EVOLUTIONARY TRENDS OF EU COMPETITION LAW – CONVERGENCE AND DIVERGENCE WITH US ANTITRUST LAW IN A CONTEXT OF ECONOMIC CRISIS

Luís Silva Morais[1]

Abstract: *This article covers the recent evolution of EU competition Law, identifying and briefly analysing its main evolutionary trends over the recent years. It emphasizes the main points of convergence and of remaining divergence with US antitrust Law. The focus is put in the field of unilateral practices by dominant undertakings and in some aspects of merger control (particularly conglomerate or vertical mergers). It also reviews possible reasons for such divergence and analyses possible recent shifts in the US that may bring the treatment of unilateral practices closer to the EU approach. Finally, it briefly refers the different EU and US approaches on the control of public intervention in the context of the current economic crisis.*

1 *Law PhD (Doctor in Law) – Lisbon Law University (FDL); Professor at Lisbon Law University (FDL); Vice-President of the Institute of Economic Financial and Tax Law of Lisbon Law University (IDEFF): Attorney-at-Law.*

1. GENERAL OVERVIEW OF THE EVOLUTIONARY TRENDS OF EU COMPETITION LAW

1.1. Main Evolutionary Trends of EU Competition Law

1.1.1. The purpose of this Article[2] is to briefly analyse the evolution and prospects of evolution of EU competition law and policy. In that process we also purport to identify possible points of *convergence* with US competition law. Conversely, we shall try to assess the possible *limits of that convergence*.

Our starting point lies in establishing a global and systematic view about the current status of EU competition law '*vis a a vis*' US competition law. On that basis, we think it may be useful to apply in this field a thought often put forward in the field of political and diplomatic relations between the EU and the US: It is perhaps time to, on the one hand, identify and consolidate points of *convergence* in the areas of competition law and policy and, on the other hand, to 'agree' in some specific areas of disagreement – or, to put it mildly, of *lack of convergence* – between the two sides of the Atlantic. In fact, while the *convergence* process is largely desirable on the whole, it certainly has its limits, that should be acknowledged as such.

1.1.2. Taking into consideration this general *leit motif* for our analysis, let us start by identifying what we consider as the major evolutionary trends of EU competition law and policy in the latest years.

On the whole, we think that *as regards the recent and prospective evolution of EU competition law, four major trends may be identified* (which we shall try to describe, justify and put into context *infra*, in the course of our analysis).

Some of these trends, particularly the first and second ones, may also be considered in the context of the evolution of national competition Laws of the EU Member States (including, naturally Portuguese Law), bearing in mind the process of *soft harmonization* that has been consistently taking place between EU competition Law and such national competition Laws.[3]

- **(i)** *Firstly, a shift in the teleological priorities of EU competition law and policy*;

2 *This Article was initially based on a presentation in a Competition Panel of the International Conference on Legal and Economic Relationship between the US and the EU, put together by IDEFF in June 2008 (of which the author was co-organizer). The text also benefited from subsequent presentations at several Workshops and was substantially reviewed and updated until December 10, 2009.*

3 On the idea of *Soft Harmonization* that has been taking place between EU competition Law and EU Members national competition Laws, see, *inter alia*, Drahos (2001).

- **(ii)** *Secondly, and strictly connected with the former aspect, a profound change of the legal methodology of EU competition law*;
- **(iii)** *Thirdly, a significant change of the institutional model or system of application of EU competition law, initiated with the decentralisation process*[4] *and, somehow, continued, with the current initiatives towards the development of processes of private enforcement of EU competition law*;
- **(iv)** *Fourthly, a liberalization and re-regulation process of former state monopolies under article 86 of the EC Treaty [article 106 of the Treaty on the Functioning of the European Union (TFEU)],*[5] *which has allowed the EU to expand its regulatory powers and has even contributed in the field of some utilities to the establishment of a broad new area of regulatory 'competition' law, that does not merely complement competition law but, in some domains, may even represent a rival body of law or, at least, a regulatory body of law whose boundaries and interplay are sometimes difficult to determine*.[6]

Beside those aspects, attention should also be given **(v)** to the *possible differing answers – in terms of competition policy – to the international economic crisis*, which erupted in 2007 and had its fullest expression in the last quarter of 2008 and in the course of 2009 (following the bankruptcy of Lehman Brothers, in October 2008).[7]

1.2. Key Aspects Regarding New Teleological Priorities and Changes of Legal Methodology of EU Competition Law – Critical Issues in Connection with Unilateral Practices

1.2.1. There is no space in the context of this analysis to cover extensively or even equally these points. We shall briefly review them and, as regards each of

4 On the *decentralization* process regarding the enforcement of EC competition law and started with the "*White Book*" of 1999, see, *inter alia*, C.D. Ehlermann (2005).

5 *Considering that the Treaty of Lisbon is to be applied from 1 December 2009, we shall recurrently refer to the relevant competition provisions according to the articles of the Treaty on the Functioning of the European Union (TFEU), since the former EC Treaty competitions provisions were thus renumbered. In various passages in which we are putting into an historic context of evolution the relevant competition provisions, we may refer to the former EC Treaty provisions as well, under an abbreviated form, 'EC', for instance article 81 EC meaning article 81 of the EC Treaty (mentioning then the correspondence to the current provisions of the TFEU, as resulting from the Treaty of Lisbon).*

6 In general, about these *liberalization* processes, and the subsequent regulatory processes, which have essentially started with the telecommunications sector, see, *inter alia*, Jordana & Levi-Faur (2004).

7 About the international economic crisis, see, in general, Blundell-Wignall (2008); Neven (2008).

those topics [*supra*, **1.1.2.**, **(i)** to **(iv)**], we shall specially emphasise *convergence* or *divergence* aspects between EU and US competition law, as the case may be.

In that process, we shall also endeavour to identify some apparently paradoxical aspects, arising from elements of *divergence* between the European Union and the US.

Considering, in first place, the shift in the main goals of EU competition law and policy [*supra*, **1.1.2.**, **(i)**], it should be referred that such process has been largely influenced by the consolidation of the internal market which, in turn, has determined that the formerly overriding goal of promoting economic integration through competition law has no longer the same importance.[8] On the other hand, we clearly have to acknowledge here a significant influence of the US Chicago School of Economics (although somehow mitigated or adjusted by the rise of the post-Chicago thinking in economics[9]).

That influence has gradually determined that *economic efficiency*, especially in the form of *allocative economic efficiency* and *consumer welfare* is a key factor in guiding the interpretation and enforcement of competition law. This aspect should be taken into consideration with the proviso that it is not always clear – even in the in the US antitrust environment – what actually represents, in substantive terms, the *efficiency standard* (meaning, *eg*., the realities which have been termed has *total welfare* or, alternatively, *consumer welfare*[10]).

