AS-EFFICIENT COMPETITOR TEST IN EXCLUSIONARY PRICES STRATEGIES: DOES POST-DANMARK REALLY PAVE THE WAY TOWARDS A MORE ECONOMIC APPROACH?

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As-Efficient Competitor Test in Exclusionary Prices Strategies: Does *Post-Danmark* Really Pave the Way towards a More Economic Approach?

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The Post Danmark judgment may cast the light on the interpretations by the EU Court of Justice of crucial dimensions of the competition policy as: selective price cuts, above-cost rebates, costs test for exclusionary abuses with common costs. As we see one of the main interests of the decision lies on the cost criteria used by the Court to determine if a given price practice may exclude a competitor as efficient as the incumbent. In other words, does *Post Danmark* constitutes a real step towards the appropriation by the Court of Justice of the more economic approach promoted by the Commission and, more broadly, is really the logic of the Court coherent with an effects-based approach? Does *Post Danmark* conciliates the traditional decisional practice of the Court with the new principles of competition policy enforcement advocated by the Commission since the issuance of its February 2009 guidelines, relative to the exclusionary practices of dominant undertakings?

Keywords: exclusionary practices, abuse of dominant position, predatory pricing, as-efficient competitor test

JEL codes: K21, L43, L44, L97
The *Post Danmark* judgment constitutes a further milestone in the evolution of the EU Court of Justice doctrine concerning some crucial dimensions of the competition policy as selective price cuts, above-cost rebates, or costs test for exclusionary abuses with common costs. As we see one of the main interests of the decision lies on the cost criteria used by the Court to determine if a given price practice may exclude a competitor as efficient as the incumbent. We may wonder if *Post Danmark* really constitutes a significant step towards the appropriation by the Court of Justice of the more economic approach promoted by the Commission and, more broadly, if the logic of the Court is really coherent with an effects-based approach. We may also question to what extent *Post Danmark* aligns the traditional decisional practice of the Court with the new principles of competition policy enforcement advocated by the Commission since the issuance of its February 2009 guidance, relative to the exclusionary practices of dominant undertakings.

The issue of the decision standard used in price-based exclusionary practices illustrates one of the crucial dimensions of the transatlantic divide in terms of competition policy enforcement (Larouche and Schinkel, 2013). If coordinated practices induce no particular debate among competition policy practitioners and academic researchers, things are very different in the field of unilateral practices, especially for exclusionary ones. 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).

However, the exclusion issue never was an object of consensus among economists and competition law enforcers¹. The Second Chicago School, after the seminal paper of Director and Levi (1956), stigmatized exclusionary practices suits². Such claims

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¹ In the United Kingdom, the Mogul case in 1889 (Mogul Steamship Co. v Mc Gregor, Cow & Co, 23 QBD 588) “effectively removed exclusionary conduct as an offence in English law for more than a half of century (Mandorff and Sahl, 2013). The difficulty to deal with exclusionary cases consists in a perceived inconsistency of the requirements of the competition policy: calling for an intensive competition between firms (even a cut-throat one) but sanctioning dominant firms if, as the result of this one, a competitor exits the market.

² According to some US scholars exclusionary strategies based suits were excessively favorably received by antitrust authorities during the so-called “populist era” e.g. from the last thirties to the last seventies.
initiated by competitors are suspected to participate to opportunistic strategies searching to find protection under the Antitrust umbrella. It is always difficult to identify such a practice. The exit of a competitor cannot be considered as a proof in itself of an abusive conduct and similarly exclusionary strategies might be successful without implying an effective exclusion of any competitor. Similarly, an exclusionary strategy implemented by a dominant operator might benefit to the consumer in the short run (see the case of predatory pricing strategies). An overly aggressive enforcement of abuse of dominant position provisions might finally excessively threat dominant operators and lead to unduly protect less-efficient competitors.

Considering the risk of false positive decisions and the hypothesis according to which false positive decisions are more detrimental in terms of welfare than the false negative ones, Chicagoan scholars have adopted a very skeptical view on antitrust enforcement against exclusionary conducts (Baker, 2013a). The long list of pro-defendant decisions of the US Supreme Court in monopolization cases testifies of the influence of such mistrust. This one is in addition not only the special feature of the Second Chicago School but was as well appropriated by the Harvard School3. Moreover according to US Antitrust case law, exclusionary strategies in regulated markets have not to be judged in the framework of antitrust laws but by the competent regulation agency.

The opposite view seems to prevail in Europe. The Court of Justice longstanding position about the special responsibility of the dominant operator to not impair by its conduct an undistorted competition (the initial wording was to preserve a structure of effective competition) reflects a view according to which exclusionary abuses are also a “core competition concern”. In addition, competition policy is not – by far – compelled to give way to sector-specific regulation, as the Deutsche Telekom decision has demonstrated.

However, the difficulty is to dispose of a standard that allows characterizing such abuses and conciliates the need for legal certainty (and administrability) and the economic accuracy. The pressures for a more economic approach of competition law enforcement lead authorities to give up their formal rules of decisions (based on legal forms) for better grounded on economic theory ones.

3 “Both [schools] generally embrace an economic efficiency orientation that emphasizes reliance on economic theory in the formation of antitrust rules. Although Chicago School and Harvard School scholars do not define efficiency identically, the two schools discourage consideration of non-efficiency objectives such as the dispersion of political power and the preservation of opportunities for smaller enterprises to compete” (Kovacic, 2007).
The competition law and economics literature provides several standards of decision. The issue of the definition of the goals of the competition policy is naturally subjacent in such a debate. The rule of decision for exclusionary case is ineluctably different depending on the primary purpose is defined as the access the market, the liberty of choice, or the welfare maximization. If the US Antitrust has adopted since the *Continental TV Inc v GTE Sylvania decision* of the Supreme Court in 1977, the consumer welfare imperative despite persisting theoretical debates (see Averitt and Lande (2007); Wright and Ginsburg (2013)), things are not so clear-cut in Europe.

If the purpose is to shift from a form-based approach to a more economic one⁴ (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*. The issue is to dispose of a unique price-based exclusionary practices test both to improve the consistency of the competition law enforcement and to 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.

Our purpose is to discuss the capacity of the as-efficient competitor standard to play such a role. We want also to put into relief the concerns raised by sector-specific issues, as network industries or high tech sectors in which new entrants might not be able to be immediately as-efficient as the incumbent. In other words, we insist on the opportunity to complete such a test with a reasonably-efficient competitor one. We aim as well at highlighting the challenges involved by this standard.

We discuss in a first section to what extent *Post Danmark* paves the way towards a more economic approach. We present, in a second section, the specificities of the European notion of abuse of dominance and discuss the parameters of the choice between the different economic standards available to support such a competition policy. In our third section, we analyze the as-efficient competitor test “consecrated” by the Court. We discuss, in our fourth section, the opportunity to adjust such a test and to use a reasonably-efficient competitor standard. In our fifth section, we consider to what extent such an adjusted test makes more sense for sector-specific regulation than it makes for competition law. Finally, we question the capacity of such an equally-efficient competitor test to participate to a more economic approach

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⁴ The effects-based approach purpose consists in substituting to a formal assessment of practices, based on legal rules, a case-by-case evaluation, based on their actual effects on competition and especially on consumer welfare.
considering the fact that it might lead to not consider the effects of the considered practice. In other words, our sixth section discusses the opportunity to consider such a test just as a necessary condition for establishing an exclusionary abuse based on price strategy and not as a sufficient one.

I – *Post Danmark* and the issue of a more economic approach of the article 102 enforcement

The *Post Danmark* preliminary ruling on the interpretation of Article 102 EC was requested by the Danish Supreme Court (Post Danmark AS / Konkurrencerådet, case C-209/10, 27 March 2012). The initial litigation concerns the price strategy of the Danish postal sector incumbent. The incumbent still enjoys exclusive rights for addressed letters and parcels (under a given weight), but operates in liberalized market for unaddressed mails (brochures, guides, local newspaper etc.). Its main competitor, for this second market, considers that it had abused from its dominant position by offering to three of its main customers selective rebates, without objective reasons linked to its actual costs. One of these devices possibly leads to fix the price below its ‘average total costs’, but above its ‘average incremental costs’. In the same time the incumbent justified its pricing by putting into relief that its rebates allow him to achieve significant economies of scales (for a comprehensive analysis of the case, see Rousseva and Marquis, 2013; Marty, 2013).

