

## **FREEDOM OF CHOICE:**

### **THE EMERGENCE OF A POWERFUL CONCEPT IN EUROPEAN COMPETITION LAW**

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Is Europe engaging on a path leading to the transformation of its competition policy?

In the last years, the European Commission has adopted landmark decisions placing to the foreground a concept that had so far gained limited attention - the concept of choice, that is, the possibility, and the right, for customers, to choose freely the products/services best corresponding to their needs, and the economic partners they want to deal with.

That new approach has not been limited to decisions issued by that institution but has also been adopted by the European courts, i.e. the General Court and the Court of justice, which, within the Union, have the highest authority to interpret European law, including the rules of competition.

The consequence may be a radical transformation of the justifications used by European institutions to explain their decision to intervene, or not, in given cases.

That new approach is analysed in this essay, which is divided in three parts. In Part I, the paper examines cases where the emerging trend appears with the highest clarity. In Part II, it considers whether that trend remains exceptional or whether it can claim some basis in earlier cases and can be established in all provisions dealing with competition law. In Part III, the new approach is discussed as regards its substance.

#### **PART I - AN EMERGING TREND**

##### **Leading case: *France Telecom***

In Europe, the rules of competition are enshrined in the Treaties concluded by the Member States and organising the modalities of their coexistence. As in the United States, these rules are formulated in general terms - opening the way to an interpretation by the European Commission which, in many regards, designs the

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policy carried out in the name of competition, under the guidance and supervision of the European courts.

This signals the importance of the case law, when it comes to analysing what competition policy is about in the European Union. Traditionally, that case law is divided in three categories depending on the type of behaviour adopted by companies and challenged by authorities. One regards monopolization - called abuse of dominant position in Europe although the two concepts do not entirely correspond with each other. Another concerns anticompetitive agreements. And the last is the control which is carried out on mergers or on operations amounting to concentrations, that is, consolidation of businesses.

As regards choice, the most developed body of case law has been adopted in the application of Article 102 TFUE, which prohibits dominant firms from abusing their position on markets. Under case law, Article 102 TFUE applies where a market is dominated<sup>2</sup> by a firm and that firm abuses that dominant position. Among the cases adopted in application of that provision, the most important one, in the context of this paper, is probably *France Telecom*<sup>3</sup>.

That case started with an investigation by the European Commission into practices adopted by the incumbent French operator France Telecom (FT)<sup>4</sup>. FT was found to dominate the market for internet

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<sup>2</sup> According to the classical definition, that concept refers to the ability of a firm to behave independently of competitors, and of consumers. Under case law, that ability results from the situation of economic power that the firm has been able to build up through all sorts of means: access to international capital markets, large array of products offered to consumers, superior organisation etc. In some instances, a dominant position can be held by several firms acting in common. In the general literature, see R. Thompson & J. O'Flaherty, "Article 82" in Bellamy & Child, *European Community Law of Competition*, Oxford University Press, 2008, 6th edition, prepared by P. Roth & V. Rose, pp. 909 s. (pp. 10.015 s. for dominance); C. Esteva Mosso e. a., "Article 82", in J. Faull and A. Nikpay, *The EC Law of Competition*, Oxford University Press, 2007, 2nd edition, pp. 313 s. (4.34 - 4.141 for dominance); R. Whish, *Competition Law*, Oxford University Press, 2d edition, pp. 173 s. In the more specialised literature, see recently E. Arezzo, "Is there a Role for Market Definition and Dominance in a effect-based Approach", in A. Mackenrodt e.a., *Abuse of dominant position : new interpretation, new enforcement mechanisms?*, Springer, 2008, pp. 21-54; P. K llezi, "Abuse below the threshold of dominance ? Market power, market dominance and abuse of economic dependence", *ibidem*, pp. 89-116; G. Monti, "The dominance threshold in Article 102 TFEU", in J. Basedow & W. Wurmnest, *Structure and Effects in EU competition law*, Kluwer Law International, 2011, pp. 57-82.

<sup>3</sup> Chronologically : Decision of the Commission, 16 July 2003 relating to a proceeding under Article [82 EC] (Case COMP/38.233 - Wanadoo Interactive). Judgment of the Court of First Instance (Fifth Chamber, extended composition), of 30 January 2007, *France T l com SA v Commission of the European Communities*, Case T-340/03, 2007 II-00107. Judgement of the Court (First Chamber), of 2 April 2009, *France T l com SA v Commission of the European Communities*, Case C-202/07 P, ECR 2009 p. I-02369. On the judgement of the Court, see A Alemanno & M. Ramondino, "The ECJ *France T l com/Wanadoo* judgment: "To recoup or not to recoup? That "was" the question for a predatory price finding under Article 82 EC", *European Law Reporter*, 2009 pp. 202-210; L. Idot, "Abus de position dominante, prix pr dateurs et r cup ration des pertes », *Europe*, 2009, n  242, pp. 30-31.

<sup>4</sup> It has given rise to the three kinds of instruments that can be obtained in a procedure applying European competition law at a European level: a decision by the European Commission, a judgment by the Court of first instance (CFI, now General Court: GC) and a ruling by the ECJ). The case has thus provided an opportunity to all bodies intervening in the application of European competition law.

access services and was selling such services at a loss. The question arose whether and, if so, to what extent the prices charged by FT could be deemed predatory.

To be found predatory<sup>5</sup>, prices charged by dominant firms must be inferior to costs. In technical terms, they must be, at least, below total costs. Thus, the cost of producing all units must be superior to the revenues obtained while selling those units. When considered per unit, it implies that the cost incurred to produce any output unit must be superior to the price charged for that unit.

Furthermore, these below cost prices must be part of a plan aiming at eliminating competitors and/or competition. The existence of such a plan can be established through a variety of means: emails, declarations, internal documents, recordings etc. Sometimes, gathering evidence is not easy and can be cumbersome. To facilitate the task of investigators, the Court of justice found that a prima facie case exists where the difference between prices and costs is really substantial. Technically, the Court introduced a threshold based on marginal cost. Under that case law, prices are presumed to be predatory where they are under marginal costs. In such a situation,, there is no need of further evidence on the existence of a plan to eliminate competition<sup>6</sup>. For the Court, it is hardly conceivable that a firm may sell units at such low prices - prices lower, even, than just the cost incurred to produce the additional units concerned, without covering any element pertaining to fixed cost. According to the jurisdiction, the motivation for such prices cannot be anything else but a desire to drive competitors out of business<sup>7</sup>.

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<sup>5</sup> On the concept of predation in the context of European competition law (Article 102 TFUE), see in the recent literature J. Glöckner, "Predatory pricing and recoupment under EU competition law : per se rules, underlying assumptions and the reality : results of an experimental study", *European competition law review*, Vol. 31 (2010), issue 11, pp. 423-431; A. Mateus, "Predatory pricing : a proposed structured rule of reason", in *European competition journal*, Vol. 7 (2011), no. 2, pp. 243-267; M. Silva, "Predatory pricing under Article 82 and the recoupment test : do not go gentle into that good night", *European competition law review*, Vol. 30 (2009), issue 2, p. 61-66.

<sup>6</sup> In *France Telecom*, the Commission demonstrated that the prices charged by FT for the sale of internet access services were, at times, inferior to average costs. That demonstration was accompanied by documents and declarations establishing that, in the analysis made by the Commission, an elimination plan indeed existed. In some instances, the prices were even below marginal costs. In conformity with the case law, the Commission deemed these practices illegal, during these periods, without seeking further evidence. (Presumption).

<sup>7</sup> Why would a firm sell an additional product at a price which is lower than the cost incurred to produce that additional product? In selling below marginal cost, the firm does not only renounce to cover all of its fixed costs. It accepts that the mere cost of producing the additional unit will not be paid for either. This, for the Court, cannot be explained otherwise than by a desire to eliminate competition. In my interpretation, the Court was probably seeking to differentiate situations on the basis of the level of loss sustained by the dominant firm. Sustaining a small loss is not the same than incurring a large one. It can be considered, legitimately, in my opinion, that a big loss probably implies that the firm is seeking other purposes than to sell goods or services. A difficult, however, in trying to distinguish situations, is to determine the moment when a loss can be deemed very substantial. The distinction between average and marginal costs provided a sort of expedient threshold.

For its defence, FT was raising objections - one of which being that an infringement should only be found if, and to the extent, the dominant firm had the perspective of recouping, after competition was eliminated, the revenues that were foregone while selling at a loss. That condition, the firm argued, was pervasive, although not explicitly mentioned, in European Competition Law.

That argument was rejected, successively, by the Commission, by the Court of first instance and by the European Court of justice. Among the instruments issued by these institutions, the one with relevance here is the ruling issued by the latter<sup>8</sup>.

That argument was dismissed for various reasons, among which one concerns choice and, more particularly, "consumer choice". For the Court, the perspective of cost recoupment is not essential for the practice to be found abusive. Supposing that the firm would not be able to recover its losses, and would continue to charge low prices, this would not take away another source of harm that consumers would undergo: with the elimination of one or several competitors, the reduction in the choice opportunities that are available to them on the relevant market.

"[T]he 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"<sup>9</sup>.

#### **Landmark decision: *Microsoft***

That ruling is particularly important as it indicates that, under competition law, a reduction in choice opportunities might be more important than low prices. But it is far from being the only instruments in which that focus on choice appears so prevalent. Another milestone in the emergence of choice as a possible standard is *Microsoft*<sup>10</sup>. The decision issued in that case by the Commission

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<sup>8</sup> Hereinafter ECJ. As a reminder, the ECJ holds the ultimate authority to interpret European law including the rules on competition.

