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The Economic Theory of European Competition Policy. Retrospectives and Perspectives

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Abstract

The purpose of the present paper is to present the inherent theoretical presuppositions of the European Competition Policy (ECP) and to offer a critical appraisal of them. In addition, the paper advances the *catallactic competition* model as a possible alternative theoretical framework to be used in enforcing ECP. The research is divided into three main parts. In its first part, we offer a short retrospective view of the main events that led to the creation of EU competition policy, and also a critical appraisal of the two referential articles (101 and 102, The Treaty of Rome) for EU competition. It will be shown – certainly not as a historical proof, but more as a theoretical deductive judgment – that these two pillars of EU competition are already designed to serve a certain theoretical thought, which is the *perfect competition model*, product of neoclassical economics. Therefore, a potential mission to reform ECP is bound to exist within the constraints of the non-realist assumptions of the perfect model. Or, in a generous sense, within the constraints imposed by later developments of perfect competition model. This is to say that future options to revise or reform ECP must also mean a *reconsideration* of article 101 and 102. The second part is dedicated to a presentation of the main theoretical influences on European competition policy and the differences between them. A reference is also made to a recent fashion in enforcing competition law, namely the necessity (of the lawyers and courts) to have more economic-based decisions when judging competition issues. The third part delivers a new perspective on enforcing competition rules by exposing the model of *catallactic competition* which is advanced as a possible proxy for the enforcement of ECP.

Keywords: EU competition policy, perfect competition, catallactic competition, political entrepreneurship

Introduction

Competition issues have become fashionable in Europe along with the creation of European Coal and Steel Community (ECSC) in 1951, and later with the Treaty of Rome (1957). An economic interpretation of the main articles (65 and 66) from ECSC (nowadays, 101 and 102 from the Treaty of Rome) dedicated to the problem of competition, reveal some already assumed theoretical presuppositions. This is to say that, in no circumstances are the origins of EU competition law neutral to competition theory. Thus, a crucial thing is to observe what sort of theories inform the competition law. The research is divided into three main parts. In its first part, we offer a short retrospective view of the main events that led to the creation of EU competition policy, and also a critical appraisal of the two referential articles (101 and 102, The Treaty of Rome) for EU competition. The second part is dedicated to a presentation of the main theoretical influences on European competition policy and the differences between them. At this point we also emphasize the transition from *the rule of law* to the *rule of reason* (a more economic approach) which concerns many competition based economists and public officials today. The third part delivers a new perspective on enforcing competition rules. The model of catallactic competition is explained and advanced as a possible proxy for the European Competition Policy.

The Birth of European Competition Policy: A Retrospective Of The Main Events

The history of European Competition Policy begins with the Treaty for Establishing the European Coal and Steel Community or the Treaty of Paris (1951)[1] where the competition problem is addressed in the form of two articles: Article 65 and 66. Article 65 concerns cartels while article 66 contains provisions with regard to concentrations (mergers) and abuse of dominant position by firms.

These two can be considered the first institutional or governmental references to economic competition, in the European area. The Treaty of Rome (March, 1957) which established the European Economic Community embodied the provisions of Article 65 and 66 and additionally pointed towards the competition problem, as one of the focal aims of the EEC.[2] In the Rome Treaty, competition issues are addressed in Article 101 (ex-Article 81 on associations and undertakings) and 102 (ex-Article 81 on abuse of dominant position).

Turning back in time, the 1950s were years of great hope for Europe. The establishing of European Coal and Steel Community (ECSC) in 1951 was a step in dispersing the energetic power of some states to a larger group which

[1]Available at http://www.cvce.eu/en/obj/treaty_establishing_the_european_coal_and_steel_community_paris_18_april_1951-en-11a21305-941e-49d7-a171-ed5be548cd58.html
[2]Papadopoulos (2010, p. 14)

was supposed to act like on a market or market-style. The assumption was that economic cooperation and an increased economic dependence between the European states would keep wars out of sight.[1] The practical intentions were to prevent aggressive actions of the European states, such as the two calamities – World War I and II – by creating a common market for steel and coal, where both production and distribution will be a task of the ECSC.[2] It would not be improper to name the ECSC, an authority invested by the governments who signed the Treaty of Paris with the power of centralizing the production of steel and coal in Europe. All the methods used by socialist regimes to plan production (price fixing, quotas, planning consumption) are familiar to ECSC.