Actually, recent analysis – such as the critical review of the Chicago School carried out by Fox (2008) in the context of comprehensive studies of the evolution of US antitrust law and policy after two republican administrations with a clear conservative focus and agenda (coordinated by Pitofsky) -[11] correctly emphasize that there are several economic definitions of *efficiency* as a driving force of the interpretation and enforcement of the very general rules and principles of competition Law.

Furthermore, Fox (2008) also points out that the more conservative approaches based on a stricter reading of Chicago School assumptions often

8 On this topic see Morais, (2010, forthcoming) (especially Part IV).

9 We refer to what is largely known as 'Post-Chicago Economics' in terms of competition theory. See on this topic Brodley, (1995: 683). For a comprehensive analysis of some of the excesses generated by the Chicago School in the field of antitrust, see, in general, Pitofsky (Editor), (2008).

10 On the discussion of the welfare of efficiency standard for the purposes of competition law, see, *inter alia*, Neven & Röller (2000); Motta (2004).

11 See the analysis of Fox (2008: 75) comprehended in the collective work Edited by Pitofsky (aforementioned).

lead to oversimplifying the evaluation of market conduct and market structures (leading to negative results in numerous cases).

In particular, the economists debate the possible differences between a *consumer welfare standard* and a *total welfare standard*, with a considerable group of economists – and also of *interdisciplinary legal and economic analysis* – showing a marked preference for the idea of *total welfare*[12] (even if that implies some minimum requirements in terms of safeguarding *certain levels of consumer welfare*, frequently envisaged as the goal of *maximizing consumer surplus over time*, in dynamic terms; however, in that case, the need to take into account a rather diffuse process of distribution of benefits to consumers over the medium term, in the form of innovation and even of income derived by citizens from firms, will somehow blur the dividing line between consumer and total surplus).[13]

In connection with the aforementioned *shift of teleological priorities*, we have witnessed a fundamental *change in the legal methodology of EU competition law* [*supra*, **1.1.2.**, **(ii)**]. It is a change leading to an increasing importance of *economics* in competition law analysis and decisions. That gradual and consistent incorporation of economic analysis and criteria in the process of interpretation and enforcement of EU competition law has been rather loosely referred as the development of an *effects based analysis*.[14]

In short, it corresponds to an analytical process which intrinsically combines legal methodology parameters with economic criteria or factors, while placing a major emphasis on assessment of *market power* of undertakings (or factors directly related with such market power).[15]

To be more precise, the overriding factor is the critical assessment of what should be called the *long lasting market power* on the part of certain undertakings. This has led, particularly in the field of anticompetitive cooperation – meaning here the discipline of article 101 of the TFUE (article 81 EC) or the *corresponding rules in terms of national competition law of the EU Member States* -[16] to a decisive emphasis on the control of horizontal agree-

12 On these issues, see, *inter alia*, Geradin, Elhauge, (2007). See also Morais (quoted), especially Part IV.

13 On this point, see, *inter alia*, Motta, (quoted: 21).

14 About this rather loose concept see Ridyard, (2009).

15 On the overriding importance of market power, see Azcuenaga (1992: 935).

16 In terms of Portuguese competition law, we refer here to articles 4 and 5 of Law n.º 18/2003, of 11 June. Taking into consideration the intense process of soft harmonization of national competition Laws,

ments (especially cartels[17]) and to the replacement of the old legalistic Block Exemption Regulations with new generations of Block Exemption Regulations[18] and Guidelines, which embody a more economic approach.

1.2.2. However, we can argue that this new *effects based* and economic approach has been largely developed in the field of 101 of the TFUE (article 81 EC – anticompetitive cooperation between undertakings) but not as much – at least comparatively – in the field of article 102 of the TFUE (article 82 EC – abuse of dominant position).

In fact, as regards abuse of dominant position and (anticompetitive) unilateral conduct on the part of undertakings, we still have a major gap – a major difference – with the US framework of monopolisation.[19]

Also, while it is to be reckoned that there is growing convergence in the analysis of *horizontal effects of mergers* between EU and US competition laws and policies, major, if not fundamental, differences seem to remain in the fields of assessment of *vertical* and *conglomerate effects* of mergers. There are perhaps three cases in the last fifteen years which, somehow, epitomise or illustrate possible divergences in the these fields of *unilateral conduct of undertakings* and *merger control* in the European Union and the US.

We refer to the **(a)** "Boeing-McDonnell Douglas" merger case,[20] to the **(b)** "GE/Honeywell" merger case[21] and to the **(c)** "Microsoft" case (in the field of

---

comprehending Portuguese competition Law, the aspects assessed above are to be applied *mutatis mutandis* to the relevant provisions of Portuguese competition Law.

17 On the concept of cartel and on the priority which has been given to its antitrust scrutiny, see, in general, Siragusa & Rizza (2007).

18 A process which has started with the Block-Exemption Regulation covering vertical restrictions (EC Regulation 2790/1999 – OJ L336 of 29 December 1999). The Commission has in the meantime initiated a first review of this first new generation block-exemption Regulation and the associated Guidelines in July 2009.

19 It should be reckoned from the start that *there are important differences between the EC abuse of dominant position regime and the US monopolization regime*. However, beyond such normative differences, a significant part of the current divergence between the US regime of monopolization and the EU regime of abuse of dominant position results from different parameters of interpretation and enforcement. On the US regime of *monopolization*, see, in general, Fox (2007: 329).

20 See "*Boeing-McDonnell Douglas*" merger case as decided in the US and the EU. In the US – Explanatory Letter of July 1, 1997, of the FTC, deciding not to challenge the merger [Chairman PITOFSKY and Commissioners JANET STEIGER, ROSCOE STARK III, CHRISTINE VARNEY, 5 Trade Reg. Rep. (CCH), par 24,295, at 24, 123 (July 1, 1997)]. In the EU see Commission Decision IV/M.877 of 30 July, 1997.

21 See "*GE/Honeywell*" merger case as decided in the US and the EU. In the EU see Commission Decision "*GE/Honeywell*" (COMP/M 2220) and CFI/GC Judgment of December 2005 (T-210/01).

abuse of dominant position in the EU and of monopolization in the US).[22] Also, although on a somehow different stand, we could refer as well to the more recent "Intel" case.[23]

1.2.3. Although we shall produce – *infra*, **1.3.**, some very succinct comments on those important precedents, we do not purport to critically analyse in great detail those cases. Anticipating and summarising some of the most important issues arising from such cases, we may argue that the most significant dividing line between EU Competition law and policy and US antitrust law and policy lies, nowadays, in the area of unilateral conduct of dominant firms.

