

IS THE CONSUMER WELFARE OBSOLETE? A EUROPEAN UNION COMPETITION LAW PERSPECTIVE

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Is the Consumer Welfare Obsolete?

A European Union Competition Law Perspective

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Abstract: In 2005, the European Commission advocated for a more economic approach for enforcing competition laws. The sole criterion for assessing the lawfulness of a market practice should be the appraisal of its net effects on consumer welfare. The Court of Justice was reluctant to adopt such an approach until its 2017 Intel Judgment. Its endorsement - which is debatable insofar as the judgment may give rise to different interpretations - may appear paradoxical in that it is concomitant with a sharp challenge to the consumer welfare criterion in the United States. The purpose of this article is to retrace the history of this criterion, particularly with regard to its adoption in the context of E.U. competition law. Our aim is to show that the criticisms of the effects-based approach can be addressed not by moving away from the consumer welfare criterion but by integrating it into a broader perspective, that also takes into account the protection of the competition process itself.

Keywords: anticompetitive practices, effects-based approach, consumer welfare, ordoliberalism, E.U. competition law.

JEL Codes: K21, L41.

As a cornerstone of European Union (hereafter EU) competition law enforcement since the (gradual) adoption of the effects-based approach over the last 15 years, the consumer welfare criterion is paradoxically being challenged at the very moment when it seemed to be gaining ground. This contribution aims to put this dynamic of adoption into perspective with the history of EU competition case law and the history of economic thought.

We show how the debates surrounding the concentration of economic power in the United States and its consequences on competition have led to a re-examination of the place of the criterion of consumer welfare as the sole criterion for assessing competitive practices. These considerations echo both the now secular debates on the finality of the Sherman Act and the questions that were raised by the neo-liberals of the 1930s on both sides of the Atlantic. It is a question of deciding between a competition policy that aims to secure the outcome of competition: allocative efficiency, and a competition policy that aims to protect the competition process for its own sake.

This second option amounts de facto to updating the European concept of the special responsibility of the dominant operator in relation to the preservation of a situation of effective competition. It is therefore not a question of rejecting the criterion of consumer welfare, but of reconciling objectives that may to some extent be incommensurable and sometimes contradictory: loyalty, fairness, preservation of market access... In the end, it is a question of the judge's own role in the application of a rule of law.

This article discusses the place of the consumer welfare criterion and its implementation in the field of competition rules. It shows in its first section that it was only very belatedly integrated into the framework of EU competition law. It highlights in its second section that in the face of the challenges to which it is subject, particularly in the United States, the consumer welfare criterion remains valid from the moment it is integrated into a broader competitive reasoning, as implemented by the European Commission. Nevertheless, our conclusion shows that such a reconciliation between potentially contradictory criteria may not go by itself. Our third and conclusive section discusses the implementation difficulties of a competition protection standard and presents some arguments developed in defence of the total welfare criterion as an alternative to the consumer welfare one.

I - A gradual convergence of EU competition law enforcement towards a more economic approach

This first section aims to highlight how European competition authorities have gradually adopted the consumer welfare as the exclusive criterion for competition rules enforcement, despite the fact that the foundations for the construction of European competition policy are based on broader theoretical roots, at least partly derived from German ordoliberalism¹.

A - The historic foundations of the EU Competition law

In this section, we first investigate the history of competition laws to separate the US influence from the European roots of the EU competition policy before considering in a second subsection the issue of the concentration of markets in the current antitrust debate.

i) The European roots of E.U. competition law

Historically, the first competition laws were North American. The first competition law enacted were more precisely Canadian² in 1889 and US with the Sherman Act in 1890. Meanwhile, the protection of competition was all but satisfying in the European continent. For instance, in France, the sanction of cartels remained purely hypothetical for a long time. Although the 1810 Penal Code had provided legal tools to sanction cartels³, the courts, since the Restoration, had made a distinction between good and bad cartels, leading to a non-enforcement (Didry and Marty, 2016). In Germany, the Reichsgericht (the Supreme Court) validated cartel arrangements in 1897 based on freedom of contract (Joliet, 1967). In the same decade, in the United Kingdom, the

¹ We will therefore assimilate the European approach and ordoliberalism in the rest of the article. The identification of the two is debatable, but it is intended to simplify the point. It would also be possible to use the concept of the Brussels School (see on this point Hildebrand, 2012).

² Combines Investigation Act, extended to include mergers and monopolization activities, as well as consumer protection. See <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03631.html>

³ The article 419 of the 1810 Penal Code stated “All those who, by means of false or slanderous facts deliberately sown in the public, by means of exaggerated offers made at the prices demanded by the sellers themselves, by meetings or coalitions between the principal holders of the same merchandise or commodity, tend not to sell it, or to sell it only at a certain price, or who, by any fraudulent means or ways whatsoever, has raised or lowered the price of foodstuffs or goods or public papers and effects above or below the prices that would have been determined by natural and free competition in trade, shall be punished by imprisonment for a minimum of one month and a maximum of one year and a fine of five hundred to ten thousand francs”.

House of Lords, then sitting as a supreme court, in its *Mogul Steamships* decision (1892), acquiesced in "predatory" strategies as long as they benefit the consumer and appear to comply with the principles of free competition⁴. Thus, prior to 1914, no legislation comparable to the Canadian and U.S. legislations existed in Europe. Gerber (1998) points out that some projects were nevertheless discussed in Austria-Hungary and Sweden on the eve of the First World War. However, these laws were not adopted.

Even worse, the experiences of the war economy led large corporations and public authorities to consider inter-firm co-ordination, i.e. cartelization, as an effective tool for steering the national economy. In this regard, it is instructive to note that the German example strongly influenced the French government during the conflict itself. A reversal is thus taking place in the aftermath of the Great War. The pre-war period was shaped by a prevailing classical liberalism. The *laissez-faire* appeared as the best approach in terms of economic policy. As in other government interventions, competition policy did not have a specific role to play as long as contractual freedom and property rights were at stake. In this respect, the European practices were quite close to the US *Classical Legal Thought* prescriptions, which hindered the application of both government interventions and antitrust rules enforcement in the *Lochner* era⁵.

By contrast, the inter-war period was characterized by the defence of the cartel as an efficient way of organizing the economy and avoiding destructive competition. This position was defended both by some of the major industry captains (G. Swope in the United States for GE, A. Detoef in France for Alsthom) and ultimately by the public authorities (see the Laval decree-laws of 1935 in the French case, for instance).

⁴ *Mogul Steamship Co. v Mc Gregor, Cow & Co*, 23 QBD 588

⁵ The *Lochner* era was characterized by a double phenomenon. Firstly, it entailed an under-enforcement of antitrust rules on the basis of protection of property rights and freedom of contract, this last one conceived as an approximation of individual liberty (Kirat and Marty, 2019). Secondly, it involved an enforcement of these same rules against trade unions (see for instance Glick, 2019a). Glick illustrates this enforcement bias through the case of the Second Cleveland Administration from 1893 to 1897 (his first one was from 1885 to 1889 was the first of the Democrat Party since the U.S. Civil War). If the Cleveland Administration brought eight antitrust cases, four of them have targeted labor unions. The most striking case was *U.S. v Debs* in 1894. Debs' labor union boycotted Pullman railway cars in solidarity with striking workers at the Pullman Palace Car Co. He was sanctioned (and eventually jailed) as his position leads to an unlawfully strike that interfered with mail delivery and interstate commerce (U.S. Supreme Court, *Debs In Re* 158 US 564 (1895)).

The sole exception on the European continent was Germany with the Weimar Republic 1923 Competition Act. The most fundamental root of European competition law lies in the assessment of its failure to overcome the market power of large companies (Marty, 2015). Many of the legal scholars and economists who founded the Freiburg School (Freiburg im Brisgau) took part in the experience and drew conclusions about the requirements for an effective competition policy. Within this perspective, strong competition regulation is necessary to ensure the sustainability of the competitive process itself against private economic powers. The government must not only act as a night watchdog, in the sense of 19th century Manchesterian liberalism, but also as a government that actively intervenes to protect competition, including against itself, as soon as its natural result leads to the concentration of economic power (Mongouachon, 2011).

