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

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Abstract: *»Für einen konventionenbasierten Ansatz der europäischen Wettbewerbspolitik«.* The article aims at developing an analysis of the European competition law enforcement dynamics based on the framework of economics of convention. The article questions the ordoliberal theoretical foundations of the EU competition policy and it assesses to what extent the implementation of a more economic approach might pertain to a convention based on Chicago School normative views. The economic history, the history of economics thought, and the legal history are scrutinized when the European court's case law is considered as the main driving force of conventional shifts in matter of competition law enforcement.

Keywords: Competition policy, abuse of dominant position, ordoliberalism, Chicago School, competition law, economics of convention, State as convention.

1. Introduction[1]

The European Commission enforcement policy (European Commission 2005, 2009) may mark a process of convergence toward a new political logic in which economic efficiency (e.g. utility maximization) is considered as the sole purpose of competition policy and consumer welfare as the sole admissible criterion for judges' decisions. However, this Chicagoan influence clashes with the traditional theoretical foundations of the European competition policy (Warzoulet 2010). This effects-based approach sharply differs from an ordoliberal conception, according to which the economic freedom of market actors constitutes the aim of the policy (Akman 2013). In other words, the first conception is focused on the defense of the market process *in* itself and *for* itself, while the second is polarized in its outcome. The first approach conceives the competition in agonistic terms. Therefore, protecting competition supposes to keep balancing an unsteady form of market characterized by an effective rivalry between competitors, a view that sharply contrasts with Chicagoan one.

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The *economization* of competition law enforcement might be an all but neutral device. We propose, in our contribution, a key to understanding these controversies in terms of competing conventions on competition policy.

Our approach is based on the economics of convention and especially on the concept of convention of the State, developed by Storper and Salais (1997). We propose to extrapolate these ones on the competition policy domain. A convention of competition might be defined as the common consensus or pattern of expectations about the public enforcement of competition laws, or as the shared interpersonal views about what the core purpose of the competition policy is. We aim at highlighting the plurality of such conventions and to lay the groundwork for an analysis of their historical dynamics. Our purpose is to explain why only evolutions in the interpretation of the Treaty by the Court of Justice (in short CJ) may set the wheels of a conventional shift in motion. We consider that the judicial decision is – from a Weberian perspective – a "reality test," through which the competition convention, defined as the articulation of a plurality of possible worlds of law (Didry 2002, 33), comes out and becomes the basis of the stakeholders' expectations.

The CJ case law has crystallized a very specific conception of the competition process. Our purpose in this contribution is to investigate its origin and to question the theoretical economic and political paradigm that underlies the current convention of competition policy. The question is all the more important that the current European case law sends conflicting signal, with the CJ Post Danmark judgment (2012) that seems to make a step towards a conciliation between the Commission views and its traditional decisional practice; the General Court (GC) Intel judgment (2014) that appears to confirm the traditional case law.

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

This article analyzes the dynamics of the conventions of competition within the European context. The first section presents the possible convention of competition. The second section, we propose to define what would be an ordoliberal convention of competition by highlighting the very specific issue of private economic powers. The third section questions the decisional practice of EU institutions in the light with these conventions and defines what the convention adopted by the EU would have been since the late sixties. The fourth section presents how this convention is challenged by Chicago-influenced

economic and legal scholars, and to what extent their views, which constitute an alternative convention, are endorsed by the Commission. Finally, the fifth section considers the plausibility of a reversal of the CJ jurisprudence that may initiate a conventional shift.

2. The Conventions of Competition Policy

We define conventions as "shared interpersonal logics how to coordinate and to evaluate actions, individuals and objects in situations of uncertainty" (Diaz-Bone 2011, 46). In a context in which a plurality of possible rationalities might be implemented, "conventions are socio-cultural resources for the coordination between actors" (Diaz-Bone 2011, 46). A convention may be useful to coordinate and to evaluate action, but to form some patterns of expectations about public policies as well.

