extend its dominance on another connected market or on an upstream or a downstream market in the same vertical chain, as for instance the Microsoft and Google cases illustrated. In other words, the validity of most of the exclusionary abuse incriminations is put into question.

As we have already noted, the Second Chicago School has evolved towards a more *laissez-faire* approach over time, becoming more and more skeptical about competition laws. The risk of capture by competitors, the possibility of false positive decisions, and its skepticism about the capacities to construct a robust theory of competition damage and to define and to implement effective remedies (Bougette and Marty, 2012), lead Chicagoan scholars to advocate for an *antitrust modesty* (Crane, 2007) and to renew with a very conservative view of competition law enforcement bordering on Austrian views or classical *laissez-faire*. The Milton Friedman (1999) views embody such a shift towards this revival of the *laissez-faire* convention, significantly different than the economic based rule of reason firstly promoted by the Second Chicago School: “My own views about the antitrust laws have changed greatly over time. When I started in this business, as a believer in competition, I was a great supporter of antitrust laws… But as I watched what actually happened, I saw that, instead of promoting competition, antitrust laws tended to do exactly the opposite, because they tended, like so many government activities, to be taken over by the people they were supposed to regulate and control. And so over time I have gradually come to the conclusion that antitrust laws do far more harm than good and that we would be better off if didn’t have them at all”.

We propose to present in our next sections these different conventions (presented in the table *infra*) and to formulate hypothesis about the EU competition trajectory across them by putting the accent on the role of the jurisprudence.
Table 1: Conventions of competition

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<thead>
<tr>
<th>Government main objectives</th>
<th>Government attitudes towards the market process</th>
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<tr>
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<td>Laissez-faire</td>
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<td>Equal opportunities to access the market</td>
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<td>Distributional concerns</td>
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<td>Efficiency</td>
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<td></td>
<td>Laissez-faire convention</td>
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<td>Second Chicago School (current) and Austrian School</td>
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<td>Absent State convention</td>
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<td>Effects-based approach convention</td>
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<td></td>
<td>Second Chicago School (original)</td>
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<td>Planning system</td>
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<td>Ordoliberal convention</td>
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<td>European integrationist convention</td>
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<td>Colbertian industrial policy</td>
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<td>External State convention</td>
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Indeed, analyzing such conventional dynamics supposes to question the economic history, the history of economic thoughts, and the legal history. Paying such attention appears to us as particularly pertinent in the case of competition policy (Giocoli, 2012) as we specifically consider the case of a mainly judge-made competition policy. The importance of the case law results from the vagueness of the articles of the Treaty of Rome on competition. This vagueness opens the door for a large margin of appreciation and interpretation by the European courts. We may also note the US situation is roughly comparable considering the vagueness of the Sherman Act and the primary role of the Supreme Court. A judicial (or even a quasi-judicial) enforcement model is very interesting to analyze the dynamics of conventions as the rule of precedent leads to use in current cases “old legal principles [that] have been inspired, either directly or indirectly by economic reasoning” (Giocoli, 2012). If the case law integrates ‘old’ economic ideas, it remains essential to assess them under the light of the specific circumstances of the case but also of the historical environment. We are conscious that, in the European case, such a choice may lead to
underestimate the influence of political choices, especially coming from the European Council. However, we conceive the European competition policy as a dynamic of a quasi-autonomous process of judicial regulation set in motion both by the Commission and by interested parties who activates the legal resources offered by the Treaty (Cohen, 1995).

II – The principles of an ordoliberal convention of competition

Our purpose, in this second section, is to present the constitutive principles of an “ordoliberal” convention of competition policy. We aim also at establishing its intellectual connection with the First Chicago School. We first adopt a history of economic thought perspective (a) before analyzing the recommendations of this convention, in order to confront it, in our next section, with the European institutions decisional practice (b).

a) A neoliberal view of competition policy

The Manchesterian tradition of economic liberalism advocates for *laissez-faire*. In this perspective, competition policy, if necessary, has to sanction only the operators that have infringed market rules. Even more, Austrian economics tradition scholars consider that competition laws themselves are unnecessary and potentially harmful. The ordoliberal tradition and the First Chicago School diverge from such views. The experiences of the failure of the first German law in 1923 during the Weimar Republic (Gerber, 1998) and of the Great Depression of the thirties convinced many scholars that the old-fashioned liberalism has to be reformed. Markets no longer appear as self-regulated. Competition is no longer seen as a natural process. The concentration of economic power, stemming from the competition process, is seen as a threat not only for the competition process itself but also for economic and political liberties.