The Lippman Colloquium organised in Paris by Louis Rougier in 1938 was the focal point of this theoretical dynamic (Mirowski and Plehwe, 2009). This conference has marked the birth of neo-liberalism and was at the origin of the foundation, after the war, in 1947, of the Mont Pèlerin Society (hereafter MPS). Whether it was the Lippman Colloquium or the first conference of the MPS, the different branches of neo-liberalism were still present, namely the ordoliberalism and what was to become, under the impetus of A. Director and E. Levi, the 2nd Chicago School (Bougette and al., 2015).

We will define in this subsection the first approach, the German ordoliberalism. We will discuss the second, the Chicago School neoliberalism, in our next subsection. The ordoliberalism is based on a set of assumptions that are quite straightforward to define. First, two powers threaten the market process: governments, which may be tempted to instrumentalize (or neutralize) it, and private economic powers, which may be tempted to manipulate it for their own benefit. Second, the market process is not seen as self-regulating. It can result in the concentration of economic power and thus in its exhaustion⁶. Third, government's intervention is therefore required to counteract this tendency, but this intervention must be "neutral". It must therefore be based on quasi-

⁶ At the opposite, according to Friedman (1962), private monopolies raise less concerns than public ones as they are 'generally unstable and of brief duration unless they can call government to their assistance'.

constitutional rules and be impersonal so as not to be instrumentalized⁷. Fourth, the protection of competition through public interventions does not aim to secure the actual outcome of competition (productive efficiency) but its process in itself and for itself.

The competitive process is conceived as a means of discovering and revealing the knowledge spread among the various players in the economy in the sense of Hayek (1945). Competition is also considered as a tool for dispersing economic power. Competition is the mechanism for dispersing power in the market sphere as democracy is the one for dispersing power in the political sphere (Marty and Kirat, 2018). The two dimensions are consubstantially combined in the ordoliberal approach: the defence of democracy and the defence of competition go along with each other.

This leads to two specificities. First, a situation of *complete competition* must be protected. This means a situation in which companies are price-takers, i.e. they do not have any market power⁸. Second, if an undertaking has such power, it must behave as if it did not have it. The notion of special responsibility of the dominant operator in the decisional practice of the European Commission stems from this approach⁹. The notion of special responsibility is defined as follow in the EU jurisprudence: “A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market”¹⁰. As we will see *infra*, it is more a matter of protecting the market process than securing allocative efficiency.

However, the European competition policy should not be regarded as mechanically driven by *ordo liberalism*. Firstly, the second German competition law was enacted in 1957... only after the Treaty of Rome. Secondly, other future Member States had their own competition legislation before then. This was the case, for example, in France with

⁷ Government may be captured by private economic power as the best guarantee against competition are regulatory barriers to entry. See Zingales (2017) for an analysis of these phenomena.

⁸ Such an approach leads to consider that the best situation is the one of an effective (and not a potential) rivalry on the markets preserving consumers freedom of choice (see for instance Amato, 1997).

⁹ EU Court of Justice, 9 November 1983, C-322/81, NV Nederlandse Banden Industrie Michelin c. Commission and 13 February 1979, Case 85/76, Hoffmann-La Roche & Co AG v Commission.

¹⁰ General Court (Court of First Instance), 30 September 2003, Case T-203/01 Manufacture française des pneumatiques Michelin v Commission.

the Commission Technique des Ententes created in 1953, which is a distant predecessor of our contemporaneous French Competition Authority. Thirdly, the Treaty of Rome, which resulted from the Messina Convention and the Spaak Report, was a compromise¹¹ between national attitudes more oriented towards competition (Federal Republic of Germany) and others more inclined to use industrial policies (France and Italy). Fourthly, the rise of DG Competition, in which the ordoliberal influence was from the outset the strongest within the Commission (Vay, 2019), was only very gradual (Warlouzet, 2010). The implementation of Regulation 17/62¹² was particularly difficult, and most of the ordoliberal influence came through the decisional practice of the E.U. Court of Justice from the 1970s onwards. Its competition law-based judgments could therefore be part of an integrationist process in the sense of Gerber (1998): the aim is to build a unified internal market governed by the rules of a free and undistorted competition.

It is worth noting, before addressing the following points, that the internal competition laws of the various EU Member States have adopted particularly broad objectives that go beyond the criterion of consumer welfare, which is never mentioned in the Treaty. Moreover, the competition laws of the various Member States are very composite in their structure. They encompass both restrictive practices law (*competitor law*) and antitrust law (*market law*). In doing so, the task of redressing the balance of economic power is never absent from competition law, as is the protection of the consumer and broader “non-economic” values (pluralism, etc.). Competition law, as Roda (2018) clearly shows, is designed to reconcile the different objectives assigned to market competition, which are by nature themselves conflicting.

ii) [The issue of Bigness: should the competition laws protect a given market structure?](#)

The purpose of the EU decisional practice was to ensure a situation of effective competition. The aim was not to protect competitors for themselves, as it could be the case in a structuralist logic (*à la* Harvard), but to compel the dominant operator to

¹¹ See Warlouzet (2008) for an in-depth analysis.

¹² EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, 21 February 1962.

check that its decisions will not have the effect (or were not likely to have the effect) of hindering competition on the relevant market. The purpose is therefore to protect competition not as regards its outcome but as regards its process.

This European perspective has conflicted in these two last decades with the approach developed by the second branch of neoliberalism, e.g. the Second Chicago School, since the 1950s'. It is not a question, in this paper, of developing the genesis of the latter (see for instance Bougette et al., 2015) but of tracing some of its basic tenets.

First, this school is directly connected to the First School of Chicago, of which Henry Simons was the figurehead, yet it differs somewhat diametrically from his positions. Simons was a neo-liberal who endorsed the very same advocations as the ordoliberalists. He was even more interventionist. He regarded the market as not self-regulating, as it was seen as inexorably converging towards the concentration of economic power. According to Simons such a tendency was as a problem in itself, whether from an economic or political point of view. It is therefore a requirement to implement the antitrust rules resolutely. Such an enforcement can lead to the dismantling of firms in order to make competition possible again. According to Simons, dismantling may be a necessary antitrust remedy whatever its cost in terms of efficiency (Kirat and Marty, 2019). The Second Chicago School will assume the perfect opposite of these positions. Situations of overwhelming dominance are no longer considered as a problem in themselves and the implementation of Antitrust rules must be based on a single criterion: efficiency¹³, whatever any considerations related to the competitive structure on the relevant market.

Second, the Second Chicago School refuses to consider certain practices as anti-competitive in themselves (with the exception of horizontal price cartels, below-cost predatory strategies, naked exclusions...). In other words, the approach that was prescribed as early as the initial studies in the late 1940s was to move away from *per se*

¹³ As Kovacic (2020, p.482) states in his critical assessment of the academic literature devoted to the influence of the Second Chicago School on current US antitrust enforcement: "The modern US antitrust era is said to be a time when the Chicago School recast antitrust goals from an egalitarian perspective to a cramped concern with economic effects, especially prices paid by consumers".

rules to a rule of reason based on an assessment of the net effect of the practices in question¹⁴. Once again, the key question was what should be the evaluation criterion.

The decisive contribution of Robert Bork (1966) was to propose a single criterion: the maximisation of consumer welfare¹⁵. Similar to Richard Posner's view according to which wealth maximization must be the sole criterion for decision making in economic analysis of law (Kronman, 1980), Robert Bork proposes the maximization of consumer welfare as the exclusive criterion for competitive decision making¹⁶. This position is perfectly embodied by the *Schor v. Abbott Labs* judgement of the 7th Cir. in 2007: “If a manufacturer cannot make itself better off by injuring consumers through lower output and higher prices, there is no role for antitrust law to play¹⁷”.

Nevertheless, Robert Bork's interpretation constituted a sharp departure from the Supreme Court's own positions (Kirat and Marty, 2019). In *Trans-Missouri Freight* (1897), the U.S. Supreme Court had interpreted the Sherman Act as protection of *small dealers and worthy men*¹⁸. In its 1945 *Alcoa* ruling¹⁹, Judge Learned Hand had stated that antitrust law aims at “put to end to great aggregations of capital because of the hopelessness of the individual before them”. Only four years prior to Robert Bork's article, the Supreme Court had reaffirmed in its *Brown Shoe* ruling²⁰ that antitrust has to protect “small, locally owned businesses”.