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

The concept of "conventions of regulation" was implemented to analyze the liberalization dynamics of network industries (Marty 2006). The transition from a legal monopoly regime to competition was analyzed through the decisional practice of the French competition authority. Legal resources of action provided by the European competition law and the liberalization directives are mobilized by the stakeholders in order to accelerate the conventional change. A same method can be applied to competition policy.

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

assume that the sense of a rule and its capacity to shape stakeholders' expectations cannot be defined outside and before its interpretation through a judicial (or a controversial) decision. We consequently adopt a Weberian perspective (Raveaud 2008). Institutions cannot be considered as exogenous factors for the stakeholders but endogenous: "institutions are conceived as enacted by actors and the meaning of these institutions for actors is reconstructed. Economic actors contribute to the interpretative process and to the following enactment of the performative reality of institutions" (Diaz-Bone 2011, 55).

The choice of this method is coherent with our definition of conventions and our view about their dynamics. We see them both in terms of a social consensus about the expectations on government interventions or judge rulings, but also in terms of equilibrium among conflicting social interests. We do not consider rules as mechanical devices that apply without uncertainty and in a constant way (as the economic analysis of law too often assumes). The law has to be interpreted by judges through its activation in judicial conflicts. In the competition law field, as many others, their rulings are based on precedents, but they are not determined by them, as it could be the case under a stare-decisis framework. The balances conflicting interests and interprets in situations what would be both the legislator intent and the current collective expectations.

According to us, the jurisprudence case law embodies a kind of crystallization of conventions and its evolution conveys their dynamics. We follow the path of Oliver Wendell Holmes in its first *Lowell Lecture* delivered on November 23, 1880; the evolution of law can be explained by:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, and the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Our purpose in this article is to apply this model to competition policy or, even more precisely, to the enforcement of competition law. Our analysis is mainly based on the decisional practice of the European Union institutions in charge of the implementation of competition policy, e.g. the Commission and the European courts of Luxembourg. We try to describe how conventions of competition "inscrib[e] general principles of justice" (Diaz-Bone and Salais 2011, 14) within the competition policy field, and shape patterns of expectations of the economic actors on the interpretation of competition law provisions. We also strive to analyze the process by which such conventions may evolve in the environment of a predominantly judge-made law. In this sense, we try to answer to one of the research questions opened by the German Historical School of economics about institutions, e.g. "when and why do the institutional arrangements of a society change?" (Kocka 2010, 50).

We propose to distinguish between different possible conventional fields in matters of competition policy through two dimensions. The first one is defined by the possible attitudes of government towards the market process and a second one defines the objectives assigned to the competition policy.

The models of intervention take three different forms. The first one corresponds to a *laissez-faire* approach. The second lies on an intervention aiming at defining the rules of the game in order to maintain a free and an undistorted competition and to provide guarantees against the concentration of economic power. The third is a direct intervention on the economic process in order to implement governmental objectives.

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

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

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

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

A last configuration, in which a direct intervention on market process result might be envisaged, corresponds to an objective in terms of freedom to access

or in terms of undistorted competition. It may be representative of the current European competition policy. The competition enforcement may go as far as counteracting the result of the market process and support an economic actor in order to protect a given structure of competition. The competition policy might lead to an asymmetric regulation of competition to the detriment of the dominant undertaking. As we will see, an ordoliberal convention might be quite different as government intervention is rather limited to edict general rules and to guarantee an undistorted access to the market.

The last conventional scheme can be obtained by crossing an intervention on the rules of the game, and a focus on the sole welfare dimension. This convention undoubtedly echoes back the case of the Second Chicago School of Antitrust. It differs from its predecessor, the First Chicago School, mainly by its lack of concern about distributional issues and its polarization on the consumer welfare maximization (Van Horn 2010). Indeed the Second Chicago School considers that the market behavior of a dominant undertaking, even a monopolist, has only to be sanctioned in very specific situations (Van Horn 2009).