With regard to production, the ECSC played a mainly indirect, subsidiary role through cooperation with governments and intervention in relation to prices and commercial policy. However, in the event of any decline in demand or shortage, it could take direct action by imposing quotas with the aim of limiting production in an organized manner or, for shortages, by drawing up production programmes establishing consumption priorities, determining how resources should be allocated and setting export levels.[3]

The common market, as was designed had nothing in common with a free market[4]. It is true that negotiations for establishing ECC had the intention of dismantling gigantic monopolies from the war time, with the purpose of creating competition[5], which 1951 EU leaders saw this as a proper solution. But only dismantling these state companies specific to war socialism may not be enough for global peace. Germany's monopoly on coal and steel (in the two wars) was practically replaced by the agreements between the leaders who signed the treaty of Paris (Belgium, France, West Germany, Italy, Netherlands, and Luxembourg). The dominance of Germany was removed and replaced with a cartel or a *supranational* entity coordinated by all these states.[6,7] Is the sharing of the production and distribution capacities a guarantee for peace? There are reasons to believe it is at a European level, but not if this governmental cartel fights with similar extra-community cartels. In this case, the only success which EU integration had achieved is to delay an inherent military conflict between it and other supranational entities, based on the same socialist ideas with regard to economic activity.

[1]A critique of the thesis that ECSC was indispensable for maintaining peace in Europe can be found in Mihai-Vladimir Topan, *The Origins of EU and the Flight from Liberalism*, Romanian Economic Journal, 2007.
[2]Robert Schuman declaration, 9 May 1957, available at http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm
[3]Treaty Establishing the European Coal and Steel Community, available at http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm
[4]Connolly (1995, p. 59)
[5]Mușetescu & Dima & Păun (2008)
[6]Bagus (2012, p.6)
[7]Mușetescu & Stamate (2011a)

An Economic Interpretation of Article 101 and Article 102

Our intention in the following is not to deliver a 'more economic approach' to the specified articles, as it is presently understood by some authors.[1] From such a perspective – the mainstream view – Article 101 and Article 102 need economic analysis, otherwise they only have a *per se* status, meaning that the courts will apply them *ad literam*. Our thesis is that Article 101 and 102 – as they are written - are already furnished with a certain doctrinaire or theoretical background which limits the applicability or the consideration of some economic theories, while opening the road to others.

Article 101 and 102 are considered the two main pillars in enforcement competition rules in Europe. Article 101 (ex-article 81) refers to undertaking and associations between firms, while Article 102 (ex-article 82) refers to the abuse of dominant position of firms. Both of them thus send a message concerning the potential negative effects that the entrepreneurial process can result in, on the market. The task of the European Commission through its specialized body in competition, the General Directorate for Competition, would be to prevent such effects, which can distort resource allocation and produce losses in consumer welfare.

For the General Directorate to successfully enforce rules in competition – an economic phenomenon – it must make use of a body of economic theory and principles which can coherently explain the competition process. If this assumption is accepted it means that economics, as a science, deserves the advisory role in elaborating and enforcing competition rules. A possible future problem would only be to pick up through a subjective process of selection, the economic theories which best serve a competition law. The formal enforcement of competition rules is ultimately a task of courts of justice and lawyers. An efficient rule (law) is based on operational concepts of analysis. As economists, we can easily point the finger - in the history of economic thought - towards many economic concepts which had only a conceptual relevance, but could never take the form of a public policy. This is tantamount to saying that such concepts were not realist from an operational perspective; lawyers would thus have significant problems in the case of an embodiment in law. We can affirm that the best example of such non-operational concepts in the study of competition is the *perfect competition model*, a product of neoclassical economics.[2] Nevertheless, this did not impede jurists and lawyers to use it as an important theoretical reference when designing the competition law.

Article 101 (ex-article 81) is a legal approach on associations and undertakings between firms. As it is stated in the official document, the competition between firms can result in actions like 'fixing' prices (point a), 'limit' and 'controlling' production (point b), 'share' markets (point c), applying 'dissimilar' conditions in relation with other firms (point d) and 'make the conclusion of contracts subject to acceptance by other parties of supplementary obligations' (point e). If one or more of these actions develop,

[1]European Advisory Group for Competition Policy, *An Economic Approach to Article 82*, available at http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf
[2]Stamate & Mușetescu (2011b)

the treaty prohibits them as they are 'incompatible with the internal market'. It is worth to note that the problem is not the incompatibility with the 'free market' but with the 'internal market'. Article 101 is definitely also an economic approach on associations and undertakings. On one hand, the text suggests that competition process is not a self-adjusting process and that a law (government intrusion) is necessary to prevent non-adjustable aspects. Still, what makes governmental intrusion efficiently superior?