We may easily connect the ordoliberal convention with the last thirties neo-liberalism, especially with the views expressed during the *Colloque Walter Lippmann* in 1938. This common root explains the coherence between the ordoliberal conceptions and the First Chicago School ones (Van Horn, 2009).

Indeed, in the last thirties, the first Chicago School took very aggressive positions in matters of antitrust laws enforcement, putting down the use of the rule of reason to the profit to formal rules and disapproving the acquisition of substantial market power “regardless of how reasonably that power may appear to be exercised” (Simons, 1934). The School and its figurehead, Henry
Simons, start to consider the large undertakings and the subsequent concentration of market power as a threat for the competition process and political liberties. The dispersal of economic power, and not the economic efficiency, is considered as the main purpose of antitrust. According to Simons (1948), “the great enemy of democracy is monopoly in all its forms”. In the last thirtyies, the Chicagoans supported antitrust enforcement as a tool to thwart against the concentration of economic power.

Simons has gone as far as envisaging clear-cut solutions to solve this issue as dismantling monopolies or bringing antitrust suits against any firm who acquire a monopoly position, even on its own merits. In this sense, the normative views of Simons were coherent with the ones expressed by Judge Learned Hand in his emblematic ruling in the Alcoa case, recommending that antitrust laws prevent the dominance of an industry by a sole undertaking. If we consider our table, such a convention may be located at the intersection of a concern about a fair distribution of market power and a judicial activism aiming at protecting the market process.

**b) An essay of definition of an ordoliberal convention of competition**

This “old Chicago School” convention is closely interlinked with the ordoliberal one (Köhler and Kolev, 2011). The Simmons’ *positive program* for neoliberalism and the ordoliberal convention shared the same views about the necessity of relying on a ‘strong State’ for implementing the rule of law in order to ensure the sustainability of the competitive process. However, the tensions that have arouse during the *Colloque Walter Lippmann* between von Mises and Rüstow have prefigured the dividing lines within the Mont Pèlerin Society between Chicagoans and ordoliberals (Denord, 2008). Two neoliberal views draw into conflict: a “unstrained laissez faire” and a “laissez faire within rules” (Kolev and al., 2014). In the first Mont Pèlerin Society conference, Eucken, following Simons’ legacy, advocates for a positive competition policy aiming at establishing and preserving the rules of game.

According to Simons, the intervention has to be oriented towards these rules (the economic order) and not towards the moves of the game e.g. the economic process. However, his focus on economic freedom constitutes one of the stumbling blocks with the future promoters of the Second Chicago School. The first objective of an ordoliberal convention is to allow economic actors to benefit from an undistorted access to the market. This freedom will inexorably be
translated by the market process into welfare maximization. The welfare appears as a by-product of economic liberty. Competition policy has not to define such a result as its objective.

Government intervention, and especially a strong defense of the rule of law, is nonetheless essential to safeguard competition. The reason is chiefly that competition is not viewed as a natural state (or a spontaneous order) but a construct order. In addition, competition does produce its effects only if its structure is uncorrupted. If the ordoliberal principles lead to ban any government intervention within the market process, in order to achieve a given purpose, its actions to preserve competition order have to be strong enough to prevent powerful economic entities from abusing from their coercive powers against smaller competitors or consumers.

The Gesellschaftspolitik supposes to limit government interventions by constitutional rules. The ordoliberal convention bans any discretionary intervention whose purpose would be to interfere with it. According to John Locke’s views expressed in its Second Treatise on Civil Government (1690), the predictability of public action and the prohibition of any discretionary interventions constitute some of the essential prerequisites for the development of individual liberties. The government intervention must pertain to an indirect regulation (an Ordnungspolitik), focused on the market form and must avoid distorting individual choices.

Providing guarantees against the exercise of public economic powers does not rule out prohibitions against the exercise of private ones. Whatever its origins, the concentration of economic powers is analyzed as a threat for economic liberties. As a consequence, competition policy has to thwart such a concentration or, if it is not possible, to forbid dominant firms to use their market power. The experience of the cartelization of the German economy has played a crucial role in shaping the ordoliberal theoretical recommendations in terms of competition policy. Considering the German experience, ordoliberalists consider that the concentration degree of the economy might be well beyond what would be necessary in terms of productive efficiency. Only “unavoidable monopolies” should be tolerated. However, they have to be submitted to a specific regulation by an independent regulatory body.