<sup>9</sup> Para 112. Emphasis added by the author. Interestingly, no similar statement appeared in the decision adopted by the Commission nor the judgment issued by the General Court. In these latter two documents, the word "choice" is not even mentioned. In answer to an argument raised by the dominant operator, the Commission stated that the possibility of cost recoupment after the elimination of competition was not a condition to be fulfilled for the application of the prohibition. Ancillary, it argued that, should that condition be introduced, it would be satisfied in the case as, in its analysis, recoupment was indeed possible, and even probable. As far as it is concerned, the CFI did not even consider the second part of the analysis made by the Commission. It simply dismissed the argument by stating that loss recoupment did not have to be established. (CFI, paras 227 et 228). (Commission, paras 332-367).

<sup>10</sup> The case gave rise to a decision by the European Commission, stating that the firm infringed Article 102 TFUE : Commission Decision 2007/53/EC of 24 March 2004 relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft Corp. (Case COMP/C-3/37792 - Microsoft), OJ 2007 L 32, p. 23. The case went to the CFI, which upheld the decision : Judgment of the Court

preceded *France Telecom* by a few months. It is not impossible that it may actually have provided the background against which that ruling would be issued<sup>11</sup>.

In substance, the case raised two issues. First, is it permissible for a dominant firm to withhold information necessary to ensure the manufacture of interoperable products? Second, should a dominant firm be allowed to bundle products - thus prohibiting customers from purchasing one of these products without the other? These questions are discussed in the following paragraphs, with a focus on consumer choice.

#### *Work group servers: interoperability information*

In the first part of the case, Microsoft was challenged for withholding information on its work group server software. Networks often have several servers. As PCs and generally electronic devices, such equipment would not work without software. On the relevant market, Microsoft was refusing to provide information which would have made it possible, for other software products, to interact with servers equipped with the software designed by Microsoft.

The issue was deemed important because Microsoft dominated the market. In European law, dominance refers to rare situations where firms build a considerable economic power allowing them to behave independently of consumers and/or competitors, that is, without having to fear that customers might run away, or that competitors might engage in strategies allowing them to gain substantial market share<sup>12</sup>. In the case at issue, most servers were equipped with

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of First Instance (Grand Chamber), of 17 September 2007, *Microsoft Corp. v Commission of the European Communities*, Case T-201/04, 2007 ECR p. II-3601. No appeal was lodged, with the consequence that the ECJ did not have a chance to express its views on the case. On the case, see recently in the literature N. Banasevic, « Windows into the world of abuse of dominance : an analysis of the Commission's 2004 Microsoft decision and the CFI's 2007 judgment », in L. Rubini (ed.), *Microsoft on trial - Legal and Economic Analysis of a Transatlantic Antitrust Case*, Edward Elgar, 2010, pp. 47-75; M. Dolmans e.a., "Microsoft's browser-choice commitments and public interoperability undertaking", *European competition law review*, Vol. 31 (2010), issue 7, pp. 268-275; N. Petit & N. Neyrinck, « Back to Microsoft I and II : tying and the art of secret magic », *Journal of European competition law & practice*, Vol. 2 (2011), no. 2, pp. 117-121.

<sup>11</sup> *Microsoft* is an impressive decision by the degree of sophistication displayed in the reasoning developed by the Commission. For that reason, it must be considered, for our discussion, as an important element in the construction of the position adopted by the European institutions in the interpretation of Article 102 TFUE. That degree of sophistication is due, probably, in part, to the identity and the wealth of the company which was targeted. Microsoft is a jewel of the US economy. At the time of the case, it had the biggest capitalisation worldwide. Hundreds of lawyers worked full time on the case for the company for several years, where the Commission could only align a few officials - most of them involved in parallel procedures at the same time. The decision issued in *Microsoft* is also impressive by the scope of the fine which was imposed on the firm: 497 millions euro - by far the largest ever, at that time, to be imposed on a single firm, even if the ceiling was later to be broken by the one imposed on Intel.

<sup>12</sup> For instance, a firm would be deemed dominant, under that definition, if, and to the extent, it would be in a position to raise prices substantially, without being concerned about losing a significant number of clients - the latter being locked into a form of dependency vis-à-vis the firm, and the competitors being incapable of challenging the dominant firm by, for instance, maintaining clients.

software developed by Microsoft. In such a context, work group managers would not purchase server software that would not be compatible or interoperable with the one made by Microsoft which, chances are, they had already acquired, and installed on their server(s).

Interoperability was thus of the essence - and, combined with the refusal by Microsoft to provide essential interoperability information, that situation placed clients in front of the following dilemma: purchase competing products - and face technical flaws as these products would not work properly in a Microsoft dominated environment; or opt for a flawless service by engaging in a homogenous Microsoft based environment - but then renouncing any possibility of looking for software that would better correspond, possibly, to their needs, if this was necessary or desirable<sup>13</sup>.

That alternative, the Commission stated, is not one competition policy should accept. Under competition policy, enforcement agencies should strive to make sure that customers can choose the products they consider as best to fit their needs. An intervention is necessary wherever these possibilities are impaired or only threatened as a result of behaviour adopted by a dominant firm.

"Due to the lack of interoperability that competing work group server operating system products can achieve with the Windows domain architecture, an increasing number of consumers are **locked** into a homogeneous Windows solution at the level of work group server operating systems ... ». <sup>14</sup> "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 ... inconsistent with the provisions of Article [102] (b) of the Treaty"<sup>15</sup>.

#### *Multimedia software: Tying practices*

The second part of the case related to the integration of Microsoft's multimedia software WMP<sup>16</sup> into its PC operating system Windows. As is known, the share detained by Microsoft in the latter market was overwhelming (more than 90 % worldwide). Windows was pre installed on computers. Microsoft had developed multimedia software which it had included in Windows - thereby ensuring the availability of the software on all PCs equipped with Windows and making it

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<sup>13</sup> "706 When confronted with a "choice" between putting up with interoperability problems that render their business processes cumbersome, inefficient and costly, and embracing a homogeneous Windows solution for their work group network, customers will tend to opt for the latter proposition. Once they have standardised on Windows, they are unlikely to report interoperability problems between their client PCs and the work group servers. While this shows that there is interoperability between *Windows* client PCs and *Windows* work group servers, it does not prove the absence of abusive conduct or harm to customers. In fact, it screens out the antecedent conduct which had anti-competitively undermined customer choice in the first place and had made the standardisation on Windows a preferred option". (Emphasis added by the author).

<sup>14</sup> Decision of the Commission, para 694. Emphasis added by the author.

<sup>15</sup> Decision of the Commission, para 782. Emphasis added by the author.

<sup>16</sup> Windows Multimedia Player.

superfluous, for consumers, to download or otherwise acquire other multimedia player software.

That strategy prompted a quick decline of the US firm RealNetworks, which had encountered success with its then original streaming video software. The share detained by that firm RealNetworks on the market vanished while that detained by Microsoft was growing exponentially. According to the analysis made by the Commission, that exponential growth was due to two elements. First: consumers did not seek to acquire other multimedia software but used the one pre installed on their computers and integrated in Windows. Second: as customers were increasingly using WMP functionality, content providers tended to use that system to encode content - thereby reinforcing the trend by limiting content that could be provided by RealNetworks and other competitors.

For the Commission and the European courts, that practice amounted, again, to an abuse: although it was a bit different from the one examined in the first half of the case, the strategy created the same result, ie a situation where choice was reduced to an unacceptable level. First, consumers did not have any real chance to use other multimedia software as one was pre installed. Second, other software manufacturers could not develop competing products that could then be proposed to consumers. Content providers were concentrating their encoding activities on the standard developed in WMP. They were not using other codes proposed by competing manufacturers. This, in turn, implied that competitors could not develop alternatives, among which consumers would then have a possibility to choose.

"[I]t constitutes an abuse when an undertaking in a dominant position directly or indirectly ties its customer by a supply obligation since this deprives the customer of the **ability to choose freely his sources of supply and denies other producers access to the market** »<sup>17</sup>.

### **Most detailed analysis: Intel**

*France Telecom* and *Microsoft* are thus important elements in the discussion carried out here. But the most useful case to date is undoubtedly *Intel* - a case that gave rise to a decision containing the fullest analysis, thus far, on the relevance of choice in the reasoning developed by the European institutions in the interpretation of Article 102 TFUE<sup>18</sup>.

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<sup>17</sup> Para 835. Emphasis added by the author.

<sup>18</sup> That case gave rise to a decision by the European Commission and an annulment procedure is pending before the General Court - with the possibility of an appeal to the Court. Decision of the Commission, of 13 March 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). As the courts had no opportunity to rule yet, the case does not provide a full overview of the positions adopted by the three bodies involved in the enforcement of European competition law at the European level. This does not take away the importance of it for the discussion carried out here. On the decision issued by the Commission, see N. Banasevic & P. Hellström, "When the Chips are Down : Some Reflections on the European Commission's Intel Decision", *Journal of European Competition Law and Practice*, 2010, pp. 301-310; D. Gérardin, "The decision of the Commission of 13 May 2009 in the Intel case : where is the

In that case, the US chip manufacturer Intel dominated the market for x86 Central Processing Units ("chips") used on computers. That firm was engaging in practices aimed at hindering activities carried out by its main competitor AMD<sup>19</sup> with the goal of driving it out of business. Of these practices, one took the form of "naked restrictions"<sup>20</sup>. Such restrictions consisted of payments made by Intel to computer manufacturers so that they would not commercialise equipment containing chips made by AMD. The other practice consisted of "conditional rebates". These rebates were payments made by customers on the condition that they will place all or quasi all their orders with Intel - not with AMD or other competitors.

On both accounts, Intel was found in violation of Article 102 TFUE, and the Commission ordered the payment of the biggest fine ever imposed to a single company<sup>21</sup>.

#### *Payments to hinder AMD activities*

For each of these practice, the Commission provided a thorough analysis as to why, in its view, in competition policy, choice must be protected on markets. On naked restrictions, the Commission concluded that, as a result of the payments made by Intel, AMD had not been in a position to commercialise products which were in demand. This resulted in harm for consumers, who were deprived of choice opportunities on the relevant market.