On the other hand, it pictures some entrepreneurial actions ('fixing prices', 'limiting production', 'sharing markets' etc.) as these could be *per se* detrimental to the competition process and consumers. At point 2, it is stated that 'any agreements or decision prohibited pursuant to this article shall be automatically void'. Point 3 leaves space for those associations and undertakings that although might embark on same actions ('fixing', 'limiting', 'sharing') can end in positive effects such as 'improving the distribution and production of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'. In this latter case, the crucial task of the economists would be to detect and measure these effects, by employing certain techniques and methods more or less validated by the economic science. The 'rule of reason' or 'ex-post' or 'effect-based' approach is possible due to the existence of point 3.

However, entrepreneurial activity is always concerned with 'fixing' prices.[1] Price formation is a complex phenomenon which requires prices to be fixed at those levels which will prove to be correct in the eyes of the consumers. Uncertainty and scarcity can change anticipation of future prices by the entrepreneurs to such an extent that they can err. This suggests that prices are dynamic and can change, and while 'fixing' them can be the task of entrepreneurs, the validation process is the task of the consumers. Seeing 'fixing' prices a detrimental action *per se* is perhaps the result of equilibrium approach, an already old and mature tradition at the time of Rome Treaty (1958). Furthermore, this type of 'fixing' prices generating negative outcomes is the opposite of what perfect competition describes as desirable in matter of prices: entrepreneurs cannot have impact on price formation. This is to say that 'fixing' prices would be a deviation from the 'normal' or 'perfect' entrepreneurial behavior. In addition, this interpretation would bring Article 101 closer to economics of perfect competition.

As concerns the 'limitation' of production things can be judged in quite the same fashion. Limitation of production is the effect of scarcity in the factors of production. If the assumption of scarcity is accepted, then economic activity means that resources are simply not compatible with any criterion of allocation, but only with that of prices which constrains entrepreneurs to limit and control production so as to make the best use of it, to satisfy the most urgent needs of the consumers. From this point of view, limitation is the outcome of obeying consumers' orders and not a mere trifle of entrepreneurs. We can speculate and conclude that the 'limitation' and 'controlling' of production – negative *per se*

[1]Stamate (2011)

- are similar in spirit with the heterogeneity condition which transforms perfect competition in monopolistic competition. Eventually, this allows entrepreneurs to differentiate in between themselves as they are producing different goods.

Article 102 (ex-article 82) focuses on the abuse of dominant position of firms. An abuse of dominant position is here defined as 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions' (point a) and 'limiting production, markets or technical development to the prejudice of consumers' (point b); point c and d are point d and e from Article 101. A first problematic theoretical supposition is that firms can make use of their economic dominance in an abusive way while consumers possess no force to change such an outcome. As this might be correct, it does not follow that government intrusion can successfully change it. It is equally probable that it might expand the problem. Then, 'unfair' prices is not quite an economic approach on prices, but tends more to an ethical one. Economics and economists in general got used not with the description of 'fair' prices but with that of market prices as they are paid by consumers. Can 'fairness' or 'unfairness' as principles of judging monetary prices be enforced in competition law? Do we possess a universal principle which allows us to divide prices in such a way? At any rate, we can at least presume that this possible principle cannot be the product of economics profession.

What we described by now is the body of Article 101 and 102 of TEEC, assuming that both of them contain a certain theoretical framework – neoclassical – and that this limits the possibility of applying other frameworks, such as free competition theory[1] for instance. The practical implication of how Article 101 and 102 are economically designed is that any reform or improvement must necessarily come from the *inside* of neoclassical economics. The two articles are designed in such a way that policy recommendations cannot jump apart from what neoclassical economics more or less states.

In our analysis of Article 101 and 102 we used a deductive approach, specific to qualitative methods of investigation. The judgments advanced might look too abstract or general to be taken into consideration by lawyers. But at stake is if economic science can really deliver other type of judgments and in what conditions.

The Present State of Affairs

A specific aim of the European Coal and Steel Community (ECSC) and European Economic Community (EEC) was to ensure competition within the common market and monitor the behavior of the producers in their endeavors to gain market power. One can legitimately ask what the sources of inspiration of these treaties are. Economists generally hold different views on various economic problems, derived perhaps from the fundamental differences between the schools of thought which vindicates them. So far, a reference was

[1]Rothbard (2006, p. 654)

made to neoclassical model of perfect competition. Thus, an appropriate method to understand economists' views is to study a little bit the history of economic thought on the specific topic of interest.

Before reviewing some of the ideas which developed the framework for understanding the phenomenon of economic competition, one thing must be stated in short. The influence of US authorities on EU authorities in elaborating the provisions of competition law (1951 and 1957), although not directly participating in negotiations, is something not to be avoided.[1] The enactment of Sherman Act in 1890 started the antitrust tradition in US and it would be a proper judgment to state that European Competition Law was built on this existent tradition.