The *Post Danmark* preliminary ruling casts the light on the interpretation by the EU Court of Justice of one of the crucial dimensions of the competition policy: e.g. price-based exclusionary abuses. The main interest of the decision lies on the cost criteria used by the Court to determine if a given price practice may exclude a competitor as efficient as the incumbent.

The more economic approach was initially sponsored by the Second Chicago School of Antitrust (Van Horn, 2009) and is also coherent with the US Supreme Court’s *Rule of Reason* (Gavil, 2012). It had first appeared in the European framework for merger control. The shift may be explained by several Commission decisions annulations by the General Court, based on manifest assessment errors of economic terms (General Court, Air Tours v Commission, case T-342/99, 6 June 2002). The more economic approach applied to merger control mainly consists in the balancing between competition damages and efficiency gains performed to approve the operation, or to define the corrective measures required. Nevertheless, the real extent of the integration of such gains is always challenged. It is not just because of the commonly denunciated reluctance of European authorities. It may also be explained by the plurality of industrial organization models and the subsequent diversity of their
conclusions. Indeed, we cannot still invoke the clear-cut conclusions of the Chicago-School based models. The current theoretical landscape is more complex and fragmented and games-theory based approaches do not allow considering given effects for all circumstances of time, space and competitive structure (Witt, 2012). Despites these difficulties, merger control is undoubtedly the more advanced field in the implementation of such an approach.

Since its discussion paper of December 2005, the Commission advocates for such an approach for abuses of dominant position cases. The treatment of unilateral practices of dominant undertakings constitutes the main bone of contention between European and US competition policy and decisional practices. Many article 102 Commission decisions have raised objections among US Antitrust observers and practitioners especially since they appear as unfair and insufficiently grounded on a sound economic approach. It was especially the case for decisions against US dominant firms in the high tech industry, as the Microsoft and Intel ones. Bundling strategy, in the first of these two cases, and loyalty rebates in the second one, were analyzed as exclusionary practices, irrespective, according US commentators, of their net effect on competition and their induced efficiency gains. According to them, the two dominant undertakings have not to be sanctioned since they have played the game of a competition on the merits. Consequently, these landmark decisions have been bitterly criticized on the ground they may lead to protect competitors and not consumers (Marty and Pillot, 2012).

Insofar, the adoption of a more economic approach is not only a technical issue (Baker, 2013b). Indeed the debate between effects-based approach and formal rules in competition law enforcement reveals a deeper controversy on the objectives of the European competition policy. Is the main purpose – as we might consider after a quick-look on the Hoffiman-Laroche judgment- to protect a given competition structure? Is it, on the contrary, to promote the consumer welfare maximization, as the Chicago School and the US case law according to a Chicagoan oriented interpretation of the original intent of the Sherman Act? If the purpose is to protect a competitive structure defined by an effective rivalry among competitors, should the competition policy protect a competitor from its market exclusion whatever its basis, even if this exclusion is produced by the own merits of the dominant firm? In such a view, the exclusion of a less-efficient competitor is conceived as harmful in itself for the competitive process. On the contrary, if the consumer welfare is considered as the

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5 Efficiency concerns and effects-based assessment are also mobilized for article 101 cases and even for state aids control (Crocioni, 2006; Evans and Nyssen, 2010).
sole purpose of competition law, preventing the exclusion of a less efficient competitor leads to an efficiency loss and finally harms the consumer.

A dominant operator has not to be sanctioned if the exclusion of its competitor is not induced by an anticompetitive strategy and if it not harms consumers. According the more extreme views, even if the dominant undertaking acquires a monopoly position; it is unnecessary and, worse, counterproductive to deprive it from the fruits of its initial investments, its business acumen or even its chance. If the exit of the competitor is only based on the merits, no antitrust rules violation has to be characterized. Chicago theoretical analysis considers that exploiting a monopoly rent has not to lead to an antitrust sanction. The monopolization is defined as the acquisition, maintenance, or extension of a market power on another basis than the merits. Market contestability is considered as sufficient to prevent any dominance power abuse as new entries would correct any rent extraction strategies. As soon as the market is contestable, a false negative decision (considering a practice as a competitive one, when it is not) does not induce consumer harm on the long run. Indeed, excessive mark-up would play as signal for new entrants. On the contrary, a false positive decision might impair the incentives to compete for both the dominant firm and its competitors, which expect to replace it. As a consequence, the enforcement of competition rules has to adopt the consumer welfare maximization as the sole criterion in order to avoid trade-offs between consumers and competitors interests. Additionally, the social cost induced by false negatives appears as less important than the one caused by false positives. Hence, the standard of proof in matters of unilateral practices has to be the more stringent as possible in order prevent such a risk of bad decision and the subsequent chilling effects.

If the Commission did not exactly follow the way of the US Antitrust Division Report on single firm practices (2008), its involvement within a more economic approach was consecrated by its guidance on its enforcement priorities for article 102. The consumer harm, and not the prejudice caused to competitors, appears as its base line criterion. As Anne Witt (2012) wrote: “More importantly, however, the Commission’s new concept of competitive harm does not appear to be compatible with the Court of Justice’s case law, which continues to adhere to its doctrines from the 1970s. These do not require the presence of direct consumer harm, but consider the mere exclusion of competitors sufficient to make conduct anticompetitive”.

Indeed, the Court decisional practice was often criticized because of its reliance on its old case law of the seventies. The case of the special responsibility to not impair an effective competition structure for a dominant undertaking was one of the crucial
dimensions of this debate. A firm enjoying a dominant position is not allow, within this framework, to develop market practices, that possibly lead to exclude a competitor from the market even if this strategy is not forbidden for a non-dominant operator and even if it lead to exclude a less efficient competitor. Consequently competing on the merits may lead to a sanction. In doing so, the protection of actual competitors may be preferred to the maximization of the welfare as soon as less efficient firms are put under the antitrust umbrella.

Nevertheless, such a policy has to be put into perspectives. Some economic cornerstones and historical and theoretical foundations of the European competition policy have to be considered.

Firstly, as soon as a dominant firm is threatened by a competitor, it is not incentivized to abuse from its dominant position. The threat is all the more significant that the competitor is already on the market and not potentially. It's both a question of time (the time needed to enter the market) but also of effectiveness. Before entering a market a firm (and particularly its funders in the framework of their due diligence process) would consider the issue of sunk costs. If these ones are already engaged, the firm will easily opt for a commercial and a pricing war. If they are not, the risk is higher for funders. As a consequence, their propensity to accept to provide the necessary funding might be lowered6. Such a behavior can be explained by financial constraints on potential new comers, by information asymmetries, and by the fact that a firm already active on a given market would accept more easily to eventually have to operate below its full costs than a firm that is not already in the market and just considers its investment decisions. In other words, the disciplinary effect of competitors is more stringent in the case of an actual threat than in a potential one. It's nothing more than the John Hicks' insight about the quiet life of the monopoly (Hicks, 1935). An effective rivalry between firms tends to deprive the “monopoly” of its main profit. In addition, the contestability hypothesis (Baumol, 1982) might be discussed according the nature of the considered market. The Article 102 is mainly enforced by the European Commission in three very specific industrial fields: network industries, high-technologies sector and pharmaceutical industry (Bougette and Marty, 2012). In these three fields, high fixed costs, significant sunk costs, high risk degree and significant time needed from the investment decision to market operations may constitute entry barriers that reduce the contestability level.

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6 The increasing level of the risk premium requested may be analyzed as the result of a raising rival cost strategy.
Secondly, in such markets the effects of an exit might be irreversible. It's particularly the case for high tech markets characterized by network effects. The competitive harm might be counterbalanced by efficiency gains in the short run. Nevertheless, some lock-in effects might be at stake. Consumers might be locked-in both in commercial and technological terms. The consumer becomes captive, because of its switching costs. In the same time, the entry becomes dramatically less probable as soon as the part of non captive demand is increasingly reduced (Bougette et al., 2012).

