

# ON SOME ECONOMIC ASPECTS OF THE EUROPEAN COMPETITION POLICY RHETORIC

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## Abstract

*Economic aspects are things to look for in any competition policy. The present paper focuses on the European competition policy and its two important general frameworks: Articles 101 and 102 of the Treaty for Establishing the European Community. The two articles prohibit various entrepreneurial actions on a market which can affect the consumer welfare and also, the competition between entrepreneurs. The paper attempts to find economic justifications of the European Commission's interventions on the market, which is the authority responsible for enforcing the two articles, and also to deliver an alternative theory of the market in the tradition of the Austrian school of economics. The reason for this purpose is that the economic justifications would be the only to legitimate the competition laws.*

**Keywords:** competition policy, prohibiting agreements, free competition, utility, efficiency, welfare

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While regulations such as antitrust laws have admittedly been judged legal, is such legislation proper in a free society? From a strict natural rights perspective, such regulations and legislation would not be proper. This theory holds that individuals have inalienable rights to life, liberty and property. These rights imply the liberty of any person or persons to enter into any non-coercive trading agreement on any terms mutually acceptable, to produce and trade any factor or good that they own, and to keep any property realized by such free exchange. This perspective would hold that it is right to own and use property; it is right to employ that property in any manner that does not infringe on anyone else's property rights; it is right to trade any or all of that property to anyone else on any terms mutually acceptable; and that it is right to keep and enjoy the fruits of that effort. These activities are right because they can logically be derived from man's natural right to life and life-sustaining action. Consequently, it would be wrong to initiate force against someone else's private

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property; wrong to forcibly interfere with someone else's voluntary property transaction; and wrong to outlaw and regulate certain types of business contracts, organizational structures, or business cooperation. These activities would be wrong since they would infringe upon the natural rights of individuals to do with their own property what they see fit. (Armentano, 1999, pp. 8)

### **Introduction**

It is the role of an economist to describe the functioning of a free market. The entrepreneurial activity is the basic component of a market, because it is the place of birth for every product. But this entrepreneurial activity is based on various needs which the market has and which are represented by the second component, the consumer. EU legislation in economic competition field (primarily articles 101 and 102 of the Treaty for Establishing the European Community<sup>2</sup>) deals with entrepreneurs and consumers. It supposes that the market or the competition and the consumers should be protected against the providential *forces* that entrepreneurs could have and exert. And for this task it uses economic principles and concepts. This research<sup>3</sup> is based on the idea that EU legislation in the field of economic competition doesn't have a coherent and realist theory of the market in general and of the entrepreneurs and consumers in particular. From this perspective, the paper attempts to deliver a theory of the free market based on private property rights and non-aggression, a mark of the Austrian school of economics.

### **The EU great two "pillars" against economic criminality: Articles 101 and 102**

For the beginning we will make a review of article 101 (ex-article 81). This states that are incompatible with the internal market:

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market (TEEC, Title VI, Chapter 1)

The analysis should start with the position of an agreement in the general problem of competition. It is prohibited any agreement or association which may affect competition. The entrepreneur or the economic agent is described in the European competition law as one who supplies products and services

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<sup>2</sup> Available at <http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/12002E.html>

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according to the needs of the consumers on the single European market. (EC website, Antitrust Overview) Similarly, the competition is defined as:

A basic mechanism of the market economy and encourages companies to provide consumers products that consumers want. It encourages innovation, and pushes down prices. (DG Competition, Antitrust Overview)

and,

In order to be effective, competition needs suppliers who are independent of each other, each subject to the competitive pressure exerted by the others. (DG Competition, Antitrust Overview)

Thus, in the European view, competition can be affected if agreements and associations between entrepreneurs, by their decisions, would discourage and not encourage innovation, would increase and not decrease prices, and the suppliers would be dependent and not independent from one another.

It is very important to mention that on a market, either it is a hampered market (regulated by governmental interventions) or a free one (there are no governmental interventions except those in order to protect the property rights of the individuals), competition can always *be affected*. (Rothbard, 2004, pp.637) In contrast with the hampered market (which can take the form of tariff or non-tariff protectionism, imposing arbitrary market quotas for companies etc.), on a free market the competition is a set of entrepreneurial actions, each action resulting from the ability of entrepreneurs to exert their property rights. To assume for example that on a free market, the competition will be affected by a hypothetical monopoly is a *non sequitur*. The meaning of competition is not the existence of an infinite number of entrepreneurs on the market (like the perfect competition model stipulates), but the existence of that number of entrepreneurs who can best satisfy the need of the consumers. (Rothbard, 2004, pp. 718) Thus, on a free market, as long as no entrepreneur, participant at the market, is involved in acts of aggression, but he only uses his property without coercively interference with others property, we can't speak about any "prevention", "restriction" or "distortion" of competition.