We will return in our second part to the discussion of this criterion both in terms of legitimacy and effects, but the consumer welfare standard is the cornerstone of what

¹⁴ For an historical perspective on the use of the rule of reason in Antitrust, see Hovenkamp (2018).

¹⁵ It is worthwhile at this point, referring to Melamed and Petit (2018), to emphasize that the Supreme Court's decision adopting the consumer welfare test should not be considered literally. While it refers to a Consumer Welfare prescription (*Reiter v Sonotone*, 442 US 330, 1979), the Sherman Act and competition policies as a whole are not prescriptive but proscriptive in nature. It is a matter of sanctioning anti-competitive practices that are not conducive to the maximization of welfare. To quote Melamed and Petit (2018), competition law prohibits practices that create or perpetuate market power on a different basis from that of economic efficiency.

¹⁶ The second Chicago School should not be seen as monolithic in terms of antitrust recommendations, either among its various promoters or over time. For example, Posner's prescriptions may deviate significantly from those of Bork in matters of predatory pricing (Kovacic, 2020).

¹⁷ *Schor v Abbott Labs*, 457 F.3d 608, 611, 7th Cir., 2007.

¹⁸ *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897)

¹⁹ *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945)

²⁰ *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962)

will become the more economic approach (or effects-based approach) in matters of competition rules enforcement.

The approach advocated by the Second Chicago School was gradually adopted by the Supreme Court in the second half of the 1970s with the *GTE Sylvania*²¹ (rule of reason, e.g. balance of effects) and *Sonotone* (consumer welfare test²²) judgments²³. The appointment of William Baxter, by the President Reagan, as head of the DoJ Antitrust Division (Assistant Attorney General), in the early 1980s consolidated this evolution²⁴, which culminated in 2008 with the DoJ's report on Single Firm Practices. In this regard, *the Economic Report of the President* published in February 2020 by the Trump Administration largely revives this model, as shown in its chapter 6, "Evaluating the Risk of Declining Competition", among other things (White House, 2020).

B - A very gradual implementation of the effects-based approach in the EU between 2005 and 2017

This section presents the implementation of the more economic approach in the enforcement of EU competition law since 2005 at the detriment of the so-called forms-based one e.g. the ordoliberal influenced one.

i. The Commission's initial activism in favour of the more economic approach

²¹ *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977)

²² Note that the first mention of the consumer welfare test was made in 1975 in Justice Brennan's dissenting opinion in the *National Bank* Supreme Court decision (*United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86 (1975)) : "Correspondent banking, like other intra-industry interaction among firms or their top management, provides an opportunity both for the kind of education and sharing of expertise that ultimately enhances consumer welfare and for "understandings" that inhibit, if not foreclose, the rivalry that antitrust laws seek to promote".

²³ As Kovacic (2020) states even if the *Sylvania* ruling cites prominently Robert Bork's and Richard Posner's articles, we should be cautious about the actual influence of academic literature on judges' decision. See for instance Hutchinson (2017) for an in-depth analysis of the use of economics by Supreme Court justices.

²⁴ The 1982 DoJ merger control guidelines were a clear break from the 1968 guidelines. The aim was no longer "to preserve and promote market structures conducive to competition" but to prevent "harm to consumer welfare, generally in the form of price increases and output restrictions". We should notice that a more economic approach gradually spread throughout the US administration in the 1960s in the area of merger control as Williamson (2002) stated. However, this influence was not a Chicagoan one. As it is also the case for Antitrust enforcement, the School of Harvard has played a significant role in such a shift. Oliver Williamson was Special Economic Assistant to the head of the Antitrust Division of the U.S. Department of Justice in 1966-67 while Donald Turner was Assistant Attorney General for Antitrust (and the first PhD in economics to head the Antitrust Division).

The effects-based approach, in which consumer welfare was the only criterion to be used in antitrust matters, emerged latterly in the European Union compared to the U.S. Several factors may explain the shift that was initiated in the early 2000s.

A first factor held to the search for a soundness of the decisions in the face of the jurisdictional control exercised by the General Court (then the CFI, Court of First Instance). Indeed, the Court had annulled several Commission decisions (in the field of merger control²⁵) because of a manifest error of assessment in the economic reasoning (Marty, 2007). These three cancellations have raised several issues in terms of legal certainty for the firms and credibility for the Commission (Roda, 2019). The use of an economic approach is intended to enhance legal certainty for the authority in charge of enforcing competition rules: the aim being to minimize the risk of the decision being overturned or reversed on appeal²⁶.

A second factor was related to the transatlantic debates that took place at the beginning of the first decade of this century between US antitrust and EU competition policy. The Microsoft case gave rise to a number of sparring induced by the (supposed or real) EU consideration of competitors' interests in antitrust litigation. The motto "The purpose of antitrust laws is to protect competition, not competitors²⁷" was tantamount to blaming European competition policy for unduly favouring inefficient competitors to the detriment of consumers, on the grounds of preserving a structure of effective competition on the market, which is conceived as a situation of effective rivalry between firms (Fox, 2003). This tension reflects both a discussion on the objectives assigned to

²⁵ See for instance: CJE/02/50 6 June 2002, Judgment of the Court of First Instance in Case T-342/99, *Airtours v Commission*. In this judgment, the Court of First Instance has annulled a previous Commission decision declaring the merger between Airtours and First Choice incompatible with the common market

²⁶ The Commission enjoys a certain margin of appreciation in complex economic assessments. The General Court has not to enter into the complexity of re-doing the economic analysis or revising the conclusions drawn therefrom by the Commission (OECD, 2019). However the Court scrutinises complex (economic) evidence in considerable detail : "Referring to the existence of a margin of discretion does therefore not prevent the Court from carrying out a full and unrestricted review, in law and in fact".

²⁷ See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Kovacic (2020, p.479) insists on the importance of this statement in the current antitrust debate (see Khan, 2018a for instance). "As amplified in later decisions, this phrase suggests that antitrust law is indifferent to the fate of individual firms unless their demise is linked to consumer detriment". Such an approach is not exclusively shared by the Chicago School, it was also (at least partially) endorsed by the Harvard School (see Wu, 2018). According to W. Kovacic, although the Harvard School has endorsed a broader range of legitimate aims for antitrust enforcement (at the difference of the Chicago based approach), it never has adopted the "antitrust's egalitarian approach" of the current *new Brandeis movement*.

competition law but also on the trade-off between the criterion of maximisation of consumer welfare and the criterion of maximisation of total welfare, to which we shall return later. The effects-based approach was seen as the only way to efficiently enforce competition laws (Gerber, 2010).

Third, the focus on consumer welfare should not be separated from a broader movement towards a public management whose accountability is based on results. New public management assigns to public policies an efficiency objective to which competition policy makes no exception. The maximisation of consumer welfare is part of this objective of guiding and monitoring results. We will insist in our conclusion on the emphasis put in the U.S. (and European) public debate on the requirements of predictability, administrability and credibility in matters of competition law enforcement.

The implementation of this approach within the EU was gradual. Crucial features were already contained in Regulations 1/2003²⁸ and 139/2004²⁹ (the latter on merger control) with distinct openings for an efficiency-based defence. However, the real turning point was the publication in 2005 of the report produced by the group of experts appointed by DG Competition (EAGCP, 2005). This last one was devoted to the implementation of a more economic approach to Article 82 of the Treaty³⁰, which deals with exclusionary or exploitative abuses (European Commission, 2009).

The report's advocates to take up the criterion of consumer welfare maximisation through the consideration of a derived criterion, the criterion of the as efficient competitor. The Commission's February 2009 orientations on priorities in terms of sanctioning abuses of dominant positions confirmed this inflection³¹. The Commission insists on the importance that the implementation of the competition rules should not lead to undue protection of an economic operator whose productive efficiency would

²⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

²⁹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

³⁰ This article is now the Article 102 under the numbering of the Lisbon Treaty, which entered into force in 2009.