Thirdly, we may consider that the exclusion of a less efficient operator might also induce a competitive prejudice if it leads to reduce the span of the technologies available on the market. As soon as we consider dynamic efficiencies or the value of the liberty of choice for consumers, the reduction of the diversity of the technological trajectories available might be considered as a competitive harm (Kerber, 2011).

Finally, the competitive process might not to be only assessed according its final result, the welfare maximization\(^7\). In an ordoliberal view, welfare maximization is a by-product of the competition policy and not really its core objective. This one lies into the protection of the competitive process in itself and for itself. An undistorted competition is the key component of the competitive order (Gerber, 1998). The exclusion of a competitor from the market, whatever its efficiency, reduces – at the minimum in the short run – the freedom of choice for consumers (Nihoul, 2012). In the same time, reducing the number of firms accessing the market, increases the concentration of market power and might impair the competitive process. This conception makes particularly sense in the industrial fields the more often involved in article 102 cases, in which entry barriers and sunk costs are very significant and for which the competitive damage might be irreversible. The foreclosure effect might be definitive considering the risks for new entrants and the consequences of positive networks effects benefiting to actual operating firms in some of the 102’s privileged markets, as high tech ones.

These points cast the light on the necessity to conciliate the more economic approach advocated by the Commission with the traditionally more cautious approach developed by the Court of Justice (at least until Post Danmark), more inspired by the ordoliberal view of the competitive process and perhaps more pessimistic about the real levels of technological and competitive turbulences than the US expectations. The conciliation between these two views passes, according to the Post Danmark preliminary ruling, through the implementation of economic tests, as the efficient

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\(^7\) Even it is not really clear if the global surplus or the consumer surplus is really at stake.
competitor one. Two main dimensions have to be discussed about such a standard of decision.

The first dimension deals with its relevance in the fields of network industries or high technologies in which a new entrant might not be equally efficient than the incumbent because of its advantages in terms of economies of scale or resulting from network effects. Is it pertinent in such cases to adjust the equally competitor test in order to ground the decision on a hypothetical reasonably efficient competitor situation?

The second dimension is closely linked the issue of the effects assessment? Is the equally efficient competitor standard a sufficient condition to establish a competition rules infringement or just a necessary one? If an abuse of dominance may be characterized only according to this standard, the equally efficient competitor test might trump the consumer welfare one. In other words, the assessment of the effects of a given market practice might be unnecessary. We have also to keep in mind that a potential exclusionary effect is sufficient for decisions taken under the article 7 of the regulation 1/2003 and that the standard might be seen as even lower for negotiated procedures (article 9) for which effects are not discussed. As commitments have become the most followed way to close article 102 procedures and as the efficient competitor test might allow sparing the trouble of assessing the net effect of the considered practice, the real span of the effects-based approach might be questioned.

II – Abuse of dominant position and competition on the merits: the choice between competing economic standards

In its 2009 guidance, the European Commission insisted on the necessity to sanction solely the practices that exclude or tend to exclude as efficient operators as the dominant firm. “Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally intervene only in the cases where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking” (§23). The Commission, by insisting on this point, tries to avoid to disincentive dominant undertakings to reduce their prices, to launch new offers or to engage new commercial strategies that might lead to exclude (even) weaker competitors. Additionally, the accent put on the costs of the dominant firm and not on the costs of its competitors makes sense if we consider that dominant undertaking have to self-assess the compliance of their business strategy with the competition laws. Logically, the competitor cost-structure is unknown. The EU Court of Justice adopts this view in Post Danmark: “It is in no way the purpose of Article 82
EC to prevent an undertaking from acquiring, on its own merits, the dominant position on a market […]. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market” (§21).

By doing so, the purpose of the competition policy enforcement cannot be assimilated to the protection of a given market structure (characterized, for example, by an effective rivalry between firms) and consequently cannot lead to protect competitors for themselves: “Thus, not every exclusionary effect is necessarily detrimental to competition […]. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation” (§22).

The exclusionary effect might be sanctioned under the article 102 only if it proceeds by another ways than the ones of a competition on the merits: “Thus, Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. Accordingly, in that light, not all competition by means of price may be regarded as legitimate” (§25).

A shift may be observed between the notion of special duty vis-à-vis a given structure of competition and the notion of special responsibility vis-à-vis of the competition process. The terms have already changed since the Hoffman-Laroche judgment (Court of Justice, 19 February 1979, case C-85/76), as the France Telecom case of the (Case 202/07P, France Telecom v Commission) testified. However, the term of structure has now definitely disappeared: “a dominant undertaking has a special responsibility not to allow its behavior to impair genuine, undistorted competition on the internal market” (§23).

Preserving the structure of the competition is not the base-line objective of the competition law enforcement. The authority in charge of the competition policy has to guarantee a complete competition framework, that is to say a market situation in which a dominant undertaking is not allow exercising its coercive powers against its counterparts in transactions (Drexl, 2011). In that sense, these views are not incompatible with a more economic approach of competition law enforcement. Indeed, protecting the competition process implies to sanction the abuse of private economic power and not to protect competitors. The EU Court of Justice follows the conclusions of the AG Mengozzi (Case C-209/10, 24 May 2011) and confirms such a
view. The exclusionary effect taken into consideration is not an effect whatever the competitor and its costs structure but an effect on an as efficient competitor.

However, the equally-competitor test is not the sole economic standard available for characterizing exclusionary practices. We have to underline that the definition of exclusionary practices by the US Supreme Court in *Grinnel* (US v Grinnel Corp., 384 US 563, 570-71), as the European one in *Hoffman-LaRoche*, does not provide any operational standard for antitrust enforcers. Excluding the consumer choice one, two other competing standards have to be evaluated. The first alternative standard available is the consumer welfare one and the second the no-economic sense one. Our purpose in this section, following Mandorff and Sahl (2013), is to present their specificities, their limits, and to track down the dynamic of the equally-efficient competitor one in the lights of the history of economic thought and the legal history.

The Chicago School advocates since the sixties for the implementation of the consumer welfare test in order to assess the compliance of a given market strategy with the competition law (Salop, 2006). This test implies to balance all the effects of the challenged practice, both the efficiency gains and the competitive harms. However, we cannot consider that such a standard is really a simplifying one in matters of competition law enforcement. Consequently, even if the consumer welfare standard appears as the best suited to the more economic approach in theoretical terms, it is sharply criticized because of its lack of administrability, or, worse, because of its strong dependency on the assumptions made by the competition authority and on the parameters chosen. In addition as competing economic models might also be used by the different actors of the litigation, it also imposes a collective excessive burden and might impair the legal certainty. Last but not least, such standard tends naturally to overweight short run effects at the detriment to long run ones. In other words, implementing such a standard might lead to privilege the static (allocative) efficiency at the expense of the dynamic (productive) one.

The non-economic sense test is an alternative standard that remains as well controversial. Such a standard is closely related the notion of profit sacrifice, as the US Supreme Court had applied for example in its decision *Aspen* in 1985, an essential facility doctrine case (Aspen Skiing v Aspen Highlands Skiing, 472 US 585). Such a test might partially lead to renew with the notion of intent to the extent that it questions the rationale of the considered market practice (Werden, 2006). To use the wording of the FTC amicus curiae in *Trinko*, a practice might be characterized as exclusionary if “it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition”. We may note that such a standard is
coherent with the ordo-liberal distinction between *Leistungswettbewerb* e.g. performance competition and *Behinderungswettbewerb* e.g. impediment competition (Akman, 2009). Nevertheless, such a criterion is also characterized by several weaknesses (Mandorff and Sahl, 2013). On the one hand it might induce false positive decisions. For example, in emerging high-tech markets, in the case of a new product (conquest phase) or as soon as the firm is in an investment phase, it makes sense at the (dynamic) economic point of view to charge a price below costs. On the other hand, some false negative decisions might be observed. Indeed, a pricing strategy might induce exclusionary effects even if the dominant undertaking does charge a price above its costs. The sacrifice might be only a renunciation to a possible higher level of profitability.