Dissent on Economic Theories

The economic theories which intent to explain competition process can be divided in two major traditions: the classical (18th century - first half of 19th century: English School and French liberal school) and neoclassical tradition (second half of 19th century – present: Harvard School, Ordoliberal school and Chicago School). In between these two traditions a third line of thought develops in 1876, with Carl Menger's *Principles of Economics*, the founder of Austrian School of economics. Two main contributions of this school must be pointed out, that certainly differentiate the Austrian thought among others. First, it is the methodological dualism (the theory versus history distinction on the one hand; and the natural science versus social science divide on the other) through which a great importance is given to theory as such for it is embedded in any history or collection of facts. Therefore economic history – collection of empirical data – is meaningless without having a theory to explain data. This was opposed to the German historical school assumptions, which was a fashionable approach when Menger wrote his treaty. A second contribution is the successful integration of money problem in the general framework of economic science; the Austrians applied the modern theory of value and prices (subjectivist and marginalist) to the problem of money.

The classical perspective on competition is that markets are self-adjusting. Although the classical economists (Adam Smith, David Ricardo) did not use a correct theory of value and prices (see the popular value paradox) this did not impede them to see the self-adjustable character of the market. Smith argues that a certain 'invisible hand' is coordinating the actions of individuals on a market in their endeavors to attain specific aims. This 'invisible hand' is a sort of natural principle or natural law, which must not be disturbed by external forces, such as government intervention. To this extent, Smith and other classical economists (Cantillon, Turgot, Hume) were following the natural law philosophy which basically states that human society (the economic aspects in particular) has some inborn natural functionality principles independent of human will. Humans must as a consequence obey them, like they involuntarily obey the law of gravity. Classical economists described competition as a

[1]Papadopoulos (2010, p. 13)

process of rivalry between firms in the production of salable goods which has the potential effect of reducing prices and profits. The egoistic gene that Smith referred to was fundamentally tied with the altruistic one meaning that individuals must *volens nolens* first give something in exchange (produce something) for the society in order for the society to remunerate their effort.

The neoclassical tradition in economics (represented mainly by Stanley Jevons, Leon Walras, Augustine Cournot, Jules Dupuit, John M. Clark, Frank Knight) has the merit of developing the modern theory of value and prices which, added to the contribution of classical economists can result in a coherent approach of economic activity. Due to their contribution, we can now explain prices in terms of subjective and marginal valuations made by the consumers upon economic goods. This neoclassical contribution was a severe hit that labor value theory of prices received (which Karl Marx[1] also used). Another distinguishing feature of neoclassical tradition is the use of mathematics to describe various market situations. The employment of mathematics – which some authors consider unfit for the social character of economic science – lead neoclassical economists into the universe of equilibrium. From this moment on, markets and prices would be analyzed in terms of equilibrium (partial and/or general).

The most notorious product of neoclassical economics in matters of competition is the *perfect competition model*. Other alternatives to the perfect competition model were brought into discussion by authors like Edward Chamberlin (monopolistic competition and oligopoly) and Joan Robinson (imperfect competition). Monopolistic competition is when sellers distinguish in between their goods (the homogeneity condition is no more fulfilled) by producing a better good or by advertising. Oligopoly is a situation when there are few sellers on the market (the 'numerous participants' condition is not fulfilled) selling identical products but each one's price is determined by the price of the others.

Time and economic analysis revealed the shortcomings of the perfect competition model, but not to the extent of spurring an abandonment. Harvard school introduced the structure – conduct – performance model in competition or *workable competition*, which explains that much more important than the number of firms are their tendency towards concentration which can affect the market structure and performance and thus the conduct of firms.

According to this concept, since perfect competition is unattainable governments should try to achieve the results which are closest to the perfect competition ideal.[2]

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[1]"Commodities therefore in which equal quantities of labour are embodied or which can be produced in the same time, have the same value. The value of one commodity is to the value of any other, as the labour-time necessary for the production of the one is to that necessary for the production of the other" in Marx (2013, p. 20). For a criticism of Marx's theories see Murray Rothbard, *An Austrian Perspective on the History of Economic Thought*, Vol. II, Classical Economics, Ludwig von Mises Institute, Auburn, Alabama, 2006.

[2]Papadopoulos (2010, p. 271). European Competition Policy used the Harvard concept in Metro case (Metro SB vs. Commission: 1977)

Concentration, in the perspective of Harvard school can be the source of entry barriers; a competition policy should thus be based on analyzing the effects of concentration and high barriers to entry. In this way, economists' attention shifted towards the entry barriers problem.