³¹ Communication from the Commission, February 2009, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

be lower than the one of the dominant firm (Marty, 2013). In other words, the aim is to prevent decisions that would lead to a transfer of welfare between consumers and competitors. As Roda (2018) points out, this inflection has in no way been based on legislative decisions: the EU Commission has made this change through its own soft law texts.

This approach leads - at least in principle - to a greater emphasis on efficiency-based defence. It also amounts to departing from the formal prohibition of certain practices for dominant operators. The effects-based approach leads to a case-by-case assessment of the lawfulness of their market practices solely based on their net effect on consumer welfare.

The Commission's approach has, however, always been marked by a pragmatic stance. It has always been a question not only of sanctioning practices which have the effect of foreclosing a competitor as efficient as the dominant operator but also those which are likely to have that effect. In other words, there is no need for the competitor to be effectively crowded out from the market. The fact that foreclosure is not effective does not exonerate the dominant operator from its liability. Pragmatically, the test may be adjusted since competitors cannot be reasonably expected to be as efficient as the dominant operator because of its economies of scale and scope. Thus, the reasonably equally efficient competitor test is used (Marty, 2013).

For instance, in margin squeeze cases where the vertically integrated dominant operator has a monopoly position in an upstream segment, the question is whether its own downstream activity could be profitable if the same price conditions were applied to it as those which the dominant operator charges to its competitors operating in the same downstream market. Nevertheless, the more economic approach implementation was not immediate and effective by far. Two criticisms have been made. The first concerned the actual place given to the efficiency-based defence. The second was the reluctance of the Luxembourg courts, which are responsible for judicial review, to endorse this shift in their case law.

- ii. [The EU Court of Justice's jurisprudence: from defending conventional decisional practice to the Intel case turnaround in September 2017](#)

The Court of Justice has been criticised on many occasions for being too attached to its jurisprudence of the past decades (Roda, 2018). This would have been an obstacle to a shift from formalism to effects in matters of competition law enforcement (Petit, 2009). It would lead to sanctioning some of the strategies of dominant operators according to their form even without carrying out a balance of effects. The Intel judgment it handed down in September 2017³² was interpreted as a substantial shift away from the positions successively taken by the Commission and the General Court³³.

It is not a question here of detailing the case, but the Intel case is of particular interest to us in that it has crystallised the European debate. In 2009, the Commission fined Intel €1 billion (then the highest fine for antitrust practices on the European continent) for a combination of foreclosure practices to the detriment of its competitor, AMD, in the microprocessors market. Among the wide range of sanctioned practices were retroactive loyalty rebates based on the share of each customer's chips consumption sold by the dominant operator. The question was whether these rebates (which amounted to exclusivity rebates) were to be considered anti-competitive in themselves and therefore sanctioned in their form alone or whether an assessment of the effects had to be carried out in order to arrive at that conclusion.

The Commission, in its 2009 decision³⁴, made this balance but only as a supplementary consideration, holding that the very form of the rebates put in place by Intel constituted an abuse of a dominant position. The EU General Court confirmed this appreciation in its 2014³⁵ ruling. However, in September 2017, the Court of Justice returned the case to the Court of First Instance, considering that the latter was nevertheless required to review the balance of effects carried out by the Commission. This judgment is subject to divergent interpretations in Europeanist doctrine (Idot,

³² Judgment of the Court (Grand Chamber) of 6 September 2017, Intel Corp. v European Commission, case C-413/14P.

³³ The 2012 Post Danmark judgment had already largely enshrined the primacy of the objective of efficiency over objectives such as choice, quality or innovation : “Competition on the merits may, by definition, lead to the departure from the market or the marginalisation 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)
Judgment of the Court of Justice (Grand Chamber), 27 March 2012, Post Danmark A/S v Konkurrencerådet, C-209/10.

³⁴ European Commission, 13 May 2009, Intel, case 37990.

³⁵ General Court, 12 June 2014, Intel Corporation v. Commission, case T-286/09.

2018). For some scholars, it marks the Court's endorsement of the effects-based approach; for others, the Court's position is essentially procedural: the General Court is required to consider in its ruling the issues raised by the parties.

Whatever the interpretation of the Intel judgment, the Court of Justice has been gradually moving towards an effects-based approach through successive opinions of Advocates General, particularly in the context of referrals for preliminary rulings. This was for example the case for the AG Wahl's opinion in the Intel decision of September 2017 cited above and, in his opinion³⁶, expressed in a request for a preliminary ruling in a case of excessive pricing in the field of collective management of authors' rights in Latvia (2017). In this specific case, his position also corresponded to a consumer welfare focused logic³⁷.

The same applies for the conclusions of AG Wathelet in the Orange Polska case related to the calculation of financial penalties³⁸. The AG insisted on the fact that the amount of the fine must be based on the assessment of the actual damage. For the latter, the General Court should have "assessed whether the effects of the infringement had been correctly established by the Commission". To do so, the Court had to consider in its assessment all the circumstances of the case, in particular the evidence and arguments presented by the defendant. In other words, abuse of a dominant position cannot be assessed *in abstracto*.

Still following the opinion of the AG Wahl³⁹, the Court of Justice, in a judgment on a request for a preliminary ruling in the case of MEO⁴⁰, also consolidated the effects-based approach by specifying that the implementation of tariff discrimination by a dominant operator cannot be regarded as anti-competitive in itself and that the - at

³⁶ Opinion of advocate general Wahl, 6 April 2017, case C-177/16, Biedrība 'Autortiesību un komunikēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome (Request for a preliminary ruling from the Augstākā tiesa (Supreme Court, Latvia)).

³⁷ "At any rate, I am not sure that concepts such as 'equitable' or 'appropriate' remuneration could be of great assistance to a competition authority. They seem to me as vague as the concepts of 'excessive' or 'unfair' prices" (§78).

³⁸ Opinion of Advocate General Wathelet delivered on 21 February 2018, Orange Polska SA v European Commission, case C-123/16P.

³⁹ Opinion of Advocate General Wahl delivered on 20 December 2017, MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência, case C-525/16.

⁴⁰ CJEU, 19 April 2018, MEO - Serviços de Comunicações e Multimédia v Autoridade da Concorrência, aff. C-525/16

least potential - anticompetitive effects had to be demonstrated. The mere existence of a difference in the treatment of trading partners is not enough to characterise an abuse. It is therefore necessary "to carry out an examination of all the relevant circumstances in order to determine whether price discrimination produces or is likely to produce a competitive disadvantage".

Can we then conclude that the effects-based approach is definitely hegemonic in both E.U. and U.S. competition law enforcement? We will see in our second part that this finding can be subject to some nuances.

II - From the Capitol to the Tarpeian rock: the consumer welfare criterion challenged

In this second part, the aim is to focus successively on the criticisms that may have been levelled against the consumer welfare criterion in the theoretical field and then in recent decision-making practice (A). However, it may be possible to challenge its alternatives on the merits (B).

A. The consumer welfare test challenged both in the academic arena and in the digital economy

The consideration of the consumer welfare criterion as the exclusive basis for the enforcement of the competition rules is the subject of a twofold criticism. This relates to its legitimacy in the academic sphere and its tractability in matters of litigations related to the digital economy.

i. The Robert Bork's interpretation of the Sherman criticized: fifty years of doctrinal controversies

The first criticism of the consumer welfare criterion lies in its legitimacy considering the U.S. Antitrust legislative history. The concept of surplus was developed in economics by Marshall in his *Principles of Economics* published in 1890 at the very same time as the Sherman Act was enacted. Its promoters in the U.S. Senate could not rely on such concepts. It was the economic power of big business that was targeted much more than its effects on prices. Such a reading is diametrically opposed to that of Bork (1966), for whom the welfare of the consumer criterion was the sole criterion underlying the

legislator's reasoning. Despite these historical evidences, Robert Bork had maintained in his *Antitrust Paradox* published in 1978 that: "Congress designed the Sherman Act as a 'consumer welfare prescription'⁴¹".