The ordoliberal conception of competition policy does not lead to condemn the dominant position. The dominant firm is sanctioned only if it uses its coercive powers against its competitors. In this sense, ordoliberal normative views on competition law enforcement cannot be assimilated to its contemporary Structural School of Harvard’s ones. The dominant position
has not to be sanctioned *per se*, whatever the dominant undertaking’s conduct. It is possible to establish a link between this view and the concept of special responsibility of the dominant firm, stemming from the Court of Justice case law, with the “as if” requirement. Within this framework, the competition authority has to sanction any market behavior of a dominant firm that tends to impair its competitors access to market (*Bebinderungswettbewerb*). If the underlying logic draws closer to the *no-economic sense* test, it might be more far reaching. Any practice resulting in putting a competitor at a disadvantage but even if it would be profitable for the dominant firm might be seen as anticompetitive in this convention. This view will be particularly debated in the CJ decisional practice related to loyalty rebates.

To conclude, the ordoliberal convention differs from the industrial policy one as it refuses to intervene directly within the market sphere in order to correct the market outcome or to orientate it towards a collectively preferable allocation. However, it also differs from the *laissez-faire* one as the government has to play as a market regulator that defines the rules of the game and sanctions any attempt to the competitive order (*Wettbewerbsordnung*). In addition, if the access to the market is undoubtedly the main concern in such an ordoliberal view, it remains that, to some extent, some ordoliberal scholars promote an objective of substantial equality of economic powers. So if in Table 1 above the position of the ordoliberal position is undoubtedly within the second column, it also might be at the second line (distributional concerns) not mandatory only at the first (level playing field). Anyway, according to ordoliberals, the sole purpose of competition policy cannot be the consumer welfare maximization (Giocoli, 2012).

**III – The European courts case law: building an ordoliberal convention of competition?**

In this third Section, our purpose consists in assessing the ordoliberal influence in the definition of European competition policy in its early years (a) and in presenting the teleological convention built by the European courts (b).

**a) Searching for the ordoliberal soul of Article 102 EU**

If the Ordoliberal School had a significant influence on the 1957 German law against restraints of competition (*Gesetz gegen Wettwerbsbeschränkungen*, GWB), its print on European competition policy provisions was indirect and imperfect. Indeed, the Treaty of Rome was a compromise between divergent views, both about the role of competition policy and about its enforcement modalities.
About the primacy of competition policy concerns, the views of the German representatives were slightly opposite than those of the French and the Italian, as these ones were more favorable to an industrial policy-based European model. Concerning the structure of the competition law enforcement, the German views conflicted with the French ones, which are more favorable to an administrative model of enforcement, based on their experience with the 1945 ordinance on prices and the 1953 decree relative to anticompetitive agreements (Marty, 1999). Even if some eminent members of the German delegation involved in the preparation of the Treaty were influenced by ordoliberal views on competition, the Treaty does not ban cartels and seems to be deceptive with respect to the European Coal and Steel Community (ECSC) model and especially to its High Authority in charge of antitrust responsibilities (Warlouzet, 2010). In addition, the vertical balance of powers was not clear. The enforcement by the Commission might be challenged.

As Akman (2009) states: “Article 82EC was not perceived as a fully enforceable provision as such”. This surely explains why, for many years, it was feared that Article 82EC would remain a ‘dead letter”. Nevertheless, the interpretation of the article opened the door for a first attempt of the increase in power of the ordoliberal influence. This one was favored by the activism of the first president of the European Commission, Walter Hallstein, and by the one of the first European Commissioner to competition, Hans von der Groeben, who was one of the authors of the Spaak Report of April 1956. The Commission with its Regulation 17/62 attempts to give to the European competition policy construction an ordoliberal spirit. It attributed strong powers to the Commission but led, in the same time, to its harmful engorgement by making mandatory the notification of any agreement among firms whatever their relative sizes on the market. As, the Member States refused to grant the Commission the powers to proceed through block exemptions, the situation led to a failure. The enlargement to the United Kingdom, with a very different legal tradition in terms of competition law, constituted another obstacle for the Commission “ordoliberal” activism.