In the following we will critically analyze the entrepreneur's actions which are prohibited by Article 101.

(a) *Directly or indirectly fix purchase or selling prices or any other trading conditions*

At the first sight, it seems that the above specifications are totally indifferent to what economic laws prescribe. The prices of the goods on the market is given first by the personal evaluation of the producer (a subjective evaluation based on costs and comparisons with the competition) and, then by consumers evaluation. Thus the entrepreneur fixes the prices of his product, or

generally the price of his property, but the final *test* comes from the consumers. (Hülsmann, 1999) He can be in error, in the sense that the price can be too high, but the autocorrecting function of the market will surely leave him without any buyer. How can be an entrepreneur incompatible with the market when he fixes purchase or selling prices for his goods and *enforces* his preferences in a contract agreed with the buyer? If the market is free or unhampered by government regulations, then the actions prohibited are in no way illegitimate. Against to this opinion, they are basic entrepreneurial functions. The limits of their legitimacy should be described economically more clearly by the authority.

(b) *Limit or control production, markets, technical development, or investment;*

Following the same logic, it is obvious that the entrepreneur cannot be incompatible with a free market, when he uses his property in the forms of “limitation”, “controlling”, “trading”, “technical development” or “investments”. If he appropriated his property non-aggressive, then he is free to dispose of it, no matter what form would take this disposal, as long as he doesn’t aggress someone else property. He can easily limit the trade with his product, for example because of some lost stocks of goods, or mistaken calculus regarding the period of depreciation of some stocks of goods, or any other error. Also he can limit his production, as a protection strategy against some competitors who engaged in dumping.

Concerning its technical abilities, how should we evaluate a situation when an entrepreneur limits its own technical development or even to other competitors? For example, if entrepreneur A and B belong to technical automobile field, and A is much more specialized and profitable than B, should we consider B limited in the sense of coercion, because of the success of A? Again, it is very important how we define the term coercion. From the perspective of free competition theory, as long as A doesn’t aggress in any way the property of B, then the latter is absolutely free to compete and become more qualified in the automobile industry. The injury should be directly demonstrated by the authority, and not indirectly, or the problem is in identifying what the natural barriers are in the technical development of an entrepreneur. The only limit for production, trade, technical development, investments and after all profit, is the consumer with his preferences. The consumer agrees by his purchases with the natural leader on the market. (Reisman, 1990, pp. 4)

*(c) Share markets or sources of supply*

The essential form of developing and perpetuate the competition and the property of the competitors is cooperation or *in extenso* the division of labor. (Mises, 1998, pp. 159) This classical principle of economy must be applied with the same stringency not only to individuals but also to associations or firms. Thus it becomes quite clear that on a free market, sharing markets and sources of supply may mean a strategy adapted to the will of the consumers. If the entrepreneurs discover that they can better serve the consumers sharing the markets and sources of supply then it is nothing wrong with that. The position of the authority must be based on a precise evaluation of the will of consumers, although we believe that the will has been already expressed by buying and stimulating the entrepreneurs in their strategy.

*(d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*

If we consequently apply this disposition we will be trapped in an inescapable error. Inequality is not only a feature of inter-personal economic actions (like for example exchange of goods) but also of social interaction between individuals. (Mises, 1998, pp.731) For example, the fact that we adopt different ways to speak with our parents, friends and strangers should make this statement clear.

In the entrepreneurial or economic field, these unequal conditions which could be named “discrimination” should be absolutely normal actions for any rational entrepreneur. From the perspective of free competition theory, discrimination or disadvantaging other trading parties remains only a good joke in the absence of demonstrated injury. Having exclusive property rights on their own property and limiting the access on it for parties who don’t meet the conditions imposed by the owners may represent discrimination, but not an aggression. If the authorities prohibit these actions, it must demonstrate an effective aggression on property rights. After all, there is no guaranteed right such as equal treatment to everybody on the market.

For example if I appropriated a property on contractual agreement which I decide to use for opening a golf club, with the observation that people with brown hair will not be accepted, can we make a case of aggression against me? It is no doubt discrimination, but such a concept has no economic relevance. It doesn’t have a place in economic theory. It can be a moral or ethical issue, but not an economic one. (Rothbard, 2004, pp. 713) According to the system of private property (absolutely compatible with free competition theory) non-discrimination can’t be a legitimate pretention.

The word discrimination means nothing other than to choose between options in an environment of scarcity... Without discrimination, there is no economizing taking place. It is chaos. (Block, 2010, pp. vii)

And if someone would engage in finding the welfare losses for the discriminated people, we will argue that this task implies objective evaluation regarding the utility of brown heads when consuming golf games. One of the main contributions of the marginalist revolution is to have been established the subjective theory of value and the subjective nature of utility, which is nothing else but a value. (Mises, 2002, pp. xiii) According to this theory, utility is a purely subjective ordinal concept which can't be measured or aggregated.