"[E]ach OEM referred to in this section was planning the introduction of a specific AMD-based product. Such products either existed or technical development or preparations for introduction to the market were well advanced. This was due to the fact that there was consumer demand for such AMD-based products"<sup>22</sup>. "In each case, Intel paid the OEMs to delay, cancel or otherwise restrict the commercialisation of the planned AMD-based products. In each case, Intel's conduct had a material effect on the OEMs' decision-making in that they delayed, cancelled or otherwise restricted their commercialisation of the AMD-based computers"<sup>23</sup>. "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**"<sup>24</sup>.

#### *Conditional rebates*

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foreclosure and consumer harm?", *Journal of European Competition Law and Practice*, 2010, pp. 112-122.

<sup>19</sup> Advanced Micro Devices, Inc.

<sup>20</sup> The market was defined as covering, worldwide, X86 chips for computers (CPUs, standing for Central Processing Units). The firm was found to be dominant as it held, on average, about 80 % of the relevant market.

<sup>21</sup> Intel was fined 1 060 000 000 euro. For Microsoft, the fine imposed by the Article 102 TFUE decision was 497 000 000 euro. That latter company faced other penalties in the course of the implementation of the decision.

<sup>22</sup> Para 1677.

<sup>23</sup> Para 1678.

<sup>24</sup> Para 1679. Emphasis added by the author.



The second type of practice adopted by Intel was assessed by the Commission along the same lines. For that institution, the rebates<sup>25</sup> granted by Intel were designed to lure computer manufacturers from purchasing competing chips. The practice resulted in AMD failure to place its products on computers. As a result of the payments they received, The computer manufacturers were not harmed directly and substantially, as they receive those payments<sup>26</sup>. But AMD was - and so were consumers, who, here also, were deprived of choice opportunities in a context where a demand existed for AMD based equipment.

"Intel was able to use the tool of conditional rebates that were capable of inducing loyalty and thereby **limiting consumer choice** and foreclosing the access of competitors to the market"<sup>27</sup>. "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"<sup>28</sup>.

## PART II - THE SCOPE OF THE NEW APPROACH

### Founding cases

The attention paid to the three cases discussed in the previous sections of this paper should not be interpreted as an indication that the European institutions were silent, earlier, on choice in the enforcement of competition law. Arguably, the concept does not always appear as prominently in decisions and judgments. But it has always been there. For instance, it was present, and considered as an essential element, in the three cases where the European approach to abuses by dominant firms was developed.

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<sup>25</sup> On rebates under European competition law, see in the recent literature Ch. Ahlborn & D. Bailey, "Discounts, rebates and selective pricing by dominant firms : a trans-atlantic comparison", *European competition journal*, Vol. 2 (2006), special issue, pp. 101-143; L. Borlini, "Legal and economic appraisal of the 'more economic approach' to unilateral exclusionary conduct : regulation of loyalty-inducing rebates (case C-95/04P)", *Yearbook of European law*, 27/2008 (2009), pp. 445-518; L. Kjølbye, "Rebates under Article 82 EC : navigating uncertain waters", *European competition law review*, Vol. 31 (2010), issue 2, pp. 66-80; I. Núñez Osorio, "A test to ban rebates : which test is applicable to rebates under TFEU Art. 102?", *European competition law review*, Vol. 33 (2012), issue 2, pp. 91-99; J. Temple Lang, Rebates, price discrimination and refusal to contract : the Commission's *Guidance Paper on Article 82*", *Europarättslig tidskrift*, Årg. 13 (2010), nr. 1, pp. 47-78.

<sup>26</sup> Placing AMD chips might have developed further computer markets, to the benefit of computer manufacturer. Through its rebates, Intel did not attempt to compensate any loss in revenue that computer manufacturers could possibly undergo through not developing AMD based equipments. The rebated were designed, according to the Commission, so as to just provide the necessary incentive for these manufacturers to be satisfied with the immediate payment they received, even if they had to forego, for that reason, the possibility to develop other sorts of products in demand.

<sup>27</sup> Decision of the Commission, para 1598. Emphasis added by the author.

<sup>28</sup> Decision of the Commission, 1602. Emphasis added by the author.

Indeed, choice was given a prominent position in the first major case involving Article 102 TFUE: *United Brands*, featuring a dominant firm preventing the commercialisation of bananas to other Member States and refusing to sell its products to distributors commercialising bananas from competitors<sup>29</sup>. For the Commission, this last practice amounted to an abuse by virtue of the effect produced on the freedom of purchasers - who could not freely choose what they saw as corresponding to their needs as they would otherwise lose the commercial relationship with the main supplier - which was essential to them.

"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"<sup>30</sup>.

The concept appeared with the same prominence in the second important case where the provision was applied - *Hoffmann La Roche*, where the dominant firm, a Swiss pharmaceutical company, had provided clients rebates which, as in *Intel*, ensured that purchasers would not buy products from competitors<sup>31</sup>. In its decision, the Commission and the Court defined the notion of abuse, in the context of dominance, as encompassing behaviour meant to "hamper" or "remove" the "freedom of choice" of purchasers, and deprive" these purchasers or "restrict" their possible "choices".

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<sup>29</sup> Judgment of the Court of 14 February 1978, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, Case 27/76, 1978, ECR p. 207. The ruling was on appeal against the decision adopted by the Commission, on 17 December 1975, relating to a proceeding under Article 86 of the EEC Treaty (IV/26.699 Chiquita), OJ L 95 of 9 April 1976, p. 1. In the literature, see A. Dashwood, "New Light on Article 86 in the *Banana Case*", *European Law Review*, 1978, pp. 314-328 ; J. Norton, "The European Court of Justice Judgment in *United Brands*: Extraterritorial Jurisdiction and Abuse of Dominant Position", *Denver Journal of International Law and Policy*, 1979, pp. 379-414; w. Bishop "Price Discrimination under Article 86: Political Economy in the European Court", *The Modern Law Review*, 1981, pp. 282-295; L. Zanon Di Valgiurata, "Price Discrimination under Article 86 of the EEC Treaty: The *United Brands Case*", *International and Comparative Law Quarterly*, 1982, pp. 36-58.

<sup>30</sup> Decision by the Commission, section II, para 3 in fine. Emphasis added by the author.

<sup>31</sup> Judgment of the Court of 13 February 1979, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76, 1979, ECR p. 461. The ruling was issued in the context of an application introduced against Commission Decision, of 9 June 1976, relating to a proceeding under Article 86 of the EEC Treaty (IV/29.020 -Vitamins) OJ L 223 of 16 August 1976, p. 27. In the literature, see mainly C. W. Baden Fuller, "Article 86 EEC: Economic Analysis of the Existence of a Dominant Position", *European Law Review*, 1979, pp. 423-441; T. Bennett, "Hoffmann-La Roche: Abuse of Dominance on the Vitamins Market Confirmed", *European Law Review*, 1979, pp. 210-220; J. Maitland-Walker, "Hoffmann-La Roche - The Judgment of the European Court Appraised", *European Intellectual Property Review*, 1979, pp.357-361; S. Garner, "Hoffmann-La Roche and Dominant Position in the EEC", *Journal of International Law and Economics*, 1980, Vol.14, pp.485-508; L. Zanon, "Price Discrimination and Hoffmann-La Roche", *Journal of World Trade Law*, 1981, n° 4, pp. 305-322.

"The conduct of Roche ... constitutes an abuse of a dominant position, because by its nature it hampers the **freedom of choice** ...<sup>32</sup> and restricts competition between bulk vitamin manufacturers in the common market"<sup>33</sup>. "... The fact of agreeing with purchasers that they will buy all or a very large proportion of their requirements from only one source by its very nature **removes all freedom of choice** from purchasers ..."<sup>34</sup>. "Obligations ... to obtain supplies exclusively from a particular undertaking ... are incompatible with the objective of undistorted competition ... because ... they 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"<sup>35</sup>.

The same prominence is given to the concept in a judgment which probably ranks third, chronologically, in the history of important Article 102 TFUE cases - *Michelin I*<sup>36</sup> where the dominant firm also used rebates to tie purchasers. The Commission and the Court concluded that an abuse had been committed as these rebates created a situation where the possibility for purchasers to choose their products was unduly restricted.

"[Michelin's] commercial conduct constitutes an abuse of a dominant position. It restricts dealers' **freedom of choice** and results in inequality of treatment as between tyre dealers. The access of other tyre producers to the market is also restricted"<sup>37</sup>. "In deciding whether Michelin NV abused its dominant position in applying its discount system it is ... necessary ... 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"<sup>38</sup>.

"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 or 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"<sup>39</sup>.

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<sup>32</sup> NOA. In that excerpt, the Commission also notes that the behaviour adopted by Roche hampers the equality of treatment of purchasers. This echoes Article 102 TFUE, under which dominant firms may not impose different terms to partners located in similar conditions.

<sup>33</sup> Decision of the Commission, para 22. Emphasis added by the author.

<sup>34</sup> Decision of the Commission, para 24. Emphasis added by the author.

<sup>35</sup> Ruling of the Court, para 90. See also para 103 and 106. Emphasis added by the author.

<sup>36</sup> Decision 81/969/EEC of the European Commission, of 7 October 1981, relating to a proceeding under Article 86 of the EEC Treaty (IV.29.491 - Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin) *OJ L 353, 9.12.1981, p. 33-47*. Judgment of the Court of 9 November 1983, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, Case 322/81, ECR, 1983, p. 3461. In the literature, see J. Shaw, "Michelin: The Court Supports the Commission's Main Findings", *European Law Review*, 1984, pp. 116-125.

<sup>37</sup> Decision by the Commission. Para 37. Emphasis added by the author.