As we have already noted, the Second Chicago School has evolved towards a more *laissez-faire* approach over time, becoming more and more skeptical about competition laws. Chicagoan scholars increasingly advocate for an *antitrust modesty* (Crane 2007) and to renew with a very conservative view of competition law enforcement bordering on Austrian views or classical *laissez-faire*.

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

Table 1: Conventions of Competition

		Government attitudes towards the market process		
		Laissez-faire	Regulating the competition	Direct interventionism
Government main objective	Equal opportunities to access the market		Ordoliberal convention	European integrationist convention
	Distributional concerns		Old Chicago School	Colbertian industrial policy *External State convention*
	Efficiency	Laissez-faire convention Second Chicago School (current) and Austrian School) *Absent State convention*	Effects-based approach convention Second Chicago School (original)	Planning system

3. The Principles of an Ordoliberal Convention of Competition

Our purpose, in this third section, is to highlight the constitutive principles of an "ordoliberal" convention of competition policy. We aim also at establishing its intellectual connection with the First Chicago School. We first adopt a history of economic thought perspective (3.1) before analyzing the recommendations of this convention, in order to confront it, in our next section, with the European institutions decisional practice (3.2).

3.1 A Neoliberal View of Competition Policy

The Manchesterian tradition of economic liberalism advocates *laissez-faire*. From this perspective, competition policy, if necessary, has to sanction only the operators that have infringed market rules. Even more, Austrian economics tradition scholars consider that competition laws themselves are unnecessary and potentially harmful. The ordoliberal tradition and the First Chicago School diverge from such views. The experiences of the failure of the first German law in 1923 during the Weimar Republic (Gerber 1998) and of the Great Depression of the 1930s convinced many scholars that the old-fashioned liberalism has to be reformed. Markets no longer appeared self-regulated. Competition was no longer seen as a natural process. The concentration of economic power, stemming from the competition process, was seen as a threat not only for the competition process itself but also for economic and political liberties.

We may easily connect the ordoliberal convention in late 1930s neoliberalism, especially with the views expressed during the *Colloque Walter Lippmann* in 1938. This common root explains the coherence between the ordoliberal conceptions and the First Chicago School ones (Van Horn 2009).

Indeed, in the late 1930s, the first Chicago School took very aggressive positions in matters of antitrust laws enforcement, putting down the use of the rule of reason to the profit to formal rules, and disapproving the acquisition of substantial market power "regardless of how reasonably that power may appear to be exercised" (Simons 1934, 58). The School and its figurehead, Henry Simons, started to consider the large undertakings and the subsequent concentration of market power as a threat for the competition process and political liberties. The dispersal of economic power, and not the economic efficiency, was considered to be the main purpose of antitrust. According to Simons (1948, 43): "the great enemy of democracy is monopoly in all its forms." In the late 1930s, the Chicagoans supported antitrust enforcement as a tool to thwart against the concentration of economic power.

Simons has gone as far as envisaging clear-cut solutions to solve this issue, such as dismantling monopolies or bringing antitrust suits against any firm who acquire a monopoly position, even on its own merits. In this sense, the norma-

tive views of Simons were coherent with the ones expressed by Judge Learned Hand in his emblematic ruling in the Alcoa case, recommending that antitrust laws prevent the dominance of an industry by a sole undertaking. If we consider our table, such a convention may be located at the intersection of a concern about a fair distribution of market power and a judicial activism aiming at protecting the market process.

3.2 An Essay of Definition of an Ordoliberal Convention of Competition

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

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

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

Whatever its origins, public or private, the concentration of economic powers is analyzed as a threat to economic liberties. As a consequence, competition policy has to thwart such a concentration or, if it is not possible, to forbid dom-

inant firms to use their market power. If "unavoidable monopolies" have to be tolerated, they must be regulated by an independent agency.