The as-efficient competitor test might address these concerns. This test is better grounded at the economic point of view than the no-economic sense one and it’s undoubtedly more administrable than the consumer welfare one. Indeed, such a standard both allows to by-pass the issue of intent (of the profit sacrifice test) and to avoid a comprehensive, costly, an excessively hypothesis-dependent assessment of a net effect (consubstantial to the welfare consumer test).

We have also to put in relief a paradox. The equally-efficient competitor test is a European specificity even if its theoretical origin can be found in the US literature and more precisely in Richard Posner works. According to Posner (1973), two different forms of pricing policy might be exclusionary. The first one corresponds to pricing policies below the marginal cost. It might be abusive if the dominant undertaking cannot demonstrate any related efficiency gains and if it might induce in the same time the exclusion of an equally – or more efficient – competitor. The second one is related to pricing policies below the long-term costs. Such a cost is defined as the cost that had to be recovered by the firm in order to stay indefinitely in business. If the intent is still taken into consideration, the reliance on this subjective criterion is significantly reduced and the cost-based test becomes predominant.

Even if the more influential test of Areeda and Turner (1975) also mobilized the equally efficient competitor standard, it more heavily relies on the intent criterion. When the price remains above costs, they recommend using additional criteria in order to avoid protecting less-efficient competitors. They acknowledge that a price between the average total cost and the average marginal cost might exclude an as-efficient competitor. In such a case, they recommend to use an intent related criteria based on the profit sacrifice logic. If this standard was partially endorsed by European

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8 See also Posner (2001).
authorities since the *Akzo* decision of 1991⁹ and if it was also implemented by some US appeal courts, the Supreme Court had never grounded a decision on such a basis, preferring its own test, requiring both a pricing below cost and a serious chance to recoup initial losses for the dominant undertaking (see *Matsushita* (Matsushita v Zenith Ratio Corp, 475 US 574, 1986) and *Brooke* (Brooke Corp Ltd v Brown and Williamson Tobacco Corp, 509 US 209, 1993) rulings).

The equally efficient competitor test without any profit-sacrifice consideration was just mentioned in the US context in a DoJ amicus curia in the *LePage’s case* (Brief for the United States as Amicus Curiae, 3M Co. v. LePage’s Inc. 14-15 (No. 02, 1865), May 28, 2004). In this multi-product bundled rebates litigation, the US Supreme Court has declined to hear the case. Nevertheless, The Court of Justice underlined, about the implementation of such a standard, that “whether or not that test is administrable, it lacks any grounding in our Antitrust jurisprudence”. On the contrary, the equally efficient competitor standard was a longstanding hallmark of the European decisional practice. It was, for example, also applied in an essential facility case, *Bronner* (Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH und Co KG, case C-7/97, 2001). However, this decision also introduces the notion of an adjusted as-efficient competitor by characterizing as abusive a market practice that tends to exclude “a hypothetical competitor of equal scale to the dominant firm”.

Insofar, the implementation of the as-efficient competitor standard in the decisional practice of the European competition authorities was not self-evident. For example, in the *Irish Sugar* case (Irish Sugar Plc v Commission, case T-228/97), a selective price cut by the incumbent, benefiting to its most important rival main customers was characterized as an exclusionary practice without having to establish any pricing below costs. The same therefore applied, in the case *Compagnie Maritime Belge* (Compagnie Maritime Belge Transports SA v Commission, case C-395/96). In this famous case (with its fighting-ships strategy by which the incumbent aligned its offer and prices with those of the new entrant), it was considered that this strategy constituted in itself an abuse without having to compare the actual prices of the incumbent with its costs.

However, the as-efficient competitor standard was not totally and irreversibly eclipsed. Even if a formalist approach was performed in the *Intel* loyalty rebates case (Commission, 13 May 2009, COMP/C:3/37.990), the test was also applied alongside.

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⁹ In fact the European standard is not strictly the one recommended by Areeda and Turner (1975). It both uses effects and intent through a presumption of lawfulness through a profit-sacrifice test and an additional step that leads to take into consideration a potential exclusionary effect if an evidence of intent is established.
The Court of Justice, who has already applied or recommended this test in Deutsche Telekom and Telia Sonera, comforts what might be a European standard\textsuperscript{10} for exclusionary price based strategy and potentially adopts a more stringent conception than the Commission’s one – and perhaps an excessively, having regard to the lack of any reference to dynamic efficiency related concerns.

**III – The as-efficient competitor test: a convenient exclusionary abuse standard?**

The as-efficient competitor criterion leads naturally to consider the practice according the costs of the dominant undertaking. For example, in a margin squeeze case, an abuse is defined as soon as the vertically integrated operator prices its upstream good in a way that its downstream “subsidiary” cannot run profitably in the retail market if the upstream “subsidiary” imposed the same price than the one applied to its competitors. If the downstream unit might operate profitably with the same conditions in terms of upstream good prices, the pricing policy cannot result into a margin squeeze. An as efficient competitor in the downstream market would be not squeezed. Such a view allows to avoid decisions in which an abuse might be characterized just because the downstream competitor would not able to operate as efficiently as the incumbent in this segment (see *Industrie des Poudres Sphériques*, §185).

*Post Danmark* follows this logic – already implemented for margin squeeze cases in Deutsche Telekom (2010) and Telia Sonera (2011) – and gives it a larger scope encompassing all the exclusionary strategies relying on prices\textsuperscript{11}. However the validity of this option and its consequences might be questioned.

Firstly, 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 (e.g. whose market shares are less important) cannot be as efficient as the dominant undertaking. Their cost structures will be obviously less favorable. Making the sanction contingent to the excluding effect on an as efficient competitor might lead in such cases (network and high tech

\textsuperscript{10} The debate on exclusionary strategies is also intense in the US, especially after the withdrawal of the 2008 DoJ report on single firm practices. For example, sharp discussions have aroused around the standard used in the enforcement of the Section 5 of the FTC Act (Peritz, 2011). For the Antitrust Law in the strict sense, the academic literature proposes some truncated rule of decision related to the Section 2 of the Sherman Act (Baker, 2013).

\textsuperscript{11} We may note, following Auf'molk (2012), that the economic coherence of the competition law enforcement and the legal certainty induced closely depends on the consistency of the standards used for characterizing an abuse, irrespective of the formal classification of the price-based abuse at stake and irrespective of sector-specific considerations.
industries) to false negative cases or in other words to an under-enforcement of competition rules. In addition, for the liberalized industries we may consider that a new entrant would be never able to be as efficient as the incumbent. Promoting competition or building competitive markets might impose to protect less efficient operators, perhaps transitorily, as we will see in our next section.

Secondly, implementing such a test supposes to define a time horizon and by the way implicitly determine a discount rate for arbitrating between short-run and long-run effects. In a nutshell, two different methods may be applied. The first one is a period-by-period approach and the second one a dynamic approach. In the first, the test is applied within a given period of time. The competition authority has to assess the existence of a squeeze for every year. This approach is nevertheless flawed. Indeed, in investments intensive industries, it makes no sense to suppose that the costs should be entirely recovered only within one period of time. A disconnection between costs and prices is quite natural during the investment phases and initial losses might be logically accepted because of the expected future additional profits. In other words, the test might lead to erroneous conclusions. The same reasoning applies to all the industries characterized by network effects or learning curve phenomena. As Spector (2008) stated “low introductory downstream prices may have innocent motives because both producers and consumers in new markets need to gain experience, and costs can usually be expected to decrease”.