<sup>38</sup> Ruling of the Court, para 73. Emphasis added by the author.

<sup>39</sup> Ruling of the Court, para 85.

## Subsequent case law

So far, it would appear that the variations in the language used in cases as regards the importance of choice have been remarkably limited. But some of these variations are worth mentioning. In another case (*Napier Brown*)<sup>40</sup>, the dominant sugar manufacturer on the British market was attempting to tie purchasers into its products through various types of price related strategies. The Commission found that

"Such an offer<sup>41</sup>, which has the effect of requiring certain existing BS customers to 'tie-in' other companies to purchase exclusively from BS in order to receive a reduced price for retail sugar, is, ... designed to deprive the purchasers in question of, or restrict their possible **choices** of, sources of supply and furthermore deny other producers ... access to the market"<sup>42</sup>.

In *Tetra Pak II*<sup>43</sup>, the dominant firm dominated various markets relating to liquid packaging, including the cartons where the liquid is poured, the machines involved in the packaging process as well as related services such as service and repair. It was using various practices to eliminate competition. For instance: clients purchasing packaging machines were compelled to use the repair and maintenance services provided by the firm for these machines. That behaviour was found abusive as it purported to avoid clients making their own choices.

"[A] requirement that the customer 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** ..."<sup>44</sup>. "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"<sup>45</sup>.

In *Michelin II*<sup>46</sup>, new proceedings were initiated against the French manufacture for, again, rebate related practices. The Commission and the CFI<sup>47</sup> used the language introduced in Hoffman and the earlier Michelin case<sup>48</sup>. In its ruling, the CFI added:

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<sup>40</sup> Commission Decision 88/158/EEC, of 18 July 1988, relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 *Napier Brown* - British Sugar) OJ L 284, p. 41-59.

<sup>41</sup> NOA. The offer in question involved rebates.

<sup>42</sup> Decision of the Commission, para 74. Emphasis added by the author.

<sup>43</sup> Commission Decision 92/163 of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 - Tetra Pak II) OJ L 72, pp. 1-68.

<sup>44</sup> Decision of the Commission, para 108. Emphasis added by the author.

<sup>45</sup> Decision of the Commission, para 109. Emphasis added by the author.

<sup>46</sup> Commission Decision 2002/405/EC of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO - Michelin) OJ L 143, p. 1-53.

<sup>47</sup> Judgment of the Court of First Instance (Third Chamber) of 30 September 2003, *Manufacture française des pneumatiques Michelin v Commission of the European Communities*, Case T-203/01, ECR 2003 p. II-04071. There was no appeal to the ECJ.

<sup>48</sup> See CFI judgment, *Michelin II*, para 60 quoting Hoffmann and *Michelin I*.

"Because it was loyalty-inducing, the quantity rebate system tended to prevent dealers from being able to select **freely** at any time, in the light of the market situation, the most advantageous of the offers made by various competitors and to change supplier without suffering any appreciable economic disadvantage. The rebate system thus limited the dealers' **choice** of supplier and made access to the market more difficult for competitors, while the position of dependence in which the dealers found themselves, and which was created by the discount system in question, was not therefore based on any countervailing advantage which might be economically justified"<sup>49</sup>

Most recently, proceedings were initiated against the German telecom operator Deutsche Telekom for price squeeze practices<sup>50</sup>. In its ruling, the Court referred to the ruling issued in *France Telecom* and discussed in an earlier section in this paper. For the Court, these prices were abusive as, in the absence of competitors, they would imply that consumers are not allowed to choose their supplier.

"Article [102 TFUE] prohibits a dominant undertaking from ... 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"<sup>51</sup>. "[T]he 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"<sup>52</sup>.

### **Beyond words: choice as a mechanism**

As appears from these cases, choice has thus been given a relatively prominent status in the application of Article 102 TFUE since the beginning of the European integration. But it would be vain to pretend the contrary - all decisions or rulings issued in application of that provision do not contain explicit references to the concept. For instance, the Commission adopted recently a decision in *Tomra*<sup>53</sup>. That decision does not refer any single time to the concept of choice - even though it was adopted after *Microsoft*, where the

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<sup>49</sup> Para 110. See also the decision cited by the Commission at para 331. Emphasis added by the author.

<sup>50</sup> Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-1/37.451, 37.578, 37.579 - Deutsche Telekom AG) OJ L 263, pp. 9-41. Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 10 April 2008, *Deutsche Telekom AG v Commission of the European Communities*, Case T-271/03, ECR 2008, p. II-00477. Judgment of the Court (Second Chamber) of 14 October 2010, *Deutsche Telekom AG v European Commission*, Case C-280/08 P ECR 2010. In the literature, see N. Dunne, "Margin squeeze: From broken regulation to legal uncertainty", *The Cambridge Law Journal*, 2011, Vol. 70, Part 1, pp. 34-37; M. Bay & G. De Stefano "ECJ Rules on Margin Squeeze Appeal", *Journal of European Competition Law & Practice*, 2011, Vol. 2, n° 2, pp. 128-130.

<sup>51</sup> Ruling of the Court, para 177. Emphasis added by the author.

<sup>52</sup> Ruling of the Court, para 182. Emphasis added by the author.

<sup>53</sup> Decision of the Commission, of 29 March 2006, relating to proceedings under Article 82 of the Treaty and Article 54 of the EEA Agreement (Case COMP/E-1/38.113 - Prokent-Tomra).

concept is used extensively and a limited time before *Intel*, which to date contains the fullest analysis of the function that *choice* plays in European competition policy.

*Tomra* concerned practices used by a firm found dominant on a market for recycling machines (liquid containers) in various Member States. Customers were retail outlets installing recycling facilities on their premises to collect bottles or cans used by final consumers. According to the Commission, that firm infringed that provision by imposing, on its clients, exclusivity or quasi exclusivity obligations.

In that case, the Commission follows a reasoning in three steps - which correspond to the three main issues to be addressed before for the application of the provision<sup>54</sup>.

Among these steps, the first is the definition of the relevant market. In that context, the Commission basically sought to determine what machines would be regarded as substitutable by customers. In doing so, the Commission was trying to determine whether and, if so, to what extent, a significant ratio of customers would *choose* one instead of another if the price for the latter underwent a small but significant non transitory increase in price (SSNIP test)<sup>55</sup>.

Second step: after defining the relevant market, the Commission sought to determine, in *Tomra*, whether the firm involved in the proceeding dominated the market. Under case law, "dominance" refers to a situation where a firm has the possibility to carry out its business activities, on the relevant market, to a significant extent, independently from possible reactions, by consumers and/or competitors, due its business decisions. Suppose that the firm would decide to raise its prices. An examination of dominance would consist in 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. This would entail an analysis of the possibility, for competitors, to increase their output to serve customers disappointed by the offers made by the firm involved<sup>56</sup>.

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<sup>54</sup> In addition to these steps, agencies and courts applying the provision must determine whether the entity involved in the proceedings constitutes an undertaking for the application of the rules of competition. They must verify that the internal market is affected - this being a condition to apply European competition law in addition to, or instead of, national competition rules. The dominant position must be held on a substantial part of the common market. And the possibility of an objective justification must be evaluated, if the practices at stake are found to be *prima facie* abusive. That last condition is examined later in this paper, as regards the topic analysed here.

<sup>55</sup> The definition of the relevant market also involves the determination of the substitutability of products in the eyes of producers or suppliers. In that context, the question is whether firms involved in adjacent activities would consider choosing as a possible sector the market as defined on the basis of demand substitutability. The same question is raised for the definition of the geographic market, both as regards customers and suppliers.

<sup>56</sup> As appears from case law, the existence of a dominant position may result from a variety of reasons - all on the circumstances of each case. Among them, one reason could be that competitors lack the capacity to serve dissatisfied customers because they are not in a position to raise their output. Another could be that they do not have the intelligence necessary to identify unsatisfied customers. A third, that

The last step in the reasoning developed in *Tomra* was whether the behaviour adopted by the dominant firm could be deemed abusive. On that point, the Commission concentrated on the ratio of transactions which, among those carried out on the relevant market, could be deemed "contestable".

That concept refers to a division made by economist among transactions carried out on dominated markets. For them, some of these transactions are "non contestable"<sup>57</sup>. This means that, for these transactions, customers have no choice but to deal with the dominant firm. For a variety of possible reasons, they could not choose another supplier in the event they would not be satisfied by the firm. This may be due, for instance, to capacity constraints weighing on competitors and preventing them from increasing output to serve dissatisfied customers even if they wanted to. Such transactions are labelled "non contestable" as, for them, competitors are not able to challenge the position of the dominant firm as being the supplier.

For the other part of the transactions, which are called "contestable", some kind of choice is still possible. Customers may decide to seek supplies from the dominant firm - or they may prefer dealing with other suppliers. The consequence is that competition can still be said to exist as regards these transactions.

In *Tomra*, it clearly appears that, when seeking to determine whether the behaviour adopted by the dominant firm amounted to an abuse, the Commission concentrated on that contestable part of the market. Rapidly, one understands that that institution was not prepared to challenge, in itself, the dominant position held by the firm. Indeed: under case law, dominance is not prohibited per se. The attention of the Commission was rather focussed on the other part of the transactions. Obviously, its purpose was to avoid that, through its behaviour, the firm would not "pre-empt" the last part of the market where competition remained effective - where customers still had a *choice* between suppliers.

That discussion would tend to demonstrate that, in each and every step followed by the Commission, *choice* was indeed present, even if the word does not appear explicitly in the instrument. In defining the relevant market, the Commission analysed the choices made by customers<sup>58</sup>. When assessing market power, it tried to assess the

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competitors do not have access to a distribution channel allowing them to serve more customers. (See *Microsoft*, where RealNetworks could not reach customers as a result of the integration of WMP into Windows).