The Chicago school criticized the Harvard school model, suggesting that a greater importance should be given to firms' size, and not to concentration and entry barriers. According to the Chicagoans, entry barriers could be the result of scale economies (case in which the firm experience an increased efficiency) or government intervention (tariff and non-tariff barriers, standards etc.). Based on this insight, they concluded that government intervention is only needed when hard-core cartels appear on the market or horizontal mergers which can facilitate the creation of a monopoly.[1]

A return to the perfect competition model has been possible through the application of game theory in competition situations. This approach took the name of *industrial organization* and its purpose was to study firms' potential of colluding in an oligopolistic market.

Another contribution to the realm of competition theories was made by William J. Baumol who proposed the concept of *contestable markets*. A contestable market is one in which "entry is absolutely free and exit is absolutely costless"[2]. Baumol makes a distinction between fixed and sunk costs and argues that a barrier in competition is the sunk cost which does not allow firms to freely move on the market. Competition policy should pay more attention to firms' sunk costs and not to prices or profits.

A new and fresh approach to competition is brought by the Austrian school of economics. The Austrian thought on competition can be divided in two major parts. First is Friedrich A. Hayek and Israel M. Kirzner with competition as a discovery process, where information problem occupies a significant role. Although he is not a part of the Austrian school from the perspective of economic theory, Joseph Schumpeter could be mentioned as another figure interested in competition, who emphasized dynamic technology efficiency and innovation as necessary outcomes of competition.

A second part is represented by *economic calculation* tradition, where figures like Ludwig von Mises and Murray Rothbard describe competition as a process of resource allocation through the means of economic calculation in monetary terms. The *catallactic competition*, Mises's concept[3], is a realist approach to competition where entrepreneurship is understood as the task of saving scarce resources and allocate them by forecasting consumers' needs in an environment which is fundamentally uncertain. Economic calculation would be the guiding star of this task. Mises argues that anticompetitive situations can be mostly the result of government intervention (protectionism) and does not recommend any active competition policy. Rothbard uses the concept of *free competition*. For Rothbard[4], the unhampered market (a market where

[1]Papadopoulos (2010, p. 272)
[2]Baumol (1982)
[3]Mises (1949)
[4]Rothbard (2006, p. 654)

government is not involved in price formation, profits, rate of interest, wages) is an instance of a market with free competition. Rothbard also develops[1] the non-aggression principle, which used in competition theory would imply that force or violence (government fines, expropriation etc.) should not be used against non-aggressors (firms which did not infringe upon the physical private property of others). The third part of the present paper is dedicated to applying the understandings of catallactic and free competition in competition law, as an alternative framework to those used by now.

The Ordoliberal School (Walter Eucken, Franz Bohm) came up with the idea of integrating law and economics problem, arguing that "economic freedom is part of the political freedom"[23]. In competition matters they gave a great deal of attention to the problem of large companies which can be a threat to economic freedom. Government should thus get involved in controlling large firms.

Up to this point we have reviewed the main ideas which had an impact on the European competition law. In short, we can observe two main concepts at work. First is free competition (represented by classical economists, in part by neoclassical Chicago economists and ordoliberal economists, and Austrian economists) and the second is the perfect competition (represented by early generation of neoclassical economists and its recent followers, Harvard school, game theorists/industrial organization and contestable markets' theorists).

The Need for an Economic Approach or the 'Effects-Based Era'

The present concerns with regard to competition issues in the EU area focus on the need for an economic approach. Simply stated, this suggests the significant role that economics should play in being a reference for ECP. The latter should be applied in courts but based on solid economic analysis. Although the ECP, as it can be seen, was always circumscribed to a certain theoretical framework, this particular accent on the need for an economic approach is somehow recent. And obviously it requires some further explanations. Why would economic theory would be needed now 'more than ever'? Moreover, since we deal with many different theories in competition what theoretical standard should be adopted?

The question for effective enforcement is not one of "more" or "less" economics, but rather what kind of economics and especially *how* the economic analysis is used – or indeed sometimes may be abused – in the context of guidelines or cases.[4]

To put it otherwise, the need for an economic approach, although useful, is vague, since the real significant problems rest in the nature and difference between competition theories.

