Cartel and Monopoly Policy

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Firm strategies are deeply affected by the legal framework which rules the relationships between the economic agents regarding monopoly and cartel policy. Undertakings have to manoeuvre through a complex universe. Not only must they master the rules of the economic game of competition but also the legal rules of competition law which are characteristic of competition and add up to the aforementioned.

First, we must point out that monopoly and cartel policy does not cover all of competition law, but at the same time, it goes beyond. The attention drawn to monopolies and agreements between the firms is at the heart of modern competition law (more often referred to as "antitrust" in the American context and as "competition law" in the European one). Competition law at large covers, besides anticompetitive practices specially agreements and concerted practices that restrict competition and abuse of dominant position), the restrictive practices, merger policy[1], State aid control and in some countries, unfair competition. Monopoly and cartel policy goes somehow beyond competition law alone. Taking into account the competition goals is essential to the enforcement of competition law this is why it is useful to make those goals clear.

The consequences of competition law can vary considerably from one country to another (or from one period to another), whereas general rules and principles are worded in a fairly similar way. Therefore, it is essential to identify the intention of the law-makers and the

[1] Voir chapitre 44

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priorities of the authorities in charge of competition law enforcement. Competition policies depend on various views on what competition should be how firms should develop and interact with one another. Given the variety of these conceptions, priority must be given to the examples of the United States of America and the European Union. Those two areas which gave themselves a complete system of competition regulation that are the most influential ones in the world. By the way, we can also note the diversity and possibly the convergence of competition policies.

At a high level of abstraction, we can consider that every competition law tends to ensure a well-functioning market, by punishing free trading and competition system infringements. Such a general definition of the purpose of competition law remains highly uncertain for the firms that are the main recipients of that corpus of rules. Indeed, how can they be sure they are complying with competition law?

In fact, the concepts of « competition » «market » or else « free trading » are far from being univocal. To provide economic agents with appropriate rules of conduct for the economic agents, we must outline the specific substance of those concepts. There are as many monopoly and cartel policies as there are economic theories. One of the salient characteristics of competition policies is their strong connection to the economic analysis which is everything but monolithic.

Incidentally, the dependence of competition law on economics means that antitrust is an « economic law » in various ways. The subject of that law is economic since it is about the behaviour of economic agents. Then, that law pursues an economic purpose since it consists in reaching certain economic goals that were considered desirable. Finally, that law is also economic because of its methods since the enforcement of rules implies the understanding of reality through concepts that were originally economic ones (such as the market or the abuse of dominant position) and the implementation of an economic reasoning (for instance the evaluation of a practice through an assessment of costs and profits linked to that practice).

The second specificity of the competition policy stems from the fact that it often incorporates objectives that cannot be deduced from competition, whatever it means. Competition law can indeed be summoned to reach goals which are political (such as the European integration), economic (such as the stimulation of innovation) or social (such as the generalization of the access to services considered essential). Due to the multiplicity of objectives, the monopoly and cartel policies appear rather unpredictable.

Monopoly and cartel policy presents itself as an important limitation to the freedom of action of firms and as a source of risks because some of their behaviours or choices are likely to be challenged, even punished by the competition authorities for the sake of the market preservation. Yet, firms can be strongly tempted to be harmful to competition insomuch as cartel and monopolies or taking advantage of a dominant position are means generally efficient for reaching the goals companies are aiming at in a capitalistic economy: the increase of profits thanks to the growth of margins and the “quiet life” thanks to a better control of their environment.

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First we will present the bases of monopoly and cartel policy (1) then the rules that result from it (2) before taking into account the competition authority decisional practices and their consequences on the firms' strategies (3).

1. Cartel and monopoly policy: its objectives, its history and its institutions

Backgrounds of cartel and monopoly policy

Competition policy concerns appear in the late nineteen century mainly because of the concentration of economic power induced by the second industrial revolution.

The Sherman Act promulgated in the US in 1890 kicked off competition policies (Kovacic and Shapiro, 1999). In a context of political debates induced by the huge growth of the trusts in the US economy and a very significant concentration of economic power, more and more concerns raised from the risks of US market foreclosure and from the unfair practices of the *robber barons*. Consequently, political pressures became more and more sensible to prevent and to sanction practices, which were likely to impede competition and to compromise finally economic freedom.

