Thanks

As the tradition requests it, a dissertation offers the author an opportunity to look back at his student journey and to see the long and sometimes hard way taken through the different stages of his studies. Obviously, like in every human story, people emerge to help and those firsts paragraphs are dedicated to them.

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Enjoy your reading.

Laurent Willemart

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Abuse of Dominant Position, Mergers: Analysis of the Evolution of the Criterion Granting the Protection of Freedom of Choice in European Competition Law

Introduction

Nowadays, the jurisprudence of European courts seems to have made the protection of freedom of choice a core argument in European competition law. However, this assessment has to be analysed in its global and historical contexts. From a global point of view, European competition law is divided into three main branches: cartels, abuse of dominant position and mergers. In this paper, focus will be put on the two last categories. From an historical point of view, the subject will be studied through legislation and European courts case-laws.

The paper will be organized into three parts. In Part 1, historical bases will be examined from ordoliberalism to the Commission *Guidance Paper* and the latest ECJ cases, as well as the influences and objectives of European competition law. Especially, how can we secure the consumer welfare objective together with the economic freedom objective?

In Part 2, three main instruments of EU competition law will be detailed. The first half of this Part will focus on the abuse of a dominant position and on article 102 TFEU. Chapter 1 will analyse the effective competition principle which was the first criterion in this area of law. Chapter 2 will cover the second principle that followed the effective competition's instrument, the as-efficient competitor test. Finally, Chapter 3 will analyse the new test in mergers since 2004, the significant impediments to effective competition test. The main purpose of this Part will be to link the different instruments between them and to understand their evolution through the historical background and the EU competition law's objectives.

In Part 3, the freedom of choice's criterion will be the prism through which the two first Parts will be analysed. An echo will be found in the jurisprudence exposed in the different chapters developing the three legal instruments. Indeed, whereas the formal aspects of the instruments will be studied in Part 2, the purposes of the protection of freedom of choice will be

underlined in the same cases, in Part 3. The interest will be to notice an adequacy in the evolution of the instruments and in the manner that protection of freedom of choice is granted.

Part 1 – Contextualization

What are the objectives of EU competition law? Many jurisdictions seem to state that consumer welfare is one of them[1]. This term has several meanings and further clarification is required, as we consider its economic origin[2]. This paper will demonstrate the slow shift operated in EU competition law towards a more economic approach pointing out the freedom of choice as a main argument and a goal to achieve. Indeed, lots of critics are raised towards the European tendency to rule over *per se* infractions, missing the economic dimension of the cases judged. Therefore, the first question to ask is: does article 102 TFEU really aims at protecting consumer welfare or does it aim at protecting and improving total welfare[3]? Depending on the answer, efficiency will have a positive impact on the final consumers or not. According to the major part of commentators, EU competition law is based on the ordoliberal doctrine[4]. How has this theory influenced the main objectives of competition law (Chapter 2), what are the economic concepts of efficiency and welfare standards (Chapter 1)? Those are the questions that will be answered in this Part.

Chapter 1 – Efficiency and welfare standards

Efficiency seems to have been very important in the original writers' mind[5]. However, what does efficiency mean and is it a universal concept? Three types of efficiencies exist: the allocative, the productive and the dynamic ones. In fact, "in order to move from abstract concepts like freedom or fairness to workable and operational conceptions of freedom and fairness in competition law, there is no alternative but to determine the economic objective of

[1] L. LOVDAHL GORMSEN, *A Principled Approach of Dominance in European Competition Law*, Cambridge University Press, 2010, p. 16.
[2] J. F. BRODLEY, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress", 62 *New York University Law Review*, 1987, p. 132.
[3] L. LOVDAHL GORMSEN, *ibid.*, p. 20.
[4] C. PRIETO and D. BOSCO, *Droit européen de la concurrence – Ententes et abus de position dominante*, Bruylant, 2013, p. 793.
[5] P. AKMAN, "Searching for the Long-Lost Soul of Article 82 EC", 29 *Oxford Journal of Legal Studies*, 2009, pp. 267-303.

the law. Such an objective cannot be other than the long-term economic «welfare[6], that can be defined as the sum of the surplus of producers and consumers in an industry. In the same way, economic efficiency is relative to the maximization of social welfare[7]. First of all, allocative efficiency describes how competition works to "allocate resources to their highest and best use by creating incentives for producers to compete to expand output in a market until the cost of the last unit of output (marginal cost) equals the price the consumers are willing to pay for the product (marginal revenue)"[8]. Productive efficiency refers to the real efficiency in production[9], namely, how firms are effectively using their resources so that products are produced at the lowest cost with the current technology[10]. As a matter of fact, it can always be improved, following the production developments, but never maximized. Finally, dynamic efficiency refers to the ability of companies to introduce new production processes, developments or products. It can be described as innovation[11]. By providing unmet needs, dynamic efficiency increases, sometimes indirectly, consumer surplus[12].

However, different kinds of efficiencies cannot be, in themselves, the real objectives of competition law[13]. Authors compare the consumer welfare and the total or social welfare. Depending on the point of view, the type of efficiency will not be searched in the same way. Indeed, producer welfare will only be accepted if, in the short-term or, as it seems to have been chosen by the Commission and the Court lately, in the long-term, it benefits the consumer[14].

Therefore, how can we define consumer welfare? This notion is, firstly, economical. The definition given by the OECD glossary is:

> Consumer welfare refers to the individual benefits derived from the consumption of goods and services. In theory, individual welfare is defined by an individual's own assessment of his/her satisfaction, given prices and income. Exact measurement of consumer welfare therefore

[6] R. NAZZINI, *The Foundations of European Union Competition Law, The Objective and Principles of Article 102*, Oxford University Press, 2012, p. 32.
[7] R. NAZZINI, *ibid.*, p. 33.
[8] L. LOVDAHL GORMSEN, *op. cit.*, p. 23 based on O. E. WILLIAMSON, "Economies as an Antitrust Defence: The Welfare Tradeoffs", 58(1) *American Economic Review*, 1968, p. 425.
[9] R. NAZZINI, *ibid.*, p. 35.
[10] S. BISHOP and M. WALKER, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell, 2002, pp. 25-27.
[11] L. LOVDAHL GORMSEN, *ibid.*, pp. 25-26.
[12] J. F. BRODLEY, *op. cit.*, p. 145.
[13] A. L. SIBONY, *Le Juge et le raisonnement économique en droit de la concurrence*, L.G.D.J., 2008, p. 91.
[14] L. LOVDAHL GORMSEN, *ibid.*, pp. 26-27.

> requires information about individual preferences. In practice, applied welfare economics uses the notion of consumer surplus to measure consumer welfare. When measured over all consumers, consumers' surplus is a measure of aggregate consumer welfare. In anti-trust applications, some argue that the goal is to maximize consumers' surplus, while others argue that producer benefits should also be counted.[15]

As explained above, this notion is highly connected with another economic term: the consumers' surplus, defined as:

> Consumers' surplus is a measure of consumer welfare and is defined as the excess of social valuation of product over the price actually paid. It is measured by the area of a triangle below a demand curve and above the observed price.[16]

One of the problems is that "welfare is highly subjective because it is linked to the individual's utility from a specific good or service"[17]. It is, therefore, difficult to measure the concrete benefit people are taking of goods or services. Another problem is the fact that welfare is calculated on the basis of surplus, i.e. the "wealth" of the consumer will be increased because there is a reduction in price and conversely[18]. Furthermore, the analysis will be based on the allocative efficiency; the dynamic one is not taken in consideration with the definitions given. Indeed, the "notion of 'consumer welfare' does not tell how to balance gains in consumer surplus (which can be measured) with possible gains in consumer welfare flowing from expected improvements in products or choice"[19].

Chapter 2 – Ordoliberalism influence

The European doctrine that rose in response to the US theories of Harvard and Chicago Schools conceives the aim of competition law as "the protection of individual freedom of action as a value in itself, or vice versa, the restraint undue economic power"[20]. According to

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[15] R. S. KHEMANI and D. M. SAPIRO, OECD Glossary of Industrial Organisation Economics and Competition Law, 1993, as seen in *OECD Glossary of Statistical Terms* https://stats.oecd.org/glossary/detail.asp?ID=3177 accessed 3 July 2016.
[16] R. S. KHEMANI and D. M. SAPIRO, OECD Glossary of Industrial Organisation Economics and Competition Law, 1993, as seen in *OECD Glossary of Statistical Terms* https://stats.oecd.org/glossary/detail.asp?ID=3176 accessed 3 July 2016.
[17] V. DASKALOVA, "Consumer Welfare in EU Competition Law; What Is It (Not) About?", *The Competition Law Review*, 2015, p. 136.
[18] V. DASKALOVA, *ibid.*, p. 137.
[19] V. DASKALOVA, *ibid.*, p. 138.
[20] W. MÖSCHEL, "Competition Policy from an Ordo Point of View" in H. WILLGERODT and A PEACOCK, *German Neo-liberals and the Social Market Economy*, Macmillan, 1989, p. 146.

the founding fathers of ordoliberalism, economy was based on two orders: the transaction economy – organised with private decision-making procedures – and the administered economy – based on criteria external to the economic system[21]. "Ordoliberalism was dedicated to achieving an economic order – a competitive order – which was able to control private economic and political power in order to ensure a prosperous and humane society which guaranteed individual economic freedom and price stability"[22]. The real objective is to develop the highest level of competition in order to have the most effective system. In that way, ordoliberals saw private economic powers as a real threat to competitive process, justifying competitive law as a tool to eliminate those powers[23]. State intervention is only justified when it aims at restricting cartels and abusive behaviour by dominant firms[24]. The real factor differentiating ordoliberalism from liberalism is that the individual economic freedom has to be protected from private and political economic powers[25].

This doctrine and its main teachings are found in the objectives of article 102 TFEU.

Chapter 3 – Article 102 TFEU objectives

This Chapter will first make a quick overview of the different objectives, which were recognized to be followed by article 102 TFEU (Section 1), then there will be an analysis of how two of those objectives – the economic freedom of competition and the consumer welfare – can be undertaken in parallel (Section 2) and, finally, after answering this question, the focus will be on who is considered to be protected in early and late cases (Section 3).

Section 1 – List of the objectives

§1. Undistorted competition

[21] D. GERBER, "Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the 'New' Europe", 42 *American Journal of Comparative Law*, 1994, p. 42.
[22] L. LOVDAHL GORMSEN, *op. cit.*, p. 41.
[23] D. GERBER, *ibid.*, p. 120-176.
[24] P. MANOW, "Ordoliberalismus als Ökomische Ordnungstheologie", 21 *Leviathan*, 2001, p. 179.
[25] L. LOVDAHL GORMSEN, *ibid.*, p. 45.

One of the Treaty's goals is "the establishing of the competition rules necessary for the functioning of the internal market"[26]. In the *Continental Case*[27] of 1973, the Court analysed the former article 3 (f) of the EC Treaty in that way:

> Article 86 is part of the chapter devoted to the common rules on the Community's policy in the field of competition. This policy is based on Article 3 (f) of the Treaty according to which the Community's activity shall include the institution of a system ensuring that competition in the Common Market is **not distorted**. The applicants' argument that this provision merely contains a general program devoid of legal effect, ignores the fact that Article 3 considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks. As regards in particular the aim mentioned in (f), the Treaty in several provisions contains more detailed regulations for the interpretation of which this aim is decisive.[28]
>
> But if Article 3 (f) provides for the institution of a system ensuring that competition in the Common Market is **not distorted**, then it requires a fortiori that competition must not be eliminated. This requirement is so essential that without it numerous provisions of the Treaty would be pointless. Moreover, it corresponds to the precept of Article 2 of the Treaty according to which one of the tasks of the Community is 'to promote throughout the Community a harmonious development of economic activities'. Thus the restraints on competition which the Treaty allows under certain conditions because of the need to harmonize the various objectives of the Treaty, are limited by the requirements of Articles 2 and 3. Going beyond this limit involves the risk that the weakening of competition would conflict with the aims of the Common Market.[29]

The Court confirmed this point of view in other cases such as *Tetra Pak*[30] or *Microsoft*[31].

§2. Freedom of competition

"Even if economic freedom is not a constituent element of the definition of competition, competition is a constituent element of economic freedom"[32]. As long as competition is seen as "the best stimulant of economic activity since it guarantees the widest possible freedom of

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[26] Article 3 §1 b) of the TFEU.
[27] Case 6/72 *Europemballage Corporation and Continental Can Co. Inc. v. Commission*, 1973. (*Continental Can*).
[28] *Continental Can*, §23. Emphasis added by the author.
[29] *Continental Can*, §24. Emphasis added by the author.
[30] Case T-83/91 *Tetra Pak International SA v. Commission*, 1994, §114. (*Tetra Pak I*).
[31] Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft), §836. (*Microsoft*).
[32] R. NAZZINI, *op. cit.*, p. 20.

action to all"[33], number of authors highlighted the link between article 102 TFEU and ordoliberalism. In *Commercial Solvents*[34] case, the ECJ confirmed the freedom to participate in a marketplace. The intention was to "protect a small firm, rather than free the competition for the benefit of consumers"[35].

Anyway, the Court is also concerned by the freedom to choose sources of supply[36]. In *Hoffmann-La Roche*[37] case, the ECJ condemned Hoffmann-La Roche for the abuse of its dominant position by entering into exclusive purchasing agreements for which it granted some loyalty rebates to its customers[38]. The condemnation was justified by the fact that "the rebates are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser or restrict his possible choice of sources of supply and to deny other producers access to the market"[39]. The ECJ confirmed this approach in *Michelin I*[40] case stating that the "discounts tend to remove or restrict the buyer's freedom to choose his sources of supply and to bar competition from access to the market"[41]. In a similar case[42], the Court declared about sugar export rebates:

> When it is granted by an undertaking in a dominant position by reference to an increase in purchases made over a certain period, without that rebate being capable of being regarded as a normal quantity discount, as the applicant does not deny, constitutes an abuse of that dominant position, since such a practice can only be intended to tie the customers to which it is granted and place competitors in an unfavorable competitive position.[43]

The concepts of access to the market and the cases involving "market foreclosure" will be developed in the next chapters.

§3. Consumer welfare

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[33] V. MERTIKOPOULOU, "DG Competition's Discussion Paper on the Application of Article 82 of the EC Treaty to Exclusionary Abuses: The Proposed Reform from a Legal Point of View", 28(4) *European Competition Law Review*, 2007, p. 241.
[34] Case 6-7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v. Commission*, 1974.
[35] V. KORAH, "The Interface between Intellectual Property Rights and Antitrust: The European Experience", 69(3) *Antitrust Law Journal*, 2001, p. 801.
[36] L. LOVDAHL GORMSEN, *op. cit.*, p. 81.
[37] Case 85/76 *Hoffmann-La Roche AG v. Commission*, 1979. (*Hoffmann-La Roche*).
[38] *Hoffmann-La Roche*, §24.
[39] *Hoffmann-La Roche*, §90.
[40] Case 322/81 *Nederlandsche Banden-Industrie Michelin NV v. Commission*, 1983. *(Michelin I*).
[41] *Michelin I*, §73.
[42] Case T-228/97 *Irish Sugar v. Commission*, 1999. (*Irish Sugar*).
[43] *Irish Sugar*, §213.

In the *Discussion Paper*, allocative efficiency is put forward: "with regard to exclusionary abuses, the objective of article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"[44]. This focus on consumer welfare was confirmed in *Guidance Paper* of 2009 which insisted on the conducts that are harmful for the consumers[45] and in different cases of the ECJ.