According to the ordoliberals, a dominant firm has to be sanctioned only if it uses coercive powers against its competitors. In this sense, their views differ from those of Structural School of Harvard's ones that led to sanction the dominant position *per se,* whatever the dominant undertaking's conduct was. It is possible to establish a link between this view and the concept of special responsibility of the dominant firm, stemming from the CJ case law, with the "as if" requirement. Within this framework, the competition authority has to sanction any market behavior of a dominant firm that tends to impair its competitors access to market (*Behinderungswettbewerb)*. Any practice resulting in putting a competitor at a disadvantage even if it would be profitable for the dominant firm might be seen as anticompetitive in this convention.

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

4. The European Courts Case Law: Building an Ordoliberal Convention of Competition?

In this section, our purpose consists of assessing the ordoliberal influence in the definition of European competition policy in its early years (4.1) and in presenting the teleological convention built by the European courts (4.2).

4.1 Searching for the Ordoliberal Soul of Article 102 EU

If the Ordoliberal School had a significant influence on the 1957 German law against restraints of competition (*Gesetz gegen Wettwerbsbeschränkungen*, GWB), its mark on European competition policy provisions was indirect and imperfect. Indeed, the Treaty of Rome was a compromise between divergent views, both about the role of competition policy and about its enforcement modalities. The primacy of competition policy concerns was challenged by the

French and the Italian, more favorable of an industrial policy-based European model. Even if some eminent members of the German delegation involved in the preparation of the Treaty were influenced by ordoliberal views on competition,[2] the Treaty did not ban cartels and seems to be deceptive with respect to the European Coal and Steel Community (ECSC) model, and especially to its High Authority in charge of antitrust responsibilities (Warlouzet 2010). In addition, the vertical balance of powers was not clear. The enforcement by the Commission might have been challenged.

As Akman (2009) states: "Article 82EC[3] was not perceived as a fully enforceable provision as such." This surely explains why, for many years, it was feared that Article 82EC would remain a 'dead letter.'" Nevertheless, the interpretation of the article opened the door for a first attempt to increase the power of ordoliberal influence. This one was favored by the activism of the first president of the European Commission, Walter Hallstein, and by the one of the first European Commissioner to competition, Hans von der Groeben, who was one of the authors of the Spaak Report of April 1956. The Commission, with its Regulation 17/62, attempted to give to the European competition policy construction an ordoliberal spirit. It attributed strong powers to the Commission but led, at the same time, to its harmful engorgement by making mandatory the notification of any agreement among firms whatever their relative sizes on the market.[4] As the Member States refused to grant the Commission the powers to proceed through block exemptions, the situation led to a failure. The enlargement to the United Kingdom, with a very different legal tradition in terms of competition law, constituted another obstacle for the Commission "ordoliberal" activism.

4.2 The Building of the Teleological Convention by the EU Courts

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

It is necessary to draw a separating line between an ordoliberal convention, and the teleological convention built by the Commission and European courts case law. Ordoliberals do promote negative rules, favoring stakeholders' freedom of choice in terms of organization within a general framework aiming at protecting the market process (Foucault 2004). Such conception excludes, to a large extent, any constructivism. However, as Robert Salais (2013, 295) under-

[2] It was, for example, the case of the deputy of Ludwig Erhard, Minister of Economics from 1949 to 1963, Alfred Müller-Armack.

[3] Articles 86, 82 and 102 correspond to the successive numbering of the same article over the Treaty revisions.

[4] 36,000 notifications for the year 1963 (Warzoulet 2008).

lines, the European authorities seem more compliant to the ordoliberal rhetoric than to its recommendations. Robert Salais (2013) sees the European project as a chimera resulting from the unexpected convergence of two initially very opposite views, the classical liberals and the upholders of plannist conceptions. According to this view, the European project drifts towards the planning of a perfect competition single market (see also Deakin and Pratten 1999).

This hybrid between the industrial and the market worlds results from a project to found the legitimacy of a political construction on economic liberty, as the ordoliberal principles did in West Germany in the late forties, according to Foucault (2004, 85). However, the legal rules at stake are not constituent or regulatory ones defining the rules of the game – *Spielregeln* – (see Vanberg 2004, 6), but are *outcome-oriented*.