Thirdly, implementing such tests also lead to break down cost data between different activities, as the Post Danmark case demonstrates (Marty, 2013). The issue is all the more difficult that the incumbent has differentiated its products and activities and practices bundling strategies. In Post Danmark, the issue was to separate the costs induced by universal service obligation and those induced by commercial activities (here the distribution of unaddressed mail). The reasoning consisted in considering the ‘incremental cost’ of this activity. These ones were defined as “being ‘those costs destined to disappear in the short or medium term (three to five years), if Post Danmark were to give up its business activity of distributing unaddressed mail” (§31). The difficulty arouse from the fact that is necessary to isolate the proportion of these ones linked to universal service obligations. The average incremental cost has to integrate both the costs induced by this activity but also an estimated (and partially arbitrary) portion of the common costs (§33).

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12 We might consider the British BSkyB case (December 2002) for which the Office of Fair Trading that in a nascent market, an operator might accept to incur losses in order to increase the number of its subscribers to the threshold at which it might operate profitably (OECD, 2009).
Fourthly, the nature of the costs taken into account might, in itself, have a dramatic influence on the legal qualification of the practice. We might illustrate this point through a 2013 decision of the OFCOM, the British regulator of telecommunication, implementing the as-efficient competitor test in a margin squeeze case. The regulator has to assess the downstream costs of an as-efficient competitor the long-term incremental costs and not the avoidable costs. The reason of this choice is that the later integrates sunk costs. If it appears appropriated to integrate them in a sector-specific regulation policy in which the main objective is to favor entry, it is by far a more challenged option as soon as the markets at stake are characterized by an effective rivalry between well-established competitors. The issue is whether existing competitors might be excluded by the dominant undertaking pricing policy. In this respect, the investments realized for accessing the market are not relevant13.

IV – From the equally efficient competitor standard to a reasonably efficient competitor one?

The exclusionary prices test implemented by the Court of Justice constitutes a clear progress considering the Akzo test formerly used. The Post Danmark standard might provide a general test of exclusionary abuses through prices. By doing so, it might overcome the theoretical limits inherent to predatory pricing tests. These ones commonly require a possibility of investment recoulement14. The standard proposed by the Court of Justice therefore covers a broad range of anticompetitive strategies. Let us remember that the case was about selective rebates granted by a dominant

13 On the issue of the integration of sunk costs – especially in the case of industries characterized by heavy investments and network externalities – see Baumol (1996) and Bolton and al. (1999).
14 Predatory pricing incriminations were sharply criticized by the Chicago School. The chances of success and the probability of investment recoupment are considered as too tight to consider such a strategy as a rational one. As a consequence, if predatory pricing strategies really exist in practice, they benefit to consumer at the short run (because of the price reduction) and may not cause any harm at the long run because of their ineffectiveness. Sanctioning a firm for predatory pricing is nothing more than harming the final consumer. In addition, predatory claims are often analyzed as strategic ones, engaged by less efficient competitors, searching for the protection of the antitrust umbrella. Such a clear-cut view is challenged by the Industrial Organization models. According to them, predatory pricing – and more broadly price-based exclusionary strategies – may make sense at the economic point of view as soon as we consider some parameters as the financial constraints on new entrants and signal strategies. The first set of parameters deal with the incomplete and asymmetric information about the firm competitiveness and about the strategy of the dominant undertaking that may lead external financiers to refuse to support the prey. The second set of parameters is linked to signaling models and to reputational investments. A dominant undertaking may engage exclusionary strategies in a given market without the purpose to recoup its initial losses (or opportunity costs). The strategy for the second period would be just a limit pricing one. The sense of this behavior as to be understood considering to whole set of markets in which the firm operates. The practice has to be analyzed as the acquisition of a reputation of aggressiveness, helping the firm to dissuade potential competitors to enter the other markets.
firm, operating in several markets, some of them liberalized, the other ones in which it operates under exclusive rights. In the case, two of the three selective price cuts in the favor of its competitor costumers led to a final price above the incumbent costs. The Court of Justice had proposed a new test (inspired by the Deutsche Telekom one) adapting the Akzo test to cases in which the dominant firm operates in different markets, allowing to dispatch costs to the different activities. In these configurations characterized by common costs, the traditional average total cost and average variable cost curves are replaced by the incremental long run cost and the avoidable cost. The purpose is to avoid false negative cases to the benefit of the incumbent and by doing so protecting the interests of an as efficient competitor\textsuperscript{15}.

Nevertheless, 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\textsuperscript{16}. The arguments for relaxing the as-efficient competitor criterion and for using a reasonably as efficient competitor test might be understood in this context (see Gaudiny and Saavedra-Valenzuela, 2012).

- **The need for an adjusted test**

We might first consider that the two tests correspond to two different logics. The as-efficient operator standard belongs to the competition law field. Its purpose is to prevent the exclusion of equally efficient operators, detrimental to the consumer

\textsuperscript{15} These points echo some theoretical debates about the margin of freedom of dominant undertakings facing new entry. For example, Baumol (1979) advocated for a rule aiming at sanctioning any transitory price cut. The purpose was to establish something like a stand-still period for analyzing the price strategy. If the price reduction is perennial, it leads to increase consumer welfare. If the price cut is a short term one, the economic sense of the strategy lies in impairing the entry of the new challenger by artificially lowering its profitability. Edlin (2002) was even more stringent by proposing to forbid any selective price cut by a dominant undertaking after a new entry. Such proposals induce nevertheless many difficulties. Firstly, forbidding price reductions, even transitory, might deprive consumers from the attached benefits. It might also provide an unduly protection to less efficient competitors. Secondly, even if the underlying reason of such a choice is their transitory less efficiency (because of their investments costs, the absence of sizeable economies of scale and scope …), it leads to accept a subsidizing device from the consumers to the newcomer. We may wonder if financiers are not more able to assess the potential of a new competitor than any competition authority (Elhauge, 2003). Prohibiting any price cut may impair the dynamic efficiency of the market and facilitate opportunistic law suits by the newcomers (Baumol and Ordover, 1985). It may also lead to maintain suboptimal pricing structure by the incumbent, fearing that any evolution after a new entry might be analyzed as an exclusionary practice (Elhaugve, 2003). In any event, we have to highlight that the competitor in the Post Danmark case was not exactly a new entrant but an already well established challenger.

\textsuperscript{16} Anyway we have to note that as soon as in Deutsche Telekom and Telia Sonera a squeeze is demonstrated on the basis of the actual downstream costs of the incumbent, it would be logically the case if the reasonably efficient competitor test was used. In this logic we might wonder if it was only necessary to perform this second cost test, knowing that the abuse was already characterized.
welfare. It provides legal certainty for the incumbent as this one may easily assess the lawfulness of its market practices. Conversely, the reasonably efficient standard makes sense in the regulatory field, e.g. on an ex-ante basis in order to promote entry or to perform an asymmetrical regulation\(^{17}\). Nevertheless, as we have seen, the competition in the newly liberalized sectors is not characterized by a level playing field. The new entrants might be excluded whatever their merits by already installed incumbent, whose competitive advantages may be just explained by their former monopoly statute.

The Commission itself has referred to such a test, for example in its *National Carbonizing Company* decision (29 October 1975). The strong appropriation by the Court of Justice of the as-efficient competitor standard contrasts – paradoxically – with the prudence of the Commission. This one leaves the door opened to an implementation of the reasonably efficient competitor standard\(^{18}\), as underlined in *Telefónica* (Commission decision of July, 4\(^{th}\) 2007, case COMP/38.374 – Wanadoo España vs. Telefónica, §314): “A margin squeeze can be demonstrated by showing that the dominant company’s own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company (‘equally efficient competitor’ test). A margin squeeze can also be demonstrated by showing that the margin between the price charged to competitors on the upstream market for access and the price which the downstream arm of the dominant operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (‘hypothetical reasonably efficient competitor test’)

Indeed, as we have already pointed out, the Commission insists in its 2009 Guidance on the opportunity to take into consideration in abuse of dominance cases both the competitive pressure exerted by even a less efficient competitor and the possibility of

\(^{17}\) We might also consider that the implementation of the as-efficient competitor standard is well-suited in regulated industries in which the new entrants need to benefit from the supply of an upstream good by the incumbent. Such a good might be – in the case of industries characterized by an essential facility - an access to network. The incumbent might be incentivized to foreclose its competitor (a regulated price of the upstream good makes the Chicagoan single monopoly profit theorem inoperative) and has really the ability to achieve such foreclusion. By a price squeeze it might easily foreclose any as-efficient challenger.