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4 It was for example to case of the deputy of Ludwig Erhard, Minister of Economics from 1949 to 1963, Alfred Müller-Armack
5 Articles 86, 82 and 102 correspond to the successive numbering of the same article over the Treaty revisions.
6 The Report took a favorable position on a per se prohibition of agreements, contrary to the Treaty (Leucht and Seidel, 2008).
7 36,000 notifications for the year 1963 (Warzoulet, 2008).
8 The debate on the merger regulation during the seventies is a second illustration of the difficulties of the Commission to implement an ordoliberal agenda.
b) The building of the teleological convention by the EU courts

Therefore, the core meaning of the articles devoted to competition purposes has emerged progressively mainly through the Court of Justice decisional practice, leading to what David Gerber (1998) named a teleological approach. The competition law enforcement becomes the privileged levy to construct an internal market based on a free and undistorted competition.

The interpretation made of the Article 102 was significantly broader than its strict wording. As it is also the case for the Sherman Act, it appears particularly difficult and consequently speculative to reconstruct the legislator(s) intent. The indeterminacy of the purpose and the vagueness of the wording of Article 102 offer a large spectrum in terms of judicial interpretation. Such situation is not so original, because of the open texture of legal provisions their effective meaning is provided by their interpretation by competent judicial courts. In other words, the sense of the Article 102 could not be provided by its wording but through the historical sedimentation of its implementation. This one is the common and complex produce of conflicting views, interpretations, and strategies of several stakeholders, as the Commission, who enforces this article, the dominant firm who try to promote a favorable interpretation, its competitors who strategically use it as a resource for strategic action, and the European courts who are in charge of the judicial control of the Commission decisions, and, in the case of the Court of Justice, of the interpretation of the Treaty.

If Akman (2009) shows that in the early years of Article 102 enforcement the protection of the market process did not trump economic efficiency concerns, the ordoliberal influence was more decisive in the Court of Justice decisional practice (Lovdahl-Gormsem, 2006). For instance, Continental Can (case 6-72) consecrated in 1973 an extension of the scope of the article 102 from the exploitative abuse to the exclusionary ones. As Akman (2009) quotes “as such, it led to Article 82EC being predominantly used for a purpose for which it was not designed”. This shift towards a different convention than the strictly ordoliberal one justifies the position of the traditional European Court of Justice case law in Table 1 and testifies on the capacity of the judicial interpretation to initiate a shift towards a new convention of competition.

According to Gerber, Continental Can can be interpreted as “the apotheosis of the teleological method”. Competition policy shifts from the sanction of the abuses of market power (e.g. a strictly ordoliberal view) to the limitation of the powers of dominant undertaking in order to build the internal market. Continental Can leads to consider that a merger operation may lead to an
abuse of market power, irrespective of any consideration about efficiency effects. As Lovdahl-Gormsen (2006) considers “It can be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure, which seriously endangers the consumer’s freedom of action in the market such a case necessarily exists if practically all competition is eliminated”. The dominant firm may impair the competition process through its intrinsic market power and might be sanctioned on this basis. The same logic was at stake in Commercial Solvents in 1974 (case C-6-7/73). The Court considered that a vertically integrated group might potentially eliminate any competition by acquiring the capacity to impair the access to market to its competitors. The issue of the impact on consumer welfare was not raised. The freedom to entry becomes one of the most important purposes of the competition policy (see also Hugin v Commission, case 22/78, 1979). Even more important, in its judgments the CJEU (and more broadly the EU courts) tends to equate restrictions of freedom to compete on an undistorted basis or to access the market with an abuse of dominant position. Essential facilities doctrine based cases could provide good examples of such an attitude (de Hautecloque and al., 2011).

Such an adherence to ‘ordoliberal’ views is not contingent and produces long term effects, notably because of the rule of precedent but also because of the strength of the integrationist perspective. In 2007, the ruling of the General Court (yet the Court of First Instance) in Microsoft was read by Ahlborn and Evans (2009) as the mark of the persisting influence of the ordoliberal perspective. According to them, the ordoliberal influence (we would say convention) might be revealed by three characteristics: i) a low threshold of dominance, ii) a form-based approach towards unilateral practices leading to quasi per se prohibitions for dominant operators in the cases of price discrimination or loyalty rebates, and iii) a structural presumption according to which a competitive market is characterize by an effective rivalry between firms.