Two main kinds of market strategies were prohibited by the Act. The first one is related to coordinated practices, the second to unilateral ones. The first section of the Act sanctions all kind of coalitions between firms, which are likely to artificially restraint trade between US States or with foreign nations. This provision is directed to every contract, combination in the form of trust or otherwise, or conspiracy between competing firms in order to artificially limit competition, or in more modern economic words to acquire a collective market power in order to maximize their joint profit. The second section of the Sherman Act is all the more interesting that it is one of the main sources of divergence between US and European competition policy. It deals with unilateral practices. It does not punish abuse of dominant position, as it will be the case for European competition law, but monopolization practices. Such practices cover all market strategies, which allow a firm to acquire, maintain or extend a monopoly power on another base than a competition on the merits.

The relative vagueness of the concepts introduced by the sections 1 and 2 of the Sherman Act and its enforcement devoted to judicial courts induced severe difficulties in its implementation, despite some very memorable cases as the dismantling of the Rockefeller's Standard Oil trust in 1911. As a consequence, the US competition policy framework was completed in 1914 by two additional legislative acts. The first one is the Clayton Act, which allows, amongst other things, to engage antitrust private law suits. By the way, US Department of Justice (DoJ) potential reluctance to engage law suits against firms may be by-passed by the agents harmed by anticompetitive practices. In addition, the incentives to take such legal actions were increased by the possibility to obtain treble damages. In the same time the FTC Act was promulgated. The implementation of competition law was not, since 1914, the monopoly of the Antitrust Division of the US DoJ but is shared with an independent

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regulation authority. If the sharing of responsibilities is particularly complex between these two bodies, economic history reveals that the FTC could in some occasions compensate what appears as an antitrust enforcement cycle, particularly observable for the Antitrust Division.

Indeed, the enforcement of US competition law is characterized by a very irregular trend. Roughly describing, the antitrust laws were enforced without strong conviction during the twenties and the beginning of the Great Depression. The climax of such tendency was the NIRA – National Industrial Recovery Act – promulgated in 1933 by the first Roosevelt administration, which encouraged prices and investment plans coordination among competitors as a response to the economic crisis in order to stabilize prices and to comfort firm expectations. The second mandate of the Democrat administration from 1936 was characterized by a strong shift towards strong antitrust laws enforcement. Until the end of the seventies, US competition policy was influenced by the Harvard School, which was very concerned about market structures. It appeared necessary to implement antitrust law suit in order to prevent - event to correct -unreasonable concentration of market power. As a consequence, Courts were very suspicious towards dominant firms and could enjoin them to reduce their market power through asset divestitures or even dismantling.

The AT&T case in 1982 was the last and a very late manifestation of such logic. Indeed, from the sixties, the Harvard approach was harshly criticized by the Chicago School, which redeemed several market practices by considering their effective impact upon consumer welfare. In other words, no matters of market dominance, the most determinant things are the incentive structure. Even a firm is hugely dominant; there is no incentive to behave as a monopoly as soon as its market position is contestable, in the sense of the absence of barriers of entry or exit. The US competition policy shifts towards a more lenient treatment of dominant firms. Extracting the rent induced by market power is seen as legitimate since this one was created by past investments, business acumen or even historic accident. Only monopolization strictly defined constitutes an infringement of the Section 2 of the Sherman Act.

The rise of the Post-Chicago Synthesis in Antitrust economics since the eighties leads to moderate some of the Chicago School normative positions by considering that some strategies not always benefit to consumers considering the actual market structures. As a consequence it is necessary to perform case-by-case analysis in order to compare potential damages for competition with efficiency gains induced by the considered practice.

Such a more economic approach (associated with a decrease of formalistic analysis) puts into relief a concern on false positives, that is to say firms found guilty, while they have just competed on the merits. The risk of chilling competition by protecting competitors and not competition is taken into consideration, especially because of the cost of such antitrust errors, which is significantly aggravated by private law suits in the US context. As a consequence, public enforcement of Section 2 sharply declined in the last decade. A DoJ report on unilateral practices published in November 2008 constituted a climax for this trend. Its

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withdrawal in May 2009 and a higher activity of FTC could be interpreted as some first but fragile clues of a new shift in the US Antitrust Policy.

Even the European Competition Policy also exhibit a shift from a rule-based approach to a more economic appraisal of competition concerns (Petit, 2009), both its history and its practices are very specific compared to the US (Gerber, 1998). European competition Law must not be considered as a legal transplant of US Antitrust laws operated after the Second World War and following the Marshall Plan. European competition policy found its roots in some Austrian government bills submitted before the First World War and in the feed-backs of the first German Competition Law promulgated in 1923 and implemented – without success – during by Weimar Republic. This experience was the object of an in-depth analysis realized by the lawyers and the economists, which are grouped during the thirties and the forties in the Freiburg University. They developed – mainly in secret – what will become the Ordoliberal School, which will exercise a strong influence on the economic policy of the West Germany after the war.