\(^{18}\) It is also interesting to note that in its decision, the Commission directly refers to a 2004 OFCOM decision, e.g. to a national sector-specific regulator methods. Such adjusted equally efficient competitor standards are implemented in UK in regulated sectors. It was for example the case for the OFCOM decision (both upheld by the Competition Appeal Tribunal and the Court of Appeal) *Albion Water* (Case n°1046/2/4 Albion Water Ltd supported by Acquavitae UK Ltd and Water Services Regulation Authority, 2006, CAT).
a currently less efficient new entrant to overcome its disadvantages as soon as it benefit from the same economies of scale and scope than the incumbent (§ 24).

Even the Court of Justice, in *Telia Sonera* (Case C-52/09, 17 February 2011), had admitted such an alternative standard. According to the Court, “that said, it cannot be ruled out that the costs and prices of competitors may be relevant to the examination of the pricing practice at issue in the main proceedings. That might in particular be the case where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons, or where the service supplied to competitors consists in the mere use of an infrastructure the production cost of which has already been written off, so that access to such an infrastructure no longer represents a cost for the dominant undertaking which is economically comparable to the cost which its competitors have to incur to have access to it, or again where the particular market conditions of competition dictate it, by reason, for example, of the fact that the level of the dominant undertaking’s costs is specifically attributable to the competitively advantageous situation in which its dominant position places it” (§45).

The reasonably efficient competitor standard basic idea consists in the working-out of a hypothetical incumbent cost structure without the benefit of its economies of scale and scope that depends on its market share. As its cost structure becomes less favorable, more competitors might be seen as excluded on another basis than on the merits. We have to keep in mind that such a tool is more legitimate for sector-specific regulators than antitrust enforcers. Implementing such a reasonably efficient competitor test might be seen, as we see in our next section, as a deviation from a competition policy enforcement defined as the *ex post* sanction of anticompetitive practices.

If we take the example of margin squeeze cases, the as-efficient competitor test is passed as soon as we have $P_{\text{up}} - P_{\text{down}} > C_{\text{down}}$ with $P_{\text{up}}$ the price of the upstream good (in the case of a network, the access charge), $P_{\text{down}}$ the price of the downstream good (the retail price in network industries) and $C_{\text{down}}$ the cost incurred by the incumbent for operating in the retail market. On the contrary, a reasonably efficient competitor standard is fulfilled if $P_{\text{up}} - P_{\text{down}} > C_{\text{down(compet)}}$ with the last term representing the downstream market costs not by the incumbent but by a hypothetical competitor, reasonably efficient. It is possible, if the incumbent benefits from competitive advantages, to obtain a result in which $P_{\text{up}} - P_{\text{down}} > C_{\text{down}}$ but $< C_{\text{down(compet)}}$ as the figure *infra* illustrates (Edwards, 2011).
In this situation, even if the incumbent might operate profitably, a new entrant would be foreclosed because of its structural cost disadvantages. These ones, as we have seen, encompass economies of scale and scope but also other first-mover advantages as brand awareness, consumer loyalty, or consumer inertia induced by the switching costs (Auf’molk, 2012).

- **How to reconstitute the cost function of a reasonably efficient competitor**

At the practical point of view, three alternative methods can be applied to define the cost structure of such a reasonably efficient competitor (Gaudiny and Saavedra Valenzuela, 2012). The first one implies to build a bottom-up model of such an operator. The second one supposes to mobilize alternative operators’ costs data. The third and last one proceeds from the adjustments of the costs borne by the incumbent in order to reflect new entrants’ effective conditions. Three kinds of adjustments are commonly performed (Gaudiny and Saavedra Valenzuela, 2012). The first ones concern the competitors’ downstream costs disadvantages. It leads to correct the incumbent per unit costs in order to neutralize the impact of its economies of scale and scope. The second ones are relative to the possibility for the downstream competitors to use different wholesale products to carry out their activities. It is then necessary to adjust the impact of access charges. The third ones are linked to the impact of a multi-products offer by the incumbent in the downstream market. It supposes to take into account the costs induced by bundling strategies.

The competition authorities have to adjust the actual costs of the incumbent to a smaller market share in order to assess what would be their (downstream) costs if they do not benefit from their current economies of scale. In other words, “the incumbent’s cost is evaluated at a lower demand than the one it is actually serving”
(Gaudiny and Saavedra Valenzuela, 2012). Commonly, the practice is to reduce the market share of the incumbent to 25%. The hypothesis, according to which a reasonably efficient competitor would obtain a market share of 25%, is closely linked to econometric studies confronting the number of operators in a given market and the price levels observed (Bresnahan and Reiss, 1991). Concisely, some assessments realized in liberalized US markets tend to show that the post-entry competition increases at decreasing rates with the number of new entrants. Most of the welfare gains are obtained through the entry of the second and third competitor (Cadman, 2011).

A same logic is applied in order to correct the impact of the economies of scope. A multiproduct incumbent is advantaged compared to a single-product new entrant as it might benefit from crowded cost savings and from cost spreading between several activities. It's also necessary in such a case to assess what would be its costs if it produced only one downstream good (or the same basket of goods and services than the one offered by its competitors). In other words, it is necessary to spread a given proportion of the incumbent’s overheads across its competitive products in order to avoid cross subsidies phenomena. In this logic, as the Post Danmark case illustrates, the competition agency has to rely on cost functions as the long-run average incremental cost. More generally, the more differentiated the activities between the incumbent and its competitors, the more difficult to perform the cost test comparison (Petulowa and Saadreva, 2013).

It might also be necessary to adjust the incumbent downstream costs to match with the entrant ones, assuming these ones have to bear specific costs related for example to interconnection with the incumbent essential facility. In the telecommunication sector, it might be for example, the case of equipment collocation costs. In the same logic, it might be required – as the Telefonica case demonstrated – to adjust the cost related to the access charge to reflect the fact that a new entrant might use a wholesale product mix different than the one of the vertically integrated incumbent. It is also necessary, in order to build a hypothetical reasonably efficient competitor, to correct the impact of bundling strategies in the downstream segment.

To its logical solution, the reasonably efficient competitor standard would require to adjust the terms of the assessment in order to compensate the costs induced for final consumer by the transition from the incumbent to the new entrant (Cadman, 2011). In short, two kinds of costs might be taken into account, respectively the search costs and the switching costs. Commonly, the new entrants have to compensate these costs by advertising investments, by subsidizing new consumers, or by providing for free
migration services. Implicitly, it might possible to assess these costs by considering the part of the difference between the average price of the incumbent and the one of its competitor that cannot be explained by cost differences. According the British energy regulator (the OFGEM), such a premium might be evaluated between 6 and 10%.

- **The Pros and Cons of the reasonably efficient competitor standard**

The trade-off between these two tests closely depends on sector related specificities. As the Commission already does in its 2009 guidance, the Court of Justice insists on the specific case of liberalized sectors in which the market position of the incumbent cannot be seen as the fruits of its own merits but as an inheritance of former exclusive rights: “When the existence of a dominant position has its origins in a former legal monopoly, that fact has to be taken into account” (§23). As we have already underlined, the Commission admitted that the demonstration of excluding effects can be skipped in such cases: “This could also be the case where the upstream market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources. In such specific cases there is no reason for the Commission to deviate from its general enforcement standard of showing likely anti-competitive foreclosure, without considering whether the three circumstances referred to in paragraph 81 are present” (§82).