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

Akman (2009) shows that, in the early years of Article 102, enforcement of the protection of the market process did not trump economic efficiency concerns; the ordoliberal influence was more decisive in the CJ decisional practice (Lovdahl-Gormsem 2006). For instance, in 1973, *Continental Can* (case 6-72) consecrated an extension of the scope of the article 102 from the exploitative abuse to the exclusionary ones. As Akman (2009, 296) quotes: "as such, it led to Article 82EC being predominantly used for a purpose for which it was not designed." This shift towards a different convention than the strictly ordoliberal one justifies the position of the traditional CJ case law, and testifies on the capacity of the judicial interpretation to initiate a shift towards a new convention of competition.

According to Gerber (1998, 116): *Continental Can* can be interpreted as "the apotheosis of the teleological method." Competition policy shifts from the sanction of the abuses of market power (e.g. a strictly ordoliberal view) to the limitation of the powers of dominant undertaking in order to build the internal market. *Continental Can* leads to the consideration that a merger operation may

lead to an abuse of market power, irrespective of any consideration about efficiency effects. As Lovdahl-Gormsem (2006, 12) considers that

> [i]t can be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure, which seriously endangers the consumer's freedom of action in the market such a case necessarily exists if practically all competition is eliminated.

The dominant firm may impair the competition process through its intrinsic market power and might be sanctioned on this basis.

The same logic was at stake in *Commercial Solvents* in 1974 (case C-6-7/73). The CJ considered that a vertically integrated group might potentially eliminate any competition by acquiring the capacity to impair the access to market to its competitors. The issue of the impact on consumer welfare was not raised. The CJ tends to equate restrictions of freedom to compete on an undistorted basis or to access the market with abuses of dominant position.

Such an adherence to "ordoliberal" views is not contingent and produces long term effects, notably because of the rule of precedent, but also because of the strength of the integrationist perspective. In 2007, the ruling of the CG (named at that time the Court of First Instance) in *Microsoft* was read by Ahlborn and Evans (2009) as the mark of the persisting influence of the ordoliberal perspective.

To sum up, it appears that the Treaty of Rome did not embody the essential features of an ordoliberal convention of competition. However, the decisional practice of the CJ during the late 1960s and the 1970s progressively shaped a very specific convention of competition more ordoliberal but different than this ideal-type in terms of interventionism. The purpose of constructing the internal market leads to the thwarting of dominant undertakings market power, and consequently to implement something like an asymmetric regulation of competition.

We have to underline that such views also echo back to the US decisional practice before the rising of the Second Chicago School. As we have seen, efficiency concerns were no more predominant. As Judge Hand stated in *Alcoa*, the Sherman Act aims at preserving a situation of effective competition.

5. A Convention of Competition Challenged by the More Economic Approach

This section deals with the differences between what might appear as two very different conventions of competition policy between "ordoliberals" on the one side, and "Chicagoans" on the other side. Their conflicting views about unilateral practices treatment bringing into opposition, and European and US antitrust practitioners in numerous cases (*Microsoft*, *Intel* or *Google*) might be analyzed through a conventional opposition. We present the Second Chicago School of competition law and economics approach (5.1) before describing the

implementation of a more economic approach of Article 102 enforcement by the Commission (5.2).

5.1 Consumer Welfare as the Sole Legitimate Purpose of Competition Laws: The Chicagoan Convention

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

Director and Levi were particularly skeptic of the application of antitrust laws "to firms of less than monopoly size or to firms which acquired their size without combination" (1956, 284). By doing so, they move away from the Simons' view and broke antitrust enforcement away from the issue of the (mis)use of economic power. Moreover, they make clear their skepticism of exclusionary abuses, especially in the case of anticompetitive leverage strategy, skepticism that constitutes the "hallmark" of the Second Chicago School that we propose to name the *Chicagoan convention of competition* (Baker 2013).