To sum up, it appears that the Treaty of Rome did not embody the essential features of an ordoliberal convention of competition. However, the decisional practice of the Court of Justice during the late sixties and the seventies progressively shaped a very specific convention of competition more ordoliberal but different than this ideal-type in terms of interventionism. The purpose to construct the internal market leads to thwart dominant undertakings market power and consequently to implement something like an asymmetric regulation of competition.
We have to underline that such views also echo back the US decisional practice before the rising of the Second Chicago School. As we have seen, efficiency concerns were no more predominant. As Judge Hand stated in *Alcoa*, the Sherman Act aims at preserving a situation of effective competition. This decision, in a margin-squeeze case, insisted on the necessity for the dominant operator to set its prices and to define its commercial strategy in a way allowing its competitors to remain into the market and to benefit from a fair “living profit”. On the public policy side, such a view of antitrust means that the liberty to access the market and the preservation of a competition structure conceived as a situation of an effective rivalry among firms have priority over the other objectives. In a nutshell, the purposes of the antitrust laws were more interpreted in terms of a prevention of any exercise of coercive powers resulting from market dominance and in terms of dispersal of economic power rather than economic efficiency, whatever its operating definition. Such a view is coherent with the theoretical positions of German ordoliberal, who considered that the economic efficiency is the result of a free and undistorted competition process and not the objective in itself of the competition policy.

**IV - A convention of competition challenged by the more economic approach**

This section deals with the differences between what might appear as two very different conventions of competition policy between “ordoliberals” on the one side, and “Chicagoans” on the other side. Their conflicting views about unilateral practices treatment bring to opposition European and US antitrust practitioners in numerous cases (*Microsoft*, *Intel* or *Google*) might be analyzed through a conventional opposition. We present the Second Chicago School of competition law and economics approach (a) before describing the implementation of a more economic approach of Article 102 enforcement by the Commission (b).

**a) Consumer welfare as the sole legitimate purpose of competition laws: the Chicagoan convention**

If the first Chicago School incarnated a convention closely related to the ordoliberal one, a dramatic theoretical evolution took place at the end of the Second World War. Indeed the historical origin of the backlash goes back at the early post-war years, with the arrival of Friedrich von Hayek at Chicago and the financial support of the Volker Fund that helped to launched successively the *Free Market Study* project and the *Antitrust Program*. The official theoretical birth of this competition law and economics school of thought might be dated at the end of the *Free
Market Study project. It was in fact definitively shaped by the several works engaged during the Antitrust program from 1953 to 1957 (Van Horn, 2010). The paper written in 1956 by the co-heads of these two programs, Aaron Director and Edward Levi, titled Trade Regulation, constitutes the manifesto of the Second Chicago School of Antitrust.

This seminal paper develops a long discussion of the Alcoa decision of the Judge Learned Hand that seems to personify the exact opposite of the views defended by Chicago scholars. Their views, according to which consumer welfare enhancement is the sole legitimate purpose of competition laws, that will move into the head in the US case-law twenty years later with the GTE Sylvania decision of the US Supreme Court in 1977. This paper highlights the constitutive features of the Chicago views on Antitrust: especially the accent puts on the economic assessment of the consequences of market practices on the consumer welfare. In a nutshell, the Second Chicago School rehabilitates the dominant position, considering that the search and the exercise of market power might be welfare enhancing (Van Horn, 2010).

The Director and Levi’s critics against the Alcoa decision give the structure to their seminal paper of 1956 that summarize some of the main results obtained through the Free Market Study project and the Antitrust Program. According to them, this decision in particular and the antitrust enforcement in general do not rely on sufficiently well-grounded economic theories. Decisions like Alcoa appear to them as outside the scope of antitrust, leading the antitrust enforcement towards “laws of fair conduct, which may have nothing whatever to do with economics”. Alcoa is view as a decision arbitrating between different and competing objectives. According Director and Levi, protecting small firms or operators without market power “in spite of possible costs” leads to sacrifice final consumer interests by impairing economic efficiency. All the principles of the Second Chicago School are in places: the primacy of economic efficiency, the advocacy for the rule of reason (the position will become different forty years in reaction against the emergence of Post-Chicago economics), the reversal of the burden of the proof of a consumer harm to the profit of the defendant, the efficiency defense, and the disregard to market power issues.