Ordoliberals consider the competition is by itself auto-destructive because it leads the concentration of economic power. Such a concentration is an issue per se because it gives some coercion capacity upon the access of the others to the market. But economic freedom is considered as a prerequisite of politic one, as a consequence it is necessary to help the market process to realize its function of dispersion of economic power. A government intervention is essential to prevent its natural and irreversible exhaustion. Interventions are necessary to prevent such exercise of economic power against the other market participants. Ordoliberal scholars advocate either that the dominant firm behaves as it is deprived of any market power or some asset divestitures to obtain a structural remedy. We must note, by the way, that if government must intervene in order to protect the market process against itself, it is also necessary to prevent discretionary intervention. Consequently, such interventions must be based on rules. Competition policy in this sense is an essential component of the economic constitution.

Ordoliberals exercised a significant influence on the economic policy of the West Germany after the war and on – to some extent - on the shaping of the German competition law promulgated in 1957. They also exert an influence on the German negotiators for the Treaty of Rome. But is extremely excessive to consider that the treaty provisions relative to competition policy are shaped in an ordoliberal way and that they explain by themselves all the specificities of the European case law (Akman, 2009). In fact, two very general articles constitute the basis of the European competition law. The first one, which is now the article 101 TFEU, deals with the prohibition of cartel agreements, with some exceptions if they contribute to global welfare, as R&D cooperation for example. The most specific article – and the one which induces the main differences between US and European competition policy – is the article 102, relative to the abuses of dominant position.

If we can draw a parallel between the article 101 and article 102 TFEU on one side and section 1 and section 2 of the Sherman Act on the other side, by considering the distinction

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between coordinated and unilateral practices, nonetheless the fact remains that a significant difference lies on the treatment of market practices of dominant firms. While, the section 2 does punish monopolization practices, article 102 does sanction abuses of dominant position. Two differences must be underlined. The first one is that the acquisition of a dominant position, if we analyze it in this context as a monopoly position, is not directly forbidden by EU competition law. On the contrary, US law considers it violates section 2 if this acquisition is not made on the merits. A second point is relative to the notion of abuses. The dominant position is not sanctioned by itself. The crucial point is to define what could be an abuse of such a market position. We will see that one of the main sources of divergences between US and EU derives from this point.

In every case, the article 102 as it was written in 1957 does not explain by itself the specificity of EU treatment of dominant firms. Law is characterized by its open texture. A legal text takes its sense through its implementation, through its interpretation by courts. Concerning the abuse of dominant position, the ordoliberal influence pass through the decisional practice of the European Court of Justice. As Giocoli (2009) considered "*The Court made teleology the cornerstone of its interpretative strategy […] The Court interpreted the Treaty's competition law provisions according to its own conceptions of what was necessary to achieve the integrationary goals*". In other words, the Court interpreted the treaty provisions relative to competition law not just as a sanction of anticompetitive practices but also as a tool to construct an internal competitive market.

The role of the European Court of Justice leads us to underline a second difference between US and European cases. This difference relies on the institutional framework of competition policy implementation. In the US, the Antitrust Division has to bring cases before courts. In the European case the Commission makes the inquiries, prepares the case for judgment and decides it. In other words, the Commission brings together investigative and adjudicatory functions. In this sense, the European procedure is closer than the FTC situation than the DoJ one. Nevertheless, the European situation is very specific considering the nature and the practice of the judicial review of the decisions of the Commission. This control is realized by the Court of Justice (and also at a first stage by the General Court – the former Court of First Instance). A Geradin and Petit's Court of Justice exhaustive analysis of competitive case law (2010) established that such control is not exercised in the same way, for merger and acquisition decisions or cartel ones and for unilateral practices. They demonstrate that no sanctioned firm ever succeeded in challenging a Commission decision on the basis of article 102 before the Court of Justice. In addition, even if the Commission is inclined to adopt a more economic approach in its decisions, it appears that the Court maintains a form based approach and follows in its own jurisprudence some cases in which a very extensive interpretation of the span of article 102 was made.

Objectives of cartel and monopoly law

The intensity or preservation of competition is not the only goal pursued through competition law. We can therefore point out that competition policy integrates other goals of economic

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policy even if the addition of non-competitive goals within competition policy remains controversial.

One of the goals specific to European competition law lies in the will to achieve the integration of the European market. This market has successively been described as common (common market), single (single market) and internal (internal market). The European integration is a goal of a political nature which inspires the European policies and applies particularly to the competition field. The idea uttered in the early 50's and 60's was that the fight against monopolies and even more against cartels aimed at preventing a segmentation on the European market. Such segmentation at the firms' initiative would substitute itself to the trade barriers between member-states, which are what the Treaty of Rome precisely wanted to abolish.