The first case where consumer welfare was at stake concerning article 102 TFEU (82 EC Treaty at that time), was *Continental Can*[46] where the Court prohibited exclusionary practices for the sole reason that it hurts consumers, directly or indirectly. "The ECJ interpreted 'abuse' to cover changes in the structure of an undertaking which lead to a disturbance of competition in the common market"[47] :

> The provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.[48]

It also appears that the Court is defending the structure of the market and by so, indirectly, is also defending consumers:

> If it can, irrespective of any fault, be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circum vented 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. Such a narrow precondition as the elimination of all competition need not exist in all cases. But the Commission, basing its decision on such **elimination of competition**, had to state legally sufficient reasons or, at least, had to prove that competition was so essentially affected that the remaining competitors could no longer provide a sufficient counterweight.[49]

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[44] DG Competition *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, 2005, §54.
[45] OJ C-45/7 *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2008, §5.
[46] *Continental Can*, § 26.
[47] L. LOVDAHL GORMSEN, *op. cit.*, p. 73.
[48] *Continental Can*, §26.
[49] *Continental Can*, §29. Emphasis added by the author.

The condition of effective competition will be studied below, in Part 2, Chapter 1. In the same idea, the analysis of the evolution that occurred in ECJ case-law on consumer welfare, leading to the protection of freedom of choice will be analysed below (Part 3).

Section 2 – Economic freedom and consumer welfare

This paragraph will raise questions and set up some basic concepts that will be developed in the following chapters of this paper.

"A potential and serious conflict can arise between economic freedom and consumer welfare in at least two situations. The first is where competition amongst rivals is protected but does not benefit consumer welfare for example, 'competitors that are not yet as efficient as the dominant company' [50], are protected in the short-term or less efficient companies are protected[51]" [52]. The second situation can arise when some companies are excluded of the market even if they were not capable, at the time they were ejected, to provide consumer welfare under the form of lower prices, better quality and effective choice[53]. In those situations, the Court must choose what objective has to be favourised. Considering this question under the angle of protection of competition process may lead us to an answer.

The ordoliberals developed the idea that competition process was a goal to protect in itself. By safeguarding the structure of competition, the outcome is lowered compared to the process. Advocate General Kokott expressed this assessment in her Opinion of *British Airways*[54] case :

> Article 82 EC is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an institution),* which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared.[55]

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[50] *Discussion Paper*, §67.
[51] *Guidance Paper*, §23.
[52] L. LOVDAHL GORMSEN, *op. cit.*, p. 85.
[53] L. LOVDAHL GORMSEN, *ibid.*, p. 86.
[54] Case C-95/04P, *British Airways plc v. Commission*, 2007. (*British Airways*).
[55] Opinion of Advocate General Kokott in Case C-95/04P, *British Airways plc v. Commission*, 2007, delivered on 23 February 2006, §68.

According to T. Eilmansberger, protecting an undistorted competition will generally maximize consumer welfare, at least in the mid-term and merely in the long-term[56]. In other words, protecting economic freedom provides consumer welfare, in the long run. Consumer welfare doesn't have to be an end in itself if the protection granted for the competition is efficient[57]. The focus on competition in the long run seems to be the trend followed by the DG COMP in protecting "not yet as efficient competitor"[58] and the Commission focus on "less efficient competitor"[59]. "Protecting those competitors means that there will be more firms in the market, which potentially could mean more competition in the long run, driving prices down and increasing allocative efficiency to the benefit of consumers"[60]. However, the question of real efficiency can be asked relating to the benefit consumers will take of such a protection. Will innovation benefit of comparable cases and in the end, will it increase consumer welfare? This situation makes it really difficult to differentiate when economic freedom protects competitor under the consumer welfare objective and when it really serves consumer welfare[61].

An example, among the abundant ECJ case-laws, can be found in *Michelin I* case where freedom of choice, which should benefit, in the end, consumer welfare, is protected, as well as freedom of competition. Concerning the freedom of choice, the Court decided:

> In deciding whether Michelin NV abused its dominant position in applying its discount system it is therefore necessary to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.[62]
>
> Such a situation is calculated to prevent dealers from being able to select freely at any time in the light of the market situation the most favourable of the offers made by the various competitors and to change supplier without suffering any appreciable economic disadvantage. It thus limits the dealers' choice of supplier and makes access to the market more difficult for competitors.

[56] T. EILMANSBERGER, "How to Distinguish Good from Bad Competition under Article 82 EC: In search of Clearer and More Coherent Standards for Anticompetitive Abuses", 42 *Common Market Law Review*, 2005, pp. 129-135.
[57] L. LOVDAHL GORMSEN, *op. cit.*, p. 91.
[58] *Discussion Paper*, §67.
[59] *Guidance Paper*, §23.
[60] L. LOVDAHL GORMSEN, *ibid.*, p. 92.
[61] L. LOVDAHL GORMSEN, *ibid.*, p. 93.
[62] *Michelin I,* §73.

> Neither the wish to sell more nor the wish to spread production more evenly can justify such a restriction of the customer's freedom of choice and independence. The position of dependence in which dealers find themselves and which is created by the discount system in question, is not therefore based on any countervailing advantage which may be economically justified.[63]

About the economic freedom, the Court specified that it was a fundamental principle of the Treaty:

> Apart from the extra bonus granted in 1977, the discount system had an adverse effect on free competition within the common market, which is a fundamental principle of the Treaty, even though the variation in the discount was relatively slight and it has not been proved that the system was applied in a discriminatory manner.[64]

This case is the perfect example of the first tendency followed by the Court concerning abuse of dominant position, namely, the effective competition analysis.

Part 2 – The EU legal instruments in areas of abuse of dominant position and mergers

In this part, the study will be focused on three major EU competition law concepts. The two first chapters will be dedicated to abuse of dominant position analysis and the effective competition concept (Chapter 1) followed by the as-efficient competitor test (Chapter 2). Finally, in Chapter 3, focus will be put on mergers control and the new test of significant impediment to effective competition. This paper will try to describe the links binding these three instruments and what can explain their evolution.

Chapter 1 – The effective competition concept

Section 1 – Abuse of dominant position

§1. Dominant position

Article 102 TFEU is written as followed:

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[63] *Michelin I*, §85.
[64] *Michelin I*, §113.

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
> Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Concerning the dominant position, this paper will not describe the evolution of the notion; solely the definition given in the *United Brands*[65] case will be remembered:

> The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.[66]

However, this definition was criticized because of its lack of economic concern[67]. European authorities gave an answer and specified the meaning of "position of economic strength" in the article 14, §2 of the Directive 24 April 2002 about telecommunication:

> An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

This precision was completed in the *Discussion Paper* of 2005:

> Market power is the power to influence market prices, output, innovation, the variety or quality of goods and services, or other parameters of competition on the market for a significant period of time.[68]

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[65] Case C-27/76, *United Brands Company and United Brands Continental BV v. Commission*, 1978. (*United Brands*).
[66] *United Brands*, §65.
[67] N. PETIT, *Droit européen de la concurrence*, L.G.D.J., 2013, p. 272.
[68] *Discussion Paper*, §24.

This paper will not study the conditions developed through case-law and different other legal sources concerning the relevant market and the economic conditions needed to face a dominant position[69].

§2. Abuse of the dominant position

Following the requirement of article 102 TFEU, being in a dominant position is not reprehensive; it is only when the dominant company abuses this position that it is turning illegal[70]. The list contained in the article is illustrative and not limited. "The concept of abuse clearly requires, at the very minimum, that the conduct of the dominant undertaking restricts competition or exploits a restriction of competition. But what is the level of competitive pressure that Article 102 aims at protecting? "[71]

Section 2 – The effective competition

The answer was given in *Continental Can*[72] case. The Court started by reminding the aim of articles 85 and 86 EC Treaty (nowadays, 101 and 102 TFEU):

> Articles 85 and 86 seek to achieve the same aim on different levels, viz. the maintenance of effective competition within the Common Market. The restraint of competition which is prohibited if it is the result of behaviour falling under Article 85, cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned.[73]

The ECJ detailed that the harm suffered by the consumers may be direct and also indirect, when the structure of an effective competition process is at stake:

> It is in the light of these considerations that the condition imposed by Article 86 is to be interpreted whereby in order to come within the prohibition a dominant position must have been abused. The provision states a certain number of abusive practices which it prohibits. The list merely gives examples, not an exhaustive enumeration of the sort of abuses of a dominant position prohibited by the Treaty. As may further be seen from letters (c) and (d) of Article 86 (2), the provision is not only aimed at practices which may **cause damage to consumers directly**, but also at those which are detrimental to them through their impact on an **effective competition structure**, such as is

[69] For further information, read N. PETIT, *op. cit*.
[70] N. PETIT, *op. cit.*, p. 302.
[71] R. NAZZINI, *op. cit.,* p. 172.
[72] *Continental Can*, §18.
[73] *Continental Can*, §25.

> mentioned in Article 3 (f) of the Treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.[74]

The Court also developed the idea of freedom of action. Indeed, in paragraph 29, it is said that lowering the level of freedom of action may constitute an abuse:

> If it can, irrespective of any fault, 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. Such a narrow precondition as the elimination of all competition needs not exist in all cases. But the Commission, basing its decision on such elimination of competition, had to state legally sufficient reasons or, at least, had to prove that competition was so essentially affected that the remaining competitors could no longer provide a sufficient counterweight.[75]

In this extract, the idea of "freedom of choice" appears for the first time. It is expressed under the words of "consumer's freedom of action" but it will be lead and developed in the ECJ jurisprudence until the clear expression of "consumer's freedom of choice".

"The objective that the current Treaties assign to Article 102 is the promotion of long-term social welfare. As a consequence, effective competition within the meaning of *Continental Can* is the degree of competition that ensures that long-term social welfare is maximized."[76] This interpretation was confirmed in the case *Metro I*[77]:

> The requirement contained in Articles 3 and 85 of the EEC Treaty that competition shall not be distorted implies the existence on the market of **workable competition**, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market.[78]

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[74] *Continental Can*, §26. Emphasis added by the author.
[75] *Continental Can*, §29. Emphasis added by the author.
[76] R. NAZZINI, *op. cit.*, p. 172.
[77] Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v. Commission*, 1977, §20. (*Metro I)*.
[78] *Metro I,* §20. Emphasis added by the author.

In this situation, "workable competition" must be read as "effective competition". This teaching was confirmed in the case *GlaxoSmithKline*[79]:

> Effective competition, that is to say, the degree of competition necessary to ensure the attainment of the objectives of the Treaty.[80]

Obviously, the legal concept doesn't correspond to economic concepts like perfect competition, workable competition or complete competition[81]. The perfect competition is an economic model whose main characteristics are a fragmented supply and demand, transparent prices and homogenous products, leading to the equality of prices and marginal cost and the maximisation of allocative efficiency[82]. Complete competition refers to the ordoliberal concept promoting the most diffused market power in order to avoid firms to exercise their power over customers or competitors, power that would limit the latter's' economic freedom[83]. Finally, workable competition is maybe the closest concept compared to effective competition. It is "the most desirable form of competition selected from those that are practically possible, within the limits set by conditions we cannot escape"[84]. Therefore, workable competition doesn't aim at the best system but at the best outcome when the first best system is not possible. In the same way, effective competition is providing a reference against behaviours that are potentially harmful to long-term social welfare[85].

Consumers' interests are considered to be protected as soon as effective competition is granted[86]. Indeed, the Commission itself highlighted that the most probable prejudice for a consumer suffering an abuse of dominant position by an undertaking is "the most likely through prices higher than would be found if the market was subject to effective competition"[87]. There is a real meaning in protecting the effective competition on the market, first of all for the undistorted European internal market and indirectly, for the consumers[88].

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[79] Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission*, 2006, (*GlaxoSmithKline)*.
[80] *GlaxoSmithKline*, §109.
[81] R. NAZZINI, *op. cit.*, p. 173.
[82] R. NAZZINI, *ibid.*, p. 173.
[83] D. HILDEBRAND, *The Role of Economic Analysis in the EC Competition Rules*, Kluwer Law International, 2009, p. 161.
[84] J. M. CLARKE, "Toward a Concept of Workable Competition", 30 *American Economic Review*, 1940, p. 242.
[85] R. NAZZINI, *ibid.*, p. 174.
[86] H. JENKINS, "Protecting Consumers: Does Competition Policy Help?", *Competition Law Review,* 2005, p. 283.
[87] The XIV Report on Competition Policy, European Commission, 1994, at part 207.
[88] P. MARSDEN and P. WHELAN, "'Consumer Detriment' and its Application in EC and UK Competition Law", *European Competition Law Review,* 2006, p. 576.

Section 3 – Developments

§1. Effective competition and anti-competitive foreclosure

The position presented above was confirmed in 2009 in the *Guidance Paper*:

> The Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise. In this context, the dominant undertaking will generally be expected to demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative conditions are fulfilled :
>
> - the efficiencies have been, or are likely to be, realised as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution,
> - the conduct is indispensable to the realisation of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies,
> - the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets,
> - the conduct does not **eliminate effective competition**, by removing all or most existing sources of actual or potential competition. Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.[89]

This test, permitting undertakings to justify their conducts – if they are beneficial to the consumers – is limited by four conditions, one of them being not to eliminate effective competition. Therefore, companies are only allowed to behave aggressively if they are not altering effective competition[90]. It can be underlined that the four conditions remind and refer to the proportionality test, influencing the consumer harm test. As a matter of fact, the Commission developed tools permitting itself to control the conduct of dominant firms:

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[89] *Guidance Paper*, §30.
[90] L. LOVDAHL GORMSEN, *op. cit.*, pp. 56-57.

> The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not **impair effective competition** by **foreclosing** their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term 'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers. The identification of likely consumer harm can rely on qualitative and, where possible and appropriate, quantitative evidence. The Commission will address such anti-competitive foreclosures either at the intermediate level or at the level of final consumers, or at both levels.[91]

This evolution, from the *Continental Can* case to the *Guidance Paper* has been marked by cases that followed *Continental Can*. One of the most important is the *Hoffman-La Roche* case of 1979. In this judgment, the Court decided to give a new definition of the abuse:

> The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.[92]

Even if the terms "effective competition" are not appearing, the Court clearly refers to this concept, specifying what an anti-competitive foreclosure of the market is. The ECJ stresses three elements for the proportionality test. Firstly, the structure of the market must be influenced by the conduct. Secondly, the methods used must be different than those usually in practice under normal conditions. Finally, the degree or the growth of competition on that market must be possibly hindered by the behaviour.[93] This statement has been materialized by the Commission in its *Guidance Paper* :

> The Commission will normally intervene under Article 82 where, on the basis of cogent and convincing evidence, the allegedly abusive conduct is likely to lead to **anti-competitive**

[91] *Guidance Paper*, §19.
[92] *Hoffman-La Roche*, §91.
[93] R. NAZZINI, *op. cit.*, pp. 169-172.

> **foreclosure**. The Commission considers the following factors to be generally relevant to such an assessment:
>
> — the position of the dominant undertaking,
> — the conditions on the relevant market,
> — the position of the dominant undertaking's competitors,
> — the position of the customers or input suppliers,
> — the extent of the allegedly abusive conduct,
> — possible evidence of actual foreclosure,
> — direct evidence of any exclusionary strategy.[94]

"*Hoffman-La Roche* establishes the general principle that conduct is abusive when it restricts competition by means other than behaviour based on efficiency or consistent with the normal profit-maximizing strategy of a non-dominant undertaking"[95].