Director and Levi were particularly skeptic on the application of antitrust laws “to firms of less than monopoly size or to firms which acquired their size without combination”. By doing so, they move aside from the Simons’ view and break antitrust enforcement away from the issue of the (mis)use of economic power. Moreover they make clear their skepticism about exclusionary
abuses, especially in the case of anticompetitive leverage strategy, skepticism that constitutes the ‘hallmark’ of the Second Chicago School that we propose to name the Chicagoan convention of competition (Baker, 2013).

According to this convention of competition a firm has not be sanctioned if it has acquired its market position because of its own merits, business acumen or even historic accident (US DoJ, 2008). Such issue is all the more contemporary if we consider the current transatlantic debates aroused by the Google case… The risk of induced by an over-enforcement of antitrust rules is already pointed out: loosing economic gains resulting from the productive efficiency and consequently harming the final consumer. The Second Chicago School finally pleads for a negative type of competition policy. Because of the skepticism about government interventions and the risks of capture by firms they advocate for a governmental intervention limited to the removing of restraints to trade and barriers to entry. The monopoly in itself does not longer be seen as a problem if it remains contestable and if it was obtained by the merits.

**b) The long walk towards a more economic approach of Article 102**

This theoretical framework provides the main basis of the criticisms addressed to the European decisional practice since the middle of the last decade. The European case-law is denounced as too formalistic and excessively based on *per se* rules that do not allow taking correctly into account the net effects of the market practices on welfare. The EU courts jurisprudence appears, according to this view, as excessively unfavorable to dominant undertakings. The decisional practice is denounced as too protective for small competitors and is criticized as insufficiently concerned by consumer interests.

In other words, the convention of competition is challenged in itself as the main legitimate purpose appears to be the welfare and no longer distributional concerns or the market freedom. A monopoly might be considered within this convention as favorable to consumers while it cannot be the case in the traditional one. The lack of concern about efficiency dimension was already at the origin of consequential annulments of Commission’s decisions in the domain of the control of mergers and acquisitions in the last decade. Leading scholars advocate for the generalization of this evolution towards such effects-based approach to the core of the European Competition Policy e.g. the sanction of the abuses of dominant position. The sharpest criticisms are made on the basis of a European lateness concerning the introduction of ‘modern’ economic
theory within the competition policy field. The indirect protection granted to competitors through the notion of ‘the special responsibility of the dominant firm not to allow its conduct to impair genuine undistorted competition’ is denounced as a persistence of old-fashioned US structuralist school based views (Géradin and Petit, 2010).

In addition the adherence of the Commission to this new convention of competition may be discussed (Petit, 2009). The 2009 Communication goes halfway towards the integration of effects compared with the 2005 project. In the 2005 paper, consumer welfare was defined as the objective underlying the article 102. The scope is by far larger in the 2009 communication. For instance the Commission states that an increase in prices does not constitute the only way for a dominant firm to injure consumers. Limiting the quality of products or the scope of the offer might be sufficient to characterize an abuse of dominant position.

Moreover, the assessment of effects is not mandatory in the case of market practices led by former legal monopolies. Such firms have certainly not obtained their positions through their merits. Nevertheless they constitute a large part of the undertakings involved in the article 102 and the protection of their new competitors might not benefit to consumers. In the same way, an abuse may characterize even if the exclusion has not been effective. Indeed, if a market practice of a dominant undertaking tends to exclude rivals on another basis than the merits, it can be sanctioned under article 102 even if no effective exclusion still occurs. The reason is the damage to competition might be irreversible if the sector is characterized by significant barriers to entry.

Even if the 2009 communication did not apply for the case of Intel decision taken in May 2009, the Commission had underlined that according the Court of Justice case law the assessment of the effective impact of the practices of the dominant undertaking is not required to characterize an infringement: “For the purposes of establishing an infringement of Article 82 EC, it is not necessary that the abuse in question had a concrete effect on the markets concerned”. Impairing competition whatever the effect is a sufficient basis to sanction a dominant undertaking. So, the “pure” convention of the effects-based approach is not and cannot be really advocated by the Commission. Nevertheless, this “imperfect” economic approach challenges the convention still in course at the Court of Justice.
V – The conditions of a conventional shift: is a reversal in the Court of Justice case law possible?