By pointing out that competition was not necessarily sought after for itself, but for the economic incentives it creates, a wide range of economic goals can turn out to be linked to the competition policy. Indeed, it can be judicious to encourage competition only when it produces the expected effects. In such perspective, innovation or competitiveness for instance can be taken into account in the assessment of potentially anti-competitive structures or behaviours. Intellectual property rights which protect innovation are thus more and more acknowledged and integrated in the enforcement of competition law, whereas those two branches of law were formerly presented as belonging to opposite rationale. Intellectual property rights (patents, brands, etc.) have the same kind of effects as legal monopolies at a smaller scale. They can stimulate or restrict competition depending on circumstances. Taking into account those complex economic effects leads to a sophisticated application of competition law.

Such an approach based upon the ultimate goals competition law paves the way to an integration of the industrial policy within the competition policy. That connection seems unnatural to all who link competitive market economy to the laissez-faire principle. Yet we must admit that in practice the concern for the promotion of efficient and competitive firms is far from being external to competition policies. The pursuit of the critical size of firms can justify a certain tolerance towards national or European monopolies (and to a smaller extent towards cartels) when the firms in question have to vie with foreign competitors. The taking into consideration of international competition by the national, federal or European authorities explains that competition policy could be tinged with public interventionism in favour of national champions.

The barrier between competition law and other public policies is not impenetrable. We can often notice that free trading does not necessarily carry out achievements such as energetic independence, general access to medical care, efficiency of public transportation, minimization of environmental damage.

A market-based economic system raises the delicate question of the articulation between competition on that market and the market's ability to respect the restrictions or to deliver the expected results. The handling of those complex policies is readily entrusted to sector-specific

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regulation authorities. But since regulation does not necessarily supplant the application of competition law and since there is anyway a residual field of economic activities which are not covered by any specific regulation, competition authorities have balance competition with other economic and social aims. Such reasoning can be used to appraise cooperation between industrial firms while taking into consideration the advantages of this cartel in terms of environmental impacts.

The multiplicity of competition, but also economic, social and political goals makes competition policy very complex. Its implementation may give way to very diverse, therefore unpredictable solutions for the economic agents that are subjected to it. That policy must be translated into a corpus of legal rules. That legal framework is likely to limit the arbitrariness and therefore to increase legal security for firms.

2. Implementation of cartel and monopoly policy

The main component of monopoly and cartel policy is antitrust law. The fundamental rules that prohibit anticompetitive practices lie in the European Treaties for European Law and in the Sherman Act and the Clayton Act for American law. These provisions are supplemented by additional statutes, regulations, case-law and guidelines issued by competition authorities.

The European and American competition laws are framed in general terms that are fairly similar. Whereas the implementation of these sets of rules may differ and even diverge, the general concepts of competition law (restrictive practices, relevant market…) are shared by European and American policy-makers and beyond.

The presentation of the main rules of antitrust law can be divided into 3 parts. First, one should say what kinds of firms or groups of firms are targeted by antitrust law. Then, one should precise what kind of behaviours constitutes anticompetitive practices.

The firms that are targeted by antitrust law

The firms that may undermine competition are, on the one hand, the monopolies and more generally, businesses holding a dominant position, and on the other hand, the firms involved in cartels and in other restrictive practices.

Any attempt to monopolize a particular market by a firm or even a group of firms is prohibited in American law as well as in European law. For instance, the Sherman Act §2 targets “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several States, or with foreign nations”. Article 102 of the Treaty on the functioning of the European Union (formerly Article 86 then Article 82 of the previous European Treaties) states that “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market (…)”.

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The dominant position is not an autonomous concept. It depends on the market where the firm sells its products or services, which is called the 'relevant market'. The dominant position refers to a substantial market power. In the *Hoffman-La Roche* case, the ECJ gives the following definition of the dominant position: "the dominant position (…) relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers" *(Case 85/76, 13 February 1979).*

The market share is the first but not the only criterion to determine whether a particular firm or group of firms has a dominant position on the market. It also depends on market structure i.e. the relative market-shares, the potential competition (the likelihood of potential new competitors to enter the market) and even on firm's performance (high profits may be a piece of evidence of market dominance). But, as often in antitrust matters, it can be delicate to say whether a firm makes a lot of money and is a leader on its market because it is inherently superior and outperforms its competitors or because of illegal anticompetitive practices. In the first case, any intervention of competition authorities may distort and severely damage the competition process instead of restoring competition.