*(e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

If *ex post* (which means after the contract was signed and honored), one of the parties condemns a pretention of the other party, although it was a contractual pretention, the condemnation becomes irrelevant because the contract should be sacrosanct. After the contract was signed (fact which implies a pre-agreement of both parties) any condemnation is irrelevant and puts the claimant in a self contradictory position, because his telling is against the acting (the contract).

If *ex ante* the contract is tied by some supplementary obligations it's probable that these obligations will be part of the contract. If not, it can be viewed as a simple proposal. On a free market there should exist the possibility to accept or refuse a proposal. But the authority cannot decide, and no one except the entrepreneur can decide, if those supplementary obligations have or have no connection with the subject of the contracts.

In conclusion, to tie the conclusion of contracts of the acceptance by the other parties of supplementary obligations, and moreover to refuse to deal with parties who don't (voluntary) comply with this, is a perfect rational attitude in the entrepreneurial field full of risks and uncertainty.

At point 3, the legislator offers the key for understanding the statements of disposition (1). It decrees that all these statements "may be declared inapplicable in case of":

- *any agreement or category of agreements between undertakings,*
- *any decision or category of decisions by associations of undertakings,*
- *any concerted practice or category of concerted practices,*

*which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:*

- (a) *impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
- (b) *Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

Thus entrepreneurs can be absolved or not even blamed for their actions. We understand that by this, the legislator makes its own provisions. Practically it describes the legal framework, the *space of the game* for the entrepreneurs, letting to the courts and national authorities from European Union to set the clear limits of them. Here we insist on the need of economic reasons when regulating the market. We believe that with the creating of more and more legal limits for the entrepreneurs and the avoidance of economic explanations, the market, either the free market or the single European market could be transformed in a place where non-aggressive actions will be imprisoned, following the model of USA. (Anderson, 2006)

Regarding article 102 (ex-article 82) we find the following disposition:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. (TEEC, Article 102)

After this disposition, the legislator gives some examples of abusive practices, which are four and similar with points a, b, c, d, and e of article 101 of TEEC.

Article 102 doesn't raise different questions than those already discussed in Article 101. It repeats the incompatible actions with the single European market, but without any economic explanations concerning neither the actions nor the single market. Therefore, we need economic arguments for justifying or incriminating entrepreneur's actions on the market. And this necessity is doubled by the Chief Economist Bureau from DG, which has exactly this role: to explain the economics behind the policies. (Muşetescu, 2006)

### **European Advisory Group for Competition Policy (EAGCP) or how to understand correctly Article 102**

In 2005 a group of professors belonging to different universities formed what is called the European Group for Competition Policy. They elaborated an over 50 pages report, named *An economic approach to article 82* (Article 102). According to EAGCP the report has the role to explain by using economic arguments, all the European Commission (EC) actions made in the spirit of Article 102. As can be seen from the report, the EAGCP proposes an analysis

toward effects of the competition problem, more exactly the anticompetitive effects generated by various entrepreneurial practices. The same report takes into consideration the efficiency of the competition policy, because as they say, the efficiency should be reflected in consumer's welfare. In other words, according to EAGCP, Article 102 is describing a medium for creating an efficient policy, because after all:

It is not a question of having more or less intervention, but of more effective intervention. The goal is to focus on the important competitive harms, while preserving and encouraging efficiency (EAGCP, 2005, pp.4)

If we are to judge this statement using free competition theory, then more efficient intervention is also an intervention. And if efficiency means a more strictly control of the market, then this means that we deal with a *de facto* improvement of intervention in the field of economic competition.

The EAGCP report is oriented toward two essential areas of competition policy: the consumers or consumer welfare, and the necessity of a non-authoritarian approach. On one hand, it is communicated the importance of the consumer welfare (by monitoring the present entrepreneurial practices on the market and comparing them with those from the past) and on the other hand, the necessity that this monitoring or control to be non-authoritarian. But for the accomplishment of these objectives it must first be defined the possible injury that an entrepreneur can make. We must have a theory of injury but also a theory of allocating resources on the market. (Armentano, 1999, pp. 14) The authority must base its decisions on certain economic aspects concerning the entrepreneurial practices on the market, before it can sanction entrepreneurs. A very vague explanation is given by the report:

If a particular type of conduct permits a company to succeed and to displace its competitors in the market, by what standard should the competition authority assess whether the conduct in question is detrimental to competition or whether the conduct in question is legitimate and its prohibition by the authority would be detrimental to competition? Ultimately, the assessment of competitive harm must be based on an assessment of how competition in the particular market works and what the practice in question means for market participants. (EAGCP, 2005, pp. 8)

But there are no economic laws to find only looking at the history or just comparing different markets. Theory precedes history, and it is with theory that we judge history. Before make judgments about competition or entrepreneurs acting on a market we must have a theory of how to look at these specific problems. It is like investigating a criminal for murder, but knowing the universal fact that murder is a bad thing. These statements may

seem as tautologies for some critiques but it certainly cannot hide the fundamental problem of the present legislation in the field of competition: the absence of a coherent theory of justice in allocating resources for satisfying consumer needs.