The risks induced by an over-enforcement of antitrust are already pointed out: losing economic gains resulting from productive efficiency, and consequently harming the final consumer. It leads finally to pleading for a negative type of competition policy. Governmental intervention should be limited to the removal of restraints to trade and barriers to entry. The monopoly in itself isnot longer seen as a problem if it remains contestable and if it was obtained by the merits.

5.2 The Long Walk towards a more Economic Approach of Article 102

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

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

Moreover, the assessment of effects is not mandatory in the case of market practices led by former legal monopolies. Such firms have certainly not obtained their positions through their merits. Nevertheless, they constitute a large part of the undertakings involved in the article 102 and the protection of their new competitors might not benefit to consumers. In the same way, an abuse may be characterized, even if the exclusion has not been effective because the damage to competition might be irreversible in sectors characterized by significant barriers to entry.

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

5.3 The European Courts Case Law Inertia in Debates

Even if the Commission would rally the "Chicagoan" convention, its 2009 communication does not engage the CJ. As Akman (2013, 5) notes: "the CJEU is the final arbiter of EU law and the Commission's modernized approach can only be valid if the CJEU […] agrees that the Commission's interpretation conforms with EU law."

However, the CJ and GC decisional practices seem to refuse to consider the gains promised by such approach [HSR: such an approach] or to balance in favor of freedom-based considerations against utilitarian arguments. For instance, the effect on welfare may be not taken into account, as the cases of *Microsoft* (case T-201/04), *Michelin II* (T-203/1), *Deutsche Telekom* (T-271/03) and *Wanadoo* (T-340/03) have demonstrated. If criteria as freedom of choice, or the preservation of diversity in terms of technical trajectories, are considered as sufficient, they are criticized as they may lead to protect competitors at the expense of consumers. According to Ahlborn and Evans (2009, 16): "The policy under Article 82 has remained virtually unchanged over the last 40 years. The Court's analytic framework is based on concepts and ideas which predate the Chicago and post-Chicago developments in antitrust thinking."

This resistance has appeared as a surprise for economists. Significantly, Oliver Budzinski (2003, 14) painted the situation darkly in 2003 than it has appeared since then: "ordoliberal ideas have been second most influential (next to adaptations of workable competition concepts) in the formation of a European competition policy […], although this influence seems to cease presently." In

fact, the CJ is not bound to reverse its decisional practice at the instigation of the Commission.

Finally, as Géradin and Petit (2010) wrote, the CJ, being after in the 1960s at the extension of the domain of article 102, and who gave its *ordoliberal integrationist* coloration, is now the main obstacle on the road of a more economic approach in the Chicagoan sense. The GC decision in *Tomra* (case T-155/06, September 2010), a case involving loyalty rebates, illustrates the persisting influence of a formalistic approach even if the Commission had, in its 2009 communication, opened the door to a defense on the basis of the efficiency gains resulting from rebates schemes. The "old" case law e.g. the integrationist convention of competition is still applied.

6. Conclusion

Such attitudes lead Géradin (2010) to consider the courts of Luxembourg as constituting the main obstacle for a possible conventional shift by supporting Commission against recourses based on efficiency defense, and alternatively by defending, against the Commission, an ordoliberal type conception of competition policy: "the ECJ and the General Court largely supported the decisional practice of the Commission […] often making matters worse by adding a strong "ordoliberal" flavor to their judgments" (Gérardin 2010, 2). The influence of this convention is confirmed by the comprehensive review of EU courts' decision performed by Akman (2013).

However, their position cannot be considered in a too monolithic way. A reversal appears to be possible, particularly if we consider the CJ *Post Danmark* judgment (Post Danmark AS / Konkurrencerådet, case C-209/10, 27 March 2012) that might be interpreted as a milestone in the evolution towards a more economic approach concerning price-based exclusionary practices. The CJ has adopted a cost criteria proposed by the Commission in its 2009 communication to determine if a given price practice may exclude a competitor as efficient as the incumbent. As the CJ underlined in *Post Danmark*, an exclusionary abuse may be characterized as soon as the dominant undertaking tends to exclude an as-efficient competitors on another basis than the merits (§25).