Agreements and concerted practices, including cartels, which restrict free trading and competition between businesses, are the second category of anticompetitive practices prohibited by antitrust law. Thus Sherman Act §1 states that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal (…)". In European law, "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market (…)" (article 101 TFEU, formerly article 85 then article 81 of the previous European Treaties).

A wide range of coordinated actions fall within the scope of these provisions: from formal anticompetitive agreements to concerted parallelism and even to a tacit acquiescence to a conduct that disrupt the market. As long as firms are independent economic entities, they are supposed to compete and not cooperate with each other, except if the cooperation between the firms is required by the government. Unlike dominant position, restrictive agreements involve at least two firms but they can be located at different stages of the production / distribution process. Thus, a distinction is made between horizontal agreements involving firms at the same level of production, like most of the cartels and vertical restraints or even joint ventures that might also raise competition issues.

The behaviors that are prohibited

The particular position of a firm – market dominance or collusion – is usually not sufficient to incur sanctions by competition authorities, especially in Europe where antitrust has never been used to dismantle monopolies as such. Only specific collusion and abuse of dominant position are subject to scrutiny as anticompetitive practices. Besides, some cartels and restrictive agreements can be cleared under the rule of reason standard or benefit from individual or group exemptions.

Cartels and other collusions are prohibited when they are agreements or practices that have as their objective or effect the prevention, restriction or distortion of competition within the market. European and American law list the main anticompetitive practices such as price-fixing, market sharing, collective boycott and concerted limitation of production. Some of them are prohibited *per se* – price fixing based on horizontal agreement for instance – whereas other practices are more ambivalent. For instance, vertical restraints that limit the freedom of resellers can improve the economic process and even enhance the competition between several distribution networks and brands. In such a case, the practice deserves to be carefully analyzed to determine whether the restriction should be permitted because it does not actually result in a restraint of trade and competition or not.

As far as monopoly and dominant position are concerned, attention must be paid to 'abuse'. Again, the law-makers, judges and competition authorities provide examples of abusive behaviors: predatory pricing, strategic deterrence, foreclosure of adjacent market, refusal to supply an essential facility to a competitor, etc. The Clayton Act contains specific provisions about discrimination. Thus, it is not allowed to apply dissimilar conditions to equivalent transactions with other trading counterparts, thereby placing them in competitive disadvantage. It is actually often delicate to make a distinction between illegal abuses and acceptable legal strategies of firms within their economic environment.

For the practices that are not judged as illegal *per se*, the needed assessment can take place following different methods and procedures. There is currently a mix of self-assessment based on guidelines and detailed regulations, and *ex-ante* or *ex-post* evaluation given by competition authorities and courts. In EU law the so-called 'block exemption' regulations exclude the application of competition law for certain agreements. This approach can improve the legal certainty for the firms by providing them with a dividing line between legal and illegal practices. The alternative and complementary system based on individual exemptions gives competition authorities a flexibility that can be said stretching far beyond the application of clear-cut established competition rules. Given the sensitivity of competition matters, law leads to choices that are part of competition policy.

3. A transatlantic comparison of cartel and monopoly policy implementation

If we can spotlight some divergences between US and EU enforcement of competition law, it is mainly on unilateral practices. Indeed, for coordinated practices, it is possible to observe a same tendency constituted by an increasing severity in the sanction of collusive agreements.

The fines imposed for such anticompetitive practices sharply rise both in Europe and in the United States. In the same time, if it was possible to observe something like a dead-lock concerning the public enforcement of the section 2 of the Sherman Act during the republican administration from 2000 to 2008 (with no antitrust case brought to courts on this basis by the US DoJ during the period), the situation was very different for the section 1. Both US and EU authorities are engaged in a policy consisting in increasing the fines in order to deter such practices. For example, the cumulated fines imposed by the European Commission grew from 870 millions of Euros for the period 1990-1999 to 5122 for the period 2000-2006 (Veljanovski, 2007). The fines imposed in each individual case also present such an increase. For example, in a decision of December 2010 relative to price collusion in the LCD panel market, the fines imposed to the six involved firms have reached 649 Million Euros. The higher sanction in a cartel agreement was the car glass decision in which the cumulated fines reached 1.38 Billion Euros. Even if the severity in the anti-cartel clauses enforcement decreased during the crisis, we can observe that the cumulated fines in 2010 reached 3.06 Billion Euros, very close to the 2007 record of 3.38 Billions.

Cartel deterrence is also increased by leniency programs, which play on the intrinsic instability of such agreements by allowing a firm which denounce such agreement to dispose from an immunity and by the additional threats constituted by follow-on suits for damages and especially in the US case (and in the UK one, to a some extent) by criminal sanctions. These ones cover both individual fines for the concerned executives but also imprisonment, which is effectively applied in the US. The deterrence effect is significantly increased and such risk helps to align individual and firms incentives.