Divergent positions were early articulated in the academic literature. This was the case, for instance, with Lande (1982), for whom the Sherman Act was essentially aimed at unduly sanctioning welfare transfers linked to the exercise of economic power. Unlike Bork, Lande considers - in the light of the legislative debates that preceded the enactment of the Sherman Act - that the legislators' objectives were less concerned with economic efficiency than with the protection of weaker parties in transactions with big companies, whether dependent companies, farmers or consumers. It was neither to protect a given market structure nor to seek an efficiency objective, but to counterbalance "abuses of dominance" in transactions.

Barak Orbach (2011) has pointed out the paradoxical nature of the consumer welfare test proposed by Bork, which can cover both the consumer surplus and the total surplus⁴². This ambiguity is a serious matter⁴³. The overall surplus measures the net effect of a practice by balancing its effects on the consumer against its effects on the producer. A practice that significantly increases output (through productivity gains) but results in a slight loss of welfare for the consumer in terms of price could be validated against the first criterion and rejected against the second. In other words, the consumer welfare test encompasses issues of welfare distribution. From a Chicago-style perspective, the primary concern must be efficiency. The distributional dimensions of welfare must be considered ex post through other public policy tools⁴⁴. Moreover, the very notion of consumer welfare involves such trade-offs: some consumers may win and others may lose. The net effect alone is taken into account. A Kaldor Hicks criterion is

⁴¹ We will see that such a position, far from obvious in legal terms (see Melamed and Petit, 2018), has been endorsed by the US Supreme Court in its 1979 *Sonotone* ruling.

⁴² See also on this point Blair and Sokol (2012).

⁴³ According to Glick (2019b), "because the concept of [consumer welfare] is vacuous, it is not surprising that there is little agreement on its meaning or application in antitrust".

⁴⁴ Farrell and Katz (2006) presents a clear statement of this view according to which a division of labor is preferable: "A number of reasons suggests that antitrust policy is poorly suited as redistribution vehicle in comparison with various tax and subsidy schemes".

at stake and not a Pareto one⁴⁵. Thus, welfare transfers are assumed. However, the test does not lead to balance efficiency gains realised by the producer and losses incurred by consumers. This is the core difference between a total welfare test and a consumer welfare one.

The ambiguity of Bork's analysis is decisive here. Only the total welfare test can be used to focus only on efficiency, ignoring any consideration of the distribution of welfare. The consumer welfare test implies separating producer and consumer gains. This is as important in the sanctioning of anti-competitive practices as it is in merger control. As Wilson (2019) notes: “in merger analysis the gains to the merging producers do not count; only the effect on consumer prices is relevant”.

Beyond the issue of the criterion used to assess welfare, one of the most recent and sharpest criticisms of Robert Bork's approach was formulated by Lina Khan in her *Amazon's Antitrust Paradox* published in 2017 in the *Yale Law Journal*. Lina Khan's work is emblematic of the neo-structuralist movement, also named the *new Brandeis movement*⁴⁶. According to Khan (2018b), “The Chicago focus on ‘consumer welfare’ [...] has warped American’s antimonopoly regime, by leading both enforcers and courts to focus mainly on promoting ‘efficiency’, on the theory that this will result in low prices for consumers. The fixation on efficiency, in turn, has largely blinded enforcers to many of the harms caused by undue market power including on workers, suppliers, innovators, and independent entrepreneurs – all harms that Congress intended for the antitrust laws to prevent”.

Lastly, it should be noted that Bork's interpretation of this criterion prevents any sanction of undue transfers of welfare compared with what would exist in a situation of perfect competition (i.e. if the firms were price-takers) and does not protect the competitive process in itself. It therefore departs significantly from the decisional

⁴⁵ However, these two criteria are challenged on their theoretical grounds by welfare economists (Glick, 2019b).

⁴⁶ Former Woodrow Wilson advisor from 1912 to 1916, Louis Brandeis was appointed to the US Supreme Court in 1916. Figurehead of the associationalist movement (Berk, 2009), Brandeis was strongly opposed to the then conventional view according to which the bigness is the necessary evil to achieve efficiency because of scale economies.

practice of U.S. antitrust until the 1970s and also from the ordoliberal foundations of European competition policy.

The consumer welfare may also be challenged on theoretical grounds. Firstly, it does not resolve situations where some consumers gain from a practice and some others lose. Therefore, it assumes that individual utilities can be aggregated (Glick, 2018). Second, this criterion is based on substantial rationality model that can be discussed in the light of the contributions of behavioural economics (Stucke, 2007). However, it is important to separate the effects-based approach, in general, from the exclusive focus on allocative efficiency, in particular. The first one is not specific to the Chicago School. As Kovacic (2020) underlines the *modern* Harvard School also endorses such an approaches. The Chicago School corresponds to the second one. Still, such an approach focuses on the Robert Bork's views and is even more restrictive than the ones of other Chicagoan scholars. As Kovacic (2000, p.485) states, "The Chicago School supplies an easily recognized villain, and Robert Bork is its sinister mastermind". Concisely, the two main challenged characteristics of this approach are i) its exclusive focus on allocative efficiency and ii) its ambiguity between consumer welfare and total welfare criteria.

ii. [Is the consumer welfare criterion still adapted to our digital economy?](#)

The influence of the Second Chicago School was spotlighted in the Stigler Center report on digital platforms (2019) mainly for blaming the noninterventionist bias of U.S. antitrust enforcers. Even if, the specificity of the chicaoan prescriptions in this respect may be questionable, it remains that the report challenges the limits of the consumer welfare criterion in matters of competition law enforcement in the digital sector.

Competition damage - as well as consumers' damage - is not limited to a reduction of surpluses. For instance, how to capture in the consumer welfare criterion the consequences of a reduction in the variety of goods and services available to consumers? Or how to take into account the effects of the foreclosure of even a less efficient competitor, if it leads to the disappearance from the market of a supplier whose products were distinct from the dominant firm's ones in terms of quality, for example in terms of privacy? In the area of mergers control, the case of the acquisition of WhatsApp by Facebook is emblematic of this issue. The damage does not come from

the disappearance of an offer or a higher price but from the reduction of guarantees in terms of privacy.

Can the damage caused to the consumer in general be estimated knowing that the respective preferences of consumers may direct each other towards one or another product? The disappearance of a supplier may therefore cause damage to competition that this single aggregate criterion does not capture.

The activities of big firms in the digital economy today raise significant competition concerns. However, it is difficult to consider that they directly harm end-user or that they result in allocative inefficiencies. The business models of platforms are characterised by zero price models (or even negative prices in some cases when subsidies for certain equipment and services are included) and by very high rates of innovation (Marty and Warin, 2020). The consumer does not have to lose out - certainly in the short term and possibly, even in the long term as long as market positions remain contestable, i.e. the competitive and technological turbulence makes the seemingly monopolistic positions of the moment precarious.

However, considering that the economic history of the last twenty years in the digital sector has no reason to repeat itself indefinitely, it is to be feared that competition will be significantly damaged. Even if today's dominant companies had once supplanted the past dominant firms (Yahoo!, MySpace, etc.), the technological and economic conditions have dramatically changed. Once it is assumed that barriers to market entry are inexorably increasing, today's monopolies may still be in place tomorrow.

What might these barriers to entry be? They may be due to the investments required, the accumulated data (and the controlled data flows), the algorithms developed and the data processing capacities, but also to the acquired position of market gatekeeper or keystone player in an ecosystem (mobile operating system, digital industrial platform, cloud computing platform). What then are the competitive risks? The first one is a risk of predatory behaviour. The gains insured to consumers may only be short-term in nature. As soon as consumers are captive, i.e. locked in a silo, the platform may increase its prices or reduce its pace of innovation. There is therefore the potential for long-term damage through the development of silo effects. Consumers will be all the

more dependent as they will have had strong incentives to opt for single-homing and their ability to exit the platform will be hindered by switching costs (whether in monetary terms or in terms of loss of contents).