<sup>57</sup> W. Baumol e.a., *Contestable Markets and the Theory of Industry Structure*, 1988. For an application, see W. Tye, *The Theory of Contestable Markets: Applications to Regulatory and Antitrust Problems in the Rail Industry*, 1994. For a discussion of the economics of Article 102 TFUE, see R. O'Donoghue & J. Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, 2006; D. Gérardin e.a., *EU Competition Law and Economics*, Oxford University Press, 2012.

<sup>58</sup> As well as economic decisions contemplated by manufacturers, in the context of supply substitutability.

choice opportunities offered to customers, thus attempting to determine whether the firm had become, for them an unavoidable partner. When analysing behaviour, it sought to control whether customers were still free to choose other suppliers for the contestable part of the market.

### **Merger control and anticompetitive agreements**

The cases examined thus far arose in the context of Article 102 TFUE - raising the question: is the importance of choice limited to that provision or is the analysis also valid as regards the other rules composing European competition law?

In substance, these rules can be divided in two categories. Some apply to undertakings. They indicate what behaviour firms must avoid on markets, as regards competition. The other ones regard public authorities. They stipulate what these authorities cannot do on markets - with a main message that, in most circumstances, such authorities cannot grant undertakings financial or regulatory advantages that would distort the position of firms on markets, jeopardize the competitive process and unduly create inequalities among market participants.

In this paper, we are not concerned with the latter category of rules - those which apply to public authorities. Such rules indeed rest on a logic, and on principles, which are specific. Our object, here, is the rules applicable to undertakings. These rules have among them a common feature: they all involve an intervention on the part of enforcers where a form and a degree of market power has been acquired on a relevant market. In Article 101 TFUE, market power is addressed in the context of anticompetitive agreements concluded by undertakings. The purpose is to avoid the adoption of such agreements where the consequence would otherwise be that function would not function properly. In the context of the merger regulation, the idea is to ensure that the firms combining their activities will not create, through their concentration, a situation where, as a result of the acquisition or reinforcement of market power, markets will likewise cease to function adequately.

As appears from that - brief - presentation, these rules have a common foundation, or a common object, which is the effect that market power can have on markets - that object being examined under various provisions depending on the circumstances where the issue is raised.

It thus comes as no surprise that the application of these two sets of provisions (merger control, prohibition of anticompetitive agreements) are submitted to the same three steps that have been examined in connection with Article 101 TFUE.

Take merger control<sup>59</sup>. To apply the rules regarding the concentration of undertakings, enforcers seek to define the relevant market(s)

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<sup>59</sup> On EU merger control, see U. Schwalbe & D. Zimmer, *Law and economics in European merger control*, Oxford University Press, 2009; J. Boyce e.a., "Merger Control" in



involved in the operation. To that effect, they analyse choices actually or potentially made by customers between products which could perform the same type of function for the latter. Enforcers will also assess the strength that parties have on the market(s) so defined, relative to the possible force and vigour displayed by other market participants. Then, they will examine the effect that the behaviour - parties concluding an agreement whereby they combine part of whole of their operations - might have on markets. If the effect is that market power would be acquired, or reinforced, the conclusion will be that the deal cannot go through.

In the context of this paper, we are more concerned with the third step as our purpose is to determine in what circumstances a specific behaviour cannot be adopted as a result of competition law. That third step is also present - along with the two other ones - in the application of Article 101 TFUE. After defining market(s) and possibly assessing the existence of power on the latter, European enforcers analyse, in the context of that provision, the clauses that agreements concluded by parties could have on markets.

And again, choice related considerations appear central in those determinations. In substance, the Commission and the European courts examine, in that context, whether these clauses, if they are allowed to exist, would have on choice. The word may not always appear, but the substance of the analysis which is then provided by these enforcers leave no doubt. Here also, a prohibition will be expressed if, as a result of such clauses, customers would lose, to an unacceptable degree, their ability to switch to other suppliers - thus their possibility to choose their economic partner.

### **PART III - ANALYSIS OF THE NEW APPROACH**

#### **"Switching"**

This discussion on the main steps involved in the application of the provision would tend to indicate that, even where the word does not appear, *choice* is present, as a mechanism, in all Article 102 TFUE cases. The possibility for customers to choose products indeed lies at the heart of market definition. It is central in the determination whether a firm holds a dominant position. And it is inherent to the notion of abuse where, when deciding whether a behaviour is abusive, the European institutions seek to ensure that competition - *choice*, thus - subsists on that part of the market which can still be deemed contestable.

To be more precise, one should state that the central feature in those steps leading to the application of Article 102 is the perspective of "switching" - the possibility, for customers, to turn

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Bellamy & Child, *European Community Law of Competition*, Oxford University Press, 2008, 6<sup>th</sup> edition, by P. Roth & V. Rose, pp. 623 s.; P. Christensen e.a., "Mergers", in J. Faull & A. Nikpay, *The EC Law of Competition*, Oxford University Press, 2009, 2nd edition, p. 421 s.; G. Monti, *EC Competition Law*, Cambridge University Press, 2008, 245 s.; A. Jones & B. Sufrin, *EC Competition Law*, Oxford University Press, pp. 847 s.; R. Whish, *Competition Law*, Oxford University Press, 2009, 6<sup>th</sup> edition, pp. 798 s.

to one or several other suppliers, or partners, when it is not satisfied with the performance displayed by the dominant firm.

Indeed: when defining the relevant market in the context of Article 102 TFUE, the Commission and the European Courts assess whether, in reaction to a "small but significant non transitory increase in price", customers would "switch" from product A to product B - in which case the latter would be regarded substitutable with the former<sup>60</sup>.

On the market so defined, they would then seek to determine whether and, if so, to what extent customers still have the possibility of "switching" from one supplier to another - in fact, from the firm under investigation to another supplier. Should that possibility not exist any longer, the conclusion would be that the market is being dominated.

Dominance being established, the Commission and European courts would examine whether and, if so, to what extent, through its behaviour, the firm has attempted to hinder the possibility for customers to "switch" as regards the non contestable part of the market. If so, the conclusion would be that an abuse has been committed<sup>61</sup>.

### **All economic partners**

*Choice*, thus, is material in decisions and rulings adopted in implementation of competition policy within the European Union - but whose choice are we talking about? As regards the determination of the people or entities concerned by possible abuses, there appears to be a certain ambiguity in the jurisprudence as well as, more generally, in European competition law as a whole.

That ambiguity arises from the variation in the terminology used by the Commission and the European courts in their instruments. Arguably, these variations may be due, to a certain extent, to case circumstances. For instance, it makes sense - partly at least - to describe the impact, on consumer choice, of the integration of WMP in Windows by Microsoft. People affected by that integration are,

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<sup>60</sup> Similarly, the Commission and the European courts wonder whether producers would "switch" their facilities from the production of *C* to the production of *B* if prices increased on the market for the latter product in the manner described in the previous sentence. And, again, they follow the same approach when it comes to defining the geographic market - asking, then, to what extent would customers would indifferently purchase in location *Z* or *W*, and whether producers established elsewhere would be able to start commercialising their products in these locations in reaction to such a price increase.

<sup>61</sup> For instance: in *Tomra*, it was found that, through obligations and financial incentives, the firm was seeking to impose on its customers an obligation to place with it all their orders or an overwhelming part of them. The same pattern took place in *Intel* where, through rebates and naked payments, the firm sought to avoid the possibility for the main computer manufacturers to place orders with AMD. In *Microsoft*, the Commission and the CFUI found that, by refusing interoperability information, the firm was seeking to undermine the possibility, for customers, to choose other server software. The same conclusion was reached as regards WMP where, as a result of the integration of its multimedia software in Windows, Microsoft was rendering meaningless any alternative that competitors could come up with.

indeed, to a large extent, final consumers - individuals using their PC in a private setting as opposed to a business environment<sup>62</sup>. By contrast, using the word "consumer" may be less adequate when discussing the effect of a possible abuse on choice opportunities existing for the five most important worldwide computer manufacturers - who cannot really said to be individuals purchasing goods for their personal use<sup>63</sup>. Yet, that one word was used by the Commission to refer, among others, to these business actors, in various passages of the decision adopted in *Intel*.

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 behaviour adopted by dominant firms? The answer would appear to be straightforward: in the context of Article 102 TFUE, any type of economic actor involved in choices on products or services proposed by a dominant firm or by other businesses.

In the context of this paper, the purpose is not to criticize these variations in terminology. For our discussion, we can only note that the use of words by the Commission and the European courts in those cases do not appear to result from a careful assessment of the meaning or connotation that could be conveyed. "Consumers", "customers", "clients", "users", "buyers", "purchasers" - to name a few - tend to be used indistinctively in decisions and rulings<sup>64</sup>.

To some extent, that variation serves the demonstration proposed here, as it indeed suggests that the identity of the persons or entities involved is immaterial. From that uncertainty as to what

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<sup>62</sup> Even in that situation, the word « consumers » may not be entirely appropriate. Personal computers are not only used by private individuals - they are also used on business premises. To reflect that variety of possible users, "customers" might have been more appropriate.

<sup>63</sup> Traditionally, the term "consumer" is used, in European law, as designating individuals (as opposed to entities) acting in a private (as opposed to business) capacity. On the word "consumers" in consumer law and in competition law, see « Is Competition Law Part of Consumer Law? », Josef Drexler, Warren Grimes, Clifford Jones, Rudolph Peritz and Edward Paine (ed.), *More Common Ground for International Competition Law*, Edward Elgar, Northampton, 2011, pp. 46-59.