The severity for cartel agreements is a common feature of both systems. It is not surprising in the sense that coordinated practices are the most harmful anticompetitive practices. Things are more complex concerning the sanction of unilateral anticompetitive practices. US and European practices present some divergences, which could be explained trough the differences between the section 2 of the Sherman Act and the article 102 of the TFEU but also by two very different conceptions of the competition.

In the US case, the Sherman Act aims at punishing monopolization strategies. That is to say, the strategies by which a firm acquires, maintains or extends (to another market) a monopoly position by unfair practices. If such a position is obtained by the merits there is no reason to contest it. The market process is driven by the search of such position, which gives a market power e.g. the ability to raise prices above the pure and perfect competition equilibrium level. Deterring such behavior by forbidding taking benefit from this market power would thwart the competition process itself and consequently would harm consumers. So, the Sherman Act does not forbid a dominant firm to extract the rents induced by its market power. In other words, a monopoly can – and also must – charge monopoly prices. Such a behavior is desirable just because it produces good incentives to competed firms to invest to acquire such a position. So, just monopolization is sanctioned and not what we can name in the European framework, exploitative abuses.

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On the contrary, excessive pricing is an abuse on its own right in the European case. In an ordoliberal sense charging a monopoly price does not respect the *as if* condition. We must keep in mind that ordoliberal thinkers advocate a firm with a market power must behave as if it is price taker and not price maker. If exploitative abuses are originally considered as the main domain of article 102 implementation, excessive pricing decisions remain a rarity. In fact, exclusionary abuses quickly become predominant in EU completion law enforcement. The Commission guidance on exclusionary abuses conduct by dominant undertakings published in February 2009 testifies of such pivotal place in the European competition policy. Some Commission's decisions relative to such market strategies can give striking example of transatlantic divergences and can help to define more precisely the specificities of the European competition policy applied to dominant firms.

A key point to understand European analysis is to consider the concept of the special responsibility of the dominant firm to not impair by its market practices genuine undistorted competition on the common market. A dominant undertaking cannot adopt some strategies, which could be lawful if they were performed by a firm deprived of market power, if the effects of these could compromise the durability of a market structure of effective competition. This does not only induce an asymmetric regulation of competition but also could lead to impose upon the dominant firm to not implement any strategy that could lead to the market exit of a competitor. Competition is construed as an actual rivalry between competing firms. The protection of competition could easily shift to the protection of competitors. Even though undertakings are incentivized to acquire market power and the natural result of the competition process could induce the exclusion of less efficient firms, European completion policy would lead to sanction a dominant operator as soon as its conduct is at the origin of such exclusion. In an ordoliberal conception, any competitor disappearance is susceptible to harm consumers because it reduces their possibility of choices and in the same time the competitive pressure on the dominant firm. On the contrary, for an US point of view, competitor exclusion must be sanctioned only if it was the consequence of unfair practices, which led to oust an equally efficient firm. If a firm obtains a monopoly position on its own merits, it does not constitute an antitrust laws violation. If a less efficient firm is excluded from the market, it does not harm consumers, since the chosen criterion is the maximization of its welfare and does take not into account its liberty of choice.

Such divergences could be observed for many unilateral market practices. We just give some examples for three ones; predatory pricing, loyalty rebates and refusal to deal. The criteria used to characterize predatory strategies are very different in the European and in the US case-law. Economic literature establishes that a firm engages such strategies by accepting losses (or foregoing profits) in the short term so as to foreclose market or to discipline actual or potential competitors in order to acquire or to strengthen market power in a second stage. In other words, predation is no more than an investment in market power.

For the European Commission, an undertaking engages such a strategy as soon as its price is set below its average avoidable cost or when the price level is set between this cost and the average total cost and it is possible the demonstrate the existence of a predation plan. On the

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contrary, the US case law leads to consider that a firm cannot violate section 2 by accepting losses as soon as it has not a reasonable chance to recoup its investment in the second period. In other words, if the practice does not result in a market power increase - for example because of new or potential entries - such a strategy does not harm consumer (on the contrary). So the *Brooke* decision of the US Supreme Court in 1993 establishes that two conditions are to be met to characterize an anticompetitive behavior. First, the firm must establish its price below its cost and second it must a have a serious chance to recoup its initial losses. The standard of proof is higher than the European practice (for an example, see the *Wanadoo* decision of the Court of Justice, 2009) and in addition the burden of proof is on the plaintiff and not on the defender.