The differing approaches between the two sides of the Atlantic in this particular domain are also very starkly illustrated in two recent Court cases in the US and European Union (again very briefly mentioned)

In the US, the Supreme Court in the "Trinko" case[24] emphasised that the mere possession of monopoly power and the concomitant charging of monopoly prices is not an unlawful practice and, on the contrary, it may be deemed as an important, if not decisive, element of the free market system. The US Supreme Court went on to consider the existence of a particular risk of undue condemnations with respect to unilateral conduct, thus affecting undertakings with market power that in numerous situations may be merely competing on the merits, while taking advantage of such market power (which may also be potentially advantageous for consumers).[25]

Also, in the more recent "linkLine" case,[26] the US Supreme Court, in the context of alleged price-squeeze practices,[27] considered again problematic

22 See "*Microsoft*" cases as decided in the US and the EU. In the US see, in particular, *US v. Microsoft Corp, 97 F Supp 2d 59 (D DC 2000)*". In the EU see Commission Decision of March 24, 2004 (COMP/C-3/37.792) and CFI/GC Judgment of September 17, 2007 (case T-201/04).

23 See "*Intel*" case – Commission Decision of 13 May 2009 – COMP/37.990.

24 See "*Trinko*" case of the US Supreme Court – "*Trinko, 540 US. at 414*". About this case, Schoen (2005: 1625); Lao; (2005: 171).

25 On this analytical perspective developed by the US Supreme Court in the aforementioned "*Trinko*" case, see again Schoen (already quoted).

26 See this precedent of the US Supreme Court – "*Pacific Bell Telephone Co v linkLine Communications Inc., 555 US, slip op (February 25, 2009)*"; see also "*linkLine Communications, Inc. v. California, 503 F.3d 876 (9th Cir. 2007)*".

27 See, in general, about the anticompetitive practices of *price-squeeze* developed by undertaking with high market power – or dominant position in terms of EC competition Law – which there is no room here to characterise, Mosso et al. (2007: 313).

the potential liability of undertakings with market power, on account of the excessive risks of qualifying as anticompetitive practices several forms of unilateral conduct that correspond to a legitimate use of market power (with price benefits for consumers). Particularly sensitive and objectionable in the Supreme Court's view would be the fact that such undertakings with market power would have no safe harbour for their pricing practices even if they were seeking to avoid price-squeeze antitrust liability ["(…) most troubling, firms that seek to avoid price-squeeze liability will have no safe harbour for their pricing practices (…)"[28]].

Differently, the European Court of First Instance (CFI) [currently the General Court (GC), after 1 December 2009 with the Treaty of Lisbon],[29] in the aforementioned "Microsoft" case [*supra*, **1.2.1.**, **(c)**], emphasised that dominant undertakings have a special responsibility,[30]irrespective of the causes of that market position. That special responsibility carries with it particular duties of refraining from any conduct that is prone, due to the large market power of the undertaking at stake, to impairing and distorting competition in the common market.

Understandably, in the context described above the CFI (GC) "Microsoft" Judgment of September 2007 met with a considerable criticism on the part of an important sector of the US doctrine and even of the US public antitrust enforcers.[31] This was followed by the adoption of an important Report by the US Antitrust Division of the Department of Justice (DOJ) on unilateral conduct under Section 2 of the "Sherman Act". This Report arose from previous Joint DOJ-Federal Trade Commission (FTC) Hearings on Section 2. We refer here to the DOJ Report "Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act" (September 2008).[32]

---

28 See – "*linkLine Communications Ink*", slip op. at 13. This risk of undue condemnation with respect to the unilateral conduct was also especially emphasized by the Supreme Court in the "*Trinko*" case.

29 *The 'Court of First Instance' (CFI) created in 1989 corresponds from 1 December 2009 onwards – with the application of the Treaty of Lisbon – to the current 'General Court' (GC). We shall recurrently use the two denominations, referring in principle on a cumulative basis to the former denomination (CFI) as regards jurisprudence previous to 1 December 2009.*

30 About the idea of a *special responsibility* on the part of dominant undertakings, particularly in case of overwhelming market power on the part of certain undertakings see again Faull, Nikpay, (Editors),(2007).

31 On that rather critical reception of the CFI/GC Microsoft decision of September 2007, see Hawk (Editor) (2008: 613).

32 On this DOJ Report "*Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act*" (September 2008), see, *inter alia*, Oliver (2009: 27).

Significantly, even considering what seemed at the time prevailing views towards less intervention on the part of public antitrust (federal) agencies in the field of unilateral conduct, this September 2008 Report proved controversial. In fact, the FTC did not follow the DOJ in the adoption of such Report, which established a series of safe harbours concerning specific circumstances and situations that would allow the pursuit of certain conducts by undertakings with monopoly power without the risk of being considered anticompetitive by the DOJ (under Section 2 of the Sherman Act). In short, the guiding principles or parameters endorsed in the Report, for the purposes of antitrust evaluation of unilateral conduct carried out by undertakings with monopoly power, somehow discouraged a more active enforcement of Section 2 of the Sherman Act towards those undertakings. It adopted a very conservative view about the actual possibilities of distinguishing beneficial competitive conduct by such undertakings from harmful exclusionary or predatory conduct by the same undertakings.[33]

The emphasis and particular concern in avoiding "overly broad prohibitions that suppress legitimate competition", on the part of undertakings with monopoly power, somehow led to a form of benign neglect in terms of Section 2 enforcement.

If, on the one hand, a significant part of the forms of exercising market power by undertakings with monopoly power – that would be qualified '*mutatis mutandis*' as dominant undertakings in the field of EU competition Law – should be regarded as competition on the merits and, on the other hand, the distinction between such beneficial competitive conduct from harmful exclusionary or predatory conduct proved especially difficult, then, on balance, only a reduced number of cases should be prosecuted as anticompetitive.

Beside that, it may be argued that this conservative view about either the justification or the feasibility of negative antitrust evaluations of conduct and market situations regarding undertakings with monopoly power also led indirectly to a more permissive orientation as regards the potential consequences of the creation or reinforcement of dominant positions for the purposes of merger control. This, in turn, may explain the more significant cases of transatlantic divergence that we identify and very succinctly comment in

33 See the aforementioned DOJ Report (September 2008), esp its *Executive Summary* and the basic principles articulated in Chapter 1 of the Report.

this article, both in the field of unilateral conduct and merger control or concentration control, if we use the EU legal terminology (see the cases briefly referred and discussed *infra*, **1.3.**).