<sup>64</sup> For a more complete analysis, see the reference cited at note 63. The only setting where some importance is granted to terminology in the field of competition law would appear to be when the Commission devises communication meant for the public. In *La Concurrence et le droit*, I have proposed to divide in three categories the information produced by the Commission in the field of competition law. A first category would consist of documents or settings (internet pages etc) prepared for the public, and intended to explain why competition policy is important for citizens. In that part of the communication, the emphasis is on advantages expected from competition for individuals, that is, final "consumers". A second category would be made of decisions adopted by the Commission in concrete, specific cases. In those decisions, one can rarely detect any form of specific attention to the situation of final consumers. The attention is on concepts the presence of which determines the application of the provision (abuse, dominance, relevant market etc). Between those categories, a middle one would contain more general, but technical information - guidelines, discussion papers, regulations. These documents announce policies to be carried out in sectors, or regarding types of behaviour and situations. As such, they also focus on concepts like those mentioned above. At the same time, they are more general than decisions and can be read by a more general audience, without going so far as being meant for the public. Thus, it may happen that, in that last category of instruments, some attention may be devoted to insist on advantages deriving from competition for citizens. P. Nihoul, *La concurrence et le droit*, Editions Management et société, Paris, 2001.

category of users is concerned, one can probably infer that the essential point, in that regard, is not who is affected - but what.

What is impacted, as a matter of fact, is: *choice* - whoever may be involved. Whatever their status or the category they belong to, the dominant firm is attempting to diminish and, indeed, possibly, eliminate the possibility, for customers, to "switch" to other suppliers in case they are not satisfied with the products or services provided by the dominant firm. As appears from case law, dominant firms seek to impede *choice* as a step towards eliminating competitors and competition. And they seek to eliminate competitors and competition to avoid, again, that possibility that customers would otherwise have, on competitive markets, to turn to other suppliers.

### **Why did they not switch**

Independent of who they are, customers<sup>65</sup> are scrutinized when it comes to assessing behaviour adopted by dominant undertakings on the contestable part of the market. In decisions and rulings, one can notice an increasing attention being placed, by the Commission and the European courts, on the specific moment when, although they could still choose products provided by other suppliers, these customers ultimately turn to the dominant firm which, by the same token, increase its dominant position on the relevant market.

Interestingly, dominant firms claimed, in all cases examined above, that their increase in market share was due to business superiority. Indeed, there would be no legitimate justification, for an authority, to intervene, on the basis of Article 102 TFUE, against an undertaking, for the mere reason that its products are excellent, and preferred by customers.

But in the last years, that claim has been extensively challenged. Typically, the dominant firm would provide surveys and analysis aiming at demonstrate its superiority - to which the Commission would respond by pointing to elements, in these studies, indicating that the success met by the firm was due, rather, to its behaviour, which could, as a result, be considered as abusive.

For instance: in *Tomra*, the Commission, provided statistics demonstrating that the market share held by the dominant firm decreased during the periods when the dominant firm did not impose on its customers exclusivity or quasi exclusivity constraints, customers turned to competitors. Meaning: for a variety of possible reasons<sup>66</sup>, customers "switched" to other suppliers when they were not prevented from doing so.

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<sup>65</sup> This word is used, throughout the paper, to refer to those acquiring goods or services from dominant firms. There is an argument to consider that competition also protects economic partners located upwards in the economic chain (suppliers) against abusive practices adopted by dominant buyers. That subject matter is not analysed here.

<sup>66</sup> As was the case for the reasons explaining the acquisition of a dominant position by a firm, the reasons explaining that customers may prefer other suppliers may be diverse - and are often specific to the circumstances of each case. In *Intel*, for

Similarly: in *Microsoft*, the Commission provided rankings prepared by specialized reviews about the performance of multimedia software. In most of these rankings, the product designed by RealNetworks was considered as being of a higher quality. That preference did not prevent the market share held by that firm from declining steadily while the share held by Microsoft was dramatically soaring. The Commission concluded that the discrepancy between the preference declared by users and the economic decisions finally made by them (purchase WMP) could only be due to the impossibility, orchestrated by the dominant firm, for customers, to turn to the products made by competitors<sup>67</sup>.

In the same case, the Commission referred to a survey carried out by a consulting company and provided by the dominant firm to establish the superiority of its products. But, contrary to the expectation of that firm, the survey was interpreted by the Commission as indicating that all meaningful differences between the products in presence could be explained by this problem considered fundamental by that institution: customers would not chose competing products because there was no guarantee that such products would interoperate with software designed by Microsoft - a software that had become the standard on the market. Thus, for the Commission, the success encountered by Microsoft was not due, necessarily, to the superiority of its products, but rather to the fact that, contrary to business traditions in the sector, it was refusing to provide information essential to ensure interoperability on networks<sup>68</sup>.

### **The decisive reason**

But among all cases recently handled in Europe as regards Article 102 TFUE provides the best illustrations of the focus increasingly placed by the Commission on the reason why, for the contestable part of the transactions carried out on the relevant market, customers ultimately opted for the dominant firm in a context where, absent the behaviour adopted by the firm, they would have opted for competing products.

In that decision, the Commission successively reviews the business decision taken by the major computer manufacturers to deal with the dominant firm for that part of their transactions. In the following paragraph, I propose to analyse the review made by the Commission. The analysis is rather detailed, and contains quotations, given the high relevance, for our discussion, of the remarks made by that institution in that context.

Thus, the Commission, in its decision, provides evidence that, during the period under investigation, Dell was actively considering purchasing part of its supplies from AMD. For Dell, such a decision

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instance, the computer manufacturers mentioned various advantages of the chips made by AMD as a reason explaining that they were contemplating to "switch" to that firm away from the dominant firm for a part of their supply.

<sup>67</sup> Decision of the Commission, para 647 - 665 and para 699.

<sup>68</sup> Decision of the Commission, para 948 to 951.

would make sense in a business perspective. The chips made by AMD presented various advantages, in terms of price and quality.

"Dell, which at the time was 100% Intel-exclusive, was actively considering **switching** a share of its x86 CPU supplies to AMD, whose products it recognised had improved and which in its view offered certain price and performance advantages"<sup>69</sup>. "However, given the conditional MCP rebates ..., Dell remained exclusively loyal to Intel"<sup>70</sup>. "the Intel rebates were aimed at **influencing that choice** and actually were one of the factors behind Dell's choice, and more precisely 'an important part'"<sup>71</sup>. "[As a result of conditional rebates,] customers which, on the basis only of competition on the merits, may have awarded a part of their purchases to a competing supplier, may **prefer** to source all or nearly all of their inputs from the dominant company in order to obtain the benefit of the discount"<sup>72</sup>.

According to the Commission, the same scenario unfolded with Hewlett Packard (HP) - at that time the second manufacturer worldwide in terms of computer sales. As appears from the decision adopted by that institution in that case, there was evidence that, during the period under consideration, HP was preparing to integrate AMD chips in some products as a result of demand expressed by final consumers. It however did not, ultimately, because Intel provided rebates conditional upon its not dealing with that competitor. According to the Commission, those rebates were specifically calculated to annihilate the business advantage that HP would have obtained by placing AMD chips on some of its products.

"HP was the first large OEM to offer ... a business desktop with an AMD x86 CPU. The launch of that product by HP derived from a demand from US IT managers for an AMD-based desktop from a top tier OEM. According to an HP internal memo, 343 US IT managers had petitioned for an AMD based desktop from a top tier OEM. In addition, AMD-based corporate desktops had already won several big tenders ... HP also published a press release in which it stated that it had received 'inquiries from large companies about Athlon based machines' and that HP 'didn't rule out the possibility that HP might use Hammer too [the next generation of AMD x86 CPUs] in some machines.' ... The press release ... stated that HP considered that AMD's new architecture for PCs and servers ... had 'very interesting performance and cost attributes' and was considered to be 'a disruptive product to Intel'"<sup>73</sup>. "However, despite its plans for a significant deployment of AMD-based corporate desktops, HP ended up shipping only limited amounts of such products, representing less than 5% of the x86 CPUs purchased by HP for that segment"<sup>74</sup>.

In its decision, the Commission also envisages the situation of MSH - another major computer manufacturer. In its review, the Commission notes that that manufacturer had been actively seeking to purchase products from AMD. Such a strategy made a sense given the lower prices charged by that firm. It also sought to produce computers based on non Intel chips to explore the possibilities that some diversity might be requested by markets. For these reasons, it repeatedly negotiated with Intel to see whether that latter firm would accept to maintain its rebates if some chips were bought from AMD. But the demand was not accepted as Intel was requesting exclusivity. For that reason, MSDH did not purchase AMD chips.

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<sup>69</sup>Decision of the Commission, para 931.

<sup>70</sup> Decision of the Commission, para 932. Emphasis added by the author.

<sup>71</sup> Decision of the Commission, para 936. Emphasis added by the author.

<sup>72</sup> Decision of the Commission, para 938. Emphasis added by the author.

<sup>73</sup> Decision of the Commission, para 952.

<sup>74</sup> Decision of the Commission, para 953.

"In MSH's perception, certain AMD-based products constituted a competitive and **attractive alternative** to comparable Intel products, in particular with regard to specific price ranges ... Against that background, MSH has repeatedly strived to negotiate an exception from its exclusivity agreement with Intel for cases in which '*a certain AMD processor is clearly and verifiably more competitive and cheaper*', ... or at least '*for the sales of specific brand products equipped with AMD processors ...*' However, these endeavours were eventually unsuccessful"<sup>75</sup>.

"MSH has '*repeatedly reviewed its purchasing strategy*' and thus reconsidered its exclusive relationship with Intel in view of the resulting lack of product variety and the apparent lack of competitiveness of Intel x86 CPUs in the entry price ranges. As a result, MSH has repeatedly entered into negotiations with AMD '*to explore whether, under terms potentially offered by AMD, terminating the exclusive sales of Intel equipped computers would be commercially sensible for MSH*'"<sup>76</sup>.