A second example can be given by the case of loyalty rebates. For the European Commission some conditional rebates allowed by a dominant undertaking could even exclude an equally efficient competitor. The Intel decision of the Commission in May 2009 is one of the last examples of such European competition authority treatment of dominant undertaking market practices. If a dominant firm proposes to its consumers a retroactive rebate if its purchases exceed a given threshold over a defined period of reference, it could chose a threshold that induces the eviction of an equally efficient competitor as soon as this one is not able to compete for the whole demand. For example, if the competitor faces capacity constraints, the dominant firm could use the "non-contestable" part of the demand to leverage its dominant position on the "constable" one. If the threshold is set sufficiently high, even the competitor would be more efficient, a consumer could prefer choosing the dominant firm if the price difference does not compensate the loss of the rebate on the "non-contestable" part.

The issue is that such analysis must not lead to prohibit *per se* loyalty rebates for dominant undertakings. They can be welfare enhancing and be justified on objective basis (anticipating scale economies for example). But, the EU jurisprudence does not impose to the Commission to demonstrate that the practices of the dominant firm have an effective exclusionary effect on the market (*Wanadoo*, General Court, 2007). There is a great contrast between such an analysis, which, amongst other things, led to a fine of 1.06 billion Euros and the attitude of the US DoJ, which did not brought a lawsuit against Intel. But, we must also note that a procedure was finally launched in the US by the FTC on these exclusionary practices. In July 2010, Intel and the FTC reached a settlement on this case.

A last example of such transatlantic divergences could be given by the treatment of refusals to deal. According the US jurisprudence, a firm, even a monopoly, remains free to contract or to refuse to contract with other firms and to choose the contractual terms. The price must be set, in principles, through a bilateral bargaining. No matter, if a monopoly price is charged. Particularly, an integrated firm is not deterred to supply an input to one of its competitor in a downstream market, since it is possible to capture all the rent produced through this price. As a consequence, there are no incentives (if some very restrictive hypothesis are verified) to

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engage exclusionary strategies against competitors. Such reasoning could be applied to margin squeeze claims[2].

In the European case, a refusal to supply can constitute an exclusionary abuse. In some circumstances a refusal to deal with a competitor in a downstream market could lead to evince it from the market. The essential facility doctrine embodies such issue. A refusal to contract constitutes an abuse of dominant position if this refusal relates to a product that is objectively necessary to the second firm to compete effectively in a downstream market, if it is likely to lead to the elimination of effective competition on this last market, if it is not based on an objective justification and if it is likely to lead to consumer harm.

The essential facility doctrine stems in fact from US case-law, especially from the *Terminal Railroad* decision of the Supreme Court (1912). But, since the nineties, US courts and scholars become more and more reluctant to use such doctrine (Areeda and Hovenkamp, 2002). The main reason lies on the risk of strategic lawsuits and on the consequences on the incentives to invest and to innovate both for the dominant firm and for its competitors. In addition, deterrence effects on investment levels could be more important than the access price is set by a poorly informed third… that is to say, the Court. As a consequence, US courts - and the most prominent of them with the decision *Trinko* in 2004 - tend to reject such doctrine.

In the same time, the essential facility doctrine is increasingly used at the European level for both tangible assets (network industries for example) and intangible ones. This second domain covers intellectual property rights. Some compulsory licensing decisions involved severe controversies, as for example the Microsoft decision in its part relative to interoperability protocol with the Windows operating system (2004). The European Commission had introduced two additional criteria to apply the essential facility doctrine to intangible assets. The first one is the new product criterion, the second one the balance of incentives. These two additional tests should avoid mandating an access, which finally harm consumers.

The new product condition should help to prevent parasitism from the competitors. A license should be required if it allows to satisfy a potential demand. It appears that the requirement was significantly weakened by the European case law. From *Magill* (1995) to *IMS* (2004) and *Microsoft* (2004), the new product became a potential or a hypothetical one. Consequently, the access does not longer deals with a downstream market but with the same market… If such decision helps to create a level playing field for the competing firms, it also implies a kind of asymmetric regulation of competition to the detriment of the dominant firm. The consequences in terms of incentives must be taken into account.

[2] We can also note that margin squeeze is not considered in the US jurisprudence as an anticompetitive practice by itself, but just as combination of two different ones, an excessive price in the upstream market and a predatory one in the downstream market. It again induces a divergence between US and European competition policy, which could be illustrated by the Linkline decision of the US Supreme Court (2009) and the Deutsche Telekom decision of the European Court of Justice (2010).