[1]Rothbard (1998, p. 51)
[2]Papadopoulos (2010, p. 277)
[3]An interesting analysis of the politics of *sozialmarktwirtschaft* (which is the practical consequence of ordoliberalism) in Germany in Jora (2006)
[4]Röller (2005)

This economics-oriented fashion determined the EC even to create within the DGC, a special agency - the chief economist institution – with powers in delivering the proper economic theories and models which could be used as proxies when enforcing the law; at the chief economist institution work ten economists specialized in competition issues, all of them having PhDs in industrial organization.[1]

The need for an economic approach also represents a landmark in the history of antitrust. It is also referred to as the *effects based approach* or the *rule of reason*, as opposed to the first traditional way of enforcing competition law or the *rule of law* or *per se rules*. This *effects based approach* allowed for judging an apparent anticompetitive practice not based on formal rules or the written law but more by studying its economic effects on the market. Therefore, a practice which according to the *rule of law* should be banned, by applying the *rule of reason* or by investigating its economic effects, might become legal because of its positive economic effects.

The choice between a per se approach and an economic one is, in fact, a choice between bad rules and an efficient approach. The difference consists not in nature but in the degree of reasonableness.[2]

For a proper assessment of the *effects* of an anticompetitive practice, ECP would need criteria. Competition law will use this criteria to distinguish between a harmful business practice and an inoffensive one. In other words, there must be clearly stated when the effects become anticompetitive.

When a practice is not seen as immediately anticompetitive, further economic analysis may help the decisional process also by defining whether we should start from a presumption of legality or illegality, which in turn depends on whether we should expect that the practice has or does not have anticompetitive effects, and by defining the criteria on the basis of which we may evaluate whether it is restrictive.[3]

A main criterion used at the present moment by ECP is consumer welfare.[4] If consumer welfare is reduced by a business practice then competition law can ban it and becomes illegal. If on the contrary, the practice increase consumer welfare then it is allowed, being legal. From a theoretical perspective, consumer welfare considerations are based on the presupposition that welfare, as such, is a quantity that can be measured.[5] Since welfare is more a qualitative referential, it is subjective (depending on the value judgments of each individual) and cannot supply a coherent standard to be applied in law.

[1]Röller (2005)
[2]Muşetescu & Stamate (2011)
[3]Pera (2008)
[4]European Advisory Group for Competition Policy/EAGCP (2010)
[5]For a critique of the idea of aggregate welfare see Murray Rothbard, *Towards a Reconstruction of Utility and Welfare Economics* (1956)

An Alternative Framework To Be Used In Competition Law: Catallactic Competition

It seems that competition law in the European area raised some problems which have determined economists to make a reconsideration of it. The trend towards a more economic approach can be viewed as an effort to search for a theoretical framework which can be embodied in law and produce efficient outcomes. However, if economists together with lawyers found the reconsideration of European competition policy principles as a proper attitude it follows that it is improvable, perfectible. This is valid up to the point where an honest eye should also admit the possibility of contesting its existence, or its abolition.[1]

Still, if we are to stick to the idea of a reform, a retrospective eye on the history of competition law and economics would evidence first, that ECP has as default neoclassical economics and second that in its evolution it adopted – not surprisingly - concepts more or less closer to neoclassical economics (monopolistic competition, imperfect competition, workable competition, game theory/industrial organization). These were concepts which combined with a certain degree of mathematical modelling could create a pragmatic and practical description of markets in the eyes of lawyers, although the assumption of equilibrium and continuity which lay at the core of modelling could hardly bring it closer to a realist description.

The last part of the present paper proposes a reconsideration of the misesian and rothbardian framework of competition or the *catallactic competition* as a possible proxy for designing and enforcing the ECP. Although improvements were made on the front of catallactic competition (Schumpeter, Hayek, Kirzner), not all of them were made in the misesian and rothbardian tradition. At the core of catallactic competition, in the way Mises and Rothbard saw it, lays the economic calculation in monetary terms which allows entrepreneurs to select in between the alternatives of investments those who meet the most urgent wants of the consumers. Economic calculation is only possible if private property exists, while the exchanges between various owners of property allow for the creation of a market and the existence of prices.

The Catallactic View of Competition. How to Design the Competition Law

Catallactic competition is different than perfect competition model in all respects. This also makes it different than all the theories post-perfect competition. The main differences are: it assumes the existence of natural barriers (older firms' advantage and reputation, economies of scale etc.), perfection is not a state to be discussed in matters of competition (uncertainty impedes entrepreneurs to have perfect information), equality of opportunity is not a realist approach in competition (given the natural inequality in endowments), it explain market prices – as they are paid by consumers – in

[1]Jora & Iacob (2012)

terms of subjective and marginal evaluations made by market participants upon the economic goods.