"However, it was clear to MSH that a change in its supplier strategy would lead at least to a substantial and disproportionate reduction of total payments from Intel, although there was some uncertainty as regards the amount of payments MSH would lose if it switched even minor parts of its demand to AMD ... Against that background, MSH '*has to date always considered that the commercial offers made by AMD would not be attractive enough to MSH from a commercial point of view*',... and has, in fact, stayed 100% loyal to Intel"<sup>77</sup>.

The last situation reviewed here is that of the computer manufacturer Lenovo. As indicated in the decision, that firm was convinced that the chips provided by AMD had to be purchased. They provided the perfect material for the sub market targeted by that manufacturer; they were cheaper than the corresponding products proposed by Intel; and the manufacturer found it interesting, from a business point of view, to have a certain diversity in its sources of supply - rather than depend on just one supplier. Despite these various reasons, which made a lot of sense from a business point of view, the manufacturer dropped its intention to purchase AMD chips - and remain 100 % Intel during the period considered. ("vérifier).

"Lenovo ... had numerous business reasons to introduce AMD-based notebooks in parallel with its already existing Intel based notebooks. Most importantly, Lenovo experienced growing market demand for AMD x86 CPUs ... Lenovo's intention to introduce AMD-based products was particularly driven by the fact that ... '*AMD has widespread penetration*';... '*AMD Has the highest penetration in the market Lenovo is targeting for growth*'; '*AMD gaining momentum in Notebooks*'; '*AMD Gaining Momentum in the Enterprise; AMD technologies are competitive; Lenovo sales teams are asking for an AMD alternative*'; '*AMD CPU Prices Are Significantly Below Intel; ASP Gap growing due to Intel ASP increasing while AMD ASP is decreasing*'; "*AMD Gaining [geographical area] Market Share EXPECTATIONS: Large CPU cost gap will continue to drive AMD share; [Lenovo notebook product] will increase mobile share*' ... AMD CPUs were also cheaper in segments critical to Lenovo. In some executives' views, '*the combination of price and performance favoured at times AMD over Intel*'"<sup>78</sup>. "In addition to AMD's competitiveness and growing demand for AMD-based notebooks, Lenovo recognised that pursuing a dual-source strategy for notebooks, as it already did for its desktops, would result in more advantageous business relationships and commercial terms with both AMD and Intel, and would also secure supplies in times of shortages"<sup>79</sup>.

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<sup>75</sup> Decision of the Commission, para 997. Emphasis added by the author.

<sup>76</sup> Decision of the Commission, para 998.

<sup>77</sup> Decision of the Commission, para 999.

<sup>78</sup> Decision of the Commission, para 985.

<sup>79</sup> Decision of the Commission, para 986.

## Several considerations

In some instruments analysed here, *choice* is the only consideration mentioned to justify intervention<sup>80</sup>. But this is far from being general. In many cases, it comes with others - and no indication as to which has priority and/or how they possibly articulate.

In *Microsoft*, the Commission mentioned two considerations to support its finding that an abuse had been committed: the restriction of choice opportunities for customers - and the negative effect produced, on *innovation*, by the practices at stake.

"Microsoft's refusal to supply has the consequence of stifling innovation ... and of diminishing consumers' **choices**"<sup>81</sup>.

In *Deutsche Telekom*, the ECJ ruled that, by squeezing competitors out of the market, the dominant German telecom operator had unduly restricted customer choice. In the same ruling, it signalled, however, that low prices are an integral objective to be pursued under competition policy - leaving readers uncertain as to how these considerations would be articulated. (Traditionally, low prices are associated with economies of scale which, in many sectors, require a form of consolidation - thus, possibly, less choice opportunities for customers).

In *Michelin I*, the ECJ stressed that conditional rebates prevent customers from choosing their suppliers freely. But it also explained that such rebates caused customers to be treated unequally<sup>82</sup>. As a result of that system, some dealers were receiving higher rebates than others selling the same number Michelin tires during a given exercise. The ECJ concluded that economic partners were treated unequally, in contravention to Article 102 TFUE. It also ruled that, as competitors were evicted from the tire manufacturing market, the choices opportunities opened to customers on that market were unduly restricted.

"[Michelin] restricts dealers' **freedom of choice** and results in equality of treatment".

To these considerations must be added others mentioned by the Commission in its *Guidance Paper* announcing priorities for the enforcement, in the future, of Article 102 TFUE<sup>83</sup>. As appears from

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<sup>80</sup> E.g., see *France Telecom*, ruling of the Court, para 112: "customers suffer loss as a result of the limitation of choices available to them". *Intel*, decision of the Commission, para 1679: "customers were deprived of a choice which they would have otherwise had". *United Brands*, decision of the Commission, section II, para 3 in fine: "a buyer must be allowed the freedom to decide". *Tetra Pak II*, decision of the Commission, para 109: the conduct does not allow customers any "any freedom to make his own choice" and "the choice should be left to the user". *Deutsche Telekom*, ruling of the Court, para 182: "consumers suffer detriment as a result of the limitation of the choices available to them".

<sup>81</sup> *Microsoft*, decision of the Commission, para 782. Emphasis added by the author.

<sup>82</sup> *Michelin I*, ruling of the Court, para 73.

<sup>83</sup> Communication from the Commission, Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 2009, p. 7. In the literature, see G. Monti, "What Future



that document, the focus will be on the most serious infringements - being defined those causing the highest harm to consumers. For the Commission, consumers may suffer three types of harm as a result of anticompetitive conduct. First, prices may be higher than they ought to be - and would be if the market was effectively competitive. Second, quality may be lower than the one anticipated in a truly competitive environment. Third, choice opportunities may be restricted for consumers - compared to those which would be open to them in the absence infringement.

"[T]he 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"<sup>84</sup>.

In the *Guidance Paper*, the Commission however goes further by stating that, in fact, the infringements causing the highest harm to consumers are those which foreclose competitors. This would appear to indicate that, in the interpretation provided by the Commission, the practices adopted by dominant firms must be considered, in the first instance, in the effect they produce on competitors. Consumers come in the second place, to the extent that intervention would only be warranted, in case of troubles caused to competitors, when a negative effect can be produced on consumers.

"The aim of the Commission's enforcement activity ... 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 »<sup>85</sup>.

That position would seem to remarkably echo a trend pervasive in the jurisprudence, which is to mention, on the one hand, the effect on competitors, or competition, and, on the other hand, the effect on customers, as the main reasons for antitrust authorities to act on the basis of competition policy - without explaining necessarily how they articulate these considerations or whether each of them stands, by itself, as a sufficient justification to support action.

*Effect on competition.*- Hoffmann-La Roche "hampers the **freedom of choice** ... and restricts competition"<sup>86</sup>. *Effect on competitors.*- Hoffmann-La Roche was seeking "to deprive the purchaser of or restrict **his possible choices** ... and to deny other producers access to the market"<sup>87</sup>. Microsoft "deprives the customer of the ability to **choose freely** ... and denies other producers

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for the Effects-Based Approach?, *Journal of European Competition Law and Practice*, 2010, pp. 2-11; A. Witt, "The Commission's Guidance Paper on abusive exclusionary conduct : more radical than it appears?", *European law review*, Vol. 35, 2010, no. 2, pp. 214-235; J. Temple Lang, "Rebates, price discrimination and refusal to contract : the Commission's Guidance Paper on Article 82", *Europarättslig tidskrift*, 2010, nr. 1, pp. 47-78; M. Adam & F. Maier-Rigaud, "The law and economics of Article 82 EC and the Commission Guidance Paper on exclusionary conduct", *Zeitschrift für Wettbewerbsrecht*, 2009, pp. 131-146 ; J. Killick e.a., "A missed opportunity : why the guidance paper does not increase predictability or advance the debate", *Concurrences : revue des droits de la concurrence*, 2009, pp. 23-26.

<sup>84</sup> *Guidance Paper*, para 5. Emphasis added by the author.

<sup>85</sup> *Guidance Paper*, para 19.

<sup>86</sup> *Hoffmann-La Roche*, ruling of the ECJ, para 90. Emphasis added by the author.

<sup>87</sup> *Hoffmann-La Roche*, ruling of the ECJ, para 90. Emphasis added by the author.

access to the market"<sup>88</sup>. Michelin "limits the dealers' **choice** of supplier and makes access to the markets more difficult for competitors"<sup>89</sup>. British Sugar was seeking to "deprive the purchasers ... of, or restrict **their possible choices** ... and furthermore deny other producers ... access to the market" decision by the Commission"<sup>90</sup>.

### **Can these considerations be ranked?**

As the European antitrust approach seems based on various considerations, a question is whether the latter can be prioritized - whether an order of priority can be established among them. In the context of this paper, the issue would be whether and, if so, to what extent, *choice* comes out of case law as being the most important consideration - or whether are considered more important.

An argument supporting a claim of priority could be the sequence of decisions and rulings adopted in the last years and providing greater emphasis on *choice*. The sequence started in 2004, when the Commission adopted its decision in *Microsoft*. In the first part of this paper, we have explained why that decision is important in European competition law - particularly in the history of cases adopted in application of Article 102 TFUE. So, it can only be considered relevant for our discussion that, in such a decision, the Commission placed so much emphasis on the effect produced on customer choice by the practices adopted by the dominant firm.

The year after (2005), that decision was followed by the ruling issued by the ECJ in *France Telecom*. Earlier, we have also submitted that that ruling can be regarded as important as regards the jurisprudence of the Court. In that ruling, the ECJ indeed mentioned *choice* explicitly, and unequivocally, as being the one reason for which, ultimately, the prices charged by the dominant firm were to be regarded as abusive - independent of the issue whether the dominant firm could recoup losses afterwards.

Lately (2009) the Commission adopted its latest decision in application of the provision - a decision which, as we have reported, contains the fullest analysis, to date, on the subject matter. In that decision, the Commission devotes a considerable portion of its analysis to demonstrating that the behaviour adopted by Intel distorted business decisions that customers would have made otherwise.