§2. Effective competition and special responsibility of the dominant company

In *Hoffman-La Roche*, the ECJ considered that conducts which could bring anti-competitive effects, even if they are minor, would be condemned under article 102 TFEU:

> Moreover since the course of conduct under consideration is that of an undertaking occupying a dominant position on a market where for this reason the structure of competition has already been weakened, within the field of application of Article 86 any further weakening of the structure of competition may constitute an abuse of a dominant position.[96]

In *Michelin I*, the Court developed this idea by assessing a "special responsibility" on the dominant undertakings' shoulders. "Since *Continental Can* and *Hoffmann-La Roche* had already defined the abuse as conduct that restricts effective competition in the internal market, the concept of 'special responsibility' in *Michelin I* simply expressed the idea that article 102 singles out dominant firms by prohibiting them from engaging in a conduct which is abusive under that provision"[97]. In other words, a dominant undertaking cannot risk eliminating the residual competition by adopting any conduct presenting that potentiality[98].

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[94] *Guidance Paper*, §20.
[95] R. NAZZINI, *op. cit.,* p. 171.
[96] *Hoffmann-La Roche*, §123.
[97] R. NAZZINI, *ibid.*, p. 175.
[98] L. LOVDAHL GORMSEN, *op. cit.*, p. 118.

As a matter of fact, the Court stipulated:

> 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.[99]

In line with *Continental Can* and *Hoffmann-La Roche*, the reference is clear with regard to the protection of effective competition[100]. Concretely, this responsibility involves that certain conducts can be declared abusive when they are adopted by dominant firms, although the same conduct, if applied by a non-dominant undertaking, can be allowed and considered as legal[101]. This teaching is quoted in a TFI judgment:

> That conclusion cannot be undermined by the fact that dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on a market where competition is already restricted by the fact of their dominant position *(Michelin I*, paragraph 57). That special responsibility means only that a dominant undertaking may be prohibited from conduct which is legitimate where it is carried out by non-dominant undertakings.[102]

Finally, one could be tempted to say that it is contradictory to speak about « abuse », so article 102 TFEU stipulates, in line with the Court, that it can encompass normal conducts[103]. However, other critics of this instrument have emerged.

Chapter 2 – The as efficient competitor test

Section 1 – Reasons of the new test

Critics appeared concerning the EU competition law's traditional approach. On the one hand, the analysis of the dominant undertakings' conducts was inappropriately based on the form of those firms. For example, a price strategy could be declared legal or illegal without any serious investigation about its actual or likely effects on the market. However, such an approach, centered on the object of the conduct rather than on the effects on the market

[99] *Michelin I*, §57. Emphasis added by the author.
[100] C. PRIETO and D. BOSCO, *op. cit.*, p. 801.
[101] N. PETIT, *op. cit.*, p. 306.
[102] Case T-191/98, *Atlantic Container Lines v. Commission*, 2003, §1460.
[103] N. PETIT, *ibid.*, p. 306.

fostered the likelihood of competition authority's errors. Either it sanctioned conduct without any negative effect on the market (economic doctrine speaks about type I error), or it didn't sanction a reprehensible conduct (type II error). On the other hand, European rules condemned *per se* infractions without allowing the firms to defend or justify their behaviours and, eventually, prove the beneficial effects their conducts were bringing. Those reproaches criticized the lack of economic understanding of the traditional approach.[104]

"The pressures for a more economic approach of competition law enforcement lead authorities to give up their formal rules of decisions (based on legal forms) for better grounded on economic theory ones"[105]. In 2009, the Commission published its *Guidance Paper*[106]. In this document, the Commission presents the general analytical framework that will be used in order to determine if an intervention is needed for eviction practices. The main contribution is the declaration to follow an effects-based approach[107]. In other words, undertakings will be condemned only if their conducts have anti-competitive effects[108].

Adopting a more economic approach is not only a technical issue. The debate between formal rules and effects-based approach underlines the difficulty raised by the objectives of EU competition law[109]. Is the main goal to protect market, competition structure, or, on the contrary, is it to promote consumer welfare? "If the purpose is to protect a competitive structure defined by an effective rivalry amongst competitors, should the competition policy protect a competitor from its market exclusion whatever its basis, even if this exclusion is produced by the own merits of the dominant firm? On the contrary, if the consumer is, for the sole purpose of competition law, preventing the exclusion of a less efficient competitor, this leads to an efficiency loss and finally harms the consumer"[110]. Indeed, protecting inefficient competitors against their market eviction goes beyond protecting an efficient competitive process[111].

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[104] C. PRIETO and D. BOSCO, *op. cit.*, p. 801.
[105] F. MARTY, "As-Efficient Competitor Test in Exclusionary Prices Strategies: Does Post-Danmark Really Pave The Way Towards a More Economic Approach?", 26 *Gredeg WP*, 2013, p. 3.
[106] OJ C-45/7 *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2008.
[107] N. PETIT, *op. cit.*, p. 317.
[108] C. PRIETO and D. BOSCO, *ibid.*, p. 803.
[109] J.B. BAKER, "Economics and Politics: Perspective on the Goals and the Future of Antitrust", 81 *Fordham Law Review,* 2013, pp. 2175-2196.
[110] F. MARTY, *ibid.*, pp. 6-7.
[111] R. JOLIET, *Monopolization and Abuse of Dominant Position*, Université de Liège, 1970, p. 250.

The Commission gives an answer about this dichotomy when developing the as-efficient competitor test. But before analysing this new instrument, it is interesting to put forward the fact that the new effects-based approach is the continuation of the EU competition policy trend, which is to protect the consumer welfare.[112] Indeed, this new approach answers the two main criticisms the traditional EU competition jurisprudence was facing. Firstly, the Commission specifies how it will characterize eviction abuses:

> The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair **effective competition** by foreclosing their competitors in an **anti-competitive** way, thus having an adverse **impact on consumer welfare**, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term 'anti-competitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers. The identification of **likely consumer harm** can rely on qualitative and, where possible and appropriate, quantitative evidence. The Commission will address such **anti-competitive foreclosure** either at the intermediate level or at the level of final consumers, or at both levels.[113]

The anti-competitive foreclosure is condemnable because it has negative effects on the consumer. The effects can be purely potential; they don't need to occur to drag a condemnation along. In paragraph 20, the Commission explains how the foreclosures will be judged with "general factors". However, the Commission is setting a test for the main abuses, "permitting to prove anti-competitive foreclosures with more than the general factors", the "as-efficient competitor test".[114]

Secondly, the possibility is offered to the undertakings to justify their practices by proving "efficiency benefits". Once again, consumer welfare is the targeted objective:

> The Commission considers that a dominant undertaking may also justify conduct leading to foreclosure of competitors on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise.[115]

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[112] N. PETIT, *op. cit.*, p. 319.
[113] *Guidance Paper*, §19. Emphasis added by the author.
[114] C. PRIETO and D. BOSCO, *op. cit.*, p. 805.
[115] *Guidance Paper*, §30.

Section 2 – The as-efficient competitor test

The as-efficient or equally competitor test enables differentiation between the anti-competitive foreclosure and the competition on the merits[116]. Although there are several traces of its use in ECJ jurisprudence, the test was implemented in the *Guidance Paper* of the Commission in 2009.

Based on R. A. Posner's work[117], the test analyses whether a conduct is likely to exclude a competitor who is at least as efficient as the dominant firm. "It distinguishes harmful exclusion that is the result from an undistorted competitive process based on the principle that competition law should not protect inefficient competitors"[118], which was one of the critics against traditional approach[119]. The Commission clearly expressed that idea:

> The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the **competitive process** in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than **competing on the merits** of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who **deliver less to consumers** in terms of price, choice, quality and innovation will leave the market.[120]

Concerning price-based exclusion, the Commission nearly established the test as a necessary condition. Even if the test itself doesn't constitute a sufficient condition to demonstrate an abuse, if the Commission establishes exclusion based on the test, the conduct will be integrated in a "general assessment of anti-competitive foreclosure":

> The considerations in paragraphs 23 to 27 apply to price-based exclusionary conduct. Vigorous price competition is generally beneficial to consumers. With a view to preventing anti-competitive foreclosure, the Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking.[121]

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[116] M. STRYSZOWSKA, "Equally Efficient Competitor Test", *Economic Focus*, 2013, p. 1.
[117] R. A. POSNER, *Antitrust Law*, University of Chicago Press, 2001.
[118] R. NAZZINI, *op. cit.*, p. 72.
[119] C. PRIETO and D. BOSCO, *op. cit.*, p. 882.
[120] *Guidance Paper*, §6. Emphasis added by the author.
[121] *Guidance Paper*, §23.

> If the data clearly suggest that an equally efficient competitor can compete effectively with the pricing conduct of the dominant undertaking, the Commission will, in principle, infer that the dominant undertaking's pricing conduct is not likely to have an adverse impact on effective competition, and thus on consumers, and will therefore be unlikely to intervene. If, on the contrary, the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anti-competitive foreclosure (see Section B above), taking into account other relevant quantitative and/or qualitative evidence.[122]

Concerning the procedure adopted by the Commission to examine if there is an abuse based on the equally efficient competitor test, *Akzo*[123]'s price-cost analysis approach, taken in the broader framework of price-based behaviour, was chosen:

> The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC). Failure to cover AAC indicates that the dominant undertaking is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. LRAIC is usually above AAC because, in contrast to AAC (which only includes fixed costs if incurred during the period under examination), LRAIC includes product specific fixed costs made before the period in which allegedly abusive conduct took place. Failure to cover LRAIC indicates that the dominant undertaking is not recovering all the (attributable) fixed costs of producing the good or service in question and that an equally efficient competitor could be foreclosed from the market.[124]

Section 3 – Different application

As indicated above, the AECT is applicable for price-based exclusionary conducts. It includes predatory pricing (§1), margin squeeze (§2) and rebates (§3). This section will analyse that despite the fact that the test was consecrated in the *Guidance Paper* of 2009, it was already, partly, applied in former ECJ cases. Section 4 will develop the first *sensu stricto* jurisprudential application of the test in the *Post Danmark I* case.

§1. Predatory pricing

[122] *Guidance Paper*, §27.
[123] Case C-62/86, *Akzo Chemie BV v. Commission*, 1991. (*Akzo*). Developed below.
[124] *Guidance Paper*, §26.

Predatory pricing is an exclusionary conduct inasmuch as the goal is to eliminate competitors from the market with a very aggressive price-policy implemented by the dominant undertaking[125]. The *Guidance Paper* defines it as followed:

> In line with its enforcement priorities, the Commission will generally intervene where there is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term (referred to hereafter as 'sacrifice'), so as to foreclose or be likely to foreclose one or more of its actual or potential competitors with a view to strengthening or maintaining its market power, thereby causing consumer harm.[126]

The usual test for predatory pricing is the Akzo test. The Court, in the *Akzo* case, formulated a test directly inspired by Areeda and Turner theories[127] about a "deliberated sacrifice":

> Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.[128]

> Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps **as efficient as the dominant undertaking** but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.[129]

In the *Guidance Paper*, the Commission changed the benchmarks and discarded the concepts of Average Variable Costs (AVC) and Average Total Costs (ATC), which were too much focused on the short term, to adopt a new wording: Average Avoidable Costs (AAC) and Long-Run Average Incremental Costs (LRAIC)[130]:

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[125] N. PETIT, *op. cit.*, p. 334.
[126] *Guidance Paper*, §63.
[127] P. AREEDA and D. TURNER, "Predatory pricing and related practices under Section 2 of the Sherman Act", *Harvard Law Review*, 1975, pp. 697-730.
[128] *Akzo*, §71.
[129] *Akzo*, §72. Emphasis added by the author.
[130] R. NAZZINI, *op. cit.*, p. 223.

> Conduct will be viewed by the Commission as entailing a sacrifice if, by charging a lower price for all or a particular part of its output over the relevant time period, or by expanding its output over the relevant time period, the dominant undertaking incurred or is incurring losses that could have been avoided. The Commission will take AAC as the appropriate starting point for assessing whether the dominant undertaking incurred or is incurring avoidable losses. If a dominant undertaking charges a price below AAC for all or part of its output, it is not recovering the costs that could have been avoided by not producing that output: it is incurring a loss that could have been avoided Pricing below AAC will thus in most cases be viewed by the Commission as a clear indication of sacrifice.[131]
>
> If sufficient reliable data are available, the Commission will apply the equally efficient competitor analysis, described in paragraphs 25 to 27, to determine whether the conduct is capable of harming consumers. Normally only pricing below LRAIC is capable of foreclosing as efficient competitors from the market.[132]

In summary, "the test is failed when prices fall below AVC. The AECT is then also failed as prices below AVC do not allow an equally efficient competitor to compete without incurring losses. It is passed when prices are above AVC. AECT is, in that case, also passed"[133]. The test requires more evidence of an anti-competitive intent for the prices between AVC and ATC[134].

This test had been confirmed in the Tribunal *France Télécom* (also called *Wanadoo)*[135] case. The recourse of this case[136] raised the question of the recoupment of losses. Indeed, a predatory strategy can only be understood if, after having eliminated the competitors, the dominant firm is recovering its losses by raising the prices. If the only policy was to apply a low prices strategy, its conduct wouldn't be negative for the consumers' interests.[137]

Although the proof of the will to recover the losses seems to be an essential element in predatory pricing strategies, the ECJ doesn't consider that it is a formal condition to prove the existence of an abuse[138].

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[131] *Guidance Paper*, §64.
[132] *Guidance Paper*, §67.
[133] M. STRYSZOWSKA, *op. cit.*, p. 1.
[134] C. PRIETO and D. BOSCO, *op. cit.*, p. 927.
[135] Case T-340/03, *France Télécom SA v. Commission,* 2007.
[136] Case C-202/07, *France Telécom v. Commission*, 2009. (*France Télécom*).
[137] C. PRIETO and D. BOSCO, *ibid.*, p. 930.
[138] N. PETIT, *op. cit.*, p. 937.

This opinion is clearly expressed in *France Télécom* case:

> Accordingly, contrary to what the appellant claims, it does not follow from the case-law of the Court that proof of the possibility of recoupment of losses suffered by the application, by an undertaking in a dominant position, of prices lower than a certain level of costs constitutes a necessary precondition to establishing that such a pricing policy is abusive. In particular, the Court has taken the opportunity to dispense with such proof in circumstances where the eliminatory intent of the undertaking at issue could be presumed in view of that undertaking's application of prices lower than average variable costs.[139]
>
> That interpretation does not, of course, preclude the Commission from finding such a possibility of recoupment of losses to be a relevant factor in assessing whether or not the practice concerned is abusive, in that it may, for example where prices lower than average variable costs are applied, assist in excluding economic justifications other than the elimination of a competitor, or, where prices below average total costs but above average variable costs are applied, assist in establishing that a plan to eliminate a competitor exists.[140]

The first extract (§110) refers to another ECJ case, *Tetra Pak II*, which, a couple of years before, already stated the same opinion:

> Furthermore, it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated. The Court of First Instance found, at paragraphs 151 and 191 of its judgment, that there was such a risk in this case. The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.[141]

The losses recoupment is just a relevant element without being a fundamental condition[142]. The jurisprudential development was confirmed in 2009 by the *Guidance Paper* :

> Generally speaking, consumers are likely to be harmed if the dominant undertaking can reasonably expect its market power after the predatory conduct comes to an end to be greater than it would have been had the undertaking not engaged in that conduct in the first place, that is to say, if the undertaking is likely to be in a position to benefit from the sacrifice.[143]

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[139] *France Télécom*, §110.
[140] *France Télécom*, §111.
[141] Case C-333/94, *Tetra Pak International v. Commission*, 1996, §44. (*Tetra Pak II*).
[142] C. PRIETO and D. BOSCO, *op. cit.*, p. 933.
[143] *Guidance Paper,* §70.