From the catallactic point of view, and concerning anticompetitive practices, before analyzing whether they can be the outcome of free competition between firms, two major enquiries must be considered. First, as also the Chicago school points out, it should be studied if anticompetitive practices have their cause in institutional barriers (e.g. a domestic producer protected by an import tariff, can reduce competition and speculate an increase in prices). A second contribution of Austrian school of economics is the consideration of political entrepreneurship in the problem of anticompetitive practices, which might be considered as a possible outcome of institutional barriers. Political entrepreneurship is a phenomenon created out of governmental intervention in the market. It develops especially whenever governments design regulations in such a way that entrepreneurs can make use of them to gain economic power and simultaneously disobeying consumers' orders. Therefore, profits and losses function not as a signal of satisfying consumers' needs but as a signal of success or failure in convincing those in bureaucratic offices. It can also develop in the sphere of private exchanges in the form of stealing, threatening with force and other forms which are all included in the criminal law.

The theory of political entrepreneurship[1] was possible due to the libertarian theory of non-aggression[2] which states that aggression should not be initiated against non-aggressors. Aggression is being initiated whenever entrepreneurs use political means (taxation, regulations) to acquire economic power by infringing the private property of others. This does not correspond to a peaceful cooperation because political means require no consent of those upon they fall.[3] At the opposite corner are the economic means, which consists of exchanges, production and other types of voluntarily (by consent) exchanges between people. As a conclusion, the existence of political means to acquire wealth can give birth to political entrepreneurship which in turn can result in anticompetitive actions (e.g. an association of firms propose quality standards legislation to prevent foreign competition; this can end up in higher domestic prices, a greater risk of collusion, risk of reducing the output sold etc.). Thereby the competition policy should also investigate the domestic degree of political entrepreneurship.

An ECP informed by the catallactic competition will have two main tasks whenever there is a suspicion of a possible anticompetitive action:

First is to detect all the institutional barriers (in the form of import tariffs, subsidies, import licenses, bureaucratic regulations which cause delays in the production and consumption chain, domestic taxation, the nature and intentions of all the legislation proposed by domestic producers etc.) and if any, to consult the public authorities in charge to reduce them or even considering abolish them, so as to prevent political entrepreneurship. In addition, if there are cases

[1]Oppenheimer (1919, p. 24)
[2]Rothbard (1998, p. 45)
[3]Hoppe (2010, pp. 26-27)

in which aggression is found (e.g.: a firm delivers goods with different features than those described in the contract) ECP can simply pass them to the courts which enforce criminal law.

Second, if there is no political entrepreneurship and no aggression on the market, ECP can proceed further in studying the nature of the anticompetitive action in question. For instance in the case of an abuse of dominant position the standard can be kept but judgments must take notice of each particular situation, and of a wider list of factors involved. First, firm's motivations must be presented. Catallactic competition would suggest that the apparent 'abuse' might be an entrepreneurial move towards an increased efficiency, releasing factors of production for some other uses. Also, the increase in price (extracting monopoly profits) is in no way plausible to keep a constant demand, but rather would decrease, fact which sets limits on the monopolist. Another instance, let it be dumping, should let apart theoretical (unsound) considerations of costs and prices, since costs cannot catallacticaly be measured and added up. More relevant would be to discuss the opportunity costs of the firm; from a catallactic point of view, businesses can sometimes plan an exit, thus dumping can speed up the process.

Any suspicion of anticompetitive action should be based on the opinions of a wide range of stakeholders involved more or less (domestic and foreign competition, consumers). A consultation of them will supply relevant information to decide upon each case in question. However, it is necessary to emphasize that (probably) the most objective and clear reference would be to adopt the principle or non-aggression (as described by the libertarian theory) when enforcing competition rules. Before imposing a fine or even sentence to jail people involved in anticompetitive practices it should check the existence of an aggression upon the private property rights. Still, if that is not institutionally possible, it should at least adopt other principles which suggest a proxy as closer as possible to the idea of non-aggression.

If the principle of non-aggression and its proxies are not sufficient, then a consultation of the stakeholders can bring some other criteria to prove that although no aggression is present, anticompetitive practices are still harmful. A new infringement philosophy is needed to incriminate more than aggression.