Another argument suggesting a form of primacy could be the pervasive nature of *choice* as a consideration leading to infringements decisions and rulings. In the sections above, it has stated noticed that *choice* has "always" been there - appearing in founding cases and being mentioned in most recent cases. It was also submitted that, in addition to being "always" there, *choice* was also "everywhere", as it is inherent in the three major steps followed by

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<sup>88</sup> *Microsoft*, decision of the Commission, para 835. Emphasis added by the author.

<sup>89</sup> *Michelin I*, ruling of the ECJ, para 85, quoted in *Michelin II*, ruling of the ECJ, para 110. Emphasis added by the author.

<sup>90</sup> *Napier Brown*, decision of the Commission, para 74. Emphasis added by the author.

the Commission and the European courts when applying Article 10 TFUE.

The pervasive nature of the concept cannot be found with a similar intensity in the other considerations mentioned by the Commission or European courts. For instance, innovation is essential - there is no doubt about it. But it is not at stake, arguably, in all circumstances. Some antitrust cases concern sectors with mature technology, where the room for innovation is limited. Similarly, the importance to treat equally all commercial partners is not established in all cases involving the application of European competition law. In various situations, the obligation to treat equally firms placed in similar circumstances is complied with. Nonetheless, an intervention may be necessary on the basis of competition policy to ensure the persistence of a sufficient degree of choice on markets.

### **Choice vs efficiency**

As far as ranking is concerned, a final argument could be based on the ruling issued in *France Telecom* and already mentioned in this section. As a reminder, the case concerned predatory prices allegedly charged by the French telecom operator. To support its position, the operator was claiming that, when charging these prices, it could not have the perspective of recouping the losses it was then incurring. Entry barriers were indeed low on the market - implying that it would not be able to raise tariffs later as high tariffs would have attracted other firms cutting prices down.

In their reply to that argument, the Commission and the CFI stated that, in their view, the possibility of loss recoupment was not a condition the application of the prohibition - with the Commission going further and, on basis of economic analysis, providing evidence that, contrary to the claim made by the operator, a perspective of loss recoupment existed when the predatory prices were charged.

In the appeal judgment, the ECJ did not go into that economic analysis but rather confirmed, for the following reason, that, possible loss recoupment is not a condition for the prohibition of abuse. Suppose that prices remain low and, thus, losses can not be recouped. As regards prices, that situation would be, economically, to the benefit of customers. But another sort of damage ought to be considered, the Court noticed: the reduction suffered by customers in choice opportunities as a result of the eviction of competitors.

The ruling is important because it appears to "prioritize" *choice* above efficiency. In European competition law, that latter concept is, traditionally, about hard numbers. It is interpreted as implying, under the efficiency doctrine, that law enforcers should not act against practices giving rise to cost savings passed on to customers. As proposed in that doctrine, lower prices should be preferred in all circumstances. Consequently, *prima facie* anticompetitive agreements and *prima facie* abuses of dominant positions should not give rise to proceedings where, if not prosecuted, they would result in low tariffs.

The reference made to *choice* in *France Telecom* appears to alter that order of preference. The ruling suggests that, in that case, action was warranted even though prices may have remained low - as low indeed as those charged by the operator selling at a loss. As the ECJ envisaged, that there was a possibility that the intervention carried out by the Commission may have resulted in higher tariffs on the relevant market. But, for the ECJ, such a possibility should not imply that the operator should be allowed to sell at a loss. When charged by dominant firms, below cost prices may evict competitors - resulting in less choice for customers<sup>91</sup>.

### **"Competition should not be eliminated"**

Efficiency claims are generally raised in the second part of antitrust investigations - when a conduct is deemed *prima facie* anticompetitive and the question arises whether it could be justified<sup>92</sup>. The examination of these efficiencies in the second part of investigations indicate that courts and agencies would be prepared to accept a reduction in the degree of competition existing on the relevant market<sup>93</sup>, thus in the degree of choice available to customers on that market, if that reduction comes with cost savings resulting in price reductions. As Intel claimed during the procedure directed against it, "consumers cannot be worse off if they are buying a product at a lower price".

But that argument raises a systemic difficulty in European competition law. Arguably, objective justifications are admitted under Article 102 TFUE - as they are under Article 101 TFUE and in the context of merger control. However, the Commission and the European courts have proven difficult to convince. To a large extent, the possibility of a justification has remained theoretical<sup>94</sup>.

This is because of what can be called "Part II", "Test 3" involved in the reasoning to be developed when the alleged existence of an objective justification is subject to assessment by antitrust authorities. Under European competition law, firms arguing that their *prima facie* anticompetitive conduct should be accepted must present arguments along the following lines. On the one hand, they must establish that the conduct in question was meant to realize an

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<sup>91</sup> That position adopted by the ECJ has not remained isolated. In *Intel*, the dominant firm was also claiming efficiency gains passed on to customers<sup>91</sup>. But the argument was rejected for lack of evidence. And the Commission echoed *France Telecom* by noting that low prices are not everything that matters for the enforcement of the provision. "Choice" is also important. As the Commission then stated, "[efficiency] in itself does not address the argument that product variety has suffered". *Intel*, decision of the Commission, para 1612.

<sup>92</sup> If it is justified, the conduct is accepted and the firm is not found in infringement.

<sup>93</sup> The conduct was found to be *prima facie* anticompetitive.

<sup>94</sup> Among all instruments adopted in implementation of Article 102 TFUE, only one ruling issued by the ECJ involves a form of an admission that, in the case at issue, the dominant firm should be allowed to resort to the practice which was originally deemed unacceptable by the Commission, and by the CFI.

objective that can be deemed legitimate under European law (Part I)<sup>95</sup>. On the other hand, they must demonstrate that the means<sup>96</sup> used to attain that objective were acceptable too. (Part II). For that part of the exercise, three tests apply. Test 1: the firm must establish that the conduct was of a nature allowing the realisation of the objective at stake. In other words, it was useful to realize that objective. Test 2: the firm must show that no as efficient, less anticompetitive conduct could be used to achieve the same result. Said otherwise: the behaviour was necessary or even indispensable because the firm could not reach the same result using other conduct that would hinder competition to a lesser degree. Test 3: the firm must demonstrate that its conduct would not eliminate competition in a substantial part of the internal market<sup>97</sup>.

In this final test, the question is whether a prima facie anticompetitive conduct can be accepted when it restricts competition to an extent that amounts to elimination or quasi elimination. At that stage, the assessment is on what should be preferred. A promise of lower prices as a result, mainly, of economies of scale coming from an increase in the market share held by the dominant firm? Or the protection of the remaining - but already limited - degree of competition?

In European law, the preference is all clear - it goes to competition. Throughout their decisions, rulings and documents, antitrust authorities European insist, in Europe, that, in their view, the main source of economic efficiency is the pressure exercised by the possibility for customers to "switch" to other suppliers where they are not satisfied with the products or services provided by their current provider. Why would they adopt a different attitude when confronted with dominated markets, where one firm has been able to free itself up from that constraint - and is using the dependence of customers to provide them with products, terms and conditions that they would not accept if they were free to choose their partner(s)?

Ultimately, the dilemma referred to above is between two forms of constraints. One is the constraint resulting from the pressure placed on firms by the possibility for customers to switch to other suppliers where they are not satisfied. The other is the one exercised by dominant firms on customers as, through the adoption of abusive behaviour, they restrict choice opportunities open to customers. In that latter constraint, behaviour deemed abusive creates situations where customers are compelled to accept the products or services provided by the dominant firm when they cannot renounce altogether purchasing on the relevant market.

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<sup>95</sup> That part of the reasoning is not the most difficult for the firm, as it is always possible to pretend that the purpose considered was a value considered as being important in European law. Such values can be identified easily on the basis of case law and legislation.

<sup>96</sup> Conduct being investigated.

<sup>97</sup> These conditions are based on case law. They are expressed explicitly in Article 101(3) TFUE, as regards prima facie anticompetitive agreements that the parties would seek to justify. In European law, the conditions also apply in other contexts - for instance as regards the conditions under which one can admit national measures which, otherwise, would fall under a prohibition to introduce restrictions to the free movement of goods, services, workers and capital.

For European antitrust authorities, efficiency, by nature, cannot come from an environment where competition has ceased, or could cease, to exist. As a market based economy, the European society rests on the idea that results are better when economic activities are carried out in competition - that is, in a context where unsatisfied customers can "switch". Where that *switch* or *choice* mechanism is threatened or eliminated, firms cannot be expected to improve performances, on a constant and systematic basis, in a hope to retain customers and possibly attract more.

That vision involves a distribution of roles, in the economy, between markets and authorities (including judges). In European competition law, the issue whether a situation will lead to more efficiency should not be decided by firms in legal or judiciary proceedings. For the Commission and the European courts, that issue should not be resolved by judges or civil servants. It should be dealt with by the markets themselves - knowing that the latter only function properly, in the European vision, where competition remains on the market<sup>98</sup>.

"Under Community competition law an undistorted competition process constitutes a value in itself as it generates efficiencies and creates a climate conducive to innovation"<sup>99</sup>. "[I]t is not for the Commission to make absolute judgments on the technical performance of the products at stake, or relative judgments on the[ir] comparative performance"<sup>100</sup>. "[Customers] are the best-placed to come to the soundest judgment as regards their supply needs, and the most appropriate products to fulfil those needs".<sup>101</sup>

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<sup>98</sup> The question is then to determine what degree of competition should remain. In the context of Article 102 TFUE, the answer is that the market still contestable, when proceedings are initiated, should remain competitive effectively.

<sup>99</sup> *Microsoft*, decision of the Commission, para 969.

<sup>100</sup> *Intel*, decision of the Commission, para 1698.

<sup>101</sup> *Ibidem*.