It is, therefore, striking that less then a year after the adoption of the DOJ Report "Competition and Monopoly: Single Firm Conduct" the new Assistant Attorney General in charge of the DOJ Antitrust Division, under President OBAMA administration, CHRISTINE VARNEY, announced in May 2009 the withdrawal of such Report, stating that it would no longer be DOJ antitrust policy.[34] More remarkably still, such position was accompanied by the express statement of "aggressively pursuing cases where monopolists try to use their dominance in the market place to stifle competition and harm consumers". It is a global shift in the policy and forms of antitrust scrutiny to be adopted towards the unilateral conduct of undertakings with monopoly power, pursuing an overall purpose of a more vigorous enforcement of Section 2 of the Sherman Act to those undertakings (while recognising and not underestimating the particular hermeneutical and enforcement challenges that such a policy implies).

Theoretically, this pronounced shift in US antitrust enforcement policies may represent a rather unexpected form of convergence of US competition Law with EU competition law, which has maintained a more vigorous scrutiny of abusive behaviour by dominant undertakings (unexpected in the sense that in the recent past most of the convergence process had implied some form of assimilation of US principles of patterns by EU competition law). However, it remains to be seen how the US Courts will react to the new orientation by the DOJ (particularly if we take into consideration the more conservative precedents that the US Supreme Court has produced in the field of Section 2 enforcement).

Conversely, on the EU side the adoption, in December 2008, of the European Commission's "Guidelines" referring to the "application of Article 82 of the EU Treaty to abusive exclusionary conduct by dominant undertakings"[35] – following a complex, not too consensual, and long process of debate after

34 See the DOJ Press Release of May 11 2009 – *"Justice Department Withdraws Report on Antitrust Monopoly Law"*.

35 We refer here to the "Guidelines on the *application of Article 82 of the EU Treaty to abusive exclusionary conduct by dominant undertakings"* – C (2009) 864 final (9 February 2009).

the "Discussion Paper" presented by the Commission in December 2005[36] – seems '*prima facie*' to have represented a major step in the direction of an economic and effects based approach to exclusionary conduct.

However, when closely and extensively analysed the EU 2008 "Guidelines" have serious shortcomings and areas of potential uncertainty (which do not contribute to make clear what will be the medium term impact of the "Guidelines"). Also, the recent case law of the GC (CFI) in the field of article 102 TFUE (article 82 EC) does not seem to imply so far that the Court is ready to accept a more flexible view or mitigated conception about the special responsibility of the dominant undertakings[37] [which, beside the undisputed normative differences between Section 2 of the Sherman Act and article 102 TFUE (article 82 EC), contributed to a stricter enforcement of this provision in comparison with US antitrust law].

In this context, we seem to be confronted in the past eighteen months with a double movement from both sides of Atlantic, which could be construed as a shift to a somehow unexpected degree convergence between US and EU competition Law in the field of unilateral practices by undertakings holding high market power (monopolists or dominant undertakings on the basis of the legal terminology to be applied in the US and the EU).

On the one hand, EU Competition Law seems to be shifting to a more economic and effects based approach in this field under an undeniable influence of US Law (which is epitomised by the adoption of the December 2008 "Guidelines"). On the other hand, US antitrust Law seems to be leaving behind the more extreme and conservative rigours of the 2008 DOJ Report "Competition and Monopoly: Single Firm Conduct", which is being repelled by the new Assistant Attorney General of the DOJ Antitrust Division, CHRISTINE VARNEY (as per the aforementioned May 2009 announcement). This latter movement may, in turn, be construed as having been, to some extent, influenced by the EU more vigorous scrutiny of unilateral conduct by dominant undertakings.

It is still premature, nevertheless, to take as granted such process of convergence and its possible extension. The EU move towards a more effects

36 See "*EC Commission DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*" (Brussels, December 2005).

37 About the difficulty of reconciling a more flexibile view of article 102 of the TFEU (article 82 EC) with the relevant jurisprudence in this field, see, *inter alia*, Gerber (2008).

based approach is far from clear or consolidated. The new disposition of the US Federal antitrust enforcers under the OBAMA administration needs to be translated into specific enforcement actions that, in turn, will have to be submitted to judicial scrutiny in terms that may possibly overcome a more conservative line adopted by US Courts and particularly the Supreme Court[38] in recent years. In any case, a new form of interplay between US antitrust Law and EU competition Law in the field of unilateral conduct is about to emerge. Its contours are to be critically discerned and evaluated in the coming times.

1.2.4. Up to know, and considering the developments which preceded the very recent (May 2009) withdrawal of the DOJ Report "Competition and Monopoly: Single Firm Conduct", a clearly different view had been maintained in the two sides of the Atlantic about the incentives to innovate. As far as that fundamental issue is concerned, we may argue that perhaps some of the differences at stake may result from the timeframe through which innovation and incentives to innovate are assessed.

We would venture to argue that in the EU one tends to look at innovation more from a medium term perspective, which takes into account possible 'gatekeeper effects'.[39] We mean here negative effects for the competition process and dynamics, preventing the development of new competitors in new and especially dynamic markets, since dominant companies tend to reproduce their initial dominant positions in those new markets.

Furthermore, there is also reason to think that, beside qualitative differences in economic theory – economic theory of competition and corresponding differences in terms of competition policies –[40] most probably some of the apparent divergence in this field may be due to the actual economic conditions of US and the European Union markets.

In fact, it may be argued that the US markets are, '*in concreto*' more economically integrated and more dynamic then the EU markers. Accordingly, the US markets tend to be more easily self-correcting, while in Europe self-

38 On the more conservative line adopted by US Courts and particularly the Supreme Court in the antitrust area over the recent years see, *inter alia*, Pitofsky (Editor),already quoted; Desanti (2007).

39 About the concept of '*gatekeeper effects*' in new and especially dynamic markets, see, *inter alia*, O'donoghue, Padilla, (2006: 194, 491).

40 About the concept and implications of *economic theory of competition* see in general Motta, already quoted (esp Chapters 1 and 2).

correction of the markets takes more time or may even not occur at all in some situations.

1.3. Some Major Precedents Illustrating Points of Divergence Between the EU and the US in the Fields of Merger Control and Unilateral Practices

1.3.1. In spite of the somehow differing approaches followed in the US and the EU in the treatment of situations involving significant market power, especially as regards unilateral conduct but also – perhaps more indirectly – as regards concentration control, the precedents in which divergent positions have prevailed as surprisingly scarce (particularly in a context of economic globalization, implying that major groups of undertakings will often have to deal simultaneously or successively with US antitrust rules and with EU competition rules or even EU Member States rules deeply influenced by EU Law).

That may be largely attributed to the practices of intense cooperation between US and EU authorities that have been developed in the latest two decades[41] and also to new ways of sharing values which are increasingly common, even if the legal formulae and terminology differs.