Conclusions

The need for a more economic approach, as emphasized by some authors, including the economists around the Chef Economist Bureau (General EU Directorate for Competition) is not questionable. This would be a first conclusion of the paper. It is definitely a success convincing the European authorities in competition and lawyers that competition is an economic phenomenon with special laws and principles. From this perspective, for instance, when judging a spectacular increase or decrease in prices supposed to harm market competition of consumers, courts should also take the responsibility to check the main economic reasons behind such an

entrepreneurial move. Therefore applying *per se* rules or the rule of law is not an efficient approach to competition issues. A more economic approach would mean to apply the rule of reason or to study the reasons and intentions of all the stakeholders engaged in an entrepreneurial action. At this point we arrive at the second conclusion of the research, that a more economic approach is not necessarily the best economic approach to be applied to competition issues. Since, as could be seen, there are many economic interpretations that can be given to the competition process, a hard task for the economists would be to select the optimum framework to be used. However, it should be mentioned also that, as it was designed, the ECP already assumed a certain theoretical framework in the name of perfect competition or at least, got influences from it. In this respect, an important insight of the paper was that public policy recommendations are severely limited by the already assumed theoretical framework. As a third conclusion, the paper advanced the *catallactic competition* model in the tradition of Austrian school of economics, as a theoretical framework to be used in enforcing ECP. The model would first search if the entrance on a market is impeded by institutional barriers which have the potential to create political entrepreneurship. Then, if none of these is present, the aim of the competition policy would be to investigate the positions of those involved in an anticompetitive action.

References

Bagus, P. 2012 . *The Tragedy of Euro*. Ludwig von Mises Institute, Second Edition. Auburn, Alabama.

Baumol, W. 1982. Constestable Markets: An Uprising in the Theory of Industry Structure. *The American Economic Review* (Mar. 1982), pp. 1-15.

Connolly, B. 1995. The Rotten Heart of Europe: The Dirty War for Europe's Money. Faber and Faber. London

Decker, C. 2009. Economics and the Enforcement of European Competition Law. Edward Elgar. Cheltenham. UK.

European Advisory Group for Competition Policy, *An Economic Approach to Article 82*, available at http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf

Hoppe, H.H. 2010. *A Theory of Socialism and Capitalism*. Ludwig von Mises Institute. Auburn. Alabama.

Jora, O. –D. 2006. Reforma Socialmarktwirtschaft-ului – Cum pot Germanii să redevină Nemți?, *Romanian Economic Journal*, vol. 9(22), pp. 115-128, December.

Jora, O. –D., Iacob, M. 2012. Corporate Governance and the Praxeology of the Owner-Capitalist-Entrepreneur. Recollecting Thoughts from the Modern Austrian School of Economics, *Review of International Comparative Management*, Volume 13, Issue 3, July.

Marx, K. 2013. *Capital*: *A Critical Analysis of Capitalis Production*. Wordworth Classics of World Literature. UK.

Mises, L. 1949. *Human Action: A Treatise on Economics*. Yale University Press.

Mușetescu, R., Stamate, A. 2011a. Formal Rules versus an Economic Approach in Dealing with Cartels: The Need for more Coherence in European Competition Law. *Romanian Journal of European Affairs*, Vol. 11, No. 4, pp. 92-102.

Mușetescu, R., Dima, A., Păun, C. 2008. The Role of the Competition Policy in Forging the European Common Market. *Munich Personal RePEc Archive*. University Library of Munich. Germany.

Oppenheimer, F. 1919. *The State*: *Its History and Development viewed Sociologically*. New York.

Papadopoulos, A. 2010. *The International Dimension of EU Competition Law and Policy*. Cambridge University Press. UK.

Pera, A. 2008. Changing Views of Competition, Economic Analysis and EC Antitrust Law. *Macerata Lecture on European Economic Policies*. University of Macerata, Italy.

Robert Schuman declaration, 9 May 1957, available at http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm

Röller, H – L. 2005. Economic Analysis and Competition Policy Enforcement in Europe in Modelling European Mergers: Theory, Competition and Case Studies, Edward Elgar.

Rothbard, M. 1956. Towards a Reconstruction of Utility and Welfare Economics in The Logic of Action One: Method, Money, and the Austrian School. London: Edward Elgar, 1997, p. 211-255.

Rothbard, M. 2006. *An Austrian Perspective on the History of Economic Thought*, Vol. II, Classical Economics, Ludwig von Mises Institute, Auburn, Alabama.

Rothbard, M. 2006. *Man, Economy and State with Power and Market*. The Ludwig von Mises Institute. Auburn, Alabama.

Rothbard, M. 1998. *Ethics of Liberty*. New York University Press.

Stamate, A., Mușetescu, R. 2011b. A Short Critique of Perfect Competition Model from the Perspective of Austrian School of Economics. *Romanian Economic and Business Review*, vol. 6, issue 4, pp. 112-122.

Stamate, A. 2011. On Some Economic Aspects of the European Competition Policy Rhetoric. *Romanian Economic and Business Review*, vol. 6, issue 3, pp. 127-137

Treaty Establishing the European Coal and Steel Community, available at http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm

Topan, V. The Origins of EU and the Flight from Liberalism. *Romanian Economic Journal*, vol. 10 (25), pp. 222-232.