If the purpose is to shift from a form-based approach to a more economic one (see Petit 2009), the "consumer welfare" test may appear as the best candidate considering the influence of the US practices. However, The CJ opted for the equally efficient operator test because it guarantees to undertake a satisfying level of legal certainty essential for allowing them to self-assess the compliance of their market strategies with competition laws. In this sense, it constitutes by far a better standard than the welfare-based ones in terms of administrability and in terms of self-assessment. Such a standard allows avoiding decisions in which an abuse might be characterized only because the down-

stream competitor would not able to operate as efficiently as the incumbent in this segment. In this sense, it prevents decisions that protect the competitor at the expense of the consumer.

Furthermore, such a rallying to a Chicagoan "pro-trust antitrust" convention is not definitively achieved. This convention sharply contrasts with the asymmetrical treatment of the dominant firm in the "integrationist" or "teleological" convention. Minimizing the risk of false positive, according to Chicagoan recommendations, is supposed to accept a greater proportion of false negative decisions, but also to sacrifice the ambition to plan a perfect competition market (Salais 2013). The resistance of the teleological convention, hostile to dominant undertakings as soon as they may impair the competition process, must not be overlooked. The General Court judgment in *Intel*, the June 12, 2014 (case T-286/09, Intel Corp v. Commission), upholding the June 2009 Commission decision, seems to turn away from the more economic approach and especially from the as-efficient competitor test, reaffirming the notion the special duty of the dominant undertaking and rejecting the necessity to perform an assessment of the effects of the practice and by the way banning any procompetitive justification for exclusive dealing and loyal rebates schemes.

References

Ahlborn, Christian, and David S. Evans. 2009. The Microsoft judgment and its implications for competition policy towards dominant firms in Europe. *Antitrust Law Journal* 75: 887-932

Akman, Pinar. 2009. Searching for the long-lost soul of article 82EC. O*xford Journal of Legal Studie*s 29 (2): 267-303.

Akman, Pinar. 2013. The role of "freedom" in EU competition law. *Legal Studies* 34 (2): 183-213.

Baker, Johnathan B. 2013. Exclusion as a core competition concern. *Antitrust Law Journal* 78 (3): 527-89.

Budzinski, Oliver. 2003. *Pluralism of competition policy paradigms and the call for regulatory diversity*. Working Paper 14/2003, Philipps Universität Marburg.

Crane, Dianel A. 2007. Antitrust modesty. *University of Michigan Law Review* 105: 1193-212.

Deakin, Simon, and Stephen Pratten. 1999. Reinventing the market? Competition and regulatory change in broadcasting. *Journal of law and society* 26 (3): 323-50.

Denord, François. 2008. Néolibéralisme et 'économie sociale de marché': les origines intellectuelles de la politique européenne de la concurrence (1930-1950). *Histoire, Economie et Société* 27 (1): 23-33.

Diaz-Bone, Rainer. 2011. The methodological standpoint of the "économie des conventions." *Historical Social Research* 36 (4): 43-63 <http://www.ssoar.info/ssoar/handle/document/36305>.

Diaz-Bone, Rainer, and Robert Salais. 2011. Economics of convention and the history of economies: Towards a transdiciplinary approach in economic history.