Anyway, in the course of that period some precedents – if not numerous – have somehow epitomised the remaining points of divergence between US and EU rules and deserve to be very briefly mentioned (since they may illustrate or clarify to extent and actual significance of such divergence).

1.3.2. The "Boeing/McDonnell Douglas" merger in the mid-1990s has represented one of the cases in which the allegedly divergent visions between US and EU competition law enforcement has been more publicized and commented (even in a political sphere, taking into consideration the important ties between the commercial aircraft industries and the State and the world dimension of such markets in terms of geographic market definition).[42]

In brief, this merger transaction was evaluated in both sides of the Atlantic, with the FTC taking US antitrust authority for reviewing the concentration,[43] and with the same operation meeting the threshold crite-

41 On those practices of increasing cooperation, see, *inter alia*, Majoras (2008: 2).

42 On this "*Boeing/McDonnell Douglas*" merger case, see, in particular, Kovacic, (2001: 805 ss.); see also Fox (1998:30).

43 In fact, in the US the FTC and DOJ have adopted "*Clearance Procedures*" for the purposes of deciding which Agency will be responsible for reviewing a merger and, in this case, allegedly a sensitive political debate took place over who would review the Boeing/*McDonnell Douglas*" merger and preceding the decision to award authority to the FTC.

ria of the EU Merger Control Regulation and therefore being subjected to European Commission jurisdiction.[44]

In the US, after a lengthy investigation, the FTC decided not to challenge the merger and, accordingly, published a brief explanatory letter (on July 1, 1997). In the EU the Directorate General of the European Commission undertook an extensive investigation of the notified concentration, following which, on July 4 1997, a fifteen member advisory panel unanimously recommended that the Commission blocked the merger. That stance originated an unusual war of words and tension[45] that was finally overcome when Boeing made several last minute concessions, that made possible an approval of the concentration by the Commission, on July 23 2007, subject to undertakings (conditional approval).

There is no room here to any lengthy analysis of the differing evaluations of the concentration in the US and the EU.[46] However, some particular points may be emphasized on account of their significance. On the one hand, it may be considered that US Law places a greater concern on the likelihood of oligopolistic pricing in a concentrated market. On the other hand, it may be considered that EU Law places a greater focus on the likelihood of a market leader achieving and using significant market power. As regards this first perspective, the US authorities have taken into consideration McDonnell Douglas pre-merger inability to compete, therefore implying that the merger would not adversely affect the prices to be paid by consumers. On the contrary, US authorities have especially value the supposed efficiencies created by the merger that could translate in lower prices for consumers.

As regards the second perspective, the European Commission particularly focused its attention on the changes that would be produced in the market structures and their dynamics and the associated increase of the dominance of the leading commercial aircraft manufacturer (those concerns were highlighted in the case by perceived long term supply relationships with the leading firm, that could undermine the capacity of the rivals to attract customers, thus producing negative repercussions for the competitive process

44 Thus originating Commission Decision IV/M.877 of 30 July 1997.

45 On that tension, which even originated statements produced by President CLINTON, see Brian Coleman, *"Clinton Hints US May Retaliate if EU Tries to Block the Boeing-McDonnell Deal"*, in Wall Street Journal, July 18, 1997, at A2.

46 For that purpose, see, Kovacic and Fox, quoted *supra* (41).

in the global market). At the same time, the European Commission had a more sceptical view about the extent of economic efficiencies generated by the merger and, above all, about the fact that any cost savings would actually benefit consumers on the long run.

In fact, on a fundamental issue – the acquired undertaking's competitive role in the market – the FTC and the European Commission managed somehow to agree [both agencies recognised that McDonnell Douglas ('MDD') was no longer a real force in the market]. However, the European Commission went on to consider the position of MDD not on a stand alone basis but in terms of effects to be produced simultaneously on Boeing – "absorbing Douglas Aircraft's supply and maintenance commitments (…)"[47] – and on Airbus (contributing to some extent to a foreclosure of the market as regards Airbus).[48]

On the whole, it may be argued that the FTC failed to appreciate Boeing's increased market power arising from privileged access to new customers and suppliers on account of the new market structure and its underlying dynamics. Conversely, the European Commission may have failed to consider the extent of welfare effects arising from the merger. In an oversimplified and too linear view this could be construed as some form of protection of the competitors and competition structures (Airbus and its position in the competitive structures of the market) and not of competition itself. The reality is more complex and both agencies have probably focused excessively in particular areas of concern, thus affecting a more 'nuanced' evaluation of the situation (and reflecting some prevailing views in US Law and in EU Law that would gain from a proper critical combination).

1.3.3. Also in the field of concentration control, the more recent "GE/Honeywell" case represents another problematic precedent, comparable – as regards the wave of discussion and criticisms it generated – with the "Boeing/McDonnell Douglas" case.[49]

The "GE/Honeywell" case[50] was one of the two concentration operations involving essentially US companies that have been blocked by the European

47 See, emphasizing this point Kovacic, in the aforementioned (2001: 831).

48 On this point see also, Muris (2001).

49 Emphasizing this fact see also, Veljanovsky, (2004: 15).

50 See "*GE/Honeywell*", already quoted. On this case see Fox (2001: 257).

Commission (the other being "MCIWorldCom/Sprint",[51] with the difference that this case was also blocked in the US). Again, we have no room here to examine the details of the case. Furthermore, the potential elements of divergence may be here more straightforward then in the "Boeing/McDonnell Douglas" case.

In fact, this case particularly reflected the EU more interventionist line with regard to conglomerate issues raised by certain concentration transactions. As far as such conglomerate concentrations are concerned, the European Commission has developed a conceptual framework that contributes to the identification of significant anticompetitive consequences of the concentrations (which tend not to be envisaged as such by the US antitrust agencies). We refer here, in particular, to the portfolio effects theories developed by the Commission and especially applied in several mergers in the beverage sector (*inter alia*, in the cases "Coca-Cola Amalgamated Beverages GB", "Coca-Cola/CarlsbergA/S" or "Guinness/Grand Metropolitan"[52]).