This dependency pattern does not only concern individual consumers. It can be extended to trading partners, i.e., the complementors of digital ecosystem. The issue is twofold. It pertains both to possible exclusionary abuses and exploitative ones. For the latter, it is no longer an issue of mark-up but an issue of mark-down. The keystone player may exploit its monopsony power at the detriment to their complementors. In a such context, the relevancy of the consumer welfare criterion may be challenged⁴⁷.

Complementors may be in a position of economic and technological dependence (Smorto, 2018). These include independent vendors in marketplaces or application developers in mobile ecosystems. They are "attracted" to the platforms through contractual incentives or the provision of boundary resources (lines of code, data, interoperability protocols, etc.). However, these contractual terms (such as data access) make them economically and technically dependent on the platform. The transactions between keystone players and their complementors are co-opetive by nature but they are intrinsically unbalanced.

Damage to competition can be a damage to a trading partner. Taking a French typology, it would be possible to consider that we are dealing here only with restrictive practices and not with anti-competitive practices. It would be a question of *petit droit de la concurrence* and not *grand droit de la concurrence*. The first deals only with contractual imbalances related issues and not, as the second one does, with the effects on consumer welfare (e.g. effects on the whole market). The question of the relationship between platforms and their complementors illustrates the issue of abuse of economic dependence (Bougette and al., 2019). Although this concept does not exist in EU

⁴⁷ Yet this point is being debated. While a large body of academic literature highlights the difficulty of the effects-based approach in dealing with situations of monopsonistic market power (in the platforms sector, on certain segments of the labour market, etc.), these considerations have been taken into account in certain M&A transactions in the United States (in the context of the takeover of Essendant by Staples, for example).

See Sycamore Partners II, L.P.; Staples, Inc; and Essendant Inc., FTC, file N°181-0180, 28 January 2019.

competition law, it can be found in French, Italian, German, Portuguese, Greek, and, since spring 2019, Belgian legislations⁴⁸.

The European Regulation on Platform to Business Relationships adopted in June 2019 illustrates the seriousness of these issues and shows that the situation of dependency of complementors can induce a certain number of competitive damages that cannot be fully reflected in consumer welfare. These may include discriminatory access to a platform with critical infrastructure features (a platform in a gatekeeper position can be seen as an essential facility). This may involve unfair access not only in relation to competitors in a downstream or related market but also in transactional terms. Unfair conditions may be imposed on a complementors. The issue is then not only a question of fairness, but also one of equal access to the market for companies (both complementors and competitors). Competition as a process may then be at stake.

Firstly, competition is being damaged by restricting consumers' freedom of choice. Second, harm to competition can take the form of harm to innovation. To the extent that access to technological paths can be closed off by the platform, it can induce damage in terms of dynamic efficiency. This was the sense of the damage to innovation that was put forward in the Microsoft case 16 years ago. In the same way, as soon as the platform "controls" the innovation dynamics of its complementors, it can reduce the incentives and the capacities to develop disruptive innovations (which can disrupt the platform) to make only incremental innovations possible (Marty et Warin, 2020). These are all the more useful for the keystone player in a digital ecosystem as they make it possible to perpetuate data flows and address the "non-consumption" issue. In contrast, disruptive innovations are much less likely in this context, as the monopoly has no interest in replacing itself. Despite its investments, it would still benefit from the same rent. Therefore, the damage to innovation can be both a damage in terms of the pace of innovation but also in terms of composition (radical versus incremental).

Given the market power that the platforms enjoy and their potentially irreversible nature, it is not a matter of departing from the criterion of consumer welfare, but rather

⁴⁸ For an in depth analysis of dominant digital platforms capacity to abuse from their economic power at the expense of their trading partners through unbalanced transaction terms, see Monnerie (2019).

of adding certain considerations that are more directly related to the ordoliberal tradition.

Firstly, this may involve reinvigorating the concept of the dominant operator's special responsibility regarding competition (Sauter, 2019). Because of its intrinsic strength (and the natural tipping tendencies of these markets), the dominant operator must ensure that its decisions do not lead to irreparable foreclosure of competitors who may not be able to compete on the merits. Secondly, there is some justification for imposing obligations that might fall within the scope of asymmetrical regulation of competition. This could be the case for guaranteeing access to some of their assets on the ground of essential facility doctrine (or access to interface protocols) or the right to data portability. Such special responsibility could also be expressed in terms of platforms' "technological" or "competitive" neutrality.

It is therefore not a question of addressing a damage to consumer welfare but of tackling potential harm to effective competition. By returning to the ordoliberal approach, it is the process of competition that must be preserved. In this perspective, the lawfulness of the practices of dominant firms must no longer be assessed by their net effect in terms of consumer welfare.

To some extent, although the US and European contexts are very difficult to compare, the Neo-Brandeisian trend also endorses the logic of the widening the spectrum of competitive harms that could be considered alongside the criterion of consumer welfare (Newman, 2019). However, the range of damages is considerably wider: decreased potential for the development of start-ups (notion of *killing zone*), increased inequalities, privacy problems, growing fake news...

The question is therefore more a matter of regulating economic power of specific firms than a matter of defending competition. Ultimately, the standard effective competition proposed by Maurice Stucke and Marshall Steinbaum (2018) is closest to the approach defended within the EU. In the same vein, the Wu's "protection of competition" test echoes ordoliberal prescription according to which competition laws have to protect the competition process for itself and not be focused on its result: the efficiency (Wu, 2018).

It is also necessary to stress the convergence of different simultaneous trends, which call into question, if not the criterion of the consumer's welfare itself, then at least its role as an exclusive consideration in the enforcement of the competition rules. We have already addressed these points above, but we propose to group them together here in the form of a synthesis.

First, criticism of the consumer welfare criterion underlies a critique of the Chicago School. We have seen that it is far reaching to associate the more economic approach with this single criterion and especially with this single school. The antitrust consensus described by Hovenkamp (2005) was in no way a consensus around the Chicago School as it existed in the 1960s. The DNA of the American antitrust doctrine undoubtedly exhibits a double helix and the courts do not base their decisions on textbooks from the 1960s (Kovacic, 2007). As Kovacic (2020) clearly states, the influence of the Chicago School on actual antitrust enforcement is often exaggerated in academic literature. The effects-based approach should not be reduced at Robert Bork's analysis and the Chicago School had more play as a catalyst for the economic-turn of the US antitrust enforcement than as a unique compass. The Harvard School had also initiated such a turn.

However, the adequacy between the criterion of consumer welfare, the effects-based approach and Chicago-style prescriptions reflects two trends that have been very strong in recent decades. First, it is a question of taking one branch of economics - and one branch alone - and making it the alpha and omega of economic analysis. Many approaches, often complementary to this last one, are rejected outside the scope of the discussion. Second, the Chicago approach has been less and less seen as an approach prescribing a case-by-case balance of effects but more and more per se rules by considering certain practices (especially vertical ones) as pro-efficiency in themselves⁴⁹.

⁴⁹ For a striking illustration of such tendencies see for instance the draft published by the FTC and the DoJ regarding the Vertical Merger Guidelines (DoJ-FTC, 2020, p.9): "Because vertical mergers combine complementary economic functions and eliminate contracting frictions, they have the potential to create cognizable efficiencies that benefit competition and consumers. Vertical mergers bring together assets used at different levels in the supply chain to make a final product. A single firm able to coordinate how these assets are used may be able to streamline production, inventory management, or distribution, or create innovative products in ways that would have been hard to achieve through arm's length contracts". Economides et al (2020, p.7) also insists on the negative permissive effects the

The outcome may be an under-enforcement of competition rules. The burden of proof lies exclusively on the complainants and its standard is increasingly high. Such an approach is problematic since it is considered - contrary to Easterbrook (1984) - that a false negative decision can be more costly than a false positive one.

Secondly, digital economy evolutions lead to questioning a reasoning that seems to focus on allocative efficiency alone, in a static way and based on partial equilibrium reasoning. Two consequences are to be taken into account.

First, competition turbulences in digital markets may not be as severe as it was fifteen years ago (Marty and Warin, 2020). As noted above, the growing importance of barriers to entry means that the contestability of markets is less and less assured. Second, platform markets are characterised by additional difficulties in terms of delineating relevant markets and assessing the effects on all sides of the business. This does not in itself invalidate the consumer welfare criterion, but it does require recognition of the increasing risks of false negatives. Third, the development of these digital markets itself legitimately leads to an increase in the scope of competitive concerns. Much of the debate around *hipster antitrust* focuses on the necessity to consider non-economic or at least very general dimensions (employment, inequalities...) in competition authorities' decisions.