Even if the Commission progressively welcomes the Chicagoan convention in its enforcement policy (European Commission, 2005 and 2009), the Court of Justice and the General Court seem to be more reluctant to overturn their traditional jurisprudence (a). However a recent case might be interpreted as a precursor of a possible conventional change (b).

a) The European courts case law inertia in debates

Even if the Commission would rally the “Chicagoan” convention, the communication on its priorities in terms of article 102 enforcement (European Commission, 2009) does not engage the Court of Justice. As the Commission states in its 2009 communication: “This document is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the Court of Justice or the Court of First Instance of the European Communities”. As Akman (2013) notes “the CJEU is the final arbiter of EU law and the Commission’s modernized approach can only be valid if the CJEU […] agrees that the Commission’s interpretation conforms with EU law”.

However, the decisional practices of the Court of Justice and of General Court seem to refuse to consider the gains promised by the effects-based approach or to balance in favor of freedom-based considerations against utilitarian arguments as soon as the firsts are at stake. For instance, the standard of proof used to characterize an anticompetitive exclusionary abuse might appear as excessively weak in Chicagoan terms. The effect on welfare may be not taken into account as Microsoft has demonstrated. In this case (case T-201/04). Indeed, the abuse was defined only through the limitation of the choices for final consumers. The General Court also seems to pay insufficient heed to effects in the Michelin II (case T-203/1) relative to loyalty rebates offered by a dominant undertaking. In other words, the criteria as freedom of choice or the preservation of diversity in terms of technical trajectories are criticized as they may lead to protect competitors at the expense of consumers. According to Ahlborn and Evans (2009): “While other areas of EC competition policy had been “modernized” over the years (notably EC merger control and the control of restrictive agreements under Article 81), the policy under Article 82 has remained virtually unchanged over the last 40 years. The Court’s analytic framework is based on concepts and ideas which predate the Chicago and post-Chicago developments in antitrust thinking”.

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Such a resistance can also be illustrated by the *Wanadoo España* and *Deutsche Telekom* cases. These two cases led the courts to reaffirm its principles in matter of treatment of dominant undertakings or, in other words, of economic entities enjoying from private market powers. In *Deutsche Telekom* (General Court, T-271/03) the Court considered that a margin squeeze effects impairs by itself the development of competitors on the downstream market. In *Wanadoo* (General Court, T-340/03), the Court stated that an anticompetitive object is sufficient to sanction a dominant undertaking irrespective of the effective impact of the practice on consumers.

This resistance has appeared as a surprise for economists. Significantly, O. Budzinski painted the situation blacker in 2003 than it has been appeared after: « […] ordoliberal ideas have been second most influential (next to adaptations of workable competition concepts) in the formation of a European competition policy […], although this influence seems to cease presently ». In fact, the Court of Justice is not bound to reverse its decisional practice at the instigation of the Commission.

Finally, as Géradin and Petit (2010) wrote, the Court of Justice, after being at the origin in the sixties of the extension of the domain of the article 102 and who gave its ordoliberal integrationist coloration, is now the main obstacle on the road of a more economic approach in the Chicagoan sense. The General Court decision in *Tomra* (case T-155/06, September 2010), a case involving loyalty rebates, illustrates the persisting influence of a formalistic approach even if the Commission had, in its 2009 communication, opened the door to a defense on the basis of the efficiency gains resulting from rebates schemes9. The ‘old’ case law e.g. the integrationist convention of competition is still applied.

**b) A possible cultural revolution?**

Such attitude leads Géradin (2010) to consider the courts of Luxembourg constitute the main obstacle for a possible conventional shift, by supporting Commission against recourses based on efficiency defense and alternatively by defending, against the Commission, an ordoliberal type conception of competition policy: “the ECJ and the General Court largely supported the

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9 We have nevertheless to underline, following Akman (2013), that the effects-based reasonnings have a better reception by the General Court. It is mainly because the CG performs a control of the manifest error of assessment on the facts.
decisional practice of the Commission, systematically rejecting appeals against these decisions by private parties, often making matters worse by adding a strong ‘ordoliberal’ flavor to their judgments”. The influence of this convention may be assessed through the comprehensive review of EU courts decision performed by Akman (2013). It reveals that the use of freedom-related concepts increases significantly from the mid-1990s, e.g. long after the beginning of the relative decline of the ordoliberalism in EU institutions.