In the "GE/Honeywell" case the concentration allowed the combination of products that were complements (e.g., GE's aeroengineering and Honeywell's avionics systems), thus giving rise to a possible leveraged dominance across two or more separate product markets and, in turn, creating the conditions in the future for possible forms of exclusionary behaviour on the part of the entity resulting from the concentration. The final outcome of the case is somehow curious and leaves significant questions unanswered, since the CFI (GC), in its 2005 decision ("General Electric v. Commission"[53]), on the one hand recognised in principle the legal grounds of the Commission's portfolio effects theories, but, on the other hand, determined that the Commission had failed to produce adequate proof to establish a competition law violation on such grounds.[54]

Again, we would venture to suggest that this outcome somehow means that there is a middle ground to be covered between the more extreme positions that have surfaced in the enforcement of US and EU competition rules. Some attention on the dynamics of market structures and forms of possible

51 See "*MCIWorldCom/Sprint*" – Case COMP M.1741 (2000).

52 See "*Coca-Cola Amalgamated Beverages GB*" (Case N.º IV/M.794), "*Coca-Cola/CarlsbergA/S*" (Case N.º IV/M.833) or "*Guinness/Grand Metropolitan*" (Case N.º IV/M.938).

53 See CFI/GC decision "*General Electric v. Commission*", Case T-210/01 (2005).

54 On this CFI/GC decision "*General Electric v. Commission*" see, *inter alia*, Weinberg (2006: 153).

leveraged dominance arising from the combination of complementary lines of products or services may be in order and should not be entirely dismissed (as it may happen sometimes in terms of US enforcement). Conversely, the standards of proof for identifying alleged anticompetitive consequences of conglomerate concentrations, on the basis of portfolio effects theories, should be more demanding then the Commission tends to assume in its practice.

1.3.4. Moving now to the field of unilateral practices, as such, the decisions adopted in the EU on the "Microsoft" case epitomise more than any other recent case the state of the art divergences between the US and the EU competition jurisdictions (although things may quickly change in this area, as referred above, taking into consideration the new positions of principle assumed by the DOJ under the new OBAMA administration).

The EU "Microsoft" case is widely familiar and needs not being addressed here in any detail.[55] As it is known, the Commission's March 24 decision of 2004 found that Microsoft had abused its dominant position in client operating systems and that such abuse was twofold. On the one hand, the Commission found that Microsoft had unlawfully refused to provide certain computer protocols that would enable competing server operating systems to interoperate with Microsoft's Windows client and server operating systems (a situation that was identified on the basis of a complaint lodged by Sun with the European Commission[56]). On the other hand, the Commission found that Microsoft had tied Windows Media Player to Microsoft's Windows client operating system (this situation being identified on the basis of a self-initiated investigation by the Commission).

Microsoft tried to have the Commission's decision annulled by the CFI (GC), but on September 17, 2007, this Court rejected Microsoft's application and confirmed the legal grounds on which the Commission had adopted the decision [the CFI (GC) merely annulled a part of the decision that concerned the appointment of a trustee to administer the protocol licensing program]. In the end, Microsoft decided not to appeal to the European Court of the Justice (ECJ) on October 22, 2007.

---

55 We refer to the Commission Decision of March 24, 2004 and CFI/GC Judgment of September 17, 2007 (both aforementioned *supra*, note 21). On this EC "*Microsoft*" case, see, *inter alia*, First (2008); Ahlborn, Evans, (2008). See also First's Article in this Number of the Review (2010).

56 This fact is relevant because it suggests that in the context of divergent views in the field of *unilateral practices* a somehow positive spill over effect may arise from such situation with competitors reacting in one of the jurisdictions at stake. On this view of possible positive spill over effects see Baker (2009: 145).

Even in the EU, the CFI (GC) decision originated a fierce debate and some very critical evaluations, according to which such Microsoft Judgment would have allegedly followed a "traditional ordoliberal analysis"[57] (in detriment of an effects based analysis). While we consider that line of criticism clearly excessive, we tend to recognize that the CFI (GC) Microsoft Judgment, on the one hand, entrusted the European Commission with a wider margin of appreciation for evaluating exclusionary abuses, and, on the other hand, it somehow softened the requirement of elimination of competition in order for the competition authorities to intervene in these types of situations.

Once again, we believe that one of the deciding factors for the adoption of such perspective has to do with the more prospective line of reasoning retained at EU level in comparison with the evaluation of unilateral practices in the US. In the Microsoft case, the Commission and the CFI acted out of concern with an elimination of the competition in the future [which, if based on objective factors able to sustain a solid prospective judgment, will translate in an idea of elimination of effective competition, for article 102 of the TFEU (article 82 EC) purposes, even if at a given present moment an undertaking does not actually eliminate all competitors].[58]

Furthermore, considering the prospective risks of elimination of competition and the relative intensity within which such risks are valued that may also translate in different ways of applying an effects-oriented standard (even in a context where such a standard tends to be invoked and applied by both US and EU competition authorities). In fact, when the prospective risks are particularly taken into consideration – as it happens in the EU – that will imply that the quantum and type of evidence that the competition authorities or the courts will require to find present and actual anticompetitive exclusionary effects is bond to be different.

1.3.5. Also in the field of unilateral practices the very recent "Intel" case, in which the European Commission imposed a record fine, is well representative of the current differences between the US and the EU (although in a context of possible and rapid change).

We refer here to the Commission's decision of 13 April 2009,[59] whereby the Commission heavily fined Intel Corporation for violating article 102 of

57 For that line of critical evaluation see, again Ahlborn, Evans (already quoted).

58 On this point, see, in particular points 561 to 563 of the CFI/GC "*Microsoft*" Judgement.

59 See "*Intel*" decision, already quoted.

the TFEU (article 82 EC), abusing its dominant position in a determined (worldwide) market for computer chips and central processing units for computers (CPUs). This decision, even if it did not provoke the same high level political and institutional turbulence between the US and the EU as it happened in the aforementioned "Boeing/McDonnell Douglas" case (*supra*, **1.3.2.**), gave rise to some vigorous controversial reaction on the US side.

Two Congressional Letters were sent in September 2009, both to the Assistant Attorney General – Antitrust Division CHRISTINE VARNEY and to the Chairman of the FTC, JONATHAN LEIBOWITZ, criticizing the Commission's "Intel" decision as an exercise in "regulatory protectionism" and, on the whole, the line of action underlying such decision as Commission's efforts at "exporting its competition policy to emerging markets".[60] While this type of positions seems to have not found any resonance with the DOJ and FTC, it still echoes anyhow a certain perception of the differences between the US and the EU as regards the treatment of unilateral practices (even after DOJ May 2009 Statement, withdrawing the previous DOJ Report "Competition and Monopoly: Single Firm Conduct").

In this "Intel" case the Commission found that Intel Corporation, holding at least 70% market share in a particular CPU market, had engaged in two specific abusive (exclusionary) practices. On the one hand, Intel would have given wholly or partially hidden conditional rebates to computer manufacturers (depending on their buying all or almost all their CPUs to Intel); on the other hand, Intel made payments to computer manufacturers in order to halt or significantly delay the launch of products containing competitors' CPUs and to limit the sales channels available to those products as well (furthermore, according to the Commission's investigation, Intel also made payments during a considerable period of time to a major retailer on condition it stocked only computers with Intel CPUs).