Although the parallel is not necessarily relevant, it could be argued that each public policy tool must have a specific objective and that bringing antitrust to address macroeconomic objectives may at best lead to sub-optimal results. This “Tinbergen rule” should not mean that the competition judge should not take into account broader dimensions...but it does mean, as we will see in our last subsection, that he should then balance conflicting objectives for which it is difficult to find common equivalents. For instance, how could a competition judge arbitrate between the interests of consumers and the interests of employees?

However, this enlargement can also take place within competition policy itself. The development of the platform economy leads to the integration into the competitive

implementation of this draft might produce through its “misplaced emphasis on the elimination of double marginalization as an efficiency justification for vertical mergers”.

reasoning of concerns that fall under other branches of law. This is first the case for consumer law since the users of the platforms are private individuals. This is also the case for contract law. The platforms involve numerous vertical contractual restrictions, which do not only concern restrictive practices (*le petit droit de la concurrence*) but also competition law enforcement (*le grand droit de la concurrence*). Contractual imbalances raise concerns not only for the parties concerned but also for competition. They may give rise to exclusionary abuses, exploitative abuses and abuses of economic dependence that competition law must (and can) address (Bougette et al., 2019).

Such concerns echo the reflections, particularly in the context of merger control, about the notion of trading partner welfare. Contractors that are dependent on platforms are not protected any more than competitors were protected in the past, but barriers to their access to the market may harm the consumer in terms of freedom of choice and the diversity of options available. Similarly, if exploitative abuses are committed, trading partners can no longer invest and thus bring benefits to consumers. Furthermore, if the keystone player controls the technological trajectory of its complementors, it can hinder any disruptive innovation and lock its complementors into innovations that reinforce their (and consumers') dependence on it.

The last area of law at stake is the right to protection of personal life (*privacy*). The platforms involve constant trade-offs between the transfer of personal data and the provision of services. A free service can be paid for by a disproportionate extraction of personal data. The consumer may not be aware of this (the so-called privacy myopia). Simultaneously, such an extraction may offer a data advantage to the dominant player against its (potential) competitors. It may create a barrier to entry. The long-term effects of these asymmetric data extraction can be a reduction of the contestability of the market and eventually its foreclosure. This constitutes a particular form of predation for which we must develop tools to balance the two effects. The case of Facebook's takeover of WhatsApp was a good illustration of these trade-offs between efficiency and privacy. In addition, it made it possible to "deconstruct" the notion of consumer by opposing consumers who did not value the protection of personal data (and who could therefore use Facebook Messenger) and those who agreed to pay a price to access the service in exchange for the protection of their data.

B- The worst criterion except for all the others?

Newman (2019) commenting on Hovenkamp's 2005 book *The Antitrust Enterprise* indicated that until a decade ago, Antitrust seemed to have reached the equivalent of the end of history with the effects-based approach. Within this perspective, the origin and termination of all analyses lay in the measurement of prices and output⁵⁰. In other words, allocative efficiency is both the means by which practices are evaluated and their sole criterion of assessment.

While this criterion has obvious limitations, it has an advantage. It provides a single standard against which practices can be measured. It achieves the objectives of legal certainty. The latter relate to the clarity of the rule, the limitation of discretionary aspects in its application and finally the predictability of its enforcement. Finally, adopting a single criterion makes it possible to avoid having to arbitrate between qualitative and often conflicting objectives.

The analysis developed by Melamed and Petit (2018) as a (reasoned) defence of the consumer welfare criterion goes in this direction. Consumer welfare provides a legitimate criterion insofar as it does not in itself carry underlying values or political choices⁵¹.

Similarly, in public choice perspective, a one-dimensional criterion is more difficult for interest groups to manipulate (Dorsey et al., 2018). Second, the application of the test is predictable, which enhances the legal security of operators and limits the risk of opportunistic lawsuits that are particularly costly for defendants⁵².

⁵⁰ Focusing on prices and outputs alone removes any dimension of quality and can lead to false negatives in platform markets operating under zero price models. Nevertheless, more sophisticated versions of the consumer welfare criterion incorporate dimensions such as quality or diversity of supply. These non-monetary variables are converted into prices as part of the analysis. For instance, such an approach has been implemented in the airline industry (see for instance Keating and al., 2013).

⁵¹ This position can nevertheless be discussed in the light of the debates to which it gives rise. The choice of a given economic method or tool cannot be regarded as neutral or purely technical. To this end, one should think of the debates in the United States between technical antitrust and political antitrust. While it is already difficult to consider competition law to be neutral in itself, its implementation invariably involves choice and political priorities.

⁵² This point can also be discussed in relation to the inner efficiency of antitrust procedures. The more economic (i.e. effects-based) approach involves the collection and processing of considerable volumes of data by defendants. Simpler - i.e. more formal - rules could limit these costs. Let us add an additional dimension: the data required are mainly price and sales data of the incriminated dominant undertaking. They often do not allow an assessment of the impact of the practices on consumer welfare. Here we come

We present above some of criteria proposed in the academic literature. Do these ones constitute alternative or complementary standards to the consumer welfare? It seems that the second answer should be retained, because of their imperfections. They nevertheless capture essential dimensions that the latter cannot reflect.

A first criterion could be the consumer freedom of choice standard. Would be anti-competitive, any “conduct that artificially limits the natural range of choices in the marketplace” (Lande, 2001). A second criterion can consist in renewing with the original 1890 legislative intent and searching for a conciliation among multiple purposes such as the preservation of a dispersed industry structure or the fairness in economic transactions (Wilson, 2019). However, it raises the difficulty to arbitrate among these objectives⁵³. A third criterion can be the protection of the competitive process in itself. Competition policy should sanction all practices that can impair this last one (Werden, 2014).

This brief overview shows that criticisms of the consumer welfare criterion are more likely to call for an adjustment of the criterion than for its possible abandonment. When it comes to the abuse of a dominant position, it is in any case a question of assessing a potential effect on competition. An effects-based approach is necessary, and the consumer surplus criterion is always called upon to play a central role, if only because of its tractability⁵⁴. However, it should not be an exclusive test and one that is overly restrictive in its operationalization by unreasonably raising the standard of proof and placing it on the complainants⁵⁵. Therefore, the risk is to be exposed to the risk of false negatives and thus to tip towards a pro-trust antitrust which constitutes both an economic and a political risk (Marty and Kirat, 2018).

to a paradox already pointed out by Bosco (2013): the more economic approach is mainly reflected in an analysis of the costs of dominant operators in predatory pricing cases rather than in any measure of consumer welfare.

⁵³ US political and theoretical debates tends to add to these objectives, additional goals as income inequality reductions or job protection. The second issue is related to the monopsonistic power (or oligopsonistic one) in specific segments of the job market as the high-tech one for instance. The first one was raised among other by Khan and Vaheesan (2017).

⁵⁴ Wilson (2019) insists on three favourable characteristics associated to the consumer welfare criterion: predictability, administrability, and credibility.

⁵⁵ Cremer and al. (2019, p.4) propose for digital markets to “impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct”

Let us recall here again one of the lessons of original neo-liberalism: the concentration of economic power, if it is no longer reversible, involves two risks for democracy. The first is the risk of political power capture by private economic powers (we could add to this, at a time when platforms play a central role in terms of access to information, a risk of manipulation of public opinion, whether voluntary or not⁵⁶). The second risk is that the concentration of economic power will trigger a backlash from the political power in terms of regulation. This should not come as a surprise: this was already the case in 1912 in the United States with the presidential debates between Taft, Roosevelt and Wilson (see Crane, 2015). The concentration of economic power raises the political question of the modalities of regulation between Jeffersonian and Hamiltonian approaches (Pasquale, 2018). The characteristic of the 1930's neoliberal approach was to lean towards the former.