Even so, such reasoning might be also applied in a larger scope than network industries or former state monopolies. The reasonably efficient competitor test might also be implemented in high-tech industries. In software industries or in electronic-platform business the network effects are very significant. As a consequence, a new entrant or a firm of the competitive fringe cannot be ceteris paribus as efficient as the dominant operator. Additionally, it might be desirable, in terms of plurality of technological dynamics to comfort the existence of alternative suppliers, even they are not equally efficient than the dominant firm. Such suppliers might be also less efficient than the dominant undertaking if we consider the whole market but they may be as well essential for customers in very specific segments of markets. Their exclusion might lead to an irreversible competitive damage for this segment of consumers. In addition, the dominance on the main market is often endangered not so by pure new comers but by this kind of marginal competitors (Vickers, 2005). Relaxing the as efficient test in this respect might make sense for the article 102 enforcement.
In fact, implementing a reasonably efficient competitor standard might make sense if the competition authority prefers promoting entry than maximizing consumer welfare. We may analyze such a choice as a trade-off between short-run gains and long-term gains for the consumers (provided by the rivalry between firms and (potential) technological paths, as the 2004 Microsoft decision underlined). We may also understand it through the notion of “equality of opportunity” between market players (Clerckx and De Muyter, 2009). This concept was introduced by the Court of Justice in Connect Austria (Case C-462/99, 22 May 2003): “The Court has consistently ruled that a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators” (§83). Putting the accent of such an equality of opportunity leads to taking into account the structural disadvantages of the new entrants, as the Commission has underlined in its 2009 Guidance.

However the reasonably as efficient operator might introduce several additional biases for competition laws implementation.

Firstly, it gives to the agency a huge discretionary power that may lead to opposite results than the ones expected both in terms of legal certainty and in terms of economic effect. The reasoning is no longer performed on the basis of the actual or observed effects of the practice and not on the costs of the dominant firm but according to a very hypothetical cost function for which the discretionary margin is very significant. Such criterion may easily lead to an over-enforcement at the expense of the dominant undertaking if the competition authority aggressively enforces the competition law provisions.

Secondly, as soon as the incumbent – or the vertically integrated operator – is obligated to supply an upstream good to its downstream competitors, we have to consider the additional costs induced by such furniture. The notion of additional upstream costs has to be integrated in the assessment (Chôné et al., 2010). Concisely, we might consider, for example in margin squeeze cases, that even the equally competitor test disadvantages the incumbent by not taking into account the additional upstream costs induced by the supply of the input to downstream competitors (or by the network access). Briefly, supplying a downstream competitor, even as-efficient as the vertically integrated incumbent on the downstream market, might reduce global welfare if such a supply induces additional costs vis-à-vis its own subsidiary (Edwards, 2011). Implementing an equally efficient competitor test only on the downstream segment without taking in account such upstream additional cost might lead to false positive decisions. In other words, it might be necessary to adjust
the upstream costs of the incumbent to prevent the risk of characterizing an abuse, as the Edwards' figure *infra* illustrates.

If such additional costs were taken into account by the General Court (then the Court of First Instance) in its *Industrie des poudres sphériques* decision, it was not the case in more recent rulings as *Telefónica* in which the Commission puts into relief the “ladder of investment” argument (§32) allowing to require from the incumbent to prevent a squeeze effect, irrespective of the entry model chosen by the new entrant and consequently of the additional upstream costs induced (Edwards, 2011).

Thirdly, we have also to consider that a new entrant might benefit from several costs advantages vis-à-vis the incumbent. It is particularly the case when this one has to maintain a large network imposed by its universal service liabilities. These one may be compensated but the structure costs might be impacted. In the same way, the productive structure (for example the technology mix in electricity sector) might be more costly for an incumbent than for a new entrant, which can opt for less expensive to run or less capital intensive technologies. Last but not least (as the French Competition Authority decision n°12-D-25 of December, 18, 2012 on practices implemented in the railway freight sector demonstrated), the incumbent might be put at a disadvantage by higher salary costs. All these factors make that considering a reasonably efficient competitor hypothesis might lead to an over-protection of new entrants.

V – Does the equally efficient operator make sense in competition law enforcement and the reasonably efficient one in sector-specific regulation?
Such questionings also illustrate the issue of the dividing line between sector-specific regulation and competition policy enforcement. When the European Court of Justice endorses the as-efficient competitor test, incidentally in a stricter acceptation than the European Commission, the reasonably efficient competitor standard might be seen as more appropriated in regulatory issues. For example, this second test is recommended by the Commission for assessing the access conditions to new generation networks (European Commission, 2010). In this recommendation, the Commission proposes to assess the possibility of a margin squeeze (between the access charge and the retail price) not only according to the downstream costs incurred by the incumbent (e.g. the as-efficient competitor test) but also “by showing that the margin between the price charged to competitors on the upstream market for access and the price which the downstream arm of the SMP operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit” (§26).

The objective, set forth by the Commission, consists in preserving (or perhaps building) an effective competition, between operators who do not benefit from the same economies of scale and scope and consequently do not bear equivalent costs per unit. Additionally, the Commission insists on the issue of the definition of an appropriate time frame for assessing a possible squeeze effect. Such a test undoubtedly makes more sense in an ex ante basis – regulating an access charge policy – than an ex post one. In a nutshell, competition rules aim at forbidding specific behaviors and consequently impose negative requirements to firms by reducing the set of acceptable strategies. For this purpose, they lead to sanction ex post any non-compliant market behavior (Parcu, 2010). On the contrary, sector-specific regulation imposes positive rules. In addition, competition law enforcement has not to seek to improve the competitive level of a given market but to preserve the competitive process in itself (or to ensure the maximization of the consumer welfare by guaranteeing the conditions of the allocative efficiency). On the contrary, regulatory measures aim at promoting a sustainable competition in formerly monopolistic markets (Cadman, 2011).

The as-efficient competitor test belongs to the first category. An incumbent might anticipate its antitrust liability by assessing a possible exclusionary effect through its own cost structure. According to the European case law, a margin squeeze is a stand-alone abuse of dominant position, arising when a vertically integrated incumbent’s downstream division cannot exercise its activity profitably on the basis of the price charged by the upstream division to its competitors in the downstream market.

19 According to the European case law, a margin squeeze is a stand-alone abuse of dominant position, arising when a vertically integrated incumbent’s downstream division cannot exercise its activity profitably on the basis of the price charged by the upstream division to its competitors in the downstream market.
might logically impose – in terms of legal certainty – that the costs structure of such a hypothetical competitor is *ex ante* defined. Indeed, in terms of competition law enforcement, the second test might fail to guarantee legal certainty and to prevent inefficient entries. Nevertheless, as the proportion of new liberalized sector cases within the Commission’s decisions on the basis of article 102 testifies, the dividing line between sector-specific regulation and competition policy is somewhat blurred. Additionally, as we will underline in our next session, the quasi-hegemonic recourse to commitment procedures, may also favor an “antitrust positive regulation” (Parcu, 2010).

Moreover, when US courts refuse to enforce antitrust laws in regulated sectors, the European competition authorities do not hesitate to affirm the primacy of the competition policy, as the Deutsche Telekom case has demonstrated. In other words, European competition policy accepts to pursue broader objectives than the sanction of anticompetitive practices. The analysis of article 102 enforcement testifies of such regulatory concerns. Many of Commission decisions related to network industries impose (or make bidding in the case of commitment procedures) some “quasi-regulatory remedies” (Auf’mkolk, 2012). The competition law might be seen according to this logic as being instrumentalized in order to carry out regulatory objectives, as promoting competition in former legally monopolized sectors. We might question the capacity of such “antitrust positive regulation” to build (through organization rules) competitive markets (Deakin and Pratten, 1999) and not a “synthetic competition” (Ginsburg, 2009).

The debate between the implementation of the as-efficient competitor standard and the reasonably efficient one has to be considered within this context. Margin squeeze cases are particularly instructive in this respect. Using the reasonable efficient competitor standard in a competition case make sense as soon as the purpose of the competition agency is to level the playing field between the incumbent and its new competitors. Such a purpose is obvious for sector-specific regulation agencies. A regulatory agency is not only bound to maximize consumer welfare. Its missions encompass intermediate objectives, as promoting market rivalry. In other words, the balance between short-term and long-term welfare effects might be different between these kinds of agency.