While part of the aforementioned business practices developed by Intel may have led to lower prices for consumers for certain periods of time – a fact acknowledged by the Commission on account of the rebates practiced by Intel – that did not avoid a finding of infraction, since the rebates practiced by such dominant undertaking were conditional on buying less of a rivals'

60 We refer here to a letter sent by twenty two members of the US Congress to the DOJ and the FTC on the 23 rd September 2009 expressing concern about at how, allegedly, the European Commission would be treating the US companies, on account of the "*Intel*" decision.

products or not buying them at all, which, in turn, would lead to reduced choices for consumers (and, we may imply, would also lead in future to higher prices if the exclusionary practices at stake were successful).

Once again, we may verify that, in terms of EU competition law enforcement in the field of unilateral practices, the decisive focus is not put on immediate or short term price reductions to consumers – as it may tend to happen more frequently in the US context – but on a range of various effects on the market functioning and on consumers over a certain period of time (bearing in mind a time frame which may comprehend medium term effects). Also, in the US context there tends to exist an overriding concern about hypothetical over-enforcement of Section 2 of the Sherman Act (monopolization) having a negative effect on innovative and risk-taking undertakings as Intel. In the EU context, conversely, more attention is given to the scrutiny of innovators – that should not be deprived of incentives to innovate on account of an excessive burden of responsibility attached to their dominant position – and also to the proper incentives to innovate, not only in a dominated market (or monopoly market) but in dependent and interconnected markets as well.

2. ENFORCEMENT ISSUES THAT CONTRIBUTE TO REMAINING AREAS OF DIVERGENCE BETWEEN THE EU AND THE US

2.1. General Overview

2.1.1. There is no doubt, at the current stage of evolution of US antitrust Law and EU competition Law, that different procedural frameworks influence, to a certain extent, different enforcement options, that, in turn, play a part in the maintenance of appreciable areas of divergence between those two bodies of Law. While different procedures were always bound to influence the substantive definition of multiple legal institutes, that aspect is especially relevant in the field of competition law (a body of law whose rules are predominantly dependent, as regards its extent and legal meaning, on casuistic processes of enforcement).

The US antitrust system was clearly built upon a common law basis, which fundamentally differs from an administrative system as the one that has been underlying EU competition law (and national competition Laws in a significant part of the Member States with civil law systems).

In short, the system of enforcement of US federal antitrust law relied essentially on the Courts, which have played a major part in building funda-

mental legal parameters – e.g. the rule of reason parameter. Although the US Federal Government was given significant powers of enforcement – through the DOJ and the FTC -[61] it has never had the margin for intervention and decision and the discretion of the Commission (acting as EU competition Law enforcer) or of most of the national Competition Authorities of the EU Member States. Furthermore, private parties were also given broad powers of enforcement, which were particularly enhanced by specific legal instruments as treble damages or one-way cost recovery. That explains why, historically, some of the most important US antitrust precedents were created in private cases (although this tended to happen above all in earlier cases and has somehow drastically changed in more recent years).

As regards the Federal Agencies antitrust investigations in civil cases, the final role in determining facts and liabilities belongs to Courts – which have shown themselves increasingly conservative in this field – and that, in turn, may explain a more cautious or even conservative approach on the part of those Agencies (in comparison with the European Commission). It is striking to notice that in recent years fewer cases brought up by the US Federal Agencies have ended up in trials (with the DOJ/FTC assuming more frequently a role of amicus curiae supporting the defendants in private cases).[62] Again, that may somehow change presently, on account of a more interventionist stance of the antitrust agencies in the context of the new OBAMA Administration (but it is too soon to make an accurate estimate and up to now the trend is as aforementioned described).

2.1.2. Conversely, in the field of cartels, the US Federal antitrust agencies – namely the DOJ – have extensive criminal enforcement powers that the European Commission does not possess (nor most of the national antitrust enforcers of the EU Member States possess, although things may change soon, since criminal competition law statutes have recently been enacted in

61 There is no room here to going into details about the institutional system of enforcement of US antitrust Law in comparison with the EU system. On those topics see, in general, Doern & Wilks (1996).

62 Beside an overly cautious approach on the part of the US Federal antitrust agencies – especially the DOJ – has indeed led to fewer cases initiated by such Agencies and ending in trials. In the field of unilateral practices the "*Microsoft*" case (aforementioned) in 2000 was practically the last case brought to trial. Beside that, even in the domain of private enforcement, which originated in the past expansive precedents, most cases in recent times have led to negative results for the antitrust plaintiffs with "*Eastman Kodack v Image Technical Services, 504 US 451 (1992)*" being the last Supreme Court victory for a private antitrust plaintiff.

the UK and Ireland and other States seem to be considering reforms in that line as well).[63]

It is noteworthy, and curious at the same time, that in the field of criminal prosecution of cartels the court procedures involved – in contrast with what happens in the field of unilateral practices – do not represent a weakness or a constraint leading the Federal agencies to a more cautions or timid approach. The US judicial system is notably equipped with instruments to aggressively investigate and enforce criminal antitrust offences (including, e.g. wiretapping and a considerably secretive US grand jury system), that would be strange to the European judicial culture (both in terms of the specific Courts of the EU and the national Courts of the Member States, even if at EU level or national level hardcore cartels were to be criminalised through new statutes).[64]

2.1.3. Another factor which has allowed the European Commission an important intellectual leadership in terms of enforcement priorities and of defining in a particular light and considering a number of overreaching objectives certain legal institutes in EU competition Law – with no parallel in terms of US system of enforcement characterised by the intervention of diverse players (Federal Agencies, different Federal Courts up to the Supreme Court and other public enforcers) – has to do with the appreciable degree of centralization that was underlying EU competition policy until the major reform of Regulation 1/2003.

That centralization arose from a lack of solid competition culture in most of the EU Member States and although it was fundamentally corrected after the 2003 reform – initiating what we have *supra* referred to as one of the four major trends of recent and prospective evolution of EU competition Law [see **1.1.2., (iii)**] – we can sustain that, even in the context of the new institutional model of enforcement of EU competition Law, a more coordinated basis for defining priorities and new legal understandings still lies with the European Commission (within the European Network of Competition

63 On the criminal prosecution of cartels under US antitrust law, see, in general, OECD (2003); International Competition Network (2008).