Similarly, the contestation of the consumer welfare test - or the restrictive use made of it - should not call for the implementation of a discretionary antitrust that could lead either to a neo-classical legal thought (reactionary antitrust) or to a return to an obsolete and impractical structuralist model. An antitrust that would target the Bigness in itself, which would champion dismantling in the absence of demonstration of damage to the consumer, would lead to several damages. First, concentration as such occurs naturally for the sectors of activity concerned; second, it does not in itself pose a problem as long as competitors and consumers can exert countervailing pressure; third, eventual dismantling - if practicable - would impose social costs that are difficult to anticipate and could result in significant losses of efficiency. This does not mean that structural remedies should be excluded per se, but that they should be subjected to a cost-benefit analysis, of which consumer welfare is one of the essential dimensions.

Nevertheless, many of the considerations carried out in the context of U.S. antitrust make sense in the European context as soon as they are acclimatised to it. The standard of effective competition proposed by Steinbaum and Stucke or that of defending the

⁵⁶ The question is beyond the scope of this reflection, but the accumulation of personal data combined with the isolation of consumers in vertical silos raises serious concerns about the social control of individuals. As such, the strategies - economically rational and efficient - of the Internet's big firms can be questioned from the angle of political desirability (Pasquale, 2013). In this artificial intelligence era, do we wish to endow the powers - whether private or public - with such tools of social control, even if they bring unquestionable efficiency gains (Pasquale, 2018).

competition process defended by Wu (2018) are not far from the ordoliberal logic. For instance, Tim Wu (2018) suggests that practices should be weighed against their compatibility with competition on the merits. A strategy that has the effect of hindering or distorting the competitive process would then be considered anti-competitive. These dimensions echo the case-law concept established by the Court of Justice of the specific responsibility of the dominant operator. The implementation of this approach had been made narrower by the so-called more economic approach (of which the criterion of consumer welfare was the keystone).

These current developments in both the competitive, political and theoretical fields suggest that the model being built by the European Commission may constitute an attractive compromise. Without disavowing the benefits of the effects-based approach, the latter maintains an ordoliberal conception of competition (a process to be protected for itself and possibly against itself). The EU Court of Justice and the EU Commission increasingly take into account dimensions that had been progressively marginalized such as transparency, fairness or loyalty (Petit, 2018), and retain a plurality of objectives among which efficiency is an essential but not exclusive component. These objectives are straightforward: the protection of free, undistorted competition on the merits. The criterion of consumer welfare makes it possible to reflect - at least partially - the last objective but needs to be supplemented by further analysis for the first two. Competition need not be reduced to its result – e.g. the allocative efficiency. It is a tool of discovery in the Hayekian sense of the term, an instrument of discovery of knowledge in society and finally - and this point is essential - a vector of dispersion of economic and political power. There can be no efficiency without free competition and no democracy without free competition.

III – Discussion

As a discussion, we might consider two issues. The first one deals with the potential effects of the implementation of a “protection of competition” criterion. The second one is related to a quite surprising defence of a total welfare criterion, presented by Wilson (2019) as an alternative for antitrust enforcement.

If the criterion of consumer welfare is likely to remain the cornerstone of the implementation of the competition rules, it appears that it cannot be the only criterion as it does not capture all the damage to competition. Is the concept of damage to competition a good alternative? The notion of particular responsibility of the dominant operator can be an interesting compromise more satisfying than truly *hipster style* approaches as a return to non-faulty monopolist rules and eventually an advocacy for structural remedies such as dominant platform dismantling⁵⁷ or “antitrust lawsuits to unwind previously completed mergers” involving Tech Giants (Kovacic, 2019, p.487). However, how should it be implemented in practice? It can lead to specific duties for dominant operators, as a mandatory access to data or to platforms (Chaiehloudj, 2020).

It remains essential, on the one hand, to avoid excessively asymmetrical competition regulation models and, on the other hand, to guarantee non-discriminatory practices in matter of access or of carry obligations for third party offers or contents. Melamed and Petit (2018) exemplify the scope of these obligations: "the promotion of inter and intra platforms rivalry would require the imposition of positive obligations - must carry requirements, mandatory API sharing, data portability measures - on platform-based firms [...]". It should be noted that this raises another essential legal issue: should competition law merely sanction certain practices, or should it impose market behaviour? In other words, how can such an essential facilities doctrine be managed effectively?

Surprisingly, the consumer welfare criterion is also challenged by the total welfare one. We have noted that the Robert Bork's conception was ambiguous. His consumer welfare may be conceived as a total welfare. According to Hovenkamp (2019): “Bork did not use the term “consumer welfare” in the same way that most people use it today. For Bork, ‘consumer welfare’ referred to the sum of the welfare, or surplus, enjoyed by both consumers and producers. Bork referred to consumer welfare as ‘merely another term for the wealth of the nation’”.

Wilson (2019) considers this total welfare criterion can be relevant as soon as we assign to competition laws the sole purpose to promote economic efficiency. Such a

⁵⁷ See Khan (2019) for instance, in the case of e-commerce platforms.

focus on total surplus makes sense in a Chicagoan perspective. As soon as competition law has to cope with efficiency, it is out of the scope to take into account welfare distribution as the consumer welfare criterion imposes to do so. It is only a matter of expanding the *size of the pie* (see for instance Williamson, 1968).

The Second Chicago School rejects distributional considerations outside the scope of economics. The reduction of welfare inequalities pertains to the sphere of political preferences. It should be address through taxation⁵⁸. In the same vein, the increasing concentration of market power has both a potential impact on efficiency (by deterring potential competitors to invest and to innovate) but also on the robustness of democracy (the higher the financial risks associated to adverse political choices the higher the capacity and the incentives to invest for exerting an influence on political power). The regulation of lobbying activities or the reform of campaign financing can address the issue of capacity to convert economic power in political one (Shapiro, 2018) but not the one of the private interest to capture public regulation.

According to Wilson (2019), adopting this criterion could lead to decisions that are more favourable to companies if, for example, a merger would lead to significant efficiency gains⁵⁹, for example in industries characterised by high levels of fixed costs⁶⁰. Among the arguments presented in defence of a total welfare criterion is the possibility of considering multi-market effects. A transaction may increase the market power on one segment and have positive effects on another. Such an operation may also transfer innovations from one segment to another and by doing so may generate dynamic efficiencies.

It therefore appears that the debate over the criteria that should guide the competitive decision leads to a re-examination of the criterion of consumer welfare as it stems from the work of Robert Bork. Two avenues of evolution are therefore to be considered. The first is to question, as Christine Wilson (2019) does, the relative interest

⁵⁸ However, Piketty (2013) has demonstrated that income and capital inequalities have a significant impact on potential economic growth.

⁵⁹ Christine Wilson (2019) also quote the case of the 1986 Canadian Competition Act that opens a room to take into consideration a broader perimeter of efficiency gains in mergers (sec.96(1)).

⁶⁰ However, while such a transaction generates efficiency gains, it also leads to an increase in market power and thus reduces the incentives to make the consumers benefits from these gains (Rainelli, 2006).

in considering the total welfare test...which is, after all, very close to the consumer welfare test as defined by Bork. The second is to revive the European tradition based on ordoliberalism, from which the Union has only recently begun to depart. Moreover, this approach, by combining an effects-based approach and taking account of the special responsibility of the dominant operator for maintaining effective competition, makes it possible to reconcile different competition policy objectives without giving way to a structuralist approach. It is always a question of balancing several values⁶¹. This inexorably induces a room for discretion.

However, two arguments must be taken into consideration. First, the criterion of consumer welfare also involves such trade-offs ... even if only between different consumers. Second, an ordoliberal approach seems particularly reasonable in an economy in which the digital sector is increasingly important. It is characterised by three features that argue in favour of this approach: the increasing and perhaps irreversible market concentration, the need to ensure the sustainability of the innovation-based competition model and to cope with the unpredictability of market dynamics. From this perspective, the criterion of the protection of the competitive process makes more sense than ever (de Streel, 2020).

⁶¹ As Roda (2018) demonstrates, the EU Competition law enforcement is characterised by a search for pluralism contrasting with an exclusively efficiency-oriented approach.

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