

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

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**Introduction<sup>2</sup>**

The European Commission enforcement policy (European Commission 2005, 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, a view that sharply contrasts with Chicagoan one.

The *economization* of competition law enforcement might be all but neutral device. 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 by the Court of Justice (in short CJ) may set the wheels of a conventional shift in motion.

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The CJ case-law 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. The question is all the more important that the recent CJ Post Danmark judgment (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. 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 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 Commission. Finally, our fifth section considers the plausibility of a reversal of the CJ jurisprudence that may initiate a conventional shift.

### **I The principles of an ordoliberal convention of competition**

We define conventions as “shared interpersonal logics how to coordinate and to evaluate actions, individuals and objects in situations of uncertainty” (Diaz-Bone 2011, 46). 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 2011, 46). 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.

The concept of “conventions of regulation” was implemented to analyze the liberalization dynamics 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. Legal resources of action provided by the European competition law and the liberalization directives are mobilized by the stakeholders in order to accelerate the conventional change. A same method can be applied to competition policy.

We do not consider institutions and particularly legal rules as external constraints for economic actors or mechanical devices that apply without uncertainty and in a constant way (as the economic analysis of law too often assumes). 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, 55).

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 case law 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 evolution of law can be explained by: “The life of the law has not been logic; it has been experience. The felt necessities of the time, and 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. We try to describe how conventions of competition “in-scrib[e] general principles of justice” (Diaz-Bone and Salais, 2011, p.14) 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, 50).

Our purpose, in this 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 anti-trust 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, 58). 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, 43): “the

great enemy of democracy is monopoly in all its forms". In the last thirties, 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 Simons' *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 arose 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 et 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. The welfare is seen as a by-product of economic liberty, a result of the market process and not the objective of the competition policy.

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 spontaneous order but a construct one. 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 that must pertain to an indirect regulation (an *Ordnungspolitik*) have to preserve competition order and be strong enough to prevent powerful economic entities from abusing from their coercive powers against smaller competitors or consumers.

Whatever its origins, public or private, 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. T. If "unavoidable monopolies" have to be tolerated they must be regulated by an independent agency.

According to the ordoliberals a dominant firm has to be sanctioned only if it uses its coercive powers against its competitors. In this sense, their views differ from those of Structural School of Harvard's ones, that led to sanction the dominant position *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 CJ 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 (*Behinderungswettbewerb*). 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.

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 consumer welfare maximization cannot be the sole purpose of competition policy (Giocoli 2012).

## **II The European courts case law: building an ordoliberal convention of competition?**

In this 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 Wettbewerbsbeschränkungen*, 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. The primacy of competition policy concerns was challenged by the French and the Italian, more favorable to an industrial policy-based European model. Even if some eminent members of the German delegation involved in the preparation of the Treaty were influenced by ordoliberal views on competition,<sup>3</sup> 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

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<sup>3</sup> It was for example to case of the deputy of Ludwig Erhard, Minister of Economics from 1949 to 1963, Alfred Müller-Armack.

(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<sup>4</sup> 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.<sup>5</sup> 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.

#### ***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 CJ 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 CJ case, of the interpretation of the Treaty.

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 CJ decisional practice (Lovdahl-Gormsem 2006). For instance, *Continental Can* (case 6-72) con-

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<sup>4</sup> Articles 86, 82 and 102 correspond to the successive numbering of the same article over the Treaty revisions.

<sup>5</sup> 36,000 notifications for the year 1963 (Warzoulet 2008).

secrated in 1973 an extension of the scope of the article 102 from the exploitative abuse to the exclusionary ones. As Akman (2009, 296) 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 CJ case law and testifies on the capacity of the judicial interpretation to initiate a shift towards a new convention of competition.

According to Gerber (1998, 116): *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-Gormsem (2006, 12) considers “[i]t 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 CJ 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 CJ tends to equate restrictions of freedom to compete on an undistorted basis or to access the market with abuses of dominant position.

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 GC (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.

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 CJ 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.

### **III 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 launch 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.

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” (1956, 284). 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).

The risk of induced by an over-enforcement of antitrust rules is already pointed out: losing economic gains resulting from the productive efficiency and consequently harming the final consumer. It leads finally to plead for a negative type of competition policy. Governmental intervention should be 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.

The 2009 Communication goes halfway towards the integration of effects compared with the 2005 project. While, consumer welfare was defined as the objective underlying the article 102 in 2005, limiting the quality of products or the scope of the offer might be sufficient to characterize an abuse of dominant position according to the 2009 communication.

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 because the damage to competition might be irreversible in sectors characterized by significant barriers to entry.

Impairing competition whatever the effect is sufficient to sanction a dominant undertaking. Even if, the “pure” convention of the effects-based approach is not and cannot be really advocated by the Commission, this “imperfect” economic approach challenges the CJ still dominant convention.

### *c) The European courts case law inertia in debates*

Even if the Commission would rally the “Chicagoan” convention, its 2009 communication does not engage the CJ. As Akman (2013, 5) 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 CJ and GC decisional practices seem to refuse to consider the gains promised by such approach or to balance in favor of freedom-based considerations against utilitarian arguments. For instance, the effect on welfare may be not taken into account as in the cases of *Microsoft* (case T-201/04), *Michelin II* (T-203/1), *Deutsche Telekom* (T-271/03) and *Wanadoo* (T-340/03) have demonstrated.. If criteria as freedom of choice or the preservation of diversity in terms of technical trajectories are considered as sufficient, they are criticized as they may lead to protect competitors at the expense of consumers. According to Ahlborn and Evans (2009, 16): “[...] 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”.

This resistance has appeared as a surprise for economists. Significantly, Oliver Budzinski (2003, 14) painted the situation more dark 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 CJ is not bound to reverse its decisional practice at the instigation of the Commission.

Finally, as Gérardin and Petit (2010) wrote, the CJ, 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 GC 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 schemes. The “old” case law e.g. the integrationist convention of competition is still applied.

#### ***IV Conclusion***

Such attitude leads Gérardin (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 decisional practice of the Commission[...]often making matters worse by adding a strong ‘ordoliberal’ flavor to their judgments.” (Gérardin 2010, 2) The influence of this convention is confirmed by the comprehensive review of EU courts decision performed by Akman (2013).

However, their position cannot be considered in a too monolithic way. A reversal appears as possible, particularly if we consider the CJ *Post Danmark* judgment (Post Danmark AS / Konkurrencerådet, case. C-209/10, 27 March 2012) that might be interpreted as a milestone in the evolution towards a more economic approach concerning price-based exclusionary practices. The CJ 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 CJ underlined in *Post Danmark*, an exclusionary abuse may be characterized as soon as the dominant undertaking tends to exclude an 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) the ‘consumer welfare’ test may appear as the best candidate – considering the influence of the US practices may be one. However, the ‘equally efficient operator test’ is raised on a shield by the CJ because it guarantees 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, new competitors are not always able to be as efficient as the incumbent as soon as they enter the markets. When fixed costs are important, when network externalities are significant, smaller firms 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 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. 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 CJ does not endorse this option. 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.

Even if such test does not imply a rallying to a Chicagoan “pro-trust antitrust” convention, it 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 because markets are seen as self-regulated.

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