Historical Social Research 36 (4): 7-39 <http://www.ssoar.info/ssoar/handle/document/36326>.
Didry, Claude. 2002. *Naissance de la convention collective. Débats juridiques et luttes sociales en France au début du 20ème siècle.* Editions de l'EHESS.
Director, Aaron, and Edward H. Levi. 1956. Law and the future: Trade regulation. *Northwestern Law Review* 51: 281-96.
European Commission. 2005. *DG competition discussion paper on the application of article 82 of the treaty to exclusionary Abuses.* Bruxelles, December.
European Commission. 2009. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. *2009/C45/02, Official Journal of the European Union*, C45/7-20 (February).
Foucault, Michel. 2004. *Naissance de la biopolitique. Cours au Collège de France. 1978-1979:* Paris: Gallimard.
Géradin, Damien. 2010. *Is the guidance paper of the Commission's enforcement priorities in applying article 102TFEU to abusive exclusionary conducts useful?* Working paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569502>.
Géradin, Damien, and Nicolas Petit. 2010. Judicial review in European Union competition law: A quantitative and qualitative assessment. *Tilburg Law School Research Paper* 1 (2011).
Gerber, David. 1998. *Law and competition in the twentieth century: Protecting prometheus.* Oxford: Clarendon Press.
Giocoli, Nicola. 2012. Crossed destinies: Law and economics meets the history of economic thought. *History of Economic Ideas* 20 (3): 15-23.
Kocka, Jürgen. 2010. History, the social sciences and potentials for cooperation – with particular attention to economic history. *InterDisciplines* 1: 43-63.
Köhler, Ekkehard A., and Stefan Kolev. 2011. The conjoint quest for a liberal positive program: "Old Chicago," Freiburg and Hayek. *HWWI Research Paper* 109. Hamburg.
Kolev, Stefan, Nils Goldsmith, and Jan-Otmar Hesse. 2014. Walter Eucken's role in the early history of the Mont Pèlerin Society. *Freiburg Discussion Paper on Constitutional Economics* 14 (02).
Lovdahl-Gormsem, Liza. 2006. Article 82EC: Where are we coming from and where are we going to? *The Competition Law Review* 2 (2): 5-25.
Marty, Frédéric. 2006. La libéralisation du secteur électrique: Une approche en termes de dynamique conventionnelle In *L'économie des conventions, méthodes et résultats*, *Vol. II: Développements,* ed. Eymard-Duvernay François, 335-49. Paris: La Découverte.
Petit, Nicolas. 2009. From formalism to effects – The Commission's guidance communication on article 82 EC. *World Competition* 32: 485-504.
Raveaud, Gilles. 2008. Causalité, holisme méthodologique et modélisation "critique" en économie. *L'homme et la société* 170-171: 15-46.
Salais, Robert. 2013. *Le viol d'Europe. Enquête sur la disparition d'une idée.* Paris: PUF.
Simons, Henry C. 1934. *A positive program for laissez-faire: Some proposals for a liberal economic policy.* Chicago: University of Chicago Press.
Simons, Henry C. 1948. *Economic policy for a free society.* Chicago: The University of Chicago Press.

Storper, Michael, and Robert Salais. 1997. *Worlds of production. The action frameworks of the economy*. Cambridge: Harvard University Press.
Vanberg, Viktor J. 2004. The Freiburg School: Walter Eucken and Ordoliberalism. *Freiburger Diskussionspapiere zur Ordnungsökonomik* 04 (11).
Van Horn, Robert. 2009. Reinventing monopoly and the role of corporations: The roots of Chicago Law and Economics. In *The road from Mont Pèlerin: The making of the neoliberal thought collective,* ed. Philip Mirowski and Dieter Plehwe, 204-37. Cambridge: Harvard University Press.
Van Horn, Robert. 2010. Chicago's shifting attitude toward concentrations of business power (1934-1962). *Seattle University Law Review* 34: 527-14.
Warzoulet, Laurent. 2008. Europe de la concurrence et politique industrielle communautaire: la naissance d'une opposition au sein de la CEE dans les années soixante. *Histoire, Economie et Société* 27 (1): 47-61.
Warzoulet, Laurent. 2010. The rise of European competition policy (1950-1991). A cross-disciplinary survey of a contested policy sphere. *EUI Working Papers*, RSCAS 2010 (80).