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The balance of the incentives should guarantee that the negative effect for radical innovations (innovations that allow to obtain a dominant position) for both the dominant firm and its competitors, which hope for substituted to it, is lesser than the positive one for follow-on innovations. In other words, we can observe an implicit trade-off between radical and incremental innovations. Implementing the essential facility doctrine reveals that the market is not seen as sufficiently turbulent to make a dominant position contestable. But, in every case, granting compulsory licenses or deciding of a mandatory access always induces a trade-off between short-term and allocative efficiency and long-term and productive one…

It also implies some hypothesis concerning intellectual property rights. Firstly, granting such compulsory licenses could make sense if we consider that competition policy has to counterweight possible excess regarding the practices of patent offices. For example, if the patents are too broad, they can be (mis)used as foreclosing tools. In this case, such decisions of competition authorities could restore collective optimality. The question remains if the judge of competition is the best suited in terms of information structure for performing this kind of task. Secondly, it could induce a shift in the intellectual property rights from the right to exclude the third to a right to obtain a financial compensation.

As a conclusion, we can underline that the differences between US and European competition policy do not derive from statute law, but from history, procedural and institutional dimensions and mainly from the decisional practice of the authorities which have to interpret the legislative acts. This interpretation process could embody some very different policies across space but also across time, as the US Antitrust history demonstrated. This dynamic – and these divergences – reveals in fact different compromises between economic efficiency considerations and economic actor fundamental rights (guarantee of property rights and contractual liberty) and to some extent differences in the conceptions of the competitive process by itself and the efficiency of government interventions.

Firstly, the main difference between an ordoliberal minded competition policy and a Chicago School more influenced one, lies on the faith in the self-regulated nature of the market process. For the Freiburg School, the market process unavoidably converges towards the concentration of economic power and as a consequence, the *laissez faire* cannot be an option.

Secondly, the ordoliberals consider that a government intervention (based on rules and not a discretionary one) could have a positive impact on the market process. Chicago Schools tends, on the contrary, to consider that Antitrust authority interventions always induce a significant risk of erroneous decisions (false positive or false negative cases). As the markets are supposed to be self-regulated, the collective cost of false negative decision is inferior to a false positive one. The reason lies on the fact that in the first case the supra-competitive level of profit realized by the firm would play as a signal for potential competitors. On the contrary, false positives play as a negative signal. The potential gains associated to a dominant position

become more uncertain for all the competitors (actual and potential). Consequently the damage caused to the competition process could be higher than the one induced by the absence of sanction of a monopoly position non-acquired on the merits (Easterbrook, 1984).

Thirdly, we must underline the impact of the differences within the purpose assigned to competition policy. According to the Chicago School – and by extension for "*a more economic approach"* promoters - its purpose lies on the maximization of the consumer welfare. According the ordoliberals the objective is not the result of competition (e.g. the productive efficiency) but the competition process by itself (the access to the market, the economic liberty…). As competition policy is not just a mechanical implementation of objective and clear defined rules but covers some dimension of collective choice, divergences in space and time are finally explicable, logical and perhaps desirable.

It appears that the primary purpose of competition policy is in all circumstances to protect the competition process. The highlighted difference between US and European cartel and monopoly policies is mainly based on the definition of their fundamental purpose. While the first one considers that the ultimate objective is to realize the market process natural result – e.g. consumer welfare maximization – the second one is focused on the process on itself and not directly on its output. In the European perspective, the freedom to access the market is a crucial point. All the market operators must access the market without seeing their freedom constrained by dominant firms' market power. As a consequence, such undertaking must not impair by their practices this economic liberty. But this special duty of the dominant firm also induces difficulties in the competition law enforcement. Competition law is undoubtedly a case-based one. Both its interpretation and its dynamic derive from decisional practices. It induces a legal uncertainty for firms since the criterion decision are not always clear *ex ante* and the outcomes of trials difficult to predict.

Such uncertainty could be all the more particularly harmful for a dominant undertaking that the convergence towards an effect-based assessment of market practices leads to a case-by-case analysis, which results are difficult to forecast. In addition, the requirement of market practices self-assessment could make things worse. Such legal risks could compromise competition policy fundamental purpose, the promotion of economic efficiency. Dominant Firms could renounce to some market strategies, which could be profitable for consumers, taking into account such risks.

Consequently, even cartel and monopoly policy is an essential requirement to ensure the functioning of the market process and to guarantee economic liberty (and perhaps political one, as the Freiburg School demonstrated), we must keep in mind that such policy could also induce some legal risks for firms. These ones could be due to the difficulties to anticipate of court decisions and also to the risk of inconsistent decisions between the different jurisdictions, induced, for example, by the specificities of US and European systems.

Improving the efficiency of cartel and monopoly policies suppose to make Court decision criteria clearer and to progress in its international harmonization process (Gerber, 2010).

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