> This does not mean that the Commission will only intervene if the dominant undertaking would be likely to be able to increase its prices above the level persisting in the market before the conduct. It is sufficient, for instance, that the conduct would be likely to prevent or delay a decline in prices that would otherwise have occurred. Identifying consumer harm is not a mechanical calculation of profits and losses, and proof of overall profits is not required. Likely consumer harm may be demonstrated by assessing the likely foreclosure effect of the conduct, combined with consideration of other factors, such as entry barriers. In this context, the Commission will also consider possibilities of re-entry.[144]

The point of view defended by the Commission and allowed by the Court, permitting the condemnation of certain predatory conducts without the proof of losses recoupment, can be justified by the protection of consumers' interests. Indeed, dominant firms sometimes behave in a predatory way just to have tranquility, to avoid entering an innovation race against competitors or just to maintain a certain reputation.[145]

§2. Margin squeeze

"A margin squeeze results from the spread between the upstream and downstream prices of a vertically integrated undertaking dominant on the upstream market"[146]. This conduct occurs when the dominant firm fixes a price, in the upstream market, which, compared to the downstream market's price is depraving the competitors of their margin, by so, preventing them to compete effectively[147]. The AECT compares the prices for the retail and its wholesale price added to retail costs. If there is a negative difference between retail price, wholesale price and retail cost, the test fails, i.e. an equally efficient competitor would not be able to stay in the market without incurring losses.[148]

The first important EU margin squeeze case was *Deutsche Telekom*[149] in 2010. The case related to former EU concepts developed in ECJ jurisprudence. Indeed, the Court referred directly to its case-law:

> It follows from this that Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its **equally efficient actual or**

[144] *Guidance Paper*, §71.
[145] M. ARMSTRONG and S. HUCK, "Behavioural Economics as Applied to Firms: A Primer", 6(1) *Competition Policy International*, 2010, p. 27.
[146] J. KAVANAGH, "Assessing Margin Squeeze under Competition Law", 3 *Competition Law*, 2003, p. 187.
[147] C. PRIETO and D. BOSCO, *op. cit.*, p. 945.
[148] M. STRYSZOWSKA, *op. cit.*, p. 1.
[149] Case C-280/08, *Deutsche Telekom AG v. Commission*, 2010. (Deutsche Telekom)

> **potential competitors**, that is to say practices which are capable of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of **competition on the merits**. From that point of view, therefore, not all competition by means of price can be regarded as legitimate (see, to that effect, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 73; *AKZO* v *Commission*, paragraph 70; and *British Airways* v *Commission*, paragraph 68).[150]

"On the facts of the case, the Court considered that the insufficient spread between Deutsche Telekom's wholesale and retail prices was 'capable of having an exclusionary effect on its equally efficient actual or potential competitors'[151]. The Court clearly placed special emphasis on competition by equally efficient competitors, explaining that"[152]:

> By further reducing the degree of competition existing on a market – the end-user access services market – already weakened precisely because of the presence of the appellant, thereby strengthening its dominant position on that market, the margin squeeze also has the effect that consumers suffer detriment as a result of the limitation of the choices available to them and, therefore, of the prospect of a longer-term reduction of retail prices as a result of competition exerted by **competitors who are at least as efficient** in that market.[153]

The equally efficient competitor principle also appears instrumental in the ECJ. It stipulates that neither an excessive wholesale price nor a predatory retail price are required to define a margin squeeze as an abuse[154]:

> In those circumstances, […] a margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article 82 EC in view of the exclusionary effect that it can create for competitors who are at least as efficient as the appellant. The General Court was not, therefore, obliged to establish, additionally, that the wholesale prices for local loop access services or retail prices for end-user access services were in themselves abusive on account of their excessive or predatory nature, as the case may be.[155]

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[150] *Deutsche Telekom*, §177. Emphasis added by the author.
[151] *Deutsche Telekom*, §178.
[152] M. MANDORFF and J. SAHL, "The Role of the 'Equally Efficient Competitor' in the Assessment of Abuse of Dominant Position", 1 *Konkurrensverket Working Paper Series in Law and Economics*, 2013, p. 10.
[153] *Deutsche Telekom*, §182. Emphasis added by the author.
[154] M. MANDORFF and J. SAHL, *ibid.*, p. 10.
[155] *Deutsche Telekom*, §183.

The Court had to judge other margin squeezes in telecommunication cases, the most famous being *Telefònica*[156] and *TeliaSonera*[157]. In the latest, the ECJ confirmed that the margin squeeze might be an abuse in itself, referring to the equally efficient competitor principle:

> A margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU.[158]

"In *TeliaSonera*, the equally efficient competitor principle is not only applied to obtain a cost measure so as to establish the existence of a margin squeeze (i.e. the conduct)"[159]. The principle is also put forward as a simplified tool in order to demonstrate the anti-competitive effects of the conduct. The existence of a margin squeeze is not sufficient to establish an abuse, it is also necessary to demonstrate an anti-competitive effect[160]:

> The Court has ruled out the possibility that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors can constitute an abuse within the meaning of Article 102 TFEU without it being necessary to demonstrate an anti-competitive effect.[161]

> It follows that, in order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking.[162]

Finally, for margin squeezes, the application of the test may be based on different cost measures. Indeed, as regards *Telefònica*, the LRAIC is indicated as the cost measure. However, in the case of *Deutsche Telekom*, the AAC may be the reliable cost measure.[163] The *Guidance Paper* recommends using the LRAIC:

> Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a

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[156] Case C-274/12, *Telefònica v. Commission*, 2013.
[157] Case 52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011. (*TeliaSonera*)
[158] *TeliaSonera*, §31.
[159] M. MANDORFF and J. SAHL, *op. cit.*, p. 11.
[160] M. MANDORFF and J. SAHL, *ibid.*, p. 11.
[161] *TeliaSonera*, §61.
[162] *TeliaSonera*, §64.
[163] M. STRYSZOWSKA, *op. cit.*, p. 1.

> lasting basis (a so-called 'margin squeeze'). In margin squeeze cases the benchmark which the Commission will generally rely on to determine the costs of an equally efficient competitor are the LRAIC of the downstream division of the integrated dominant undertaking.[164]

§3. Rebates

The last large category to which the AECT applies is the rebates[165]. Historically, the position of the Court towards rebates has always been strict, applying vague and general standards for exclusion like "rebates not constituting normal competition"[166] or "competition on the merits"[167]. In order to clarify the law, the Commission dedicated a part of its *Guidance Paper*[168] and of its *Discussion Paper* to the exclusionary rebates:

> Most straightforwardly, its product, in terms of price/quality ratio, may simply be more attractive than competing products. A superior price/quality ratio for individual orders of customers is unobjectionable under Article 82 because it is competition solely based on the merits.[169]

The *Discussion Paper* lists three types of rebates, conditional, unconditional and in return for the supply of a service[170]. The conditional ones are considered to be the most harmful. They are defined as rebates awarded for purchasing behaviour executed by customers. It includes exclusivity purchases or discounts granted when a purchasing threshold is attained. For the latter, there is a distinction between incremental rebates, which are applied to all the units over the threshold, and retroactive rebates, which are accorded for all the units purchased in a relevant period whenever the threshold is exceeded. The retroactive ones are considered to be the most important because they imply a larger quantity.[171]

The first case where the new test of the Commission's *Guidance Paper* was applied is *Intel*[172]. "The Commission did perform an equally efficient competitor analysis in line with its *Guidance Paper* – complete with a price-cost test showing that an equally efficient competitor

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[164] *Guidance Paper*, §80.
[165] N. PETIT, *op. cit.*, p. 342.
[166] *Hoffmann-La Roche*, §91.
[167] *Michelin II*, §97.
[168] *Guidance Paper*, §§37-46.
[169] *Discussion Paper*, §134.
[170] *Discussion Paper*, §§138, 170, 171.
[171] N. PETIT, *ibid.*, pp. 344-346.
[172] Commission Decision of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3 /37.990 – *Intel*).

could not match Intel's offer"[173]:

> In light of the above, it can be concluded that the level of HPA1 and HPA2 rebates granted by Intel between November 2002 and May 2005 was de facto conditional on HP sourcing almost all of its x86 CPU requirements for corporate desktops from Intel. The rebates in question constitute fidelity rebates which fulfil the conditions of the relevant case-law for qualification as abusive (see recitals (920), (921) and (923)). In addition, they had the effect of restricting HP's freedom to choose its source of x86 CPU supply for corporate desktops and preventing other competitors from supplying HP with corporate desktop x86 CPUs over the period in question.[174]

> Given all the relevant parameters (namely de facto conditions for the rebates applied by the dominant undertaking, contestable share, reference period and cost measure), the as efficient competitor analysis as applied in this case examines what price an as efficient competitor would have to offer an Intel trading partner in order to compensate it for the loss of any Intel rebate. If Intel's rebate scheme means that in order to compensate an Intel trading partner for the loss of the Intel rebate, an as efficient competitor has to offer its products below a viable measure of Intel's cost, then it means that the rebate was capable of reducing access to Intel trading partners which could offer products from the as efficient competitor, or in other words capable of foreclosing a hypothetical as efficient competitor. This would thereby deprive final consumers of the choice between different products which the Intel trading partner would otherwise have chosen to offer were it to make its decision solely on the basis of the relative merit of the products and unit prices offered by Intel and its competitors.[175]

"However, the Commission presented this analysis alongside a more traditional analysis grounded in the previous, form-based case-law on rebates; stating that it is not required by case-law to perform the tests advocated in the *Guidance Paper* in order to establish abuse"[176]:

> It should also be highlighted that the as efficient competitor analysis is one way of examining the capability to harm competition in the present context. However, it should not be regarded as a necessary or absolute test.[177]

As regards conditional rebates, also called loyalty rebates, cases, such as *Intel*, the Commission considers that the foreclosure of an as-efficient competitor occurs when the effective price the competitor has to pay if he wants to compensate a customer for the loss of the rebate is below the relevant cost benchmark[178]. Indeed, there is a possible foreclosing of

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[173] M. MANDORFF and J. SAHL, *op. cit.*, p. 12.
[174] *Intel*, §972.
[175] *Intel*, §1154.
[176] M. MANDORFF and J. SAHL, *ibid.*, p. 12.
[177] *Intel*, §1155.
[178] R. NAZZINI, *op. cit.*, p. 236.

competitors when rebates result from a relevant cost benchmark which is below an average price. In fact, the Commission considers that it is an open door for the dominant undertaking to leverage its market power on the non-contestable share of demand in order to deprave the competitors to attract the customers for the contestable share of demand[179]. In such cases, the test compares two kinds of market shares: the required and the contestable ones. The required one is the market share needed by a competitor if he wants to compete on the market effectively, without incurring any loss. The contestable one is the maximum volume that a competitor could take. If the contestable share is below the required share, the test is failed.[180]

Section 4 – Jurisprudential consecration: the *Post Danmark* case

The first case that consecrated the new approach provided by the Commission's *Guidance Paper* was *Post Danmark I*[181] in 2012[182]. The Court declared in this judgment a new definition of the abuse of dominant position, a positive opinion about the effects-based approach and what are the justifications available for the undertakings[183].

This judgment is the perfect compromise between the old and the new approaches. Indeed, after reminding the first principles such as the special responsibility of the dominant undertaking (first extract) or the obligation not to foreclose competitors if it is not based on competition on the merits (second extract), the Court is innovating and gives a new definition of the abuse (last extract):

> According to equally settled case-law, a dominant undertaking has a **special responsibility** not to allow its behaviour to impair genuine, undistorted competition on the internal market (Case C-202/07 P *France Telecom* v *Commission* [2009] ECR I-2369, paragraph 105 and case-law cited). When the existence of a dominant position has its origins in a former legal monopoly, that fact has to be taken into account.[184]

> In that regard, it is also to be borne in mind that Article 82 EC applies, in particular, to the conduct of a dominant undertaking that, through recourse to methods different from those governing **normal competition** on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition

[179] R. NAZZINI, *op. cit*., pp.235-236.
[180] M. STRYSZOWSKA, *op. cit.*, p. 2.
[181] Case C-209/10, *Post Danmarrk A/S v. Konkurrencerådet*, 2012. (*Post Danmark I*).
[182] C. PRIETO and D. BOSCO, *op. cit.*, p. 805.
[183] F. MARTY, *op. cit.*, p. 5.
[184] *Post Danmark I,* §23. Emphasis added by the author.

> existing in the market or the growth of that competition (see, to that effect, *AKZO* v *Commission*, paragraph 69; *France Télécom* v *Commission*, paragraphs 104 and 105; and Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraphs 174, 176 and 180 and case-law cited).[185]
>
> Thus, Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be **as efficient as it is itself** and strengthening its dominant position by using methods other than those that are part of **competition on the merits**. Accordingly, in that light, not all competition by means of price may be regarded as legitimate (see, to that effect, *AKZO* v *Commission*, paragraphs 70 and 72; *France Télécom* v *Commission*, paragraph 106; and *Deutsche Telekom* v *Commission*, paragraph 177).[186]

Those extracts demonstrate the references to the previous cases analysed above; cases which approached the principle of as-efficient competitor. In §25, the Court made hers the as-efficient competitor concept. However, it is specified that the less efficient competitors are not supposed to be protected[187]:

> It is settled case-law that a finding that an undertaking has such a dominant position is not in itself a ground of criticism of the undertaking concerned (Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 57, and Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 37). It is in no way the purpose of Article 82 EC to prevent an undertaking from acquiring, on its own merits, the dominant position on a market (see, inter alia, *TeliaSonera Sverige*, paragraph 24). Nor does that provision seek to ensure that **competitors less efficient** than the undertaking with the dominant position should remain on the market.[188]
>
> Thus, not every exclusionary effect is **necessarily detrimental** to competition (see, by analogy, *TeliaSonera Sverige*, paragraph 43). 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.[189]

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[185] *Post Danmark I,* §24. Emphasis added by the author.
[186] *Post Danmark I,* §25. Emphasis added by the author.
[187] M. MANDORFF and J. SAHL, *op. cit.*, p. 14.
[188] *Post Danmark I*, §21. Emphasis added by the author.
[189] *Post Danmark I*, §22. Emphasis added by the author.

As Rousseva and Marquis[190] underlined it, the §22 of the case is very close to §6 of the *Guidance Paper*, which demonstrates the adoption of the Commission's point of view by the Court:

> The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not **exclude their competitors by other means than competing on the merits** of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and **not simply protecting competitors**. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.[191]

The second big incentive given by this case is the favourable echo sent by the Court towards the effects-based approach. Not only does the ECJ indicate what costs test should be applied, it puts the reasoning in the global new approach[192]:

> Having regard to all the foregoing considerations, the answer to be given to the questions referred is that Article 82 EC must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests.[193]

Finally, in §41, the Court provides arguments that the dominant undertaking can put forward to demonstrate the usefulness of its conduct.

Section 5 – Last evolution

Recent case-laws seem to show a new tendency taken by the European Courts and more particularly by the ECJ. Indeed, the *Intel*[194] case of 2014 and the *Post Danmark II*[195] case of

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[190] M. MARQUIS and E. ROUSSEVA, "Hell freezes over: A climate change for assessing exclusionary under Article 102 TFEU", 4(1) *Journal of European Competition Law and Practice*, 2013, p. 42.
[191] *Guidance Paper*, §6.
[192] N. PETIT, *op. cit.*, p. 317.
[193] *Post Danmark I*, §44.
[194] Case T-286/09, *Intel v. Commission*, 2014. (*Intel 2014*)

2015 tends to demonstrate a shift in ECJ jurisprudence concerning effects-based approach as well as the AECT and their necessity and usefulness[196].