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20 Auf’mkolk (2012) counts 26 margin squeeze cases from 2000 to 2010 (European, British, German and French). 24 of them concerns regulated industries and 20 involves the telecommunication sector. More broadly, a very small number of the principal European margin squeeze cases does not involve regulated sectors as the *Industrie des Poudres Sphériques* (General Court, case T-5/97) and *Napier Brown v British Sugar* (Commission, case 30.178)
Implementing the reasonably efficient competitor standard might be necessary to correct the advantages benefiting to the incumbent (as the 2009 guidance of the European Commission underline) and ensuring a competition level playing field, but also might lead to protect inefficient new entrants under an *Antitrust umbrella*\(^\text{21}\). However, it might induce as well some “feedback effects” at the legal point of view. These ones are susceptible to impair the coherency of the competition policy itself (Auf'molkol, 2012). On one hand, it might lead to a differentiation of the standard used according the sector that would impair the consistency of the competition law enforcement. For example, a pricing practice might be seen as admissible in commodity markets and as abusive in recently liberalized network industries (Auf’molkol, 2012). On the other hand, it might lead to replicate far-reaching antitrust remedies to very different sectors. In other words, the remedies shaped to address specific issues in network industries might be excessive and counterproductive in other sectors. The clear-cut separation between regulated sectors and unregulated ones established by the US Supreme Court in *Linkline, Crédit Suisse*, and *Trinko* allows avoiding such a possible pitfall.

**VI – Discussion: as-efficient competitor test and effects-based approach**

The standard adopted by the Court of Justice about exclusionary prices might allow to develop a sounder economic analysis of pricing strategies of incumbents. On the one hand, it leads to consider a larger specter of strategies than the predatory ones. The recoupment of investments makes no sense in numerous cases and the competition authority must adapt the traditional tests to high fixed costs industries in which common costs between different activities are very significant. In the same way, according a lower importance the intent issue makes sense considering the debates on the pertinence of such concepts in competition policy (as intents are unknowable (Stucke, 2012)). By doing so, the test adopted participates to a more-economic approach. However, on the other hand, it is difficult to consider that such test always pertains to an effects-based approach.

Firstly, considering the relationships between the prices and the costs of the incumbent for characterizing the abusive nature of the strategy seems to allow not considering the effects issue (Bosco, 2013). If the dominant firm prices beyond its avoidable cost, its strategy is automatically interpreted as an exclusionary one whatever its actual (or even potential) effects. If the dominant firm price above its avoidable cost but beyond its incremental cost, it may be analyzed as an exclusionary

\(^{21}\) Margin Squeeze claims are often considered with suspicion by scholars as they might easily lead to protect competitors sometimes at the expense of competition itself (at least in a consumer welfare perspective). See Sidak (2008).
strategy if it tends to exclude as efficient competitor. The standard of proof appears as a little bit weak. The case of margin squeeze appears as very significant. Contrary to the US standards, a squeeze is considered as a stand-alone abuse of dominance. It is no necessary to establish exclusionary pricing practices, as predatory prices. The Post Danmark test does not take into consideration the actual effect of the practice in terms of consumer welfare.

Secondly, we may underline that, within the European competition law enforcement framework, the specific nature of the market is taken in consideration only in order to relax the decisional standard at the expense to the incumbents. More broadly, we may underline the proximity of this logic with the one developed by the Commission within its 2009 guidance. If we consider the share of network industries cases in the Article 102 based suits, we may fear a very tight perimeter of implementation of a real effects-based approach. In the same spirit, reasoning first according to the relationship between costs (even avoidable ones) and prices decided by the dominant undertaking and only in a second time – if necessary – on the excluding effects, leads to some questions about the treatment of high tech industries cases, especially for two-sided markets, for which costs analysis appear as difficult to manage.

For example, how to really define a cost threshold in the case of an electronic platform of intermediation optimal pricing? Furthermore, how to manage for such industries with the distinction between actual and potential exclusionary effects? Waiting any actual effects might condemn the competition policy enforcement to ineffectiveness. The competition damage might be irreversible, because of the structure of such industries (high fixed cost, very significant network effects, and technological and commercial lock-in phenomena).

Characterizing an abuse of dominant position only in the case of an actual exclusionary effect is not sufficient to dissuade a dominant firm to behave strategically against its competitors. Nevertheless, the question lies in the standard of proof adopted for a potential effect? How to separate in such cases a formal-rule based view from an effects-based one? Perhaps more fundamentally, how to define the potential scope of implementation of any effects-based approach, considering the fact that an increasing number and already a large majority of cases (100% in the case of energy sector since 2007) are settled according the article 9 of the regulation 1/2003? Shall a real effects-based logic really be implemented in such commitments?

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22 “A margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU” (Court of Justice, TeliaSonera, 17 February 2011, case C-52/09, §31).
procedures in which there is no discussion about the assessment of the competition harm, of the efficiency gains associated to the practice and about the proportionality of the negotiated remedies?

More broadly, the debates on the different price-based exclusion standards (the consumer welfare, the profit sacrifice and the equally efficient operator) put into relief the issue of the implicit trade-off performed by the competition law enforcement agency between short-run allocative efficiency (if knowable) and long-run productive efficiency (if reliable). On the one hand, privileging the second one might lead to prefer two birds in the bush over a bird in the hand. On the other hand, as the 2009 Commission guidance underlines, the implementation of competition policy has to take into consideration the specific conditions of the considered market, especially when the dominance is the fruit of former exclusive rights. However, using competition law for improving the competitive level of a given market, or to ensure – artificially – a level playing field, contributes to blur the boundary between the logics of regulatory and competition policies.

Finally, it is particularly interesting to put into perspective the test used by the Court of Justice (and its subjacent reasoning about the issue of the actual effects of the exclusionary practice) with a June 2013 decision of the British OFCOM (Edwards and Walker, 2013), related to a margin squeeze claim (OFCOM, CW/988/06/08, complaint from THUS Plc and Gamma Telecom Ltd against BT about alleged margin squeeze in wholesale calls pricing, final decision, 20 June 2013). The complaint was lodged by to BT's competitors in the supply of wholesale calls who depends from the incumbent for upstream input (accessing its copper pair). Despite establishing a squeeze induced by a margin between BT's upstream and downstream costs insufficient to allow an equally efficient operator to cover its downstream costs, the OFCOM does not recognize an abuse of dominant position because of the lack of actual or likely future exclusionary effects. In other words, the OFCOM considers the as-efficient test as a necessary but not sufficient to establish an abuse. Consumer welfare harm is a condition, according the OFCOM, to characterize an abuse of dominant position. However, the costs tests alone do not establish an antitrust liability. If such a statement appears to recognize a more limited importance to the equally efficient operator standard than the Court of Justice did in Post Danmark, we have to keep in mind that its interpretation of the standard was even more far reaching than the Commission one. This one stated, in its 2009

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23 The OFCOM grounds its assessment on the lack of evidence of any reduction of the intensity of competition or of observation of downstream competitor exiting the market.
Guidance, that this test was not sufficient for establishing an abuse. It was necessary to demonstrate that the practice tends to have a foreclosing effect. It’s quite paradoxical to note that the Court of Justice seems to endorse an even more resolved attitude towards this test than the Commission itself. The adoption of the equally efficient competitor test – outside the range of margin squeeze in regulated markets – and the stringent acceptance of its results, might induce a clear-shift of the Court of Justice decisional practice towards a more economic approach and towards a unified framework for assessing the compliance of price-based strategies of dominant undertakings.

However, two concerns might lead to fear a potential excessive reliance on such a standard. The first one deals with dynamic efficiency concerns and the second one with the issue of the assessment of effects. Firstly, in its 2009 Guidance, the Commission insisted on the necessity to put the results of test into perspective in order to deal with dynamic efficiency considerations (§24). Unfortunately, the Court of Justice does not take such a precaution. Consequently, the European case law might run the same risk of an over-weighting of false positive risks than the US one. Secondly the Court of Justice unconditional appropriation of the equally efficient competitor standard might induce another pitfall consisting in performing exclusively a cost-based assessment at the expense of any evaluation of the effects – actual or potential – of the strategy of the dominant undertaking. The more economic approach in practice might be dramatically different than an effects-based one....
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