### **Authority versus the market**

The fundamental question is if authority should intervene in any way on the market. If X drives out the competition by simply using his own factors of production and intellectual property, can we impute anything to him? Can be the injury demonstrated? Is there another way for entrepreneurs to compete, other than disposing freely of their property? Market participants can eliminate each other without injuring somehow the market, or the competition. Using the neoclassical concept of equilibrium we could argue that every acquisition or fusion is a new step towards a new equilibrium, the equilibrium of that specific moment or context.

*Inter alia* we can also raise the question of an existing authority with powers in regulating competition. Why it is seemed as essential the existence of such an authority? Although the critiques or those who favor EC intervention on grounds of consumer welfare will disagree, we have to mention that in a free market the only *authority* free to decide if the entrepreneurs have good skills in satisfying the demand, is the consumer. If the consumer is not satisfied, he can substitute or boycott his suppliers, thus causing them losses. Only consumers and no one else can impose a *sanction* to the entrepreneur who is unfortunately using his capital and property not according to their most urgent needs. In a sort of way, we could say that this is the most profitable sanction because it can bring more entrepreneurial efficiency thus creating a competitive market. Entrepreneurs are *forced* to use their resources rational, and this condition is available also for the so called imperfections of the market (e.g. monopoly, oligopoly, and cartel). Even if we suppose that an *imperfect* competitor could develop (although there are no empirical and much less theoretical proofs to maintain this) it is a non-economic statement to say it can be absolved by the constraints naturally imposed by the consumers and the market. The rational allocation of the factors of production is a condition for being competitive, and sometimes to subsist on a market, even for an *imperfect* competitor. If we suppose that he can abuse by his position, we have to also suppose that is indifferent to the problem of rarity. Could this type of entrepreneurial conduct be a competitive and a long-living one?

In conclusion, problems like bad allocation of resources or consumer welfare is not the task of an authority, which by its definition cannot know the

preferences of the entrepreneurs in the allocation problem or those of consumers. Even if we accept the existence of competition authority, a more fundamental problem remains unsolved: what are the criteria used to identify and sanction a specific anticompetitive practice on the market? The efficiency criterion cannot be a universal one. Also, the utilitarian approach which suggests that it can step over the methodological impossibility to aggregate the utility (e.g. social utility or social welfare) has failed to offer an economic explanation.

### Conclusions

The state cannot be interested in the consumer welfare problem. This is a virtue of the free market. The state imposes restrictions to the free market, thus infringing on the consumer welfare. What are the fundamental implications of competition authority and its actions (enforcing competition policy) for the consumer?

In the first place, even if we find the consumer as basic element in the competition policy, it is important to mention that no one asked for that. Because the consumer is the supposed victim of the entrepreneurs, he should be able to react in a way, and we detailed his options. If the consumer doesn't react, then how can someone argue that he is affected by the entrepreneurial movements on the market? Even if he reacts, an important question arises: how do we know that his complaining calls for universal and immutable rights and duties of the entrepreneur? Thus, it is not sufficient for the competition policy just to mention the importance of the consumer, but also what are his needs, because we believe we cannot base a law on whatever needs this has. The blind intervention in the name of the consumer can have negative results. For example, in the case of Microsoft vs. EC, we could easily state that the decision of EC to impose penalties (over 1.6 billion Euros) to Microsoft and force the company to sell Windows Media Player (WMP) as a separate product from Windows, practically forced the consumers to pay more for WMP, although it could be delivered cheaper tied by the Windows. If on the other hand the intervention is supported by arguments concerning the necessity<sup>4</sup> to have more entrepreneurs on the market, the question is how many? Also, who decides the optimum number of entrepreneurs on the market?

The questions raised in this paper can be summed up to two. First is the necessity of having an economic explanation for the existence of an authority in

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<sup>4</sup> Which most often appears in cases of monopoly where it is considered that the monopolist refuses to supply at his real capacities and raises the price of the restricted output, and also that *numerous participants* at the market would guarantee a better price and *plenty* of products

the economic competition field, and the second, having agreed with its existence, revealing the economic laws and theories which motivates its intervention on the market. Neither the first problem nor the second are sufficiently discussed in the positions and actions taken up to now by the EC. We believe it is extremely important to base the public policy of competition on strong theoretical backgrounds which have realistic premises. A good proposal for the leaders who designate the public policy would be to identify the existent alternative theories of competition.

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