§1. Effects-based approach

The most revealing case that sows confusion regarding the effects-based approach is *Intel 2014*[197]. Indeed, the Court decided to come back to a more formalistic approach rather than continuing the new trend based on the effects[198]:

> That approach can be justified by the fact that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition.[199]

The Court considered the effects-based analysis as irrelevant and unnecessary concerning the Intel's exclusivity rebates:

> The Court would point out that, contrary to the applicant's claim, the question whether an exclusivity rebate can be categorised as abusive does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect.[200]

As regards the market share concerned by the rebates, the Court doesn't take it into account:

> In that context, it should be recalled that competitors of the undertaking in a dominant position must be able to compete on the merits for the entire market and not just for a part of it (Case C-549/10 P *Tomra*, paragraph 73 above, paragraph 42). An undertaking in a dominant position may not therefore justify the grant of exclusivity rebates to certain customers by the fact that its competitors are free to supply other customers (see paragraph 117 above). Similarly, an undertaking in a dominant position may not justify the grant of a rebate subject to a quasi-exclusive purchase condition by a customer in a certain segment of a market by the fact that that customer remains free to obtain supplies from competitors in other segments.[201]

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[195] Case C-23/14, *Post Danmark A/S v. Konkurrencerådet*, 2015. (*Post Danmark II*).
[196] SHEARMAN AND STERLING LLP, "*Post Danmark II*: An 'Evolution' Rather Than a 'Revolution' in the Assessment of Rebate'", 15 october 2015, http://www.shearman.com/~/media/Files/NewsInsights/Publications/2015/10/Post-Danmark-II-An-Evolution-Rather-Than-a-Revolution-in-the-Assessment-of-Rebates-AT-101515.pdf accessed 7 July 2016.
[197] For a complete development on the subject, see: P. NIHOUL, "The Ruling of the General Court in *Intel*: Towards the End of an Effect-based Approach in European Competition Law?", *Journal of European Competition Law and Practice*, 2014, pp. 521-530.
[198] A. M. RIZZO, "The Judgment of the General Court in *Intel*", 3 *Italian Antitrust Review*, 2014, p. 250.
[199] *Intel 2014*, §85.
[200] *Intel 2014*, §85.
[201] *Intel 2014*, §132.

The General Court declared in this case that, concerning exclusivity rebates, it was not necessary to demonstrate a potential or actual anti-competitive effect, as long as those rebates remain illegal *per se*[202].

In *Post Danmark II*, the effects-based approach is less criticized. However, it is used in very ambiguous and vague terms:

> However, the fact that a rebate scheme, such as that at issue in the main proceedings, covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect.[203]

> It follows from the foregoing considerations that Article 82 EC must be interpreted as meaning that, in order to fall within the scope of that article, the anti-competitive effect of a rebate scheme operated by a dominant undertaking must be **probable**, there being no need to show that it is of a serious or appreciable nature.[204]

> In that regard, and as the Advocate General stated in point 80 of her Opinion, the anti-competitive effect of a particular practice must **not be of purely hypothetical**.[205]

In these circumstances the use of AECT, a more economic approach, can add rigour to the assessment:

> The as-efficient-competitor test must thus be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme.[206]

However, especially in *Post Danmark II*, the AECT has been criticized.

§2. As-efficient competitor test

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[202] N. GRUNNAR, "The Post Danmark II judgment: effects analysis in abuse of dominance cases", October 2015, http://www.oxera.com/Latest-Thinking/Agenda/2015/The-Post-Danmark-II-judgment-effects-analysis-in-a.aspx accessed 10 July 2016.
[203] *Post Danmark II*, §46.
[204] *Post Danmark II*, §74. Emphasis added by the author.
[205] *Post Danmark II*, §65. Emphasis added by the author.
[206] *Post Danmark II*, §61.

As observed in many jurisprudence extracts quoted below, the *Tomra*[207] case was the first one to question the equally efficient competitor principle in 2012. The 2006 decision of the Commission established that Tomra's rebate scheme was exclusionary. However, the Commission referred to a different economic analysis than the one mentioned in the *Guidance Paper* one. The 2012 ECJ judgment followed the same line, except for AECT test.[208]

Despite the Tomra case, it is considered that the AECT was mainly questioned on its usefulness, its necessity, in the two above-mentioned cases, *Post Danmark II* and *Intel 2014*. In *Post Danmark II*, the Court upheld that this economic test was not a prerequisite in order to prove price-based abusive conducts, especially, rebates[209]:

> As regards the comparison of prices and costs in the context of applying Article 82 EC to a rebate scheme, the Court has held that the invoicing of 'negative prices', that is to say, prices below cost prices, to customers is not a prerequisite of a finding that a retroactive rebate scheme operated by a dominant undertaking is abusive.[210]

However, the Court goes further in this case, specifying that in this particular case, AECT was not relevant at all. Indeed, according to the ECJ, the structure of the market concerned made the existence of an as-efficient competitor nearly impossible and, in the mentioned market, a less efficient competitor could intensify competitive pressure[211]:

> On the other hand, in a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible.[212]
>
> Furthermore, in a market such as that at issue in the main proceedings, access to which is protected by high barriers, the presence of a less efficient competitor might contribute to

[207] Case C-549/10, *Tomra Systems ASA and others v. Commission*, 2012. (*Tomra*).
[208] M. MANDORFF and J. SAHL, *op. cit.*, p. 12.
[209] K. SIDIROPOULOS, "Post Danmark II: A Clarification of the Law on Rebates under Article 102 TFEU", December 2015, http://europeanlawblog.eu/?p=3013 accessed 10 July 2016.
[210] *Post Danmark II*, §56.
[211] SHEARMAN AND STERLING LLP, "*Post Danmark II*: An 'Evolution' Rather Than a 'Revolution' in the Assessment of Rebate', 15 October 2015, http://www.shearman.com/~/media/Files/NewsInsights/Publications/2015/10/Post-Danmark-II-An-Evolution-Rather-Than-a-Revolution-in-the-Assessment-of-Rebates-AT-101515.pdf accessed 7 July 2016.
[212] *Post Danmark II*, §59.

> intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking.[213]

Beforehand, the Court considered a more general point of view by analysing the necessity of the test in accordance with article 102 TFEU. In general, the opinion was less radical but established a lowered relevance of the AECT, "a tool amongst others"[214], compared to the *Guidance Paper* requisite:

> On the other hand, in a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible.[215]

> Nevertheless, that conclusion ought not to have the effect of excluding, on principle, recourse to the as-efficient-competitor test in cases involving a rebate scheme for the purposes of examining its compatibility with Article 82 EC.[216]

This tendency was already observable in *Intel 2014*, when the Court decided to limit the scope and usefulness of AECT[217]:

> Moreover, it follows from Case C-549/10 P *Tomra*, paragraph 73 above (paragraphs 73 and 74), that, in order to find anti-competitive effects, it is not necessary that a rebate system force an as-efficient competitor to charge 'negative' prices, that is to say prices lower than the cost price. In order to establish a potential anti-competitive effect, it is sufficient to demonstrate the existence of a loyalty mechanism (see, to that effect, Case C-549/10 P *Tomra*, paragraph 73 above, paragraph 79).[218]

> It follows that, even if an assessment of the circumstances of the case were necessary to demonstrate the potential anti-competitive effects of the exclusivity rebates, it would still not be necessary to demonstrate those effects by means of an AEC test.[219]

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[213] *Post Danmark II*, §60.
[214] *Post Danmark II,* §61.
[215] *Post Danmark II,* §57.
[216] *Post Danmark II,* §58.
[217] A. M. RIZZO, *op. cit.*, p. 253.
[218] *Intel 2014*, §145.
[219] *Intel 2014*, §146.

> However, it must be stated that an AEC test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult.[220]

Chapter 3 – Close competitors in mergers SIEC test

Even if mergers are not regulated by article 102 TFEU and the abuse of dominant position, this chapter will demonstrate that the new significant impediment to effective competition (SIEC) test, put in place with the EU Merger Regulation of 2004[221], can be highly related to the concepts of effective competition and as-efficient competitor. Indeed, the process in which it takes place is common to the abuse of dominant position regime.

In the first section, the evolution of the test concerning mergers will be studied, the reasons for the change as well as how the new test apprehends the teachings of the former test. In the second section, the concept of close competitors and the incentive it gave to the mergers regime will be developed.

Section 1 – The SIEC test

§1. The former test: the dominance test

The test set in place in the Merger Regulation of 1990 was the dominance test. It prohibited mergers that "create or strengthen a dominant position as a result of which effective competition would be impeded". Two interpretations are possible: the first one considers the test as a cumulative test. A merger is forbidden if there is a dominant position created or strengthened and if the change on the market leads to a SIEC. Dominance is seen as a necessary but not sufficient condition. The other interpretation is to consider that mergers which strengthen or create a dominant position bring automatically an effective competition impediment.[222]

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[220] *Intel 2014*, §150.
[221] Council Regulation (EC) N° 139/2004 of 20 January 2004. (Merger Regulation).
[222] L-H. RÖLLER and M. DE LA MANO, "The Impact of the New Substantive Test in European Merger Control", *European Competition Journal*, 2006, p. 11.

Before analysing the critics addressed to this test, it is important to notice that the concept of dominance is taken from the *United Brands*[223] case's definition. Even if obvious, this is the first link that can be established between abuse of dominant position and mergers: the framework is identical, the notions are common and the objectives are reached using the same reasoning. A first critic to this definition is the lack of economic meaning when using a dominance-based test[224]. A firm, even if dominant on the market, cannot act totally independently from customers and consumers. Its behaviour is considered to be independent to an appreciable extent[225]. Economically speaking, it refers to elasticity, "the rival's price and quantity elasticity measures, respectively, the percentage change in rival's price and quantity that follow from a 1% change in the allegedly dominant firm's price"[226], if elasticity is low, it is considered that the dominant firm can – to an appreciable extent – act independently. In other words, the legal notion is very close to the economic concept of market power. The Commission's glossary of competition terms confirmed that:

> A firm is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers and, ultimately, the final consumer. A dominant firm holding such market power would have the ability to set prices above the competitive level, to sell products of an inferior quality or to reduce its rate of innovation below the level that would exist in a competitive market.[227]

As discussed above, the old test could interpret dominance as a necessary but not sufficient condition to establish a significant impediment to effective competition. This point of view was confirmed in *Air France*[228] case[229]:

> The Commission is bound to declare a concentration compatible … where two conditions are fulfilled, 1) the transaction … should neither create nor strengthen a dominant position and 2) competition … must not be significantly impeded by the creation or strengthening of such a position. If therefore, there is no creation or strengthening of a dominant position, the transaction

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[223] *United Brands*, §65. See infra note 65: The dominant position referred to in this article relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.
[224] J. FINGLETON and D. NOLAN, "Mind the Gap: Reforming the EU Merger Regulation", *Mercato, Concorrenza, Regole*, 29 May 2003.
[225] L. F. LA COUR and H. P. MØLLGAARD, "Meaningful and Measurable Market Domination", 24 *European Competition Law Review*, 2003, p. 132.
[226] L-H. RÖLLER and M. DE LA MANO, *op. cit.*, p. 12.
[227] The Commission's July 2002 Glossary of Competition Terms, Dominant Position definition, p. 14.
[228] Case T-2/93, *Air France v. Commission*, 1994. (*Air France*).
[229] D. HILDERBRAND, *op. cit.*, p. 471.

> must be authorised, without there being any need to examine the effects of the transaction on effective competition.[230]

This observation may lead to the second critic. Ambiguity surrounded the notions of "dominance" and "SIEC" in Commission's papers and Court's judgments. The feeling was that those two notions were, more than related, interchangeable. In the *EDP*[231] case, the Court finally explained from where the confusion could have come from and reaffirmed the two-condition point of view[232]:

> It follows that proof of the creation or strengthening of a dominant position within the meaning of Article 2(3) of the Merger Regulation may in certain cases constitute proof of a significant impediment to effective competition. That observation does not in any way mean that the second criterion is the same in law as the first, but only that it may follow from one and the same factual analysis of a specific market that both criteria are satisfied.[233]

> The Court observes that Article 2(2) and (3) of the Merger Regulation lays down two cumulative criteria, the first of which relates to the creation or strengthening of a dominant position and the second to the fact that effective competition in the common market will be significantly impeded by the creation or strengthening of such a position.[234]

The final main critic of the dominance-based test is the fact that it leads to under-enforcement. In other words, even if there was no dominance, a merger could bring massive anti-competitive effects.[235] This situation may occur when the merging undertakings are selling close substitutes. Indeed, this closeness imposes a competitive pressure on each other. If the parties were not market leaders, by making dominance a necessary condition, the old test was not covering anti-competitive effects when mergers were settled between firms selling close substitutes.[236] Furthermore, "if dominance is properly understood as significant market power then there is no reason for market leadership to be necessary for dominance. Moreover, the ability to increase prices above competitive levels depends on more than just market shares. In tight oligopolies, product differentiation reduces the intensity of competition and allows several firms to enjoy market power simultaneously even if none emerges as clear

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[230] *Air France,* §79; confirmed by Case T-290/94, *Kaysersberg v. Commission*, 1997, §184.
[231] Case T-87/05, *EDP v. Commission*, 2005.
[232] L. ORTIZ BLANCO, *Market Power in EU Antitrust Law*, Hart, 2012, p. 73.
[233] *EDP*, §49.
[234] *EDP*, §45.
[235] D. HILDERBRAND, *op. cit.*, p. 475.
[236] L. ORTIZ BLANCO, *op. cit.*, p. 87.

market leader. Here, market power is closely related to the degree of substitutability between different competing brands, rather than market shares per se"[237].

All those critics lead to the new EU Merger Regulation and to the importance given to economic consideration, effects-based approach, analysis of substitutability of products and closeness of competitors. In the new test, SIEC is the single sufficient condition and "dominance" is not needed anymore for a SIEC.

§2. The new Test

The new Merger Regulation of 2004 reformulates the substantive test as such:

> A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.[238]

Before further analysing the new test, it is interesting to underline a new link between mergers control and abuse of dominant position. The merger test is called "Significant Impediment to Effective Competition" test and the test advanced by *Continental Can* was measuring the infringement to effective competition structure. Even if the test evolved to the AECT concerning article 102 TFEU, the formula remained for mergers following the same evolution as its brother's concept of dominant positions: the more economic approach and the effects-based approach.

One of the aspects of the new regime is the recognition of efficiencies. It was already articulated in Merger Guidelines[239] and the new test – because not every merger brings the same efficiency – allows a better analysis of the inputs developed by mergers.[240]

The main objective of the new test was to increase merger control effectiveness by lessening the under-enforcement (false negatives) and over-enforcement (false positives). The annulment of dominance condition permitted to take into account the equilibrium effects of

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[237] L-H. RÖLLER and M. DE LA MANO, *op. cit.*, p. 15.
[238] Merger Regulation, Article 2, §3.
[239] Commission Notice – Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings", DG COMP, 28 January 2004.
[240] L-H. RÖLLER, J. STENNEK and F. VERBOVEN, "Efficiency Gains from Mergers", *European Economy, Reports and Studies*, 2001, p. 31.

the mergers. The equilibrium effects occur when the prices set by merging firms and their competitors are the best reactions to what the others did. In fact, the equilibrium effects include all the market reactions subsequent to a merger and the potential price modifications. It can occur in the following situations: elimination of potential competition, control of entry barriers, raising rival's costs, … [241]

This economic approach can also be observed concerning the lessening of false positives. The new test, by eliminating the dominance requirement, focuses on the most economic concern that appears with a merger: is competition going to be reduced?[242] As it was the case with article 102 TFEU and AECT, the new merger approach is effects-based. This approach permits positive-competitive mergers.[243]

Concerning the effects-based approach, the new regulation focuses on the importance of close substitution, close competition.