However, the position of the European Court cannot be considered in a too monolithic way. A reversal appears as possible, particularly if we consider its recent case law. Its *Post Danmark* judgment (Post Danmark AS / Konkurrencerådet, case. C-209/10, 27 March 2012) might be interpreted as a milestone in the evolution of the EU Court of Justice doctrine concerning price-based exclusionary practices towards a more economic approach. The Court has adopted a cost criteria proposed by the Commission in its 2009 communication to determine if a given price practice may exclude a competitor as efficient as the incumbent.

As the EU Court of Justice underlined in *Post Danmark*, an exclusionary abuse may be characterized as soon as “the conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition” (§24). An abuse of dominant position is characterized if the dominant undertaking tends to exclude its as-efficient competitors on another basis than the merits (§25).

If the purpose is to shift from a form-based approach to a more economic one (see Petit, 2009), three different tests might be implemented. The best candidate – considering the influence of the US practices - is the ‘consumer welfare’ one. However, two other standards might be used. The first one is the no-economic sense test and the second is the ‘equally efficient operator test’ raised on a shield by the European Court of Justice in *Post Danmark*. This last test may guarantee to undertakings a satisfying level of legal certainty that is essential for allowing them to self-assess the compliance of their market strategies with competition laws. In this sense, it constitutes by far a better standard than the welfare based ones in terms of administrability and in terms of self-assessment. Such a standard allows avoiding decisions in which an abuse might be characterized only because the downstream competitor would not able to operate as efficiently as the
incumbent in this segment. In this sense, it prevents decisions that protect the competitor at the expense of the consumer.

However, it might be seen as excessive to suppose that a new entrant is always able to be as efficient as its main competitor as soon as it enters the markets. When fixed costs are important, when network externalities are significant, a new competitor and perhaps any competitor of the competition fringe cannot be as efficient as the dominant undertaking. Their cost structures will be obviously less favorable. It is particularly the case in high tech sectors and in network industries two of the main contributors for Article 102 case law. Making the sanction contingent to the excluding effect on an as efficient competitor might lead in such cases (network and high tech industries) to false negative cases or in other words to an under-enforcement of competition rules. The ‘as-efficient competitor test’ might not address one of the main challenges of the European competition policy, e.g. ensuring a level playing field. The arguments for relaxing the as-efficient competitor criterion and for using a reasonably as efficient competitor test might be understood in this context.

The reasonably efficient standard is commonly used in the regulatory field, e.g. on an ex-ante basis in order to promote entry or to perform an asymmetric regulation and not so frequently in the competition law field. Nevertheless, competition in the newly liberalized sectors is not characterized by a level playing field. New entrants might be excluded whatever their merits by incumbents whose competitive advantages may be only explained by their former monopoly statute. The Commission admitted in its 2009 Guidance the opportunity to take into consideration in abuse of dominance cases both competitive pressure exerted by even a less efficient competitor and the possibility of a currently less efficient new entrant to overcome its disadvantages as soon as it benefits from the same economies of scale and scope than the incumbent (§ 24) does. So its approach does not preclude using such adjusted tests.

Surprisingly, the European Court of Justice endorses only the as-efficient competitor test. Its standard appears in this sense stricter than the European Commission one. Its position might be seen as more conflicting with its own convention of competition than the Commission one was. The risk of false negative (e.g. to grant an excessive protection to dominant undertakings in the name of consumer welfare maximization) is substantially increased by such a choice. In other words, a ruling as Post Danmark could be interpreted as a possible clue of a conventional shift. However, the reliance on cost-based tests might be a little paradoxical in a Chicagoan convention
of competition theoretically based on the criteria of the net effect on consumer welfare. It pertains to a more economic approach but it cannot be attached to an effects-based one as the assessment only rely on the incumbent costs and never supposed to measure the effect on the markets (Bosco, 2013).

Even if the convention of competition is slightly different from its ideal-type, it remains that the Chicagoan “pro-trust antitrust” bias introduced contrasts with the asymmetrical treatment of the dominant firm in the “integrationist” or “teleological” convention. Minimizing the risk of false positive supposed to accept a greater proportion of false negative decisions. According to Chicagoan views the last are less costly in term of welfare only if markets are self-regulated. The conceptions about the competitive process underlying our different convention of competition are irreconcilable and lead to opposite competition law enforcement logics…

References


US Department of Justice – Antitrust Division, (2008), Competition and Monopoly – Single Firm Conduct under the Section 2 of the Sherman Act, September.


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