Section 2 – The closeness of competition

Analysing the closeness of competition[244] between merging firms and their rivals allows a more precise assessment of the competitive effects of the merger. Indeed, by encompassing broader criteria than the former dominance-based test, the possible elimination of a close competitor can lead to a significant impediment to effective competition even when the merging undertakings are not holding a massive part of the market shares or threaten to become market leader.[245]

"The idea behind the analysis of closeness of competition is simple: the closer the competition between the merging firms and the more distant their relationship to their rivals, the greater the competitive scope of action which the merging parties achieve through the transaction. Such elimination of close competition can subsequently give rise to unilateral price

[241] L-H. RÖLLER and M. DE LA MANO, *op. cit.*, pp. 17-20.
[242] A. WEITBRECHT, "EU Merger Control in 2004—An Overview", *European Competition Law Review*, 2005, p. 68.
[243] L-H. RÖLLER and M. DE LA MANO, *op. cit.*, pp. 20-21.
[244] This section is based on S. THOMAS, "Close Competitors in Merger Review", *Journal of European Competition Law & Practice*, 2013.
[245] L. ORTIZ BLANCO, *op. cit.*, p. 96.

increases"[246]. The analysis of close competition is the new decisional practice of the Commission; proof is, inter alia, in *Orange/H3G* or *UPS/TNT* press releases:

> The economic analysis conducted by the Commission, taking into account the parties' particular strength in the private customer and data market segments, has shown that the market power of the merging parties would have been higher than what their market shares suggested.[247]

> Other market players, such as national postal operators, can only compete to a limited extent because they do not reach comparable efficiency or reliability, given their heavy reliance on road rather than air transport.[248]

§1. Definition of the concept of close competition

Mergers are problematic when the merging parties were previously close competitors and when their relations with the other rivals are distant. In order to describe what is a close competitor, it is important to draw a line between differentiated products and homogenous products.

a. Close competition with differentiated products

The problem with differentiated products is that even if there are substitutable to some extent, their substitutability varies because of the differences. Obviously, the "market definition" is working as a first filter but it is necessary to develop a second step in the analysis. This step will be a qualitative and quantitative method tools.[249]

The qualitative analysis is based on the comparison of quality, image, price and all the relevant characteristics in the customer's eyes. The customers' preferences are a means to describe the closeness of competition, as much as the perceptions of all the actors on a defined market: competitors, customers, suppliers … [250]

The quantitative analysis relies on the diversion ratio. This ratio measures the switch that customers make when they buy product Y instead of product X because the price of X has

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[246] S. THOMAS, *ibid.*, p. 5.
[247] Commission 12/12/2012 COMP/M.6497 – "*Orange/H3G*" press release IP/12/1361.
[248] Commission 30/01/2013 COMP/M.6570 – "*UPS/TNT*" press release IP/13/68.
[249] S. THOMAS, *op. cit.*, p. 7.
[250] M. VESTAGER, "Harvesting salmon, jumping guns: the Marine Harvest early implementation case", *Competition Merger Brief*, 2014, pp. 5-9.

increased. This ratio is based on two variables: the cross-elasticity of demand and own-price elasticity of demand. Cross-elasticity measures the extent to which demand changes when price of another product change and everything else stays equal, own-price elasticity calculates the changes on demand when the price of the product itself changes.[251] The formula is: cross-elasticity of demand from X to Y divided by the own-price elasticity of demand for X. The higher the diversion ratio of the merging parties' products, the closer the competition and, more important, the risk to witness unilateral price increases.[252]

Following the diversion ratio, it will be possible to estimate whether and to what extent the merged companies will have incentives to raise their prices. The factor expressing this risk has been developed by Shapiro and Farrell[253] and is called the "Upward Pricing Pressure" (UPP). This test reconciles two opposite tendencies, the first one being to raise prices because of the merging power and to develop sales of other products thanks to the upward prices, the second one being to reduce prices because of the win in efficiency thanks to the merger[254]. The UPP test can therefore be based on the diversion ratio from X to Y, the margin between prices and cost of product Y – this part of the formula concerns the first tendency – and on the efficiency of product X – this part concerns the second tendency. The formula being: DRXY x MY > EX, where DRXY is the diversion ratio from X to Y, MY is price-cost margin of product Y and EX is efficiency of product X.[255] If the left part of the formula (DRXY x MY) is higher than the right part (EX), the merger will result in an upward pricing pressure for the product X.

b. Close competition with homogenous products

Close competition can also exist between firms producing homogenous goods. Indeed, competition can be close between merging undertakings if, thanks to the fusion, they can more easily increase their output than their rivals. "The easier an increase in output would be for the merging firms and the more restricted their rivals are with respect to output increases,

[251] C. SHAPIRO, "Mergers with Differentiated Products", 10 *Antitrust*, 1996, p. 23.
[252] S. BISHOP and M. WALKER, *The Economics of EC Competition Law*, Sweet & Maxwell, 2010, pp. 76-84.
[253] J. FARRELL and C. SHAPIRO, "Antitrust Evolution of Horizontal Mergers: An Economic Alternative to Market Definition", *The B.E. Journal of Theoretical Economics*, 2010.
[254] L. MATHIESEN, Ø. A. NILSEN and L. SØRGARD, "A Note on Upward Pricing Pressure: The Possibility of False Positives", 8(4) *Journal of Competition La wand Economics*, 2012, pp. 881-887.
[255] S. MORSEI, "The Use of Upward Pricing Pressure Indices in Mergers Analysis", February 2010, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb10_Moresi2_25f.authcheckdam.pdf accessed on 21 July 2016, p. 3.

the closer the competition between merging firms is deemed to be".[256] Obviously, the firms with greater possibility to increase their output can put a higher competitive pressure or restriction on the others than firms with reduced capacity[257].

However, there is an absence of clear standards permitting to evaluate the effects of the elimination of capacity-based competition. Despite that fact, the Commission seemed to have adopted this idea. In the *BASF/CIBA* case, the Commission estimated that the market concentration due to the merger between BASF and CIBA, even if only representing 30-40% of market shares, would not allow the main rival, Arkema, even with 60-70% of market shares, to constitute a sufficient competitive restraint:

> The Commission considers it unlikely that in the market situation post-merger where only Arkema and the merged entity would remain as suppliers the latter would be prevented from raising prices, even if Arkema would have spare capacity.[258]

Conversely, in the *Bertelsmann/Springer/JV* case, the Commission used the capacity argument in the opposite direction. Indeed, if the merging firms have lower opportunity to increase their output than their non-merging rivals, the capacity argument can plead for a situation where there is no significant impediment to effective competition, even if the concentration results in a large combined market share.[259] This case occurred in *Bertelsmann/Springer/JV* where the Commission estimated that even if market shares were high, no significant impediment could be found:

> Given the volumes which competitors could make available according to the above calculation, it is unlikely that the Parties could profitably raise prices.[260]

§2. Market definition and close competition

Even if some authors defend the idea of a single-step test, i.e. the diversion ratio from which arises the UPP test, three arguments seem to justify a two-steps test : firstly, defining the

[256] S. THOMAS, *op. cit.*, p. 10.
[257] S. BISHOP and M. WALKER, 2010, *op. cit.*, pp. 93-94.
[258] Commission 12/03/09 COMP/M.5355 – *"BASF/CIBA"*, §21.
[259] S. THOMAS, *ibid.*, p. 11.
[260] Commission 03/05/05 COMP/M.3178 – "*Bertelsmann/Springer/JV*", §139.

relevant market and secondly, analysing the effects of the merger on this relevant market.[261] The Court defends this opinion :

> The Court notes, to begin with, that a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition.[262]

The first argument is that both diversion ratio and market definition defend the same point of view. They serve the same purpose and are based on customers' reaction to hypothetical price changes. In a way, they are complementary – as observed above – the market definition is a first filter refined by the diversion ratio. The second argument in favour of the two-step test is the fact that diversion ratio and UPP test require a lot of, sometimes unavailable, data. Building a test on less-informed or less-developed formula would be dangerous. Finally, the third argument refers to the definition of the diversion ratio. Indeed, everything had to stay equal compared to the products' price shifts. The UPP test did not take into consideration the possibility of new entrants. In other words, a merger can have effects that encourage potential rivals to enter the market. And how can the Commission have the data of these potential entrants if it wants to calculate the UPP.[263]

This part of the merger review demonstrates a link that had previously been drawn. The importance of the vocabulary and the definition of the concepts such as "relevant market" in the abuse of dominant position area of EU competition law. Those two branches, mergers and 102 TFEU, work in parallel, borrowing concepts, teachings, remarks and drawbacks to evolve in the same way.

§3. Market dominance criterion

Even if the dominance-based test has been replaced by the more economic and effects-based approach SIEC test, the market share and the former dominance tools can still be used in the economic approach. As mentioned in the previous paragraph, the purpose is to analyse the probable shift between products if there are some price changes.[264]

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[261] J. E. LOPATKA, "Market Definition?", *Review of Industrial Organization*, 2011, pp. 69-70.
[262] Case C-68/94, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission*, 1998, §143.
[263] S. THOMAS, *op. cit.*, p. 13-15.
[264] J. FARRELL and C. SHAPIRO, *op. cit.*, p. 57.

For example, concerning differentiated products mergers, in the *Porsche/Volkswagen*[265] merger, even if the concentration lead to a market share of 30-50% of Danmark sport cars market, given that consumers didn't consider Porsche and Volkswagen as close substitutes, the merger was cleared without remedies. The same happened in the *Volvo/Renault V.I.*[266] case. This conclusion can be reached for homogenous products mergers. The classic market-structural approach is improved and supplemented by the UPP and diversion ratio test. As quoted above, the *Bertelsmann/Springer/JV* merger was allowed even if the market share was increased. The only reason for this was the absence of significant impediment to effective competition.[267]

Chapter 4 – Conclusion

This second part of the paper described the main instruments in EU competition law and, more precisely, the abuse of dominant positions and mergers. Three conclusions can be drawn concerning these two subjects:

- Abuse of dominant position and mergers have a common ground. Indeed, the notions of "relevant market", "dominance", "market shares", "effective competition", "competitors", etc., are shared in the two areas. Theories and legal tools developed reflect to each other's, whatever the side of the line you are. Even when referring to different concepts such as "as-efficient competitor" and "close competitor", the lexical field is identical. In this example, competitors are compared to the maximum level preventing the action (dominant position or merger) to be harmful with best level of protection, implying the most adapted description of the competition at stake that need to be protected without it being discouraging to undertake.
- The instruments evolved in the same direction, undergoing the same reviews. In fact, the effective competition concept and the dominance-based test were both criticised for not being "economic" enough and therefore, not "effects-based" enough. Both areas corrected the shoot by replacing and adapting their tests. Concerning the abuse of dominant position, the as-efficient competitor test appeared and, for mergers, the SIEC test replaced the old one.

[265] Commission 23/07/08 COMP/M.5250 – "*Porsche/Volkswagen*".
[266] Commission 01/09/00 COMP/M.1980 – "*Volvo/Renault V.I.*".
[267] S. MORSEI, *op. cit.*, p. 4.

- Finally, the development demonstrated that the shifts were maybe effectuated in a disproportionate manner. In the abuse of dominant position area, the *Post Danmark II* and *Intel 2014* cases proved that the new test cannot be considered as always necessary and sufficient. In the same order of idea, the SIEC test cannot work as a single-step test, it must be based on a relevant market definition and work with the old dominance criterion as a complement. The evolution is not totally independent of the old concepts, theories and tests.

Part 3 – The evolution of the protection of freedom of choice criterion

This part will focus and put into perspective the evolution of the criterion based on freedom of choice and the different legal instruments analysed in Part 2 as well as the objectives and their possible dichotomy in Part 1 (Chapters 1 and 2). As a matter of fact, consumer welfare can be considered as a major, if not the main, objective in EU competition law. How can this objective be apprehended with the economic freedom's one? Could the targeted group - i.e. consumers, customers, suppliers, competitors – give an indication about how those objectives are working together (Chapter 3)?

This Part will mainly be based on the different cases analysed in the previous parts in order to draw the links between the evolution of the legal instruments and their connexions – or not – with the evolution of the protection of freedom of choice's criterion.

Chapter 1 – Protection of freedom of choice in article 102 TFEU

In *Post Danmark I,* the ECJ made, for the first time, a clear and perfect reference to "price, choice, quality, or innovation" instead of defining the term "consumer welfare". However, "price, choice, quality, or innovation", are the terms usually used by the Commission to describe consumer welfare[268]:

> The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their

[268] V. DASKALOVA, *op. cit.*, p. 135.

> competitors in an anti-competitive way, thus having an adverse impact on **consumer welfare**, whether in the form of higher **price** levels than would have otherwise prevailed or in some other form such as limiting **quality** or reducing consumer **choice**.[269]

However, before concluding the evolution with this judgment, the choice criterion has always been at a central place. Did the evolution follow the same pattern as the different instruments previously studied ? The answer is yes.[270]

Section 1 – Early cases

The concept of choice has always been present in the EU case-law. Indeed, in the first case where article 102 TFEU was at stake, *Continental Can* in 1973, the Court already made a reference to the freedom that should be allowed to consumers[271]:

> If it can, irrespective of any fault, 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. Such a narrow precondition as the elimination of all competition need not exist in all cases. But the Commission, basing its decision on such elimination of competition, had to state legally sufficient reasons or, at least, had to prove that competition was so essentially affected that the remaining competitors could no longer provide a sufficient counterweight.[272]

This first extract has to be understood in its global context. The Court was applying the effective competition test to prove whether an abuse was present or not. Furthermore, the Court was developing the premises of consumer welfare protection. Indeed, neither is the term "choice" written nor is a clear position explained. However, it gives the first indications of the followed way.

The next textbook case on the timeline is *United Brands* in 1978. This case, famous for its recognition as the judgment defining the "abuse of dominant position" also embraced the analysis of buyers' freedom of choice, especially in the decision made by the Commission in 1975:

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[269] *Guidance Paper*, §19.
[270] The following chapter will be based on P. NIHOUL, "'Freedom of Choice': The Emergence of a Powerful Concept in European Competition Law", *Concurrences*, 2012, available on http://ssrn.com/abstract=2077694.
[271] P. MARSDEN and P. WHELAN, *op. cit.*, p. 577.
[272] *Continental Can*, §29. Emphasis added by the author.

> A buyer must be allowed the **freedom to decide** what are his business interests, to **choose** the products he will sell, even if they are in competition with each other; in effect to determine his own sales policy. When dealing with a supplier in a dominant position, such buyer may well find it worthwhile to sell several competing products, including those of the dominant firm, and to advertise them, but to an extent which he must remain **free to decide** for himself.[273]

In the judgment of 1978, the Court clearly indicates its caring for consumers. However, the clear expression of "consumers' choice" is not written as such but, as an early case, it shows the tendency taken:

> In this case, although these conditions for selection have been laid down in a way which is objective and not discriminatory, the prohibition on resale imposed upon duly appointed Chiquita ripeners and the prohibition of the resale of unbranded bananas — even if the perishable nature of the banana in practice restricted the opportunities of reselling to the duration of a specific period of time — when without any doubt an abuse of the dominant position since they **limit markets to the prejudice of consumers** and affects trade between Member States, in particular by partitioning national markets.[274]

> Such conduct is inconsistent with the objectives laid down in Article 3 (f) of the Treaty, which are set out in detail in Article 86, especially in paragraphs (b) and (c), since the refusal to sell would **limit markets to the prejudice of consumers** and would amount to discrimination which might in the end eliminate a trading party from the relevant market.[275]

The concept is still present in the *Hoffman-La Roche* case of 1979. In this loyalty rebates case, the Court defined the notion of "abuse" by integrating it in a choice-based approach, estimating that the rebates were preventing purchasers – noting that the ECJ doesn't speak about consumers especially – to exercise his possible choice[276]:

> The rebates are not based on an economic transaction which justifies this burden or benefit but are designed to **deprive the purchaser of or restrict his possible choices** of sources of supply and to deny other producers access to the market.[277]

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[273] 76/353/EEC: Commission Decision of 17 December 1975 relating to a procedure under Article 86 of the EEC Treaty (IV/26699 - Chiquita), OJ L 95 of 9 April 1976, section II §3. Emphasis added by the author.
[274] *United Brands*, §159. Emphasis added by the author.
[275] *United Brands*, §183. Emphasis added by the author.
[276] L. LOVDAHL GORMSEN, *op. cit.*, p. 81.
[277] *Hoffmann-La Roche*, §90. Emphasis added by the author.

Hoffmann-La Roche introduces a new vocabulary in the approach. However, the notion of consumer has not appeared yet.

Finally, chronologically speaking, the last case of the early approach is *Michelin I*, in 1983. This case also concerned loyalty rebates and was, as developed above, the perfect example of the effective competition approach. Once again, the concept of freedom of choice is prominent and once again, the target category of protected people is vague, the Court speaks about "buyers", the Court gets back to the language introduced in *Hoffmann-La Roche*[278]:

> In deciding whether Michelin NV abused its dominant position in applying its discount system it is therefore necessary to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to **remove or restrict the buyer's freedom to choose** his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.[279]

> Such a situation is calculated to prevent dealers from being able to select freely at any time in the light of the market situation the most favourable of the offers made by the various competitors and to change supplier without suffering any appreciable economic disadvantage. It thus **limits the dealers' choice** of supplier and makes access to the market more difficult for competitors. Neither the wish to sell more nor the wish to spread production more evenly can justify such a **restriction of the customer's freedom of choice** and independence. The position of dependence in which dealers find themselves and which is created by the discount system in question, is not therefore based on any countervailing advantage which may be economically justified.[280]

In this first phase of freedom of choice protection, the feeling is that both objectives of freedom of economy and consumer welfare are protected in a comparable way. The Court doesn't make a clear choice as to who has to be defended and tries to find compromises where both competitors and consumers are not in a disadvantaged situation.

Section 2 – The economic approach phase

§1. The slow shift

[278] P. NIHOUL, 2012, *op. cit.*, pp 10-11.
[279] *Michelin I*, §73. Emphasis added by the author.
[280] *Michelin I*, §85. Emphasis added by the author.

Before the *Guidance Paper* of 2009 and even before two famous cases apprehending the economic approach, the Court slowly shifted from the effective competition principle to the more economic as-efficient competitor test. Although it has only been consecrated in *Post Danmark I*, the second part of this paper demonstrated that, in the past, the as-efficient principle was embraced in an approximate form.

One of the cases showing this slow shift is *Tetra Pak II*, in 1996, which concerned predatory pricing and the importance of recoupment of losses, as well as some tying practices. Even if the practical discussion about the premises of equally efficient competitor principle had a huge importance in the EU competition law debate, the discussion about the protection of freedom of choice did not evolve as much. Indeed, the Court seems to refer to previous case-laws, especially *Hoffmann-La Roche*'s jurisprudence:

> That argument by the applicant cannot be accepted. For the reasons already given by the Court (see paragraph 82 above), the tied sale of filling machines and cartons cannot be considered to be in accordance with commercial usage. Moreover and in any event, even if such a usage were shown to exist, it would not be sufficient to justify recourse to a system of tied sales by an undertaking in a dominant position. Even a usage which is acceptable in a normal situation, on a competitive market, cannot be accepted in the case of a market where competition is already restricted. The Court of Justice has in particular ruled that, where an undertaking in a dominant position directly or indirectly ties its customers by an exclusive supply obligation, that constitutes an abuse since it **deprives the customer of the ability to choose** his sources of supply and denies other producers access to the market.[281]

The reason of speaking about a slow shift is that the Commission's decision is way more explicit and talkative as regards the protection of freedom of choice :

> Such a requirement that the customers obtain maintenance and repair services exclusively from Tetra Pak closes the door to any competitor on the maintenance and repair services market.
> It also binds the customer completely to Tetra Pak, **not allowing him any freedom to make his own choice** — whatever it may be — and not even giving him, except in certain limited cases of small-scale maintenance specifically referred to, any possibility of having maintenance and repair services provided by his own technical staff.[282]

[281] *Tetra Pak II*, §137.
[282] Commission Decision 92/163 of 24 July 1991 relating to a proceeding ursuant to Article 86 of the EEC Treaty (IV/31043 – Tetra Pak II) OJ L 143, §108. Emphasis added by the author.

> The Commission wonders why, if the claim that only Tetra Pak cartons may, for technical reasons, be used on Tetra Pak machines is true, this group sees the need to make such use the subject of a contractual obligation. If there is genuinely no technical alternative, such an obligation is unnecessary. However, if such an alternative does exist, **the choice should be left to the user**, and any obligation to purchase solely from an undertaking which is in a position such as that occupied by Tetra Pak should be prohibited.[283]

A second case which demonstrates a more economical concern is *Hilti*, in 1994. In the same way as the *Tetra Pak II* case, the Commission's decision[284] takes a more important interest in freedom of choice's concern that the TFI and ECJ decisions. This case concerned tying and bundling practices. Even if not studied in the three legal instruments of Part 2, tying and bundling practices are an important part of EU competition law, more precisely in the area of abuse of dominant position. However, there is a clear link with the subjects studied above; *Hilti* and *Tetra Pak II* (for its tying component) are part of the new *per se* approach of the 1990s. Like the as-efficient competitor principle, the new approach concerning tying and bundling appeared because of the lack of economical and effects-based concern, even if *Hilti* Commission's decision still relies on effective competition; the slow shift was operating.[285]

The *Hilti* case, on the protection of freedom of choice, develops an argumentation from the consumer viewpoint:

> Making the sale of patented cartridge strips conditional upon taking a corresponding complement of nails constitutes an abuse of a dominant position, as do reduced discounts and other discriminatory policies described above on cartridge-only orders. These policies **leave the consumer with no choice** over the source of his nails and as such abusively exploit him. In addition, these policies all have the object or effect of excluding independent nail makers who may threaten the dominant position Hilti holds. The tying and reduction of discounts were not isolated incidents but a generally applied policy.[286]

In the *Hilti case*, the Commission uses the term "consumers' choice" for the first time. This way of thinking will be followed in the next phase.

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[283] Commission Decision Tetra Pak II, §119. Emphasis added by the author.
[284] Commission Decision 88/138 of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 — Eurofix-Bauco v. Hilti), OJ L 65.
[285] J. LANGER, *Tying and Bundling as a Leveraging Concern under EC Competition Law*, Kluwer Law International, 2007, p. 126.
[286] *Eurofix-Bauco v. Hilti*, §75.

§2. The economic approach execution

The two most famous cases preceding the *Guidance Paper*, concerning freedom of choice's protection, are *Microsoft*, in 2004 and *France Télécom* (*Wanadoo*), in 2007.

Microsoft case concerned a tying and bundling practice as well as the withholding of information from competitors, making them unable to produce compatible products. This case is the first to have developed a real effects-based approach concerning tying and bundling practices[287]. In the Commission's decision[288], "consumers' freedom of choice" is clearly at stake[289]. The consumer choice can be defined as "the state of affaire where the consumer has the power to define his or her own wants and the ability to satisfy these wants at competitive prices"[290], it can be referred to "consumer sovereignty", defined as "the set of societal arrangements that causes that economy acts primarily in response to aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses"[291] :

> Microsoft's refusal to supply has the consequence of stifling innovation in the impacted market and of **diminishing consumers' choices** by locking them into a homogeneous Microsoft solution. As such, it is in particular inconsistent with the provisions of Article 82 (b) of the Treaty.[292]

Concerning the tying part of the case, the Commission was preventing the consumers from an indirect harm. Once again, there is a reference to the anti-competitive market foreclosure and the detriment that could result for the consumers[293] :

> The fourth element of tying contrary to Article 82 of the Treaty is that tying has a harmful effect on competition. The Court of Justice has stated that it constitutes an abuse when an undertaking in a dominant position directly or indirectly ties its customer by a supply obligation since this

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[287] J. LANGER, *op. cit.*, p. 137
[288] Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft).
[289] P. MARSDEN and P. WHELAN, *op. cit.*, p. 577.
[290] R. H. LANDE, "Consumer Choice as the Ultimate Goal of Antitrust", 62(3) *University of Pittsburgh Law Review*, 2001, p. 503. 503-525.
[291] N. W. AVERITT and R. H. LANDE, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law", 65 *Antitrust Law Journal*, 1997, p. 715. 713-756.
[292] Commission Decision *Microsoft*, §782. Emphasis added by the author.
[293] L. LOVDAHL GORMSEN, *op. cit.*, p. 120.

> deprives the customer of the **ability to choose freely his sources of supply** and denies other producers access to the market.[294]

The *France Télécom* case was initiated a couple of months after *Microsoft*. This milestone judgment concerned predatory pricing and the importance of losses recoupment. The justification given by France Télécom was that the undertaking was not recouping its losses after an eventual foreclosure of its competitors. The argument was rejected at every level, because of the "consumer choice":

> Moreover, the lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position, in particular, following the withdrawal from the market of one or a number of its competitors, so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further reduced and customers suffer loss as a result of the **limitation of the choices** available to them.[295]

Those landmark cases showed the shift made in the economic effects-based approach. The consumer is at a centre position, whatever the harm he is suffering, direct or indirect. The protection of the market structure is relevant because in final position, the consumer is suffering from the eventual competitors' evictions or foreclosures from the market. This was clearly reflected in AG Kokott's opinion about the *British Airways* case of 2007.

Section 3 – The Guidance Paper era

§1. The Guidance Paper

In 2009, the Commission published its *Guidance Paper*, declaring what will be the priorities for the enforcement of article 102 TFEU. According to the Commission, consumers may suffer from three types of harm because of anti-competitive behaviours. Firstly, prices may be higher than they are supposed to be, secondly, consumers may suffer a lower quality than anticipated and finally, choice opportunities can be limited:

> In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower **prices**, better **quality** and a wider **choice** of new or improved goods

[294] Commission Decision *Microsoft*, §835. Emphasis added by the author.
[295] *France Télécom*, §112. Emphasis added by the author.

> and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.[296]

As mainly quoted in this paper, §19 of *Guidance Paper* defines what the Commission considers as the consumer welfare, i.e. the price, quality and choice standards.

§2. Case-law after Guidance Paper, the continuity of economic approach

Three main cases can be analysed in this chronological time lap. First of all, there is the *Intel* case in 2009, secondly, the *Deutsche Telekom* case in 2010 and finally, the *Tomra* case in 2012. As a reminder, those cases occurred during the transitory period after the AECT was recognised by the *Guidance Paper* and before the consecration contained in *Post Danmark I*.

The *Intel* Commission's decision of 2009 concerned conditional rebates and payments to hinder AMD's, its competitor, activities. Concerning the latest area of the case, the Commission declared:

> As a consequence, AMD-based products for which there was a customer demand did not reach the market, or did not reach it at the time or in the way they would have in the absence of Intel's conduct. As a result, customers were deprived of a choice which they would have otherwise had and competition on the merits was harmed.[297]

As developed in previous cases (*France Télécom* or *Microsoft*, for example) this part clearly refers to the possible indirect harm caused to consumers. Conversely, concerning the rebates, the Commission clearly focuses on the consumers' direct harm in addition to the indirect probable harm:

> In addition, the exclusivity arrangement with MSH deprived competitors of the ability to use certain distribution channels in the consumer segment, had an influence on the OEMs' choice of their x86 CPU supplier for consumer products and **limited the choice of consumers** that wanted to purchase their product from MSH.[298]

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[296] *Guidance Paper*, §5. Emphasis added by the author.
[297] *Intel*, §1679. Emphasis added by the author.
[298] *Intel*, §1598. Emphasis added by the author.

> As a result of Intel's rebates and payments, end-customers were artificially prevented from choosing other products on the merits (price and quality of the respective x86 CPUs), since Intel's conduct prevented the competitors' product from being offered with certain individual OEMs and with MSH. In this case, this excluded, limited or delayed AMD x86 CPUs in the market. As such, Intel's exclusionary practices had a direct and immediate negative impact on those **customers** who would have had a **wider price and quality choice** if they had also been offered the product of their favourite OEM and/or retailer with x86 CPUs from Intel's competitors.[299]

Concerning the *Deutsche Telekom* case of 2010, which was about margin squeeze practices, the Court considered that those conducts were abusive by limiting the presence of competitors. A limitation from which consumers would eventually suffer:

> It follows from this that Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors, that is to say practices which are capable of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to **choose** between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits. From that point of view, therefore, not all competition by means of price can be regarded as legitimate.[300]

> By further reducing the degree of competition existing on a market – the end-user access services market – already weakened precisely because of the presence of the appellant, thereby strengthening its dominant position on that market, the margin squeeze also has the effect that **consumers** suffer detriment as a result of the **limitation of the choices** available to them and, therefore, of the prospect of a longer-term reduction of retail prices as a result of competition exerted by competitors who are at least as efficient in that market.[301]

In those extracts, the as-efficient competitor principle, the anti-competitive foreclosures, the direct and the indirect consumers' harm, clearly appear. The question of what objective is mainly followed, be it the consumer welfare or the economic freedom can be asked. The question will be addressed in the Chapter 3 of this Part.

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[299] *Intel*, §1603. Emphasis added by the author.
[300] *Deutsche Telekom*, §177. Emphasis added by the author.
[301] *Deutsche Telekom*, §182. Emphasis added by the author.

Finally, the *Tomra* case in 2012, which concerns loyalty rebates - and in which, neither the Commission nor the Court analysed the case through an AECT – creates, once again, an exception in the EU competition case-law. Indeed, after all the jurisprudence studied above, there is no explicit reference to the concept of choice in this judgment. However, choice is present in this case as a background mechanism. This mechanism will also be highlighted in the next chapter about mergers. In this precise case, three issues were at stake and, for every one of them, the concept of choice was decisive in the Court decision.[302]

First of all, the Commission analysed the relevant market definition. It applied the SSNIP test, the small but significant non transitory increase in price test, which analyses to what extent, consumers will shift from a product to another if the price increased a little bit. It is a way to check the substituability of the products. In this step, consumers' choice is already central because the SSNIP test analyses if they would choose another product when the first one is getting more expensive.[303]

Secondly, the Commission analysed whether the firm was dominant by trying to "determine whether and if so, to what extent customers would be ready to react by choosing another supplier pricing the same product lower"[304]. Once again, choice is present.

Finally, the Commission analysed what "contestable" share of transaction could be deemed as such; in other words, the Commission analysed the abusiveness of the conduct. By making a reference to the "contestable transactions" which are the part of transactions for which the customers have a possible choice, the Commission, for the third and last time, based its argumentation and analysis on the concept of choice.[305]

Section 4 – Post Danmark I and its teachings

As much as it was the case concerning the AECT, the *Post Danmark I* case is a milestone concerning consumer welfare. Indeed, in this case, for the first time, the ECJ made a reference

[302] P. NIHOUL, 2012, *op. cit*, p. 14.
[303] P. NIHOUL, 2012, *ibid.*, p. 14.
[304] P. NIHOUL, 2012, *ibid.*, p. 14.
[305] P. NIHOUL, 2012, *ibid.*, p. 15.

to "price, choice, quality or innovation" which is the usual formulation of the Commission to refer to consumer welfare, in the *Guidance Paper*, §19, for example[306]:

> Thus, not every exclusionary effect is necessarily detrimental to competition (see, by analogy, *TeliaSonera Sverige*, paragraph 43). 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**.[307]

In this case the Court seems to adopt the Commission's point of view concerning consumer welfare, without making reference to this latest formulation but by rather using the "price, quality and choice" terms[308]. On the other side, the Court confirms its precedent jurisprudence by analysing the effects of the practice, on choice namely, and by following a more economic logic[309]:

> In order to determine whether a dominant undertaking has abused its dominant position by its pricing practices, it is necessary to consider all the circumstances and to examine whether those practices tend to **remove or restrict the buyer's freedom as regards choice** of sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 175 and case-law cited).[310]

Post Danmark I is, in a way, the perfect consecration by the Court of the Commission's opinion, on both form and content. Indeed, the Court established the AECT officially, even if the principle was approached in number of cases before and consumer welfare is understood in the same way as in the *Guidance Paper*.

As studied above, the *Post Danmark II* and *Intel 2014* cases put the teachings of *Post Danmark I* into question, especially concerning the AECT as regards its necessity or efficiency. Concerning the freedom of choice's protection criterion, the Court did not change its position.

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[306] D. DASKALOVA, *op. cit.*, p. 135.
[307] *Post Danmark I*, §22. Emphasis added by the author.
[308] N. PETIT, *op. cit.*, p. 319.
[309] C. PRIETO and D. BOSCO, *op. cit.*, p. 890.
[310] *Post Danmark I*, §26.

In *Post Danmark II*, the Court did not challenge the position held in *Post Danmark I* and did not refer to "consumer harm" as it was the case in the first judgment. Reference is made to older jurisprudence and the more general terms of "buyers, customers, …":

> If that were established, a matter which it is for the referring court to ascertain, the incentive to obtain all or a substantial proportion of their supplies from Post Danmark would be particularly strong, reducing significantly customers' freedom of choice as to their sources of supply.[311]

> As regards, in the first place, the likelihood of an anti-competitive effect, it is apparent from the case-law cited in paragraph 29 above that, in order to determine whether a dominant undertaking has abused its position by operating a rebate scheme, it is necessary, inter alia, to examine whether that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.[312]

In *Intel 2014*, the Court's position was exactly the same as for *Post Danmark II*. There is no shift in the way to approach the freedom of choice's protection principle but a lot of references to the principal ECJ case-law:

> The evidence gathered by the Commission led it to the conclusion that Intel's conditional rebates and payments induced the loyalty of the key OEMs and of MSH. The effects of these practices were complementary, in that they significantly diminished competitors' ability to compete on the merits of their x86 CPUs. Intel's anti-competitive conduct thereby resulted in a **reduction of consumer choice** and in lower incentives to innovate.[313]

With the exception of the *Tomra* case – even if choice was a main concept in the Court's way of thinking – the evolution of the freedom of choice's protection criterion followed the same path as the instruments to which it refers. In other words, the more or less quick change in the EU competition law instruments was followed, in the substance, by an as much quick or slow change in the way the Court and the Commission perceived the importance to be given to freedom of choice and to the protection that has to be dedicated to it.

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[311] *Post Danmark II*, §36.
[312] *Post Danmark II*, §64. See also §§ 29 and 31.
[313] *Intel 2014*, §31.

Chapter 2 – Protection of freedom of choice in mergers

Even more than in the *Tomra* case, the choice aspect in mergers sits in the general driving idea of the regime and its application. Although there are some very clear extracts relating to the direct protection of freedom of choice, the main tip of the iceberg is the indirect protection of it. The study will thus focus on the general background, picking up some examples in various mergers cases, not especially in the above approaches.

On the one hand, there are some cases like *Bertelsmann/Springer/JV* where the customers' freedom of choice is clearly expressed and where the Commission explicitly defends it:

> The concentration will thus **limit the choice** for publishers of magazines, catalogues and advertisements. As most of these publishers organise private tenders prior to the awarding of their printing contracts, in particular those for magazines and catalogues, the number of potential bidders will be reduced. However, it appears from the market investigation that German customers have increasingly invited the abovementioned foreign rotogravure printers to their tendering procedures. Therefore, the effect of the concentration is likely to be alleviated in that respect.[314]
>
> However, the concentration will not lead to a situation in which non-vertically integrated publishing houses **no longer have sufficient choice** in such circumstances.[315]

That is the first way to link abuse of dominant position, protection of freedom of choice, and mergers. It is the clear expression of the protection against limiting or depriving customers, consumers, buyers, of their freedom of choice. Another example can be found in the *Gillette/Duracell* case:

> In view of the strong market positions already held by both Gillette and Duracell in their respective businesses, and also taking into account the fact that to a large extent their products are sold to the same customers, the Commission has deemed it necessary to analyse the likely competitive impact of the proposed concentration. In this respect, the issue for consideration has been whether the combination of these two leading manufacturers of branded fast moving consumer goods might unfairly reduce third parties' legitimate opportunities of access to markets and supplies. In particular, the Commission's main concern was related to the possibility that the stronger joint negotiating power of Gillette and Duracell might allow them to obtain from

[314] *Bertelsmann/Springer/JV*, §155. Emphasis added by the author.
[315] *Bertelsmann/Springer/JV*, §157. Emphasis added by the author.

> customers a privileged allocation of selling spaces (especially at strategic locations such as at supermarket check-out counters) to the detriment of their competitors' products, thereby significantly **restricting consumers' freedom of choice** in the long run.[316]

The second way, as indicated above, is comparable to the analysis made for the *Tomra* case in article 102 TFEU area. Even when choice is not formally expressed in the cases, the all mergers procedure is based on choice.

Indeed, concerning the SIEC test, it was demonstrated that this test was a two-steps approach. Firstly, it defined the relevant market and, secondly, it analysed whether there was a SIEC or not. It is, for the first part of the test, exactly the same as in the *Tomra* analysis made in the previous Chapter. The relevant market is analysed by the fact and the extendable choice made by customers when prices are changing for a product.

Concerning the second part and, more specifically, close competition with differentiated products, qualitative and quantitative analyses were performed after having used the market definition as a first filter. The qualitative test was just the perfect understanding of the buyers' freedom of choice, i.e it compared quality, image, price and all the relevant characteristics in the buyers' eyes. The quantitative analysis ties in with the second part of the analysis in *Tomra*, the calculation on the potential switch of buyers to a substitute because of a change in price of a certain product. Once again, choice is at a central place.

As regards the second part of the test and, more specifically close competition with homogenous products, the capacity test only focused on the possible impediment to effective competition. As critics rose about article 102 TFEU, rules on mergers also changed and only the effects are judged with the new test. The Court and the Commission are no longer strictly focused on market shares, they analyse the possible constraint of the rivals in order to offer buyers a choice.

Hereunder are some examples of this general concern about choice in the procedure:

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[316] Case No IV/M.836 of 4 October 1996 – "*Gillette/Duracell"*, §10. Emphasis added by the author.

> The Parties submit that **end users choose** a projector depending on which parameters they attach most importance to but they normally will be able to choose from a range of projectors that meet their needs and expectations. Moreover, they submit that from a supply-side perspective, there is full **substitutability** across the range of projectors with the Parties and their main competitors all able to offer a full range of projectors from relatively standard models that are intended for use in an environment with limited or no ambient light to models that are capable of projecting clear images in fully lit rooms. They therefore submit that DLP and LCD form part of a single product market of digital projectors.[317]
>
> It follows that the proximity between the Parties depicted in Figure 6 suggests that many customers would have a tendency, **all other things being equal**, to v**iew them as first and second choice**, and be less willing to **switch** to the remaining competitors. It is not conclusive in this regard, as significant switching is also observed from and to the other competitors in the market.[318]
>
> The merger will **reduce the choice of suppliers** from "4 to 3".[319]

Once again, there are lookalikes in both procedures, provided by the same critics and providing the same type of answers. One of those similitudes is the way to express the targeted group of people protected. Is it the consumers, the customers, the suppliers, the buyers or even sometimes, the competitors or the rivals that are protected under the "freedom of choice's criterion"?

Chapter 3 – Category protected

As already underlined above, European institutions (Commission and Courts), use a various terminology to express whose choice is protected. Indeed, a certain ambiguity lies in the jurisprudence, sometimes because of the circumstances in the cases, sometimes because of the general meaning of the terms used by the Court. Speaking about consumers is justified in cases were the final-users are at stake, it is a little bit less appropriate when the cases concern the competitors or the customers. Anyway, in both cases, those groups of people are buyers but cannot be understood as consumers. As such, consumers are considered in European law

[317] Commission COMP/M.5421 of 29 September 2009 – "*Panasonic/Sanyo*", §144. Emphasis added by the author.
[318] *Orange/H3G*, §248. Emphasis added by the author.
[319] *UPS/TNT*, §§712 and sq. Emphasis added by the author.

to be people using products for their private use. Competitors or customers in the supply-chain cannot be considered in this definition.[320]

"So, ultimately, who is concerned by that choice mechanism? In other words, who is protected by the Commission and the European courts when it comes to assessing the behaviour adopted by dominant firms?"[321] It appears out of the whole analysis of this paper that all the economic actors of a supply-chain, from the competitors to the final-users, passing by the customers and suppliers, are targeted by the regime.

The distinction is important when analysing the direct or indirect effects suffered by the final users, i.e. the consumers. Indeed, if we look at the European competition law objectives, the situation is different if all entities of the chain are considered to be the same. In other words, what would be consumer welfare and who would be protected by the economic freedom if, whatever the place occupied on the supply-chain, courts equally protected everybody from the same harm. In fact, "not making a choice between intermediary and final consumers can lead to a serious conceptual inconsistency and confusion can rise amongst market operators and competition law enforcers as to the correct standards to be applied".[322]

More than the groups protected, this paper demonstrated that it is the concept of choice that is protected, wherever the groups are on the chain. "Switching" is the possibility that must be protected to all the market actors.[323] Concerning mergers, the idea is exactly the same and is clearly expressed in article 2 §1 b) of E.C.M.R:

> Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.
> In making this appraisal, the Commission shall take into account:
> The **interests of the intermediate and ultimate consumers**, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.[324]

[320] P. NIHOUL, 2012, *op. cit.*, p. 19.
[321] P. NIHOUL, 2012, *ibid.*, p. 19.
[322] V. DASKALOVA, *op. cit.*, p. 139-141.
[323] P. MARSDEN and P. WHELAN, *op. cit.*, p. 571.
[324] Article 2§1(b) of E.C.M.R. Emphasis added by the author.

The same idea is expressed about article 101 TFEU. As already mentioned before, EU competition law is global even if divided in three branches: cartels, abuse of dominant position and mergers, these branches are sharing concepts, notions and terms[325]:

> The concept of '**consumers**' encompasses all **direct or indirect users** of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers. These customers can be under- takings as in the case of buyers of industrial machinery or an input for further processing or final consumers as for instance in the case of buyers of impulse ice-cream or bicycles.[326]

Courts have showed that the producers and business partners experiencing harm are encompassed in an as important manner as the consumers' harm. This idea demonstrates the junction between the two main objectives that could have been perceived as opposite. Consumer welfare can work with economic freedom and thus, with producers' or competitors' welfare.[327]

This can be explained by the need to cover the wider scope of the competition principle. As such, "concentrating" on a single aim, namely the consumer welfare, would significantly reduce the scope of competition laws. The current law not only protects consumers, it also protects producers. Why does laws protect producers and not only consumers? Producers have the same rights as anyone else in a market economy. In particular, they enjoy property rights. If we wish - and this seems to be the most important point - to encourage people to commit themselves in an activity on a market, we ought to protect them from expropriation. This includes protection against expropriation through cartelization or abuse of dominance. If we take the view that it is acceptable for a purchasing cartel to deny a manufacturer the possibility of earning revenues on a previous investment, we create a disincentive to market participation"[328].

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[325] V. DASKALOVA, *op. cit.*, p. 147.
[326] Commission (EU), Notice: Guidelines on the application of Article 81(3) of the Treaty, 2004, OJ C 101/97, §84; see also Commission (EU), Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011, OJ C11/1, §49.
[327] V. DASKALOVA, *ibid.*, p. 156.
[328] D. ZIMMER, "On Fairness and Welfare; The Objectives of Competition Policiy" in C-D. EHLERMANN and M. MARQUIS, *European Competition Annual 2007*, Hart, pp.103-107.

The dichotomy between consumer welfare and economic freedom seems to have disappeared. By mixing the objectives in the different instruments, an equilibrium has been reached whereby the protection granted to one of the objective is limited by the importance given to protect a part of the other objective. For instance, if economic freedom is granted by the AECT, less efficient competitors are not protected and thus, competition on the merits is not at stake. On the one hand, the AECT exists to prevent abuse of dominant position and, therefore, to either directly protect consumer's choice, quality or price, or indirectly do it by protecting competitors, customers or suppliers. It avoids excesses on both sides. Sometimes, a large scope of choices is not the solution if the choices offered by the potential or actual competitors are not as good as those proposed by the dominant undertaking. On the other hand, sometimes, depriving the rivals to develop their products, and by such, offering the market a new choice, will be negative for the final consumers. In both situations, the objectives and the manner to attain them avoid excessive decisions. In the same way, concerning mergers, consumer welfare is one of the final objectives to reach but, once again, the test is based on principles permitting a real competition, not depriving dominant firms who want to merge from their advantages and in the same way, not preventing potential or actual competitors to act, enter or compete on the market.

The *Guidance Paper* directly expresses those ideas, the mix of the aims and the way to reach them :

> In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that **markets function properly** and that **consumers benefit** from the efficiency and productivity which result from effective competition between undertakings.[329]

The broader is the approach, by studying the European competition law as a whole, the easier are the links to make between the different branches, instruments, approaches, theories, tests, cases, legislations …

[329] *Guidance Paper*, §5.

Conclusion

This paper analysed the consecration by European courts and institutions, mainly the Commission, of the protection of freedom of choice. The study was based on European case-law, for both the instruments and the substance analyses which only concerned abuse of dominant position and mergers. The area of cartels, article 101 TFEU, has been set aside in the comparison made.

Part 1 was dedicated to the context that has led to nowadays position. The bases were set by examining the European competition law in its economical dimension and the concepts of efficiency and welfare, in their historical dimension by analysing the ordoliberalism and the idea of law which can only deprive people from their right when working for the efficiency of competition. In that way, private and political powers can be limited if they overpass their rights. This leads to the analysis of the main objectives of European competition law and the way it is possible to implement them which seem to be opposed: economic freedom and consumer welfare.

Part 2 was dedicated to the study of formal instruments in the areas of abuse of dominant position and mergers. The two first instruments concerned article 102 TFEU. First of all, the effective competition principle was at stake. The main principle is based on the direct or indirect harm suffered by consumers as a consequence of undertakings' conduct. This idea developed into the analysis of anti-competitive foreclosures and the competition on the merits as well as the special responsibility that lays on dominant undertakings' shoulders of not impeding competition in a condemnable way. The critics that rose against this instrument lead to the adoption of a more economic, effects-based approach of the problem. Indeed, the way to counter the disadvantages of the first instrument was the development of the as-efficient competitor test. This test is used for monetary abusive conducts and was formally recognised in *Post Danmark I* case, in 2012. However, the shift that occurred between effective the competition principle and AECT was tempered by two cases : *Intel* in 2014 and *Post Danmark II* in 2015, reminding that the new instrument is not yet completely rid off the older principles and approaches.

The third Chapter of Part 2 closed the instrumental analysis by examining the significant impediment to effective competition test in mergers. The focus was put on the importance given to competition's closeness and the economical concern dedicated in the test. Chapter 4 of this part reminded the links between the three instruments, which can briefly be described as the common ground, the similarity in the evolution and the last teachings encompassing former notions that seemed to have been suppressed when new tests were implemented.

Finally, Part 3 encompassed the two first parts by bringing together the objectives of Part 1 and the instruments of Part 2 through the prism of protection of freedom of choice. The interest lied in the fact that the jurisprudence analysed in the first parts was summarized with a shift in the focus. Indeed, instead of studying the instruments, the same cases were examined concerning the answers they gave to the European competition law's objectives and, more specifically, to the freedom of choice's criterion. Not only a similarity was observed between abuse of dominant position and mergers but, once again, the evolution of the criterion's protection coincided with the above-analysed instruments' evolution.

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