64 On these issues, see also in general, Furse (2006: 466).

Authorities, notwithstanding the lack of a solid normative or institutional basis for that Network or other lacunae it may have).[65]

2.2. The Interplay Between Differing *Enforcement* Systems and Instruments and the Competition Law Scrutiny of *Unilateral Practices*

There is another curious factor that should not be overlooked, which has to do with enforcement practices and the type of effective remedies that can be used to tackle monopolistic abuses.

In the US, public authorities are essentially limited to civil injunctions and divestitures whose adoption – as already referred in general terms – effectively depends on Courts. This judicial arm of the system, in turn, tends to be – at least in the course of recent years – very conservative.[66] Differently, in the context of the EU competition law system, more use is made of enforcement instruments such as large fines and other remedies which are very actively promoted by administrative agencies and not wholly dependent on Courts (either the European Commission, acting as the EU Competition Authority, either the Member States Competition Authorities in the framework of the European Network of Competition Authorities).

What is curious or even paradoxical here is that, despite Europe's legal activism in the field of article 102 of the TFEU (article 82 EC unilateral practices by dominant undertakings), it is the US that has effectively used in the past what we may call the 'atom bomb', meaning the basic structural remedy of divestiture. In fact, while article 7, par. 1, of EU Regulation 1/2003 has expressly established a power to adopt structural measures necessary to end the infractions to competition Law,[67] the fact remains that the Commission or the EU Regulators do not actually use such structural remedies in situations involving article 102 of the TFEU infringements (or do not even have

65 We have no room here to analyse the *decentralisation process* arising from Regulation 1/2003 and the creation of *the European Network of Competition Authorities*. See, in general, Ehlermann (2000: 537); Hawk (2007: 41).

66 This, of course, may change although at this point the general trend of the Supreme Court in the antitrust area seems to be steadily conservative. On this context and on the prospects concerning such jurisprudence see, inter alia, Harber (2007); Elhauge (2007: 59).

67 On this sensitive point, see, *inter alia*, about *structural measures*, comparing the US and the EU regimes, Shelansky, Sidak (2001, p. 1); Rochefordiere (2001: 11).

in itself the power to impose such structural measures, as it happens, in our view, e.g., with the Portuguese Competition Authority[68]).

As regards the more recent hurdles that in the US seem to be on the way of a more active application of Section 2 of the Sherman Act to unilateral practices – by the Federal agencies and by the Courts – some attention should also be given to the private enforcement factor (to which we shall briefly refer *infra*, **2.3.**). In fact, WILLIAM KOVACIC has rightly emphasized that there may be a concern on the part of US Courts with possible excesses of private rights that could be developed if the liability standards in the area of unilateral practices were somehow lowered.[69] (a type of concern that would be virtually unknown in the EU).

Considering the potential for some excesses of private antitrust litigation in the US context, a measured concern for the consequences of lowered antitrust liability standards in the area of unilateral practices and adverse effects on innovation that would arise from that process may actually be understood. Those concerns, in turn, should not be magnified to the point of making innovative dominant undertakings virtually immune form antitrust enforcement in the area of monopolisation. It is indeed striking in this field that, after prosecuting the "Microsoft" case in the District Court in 2000,[70] the US Federal antitrust agencies have not brought to Courts a single Section 2 (monopolisation) case in the subsequent seven years. Underlying this peculiar situation are Supreme Court precedents in the (already mentioned) "Trinko" case and also in the "Credit Suisse" case,[71] which have severely constrained the margin for antitrust liability under Section 2.

2.3. Issues Regarding the Private Enforcement of Competition Law

As regards the systems of enforcement of competition rules and the substantive elements of divergence that may arise from such procedural aspects, we have

68 On this specific point concerning Portuguese competition law see Morais (2006: 127).

69 See Kovacic (2008).

70 See *US v. Microsoft Corp, 97 F Supp 2d 59 (D DC 2000)*. Curiously, the DOJ won then a significant victory before the District Court, although followed by a rather different judicial decision of the DC Circuit (on account of a serious lack of study and relevant hearings on the part of the District Court). However, the more aggressive DOJ approach involving a divestiture plan would not be pursued by the BUSH Administration in 2001.

71 See the US Supreme Court precedent in the "*Credit Suisse*" case – "*Credit Suisse Sec (USA) LLC v Billing, 551 US 264 (2007)*".

already referred incidentally above that one of the chief differences between the US and the EU has to do with the major importance of the elements of private enforcement in the US, with no correspondence in the EU.

Again, the historical context of formation and development of each of those bodies of Law plays an important part in that contrasting procedural framework, which we shall not discuss here.[72] US judicial culture created the conditions over the years for a peculiar and distinctive form of private rights of action, with mandatory treble damages, broad rights of discovery, class actions, jury trials and other elements. The EU judicial landscape is entirely different, especially in the Continental Member States. Furthermore, EU competition Law was developed and nurtured on the basis of a centralised policy of enforcement – having the European Commission as its axis – that only recently (2003) has been adjusted. Such centralised and administrative option in terms of enforcement policy was not only originated on the basic characteristics of the legal systems that more decisively influenced the EU legal system, but also derived from a lack of a disseminated competition culture at European level.

Accordingly, at the moment in which the consolidation of an European competition culture has made possible the decentralisation reform of 2003, consideration was also given, almost immediately, to the creation of new conditions that could foster a dimension of private enforcement of competition Law. Hence, the analysis proposed by the European Commission in the "Green Paper" of December 2005, closely followed by the "White Paper" of 2008.[73]

Although major judicial precedents – namely the Court of Justice of the EU cases "Courage and Creham" and "Manfredi"-[74] and the considerable discussion associated with the "Green Paper" and "White Paper", of 2005 and 2008 have paved the way to new developments in terms of private enforcement, we maintain that there are clear limits as to what Europe can do in this field (at least, in comparative terms with the US).

---

72 On this historical context see, in general, Grady (2006: 515).

73 See "*Green Paper on Actions of Compensation for competition law infringements*" – COM (2005) 672 final, Brussels, 19,12,2005, and "*White Paper on Indemnity Actions for competition law infringements*" – COM (2008) 165 final, Brussels, 2, 4, 2008. On the perspective of *private enforcement of competition Law* in the EU see, in general, Komninos, (2008).

74 See "*Courage and Creham*" (C-453/99) case, of the Court of Justice of the EU, and "*Manfredi*" case (C-295/04 and others) of the same Court.

In other words, we believe that, even if some movement towards private enforcement of EU competition rules may be initiated – e.g., on the basis of one or more Directives to be proposed and approved after the discussion of the 2008 "White Paper" – it will always be a limited one and the US and the EU will continue to live in two separate worlds in this area (accordingly, the idea that, in time, EU Courts may follow US Courts in their concern with excessive liability to be established under certain competition rules, inviting thereby an overreach in terms of private enforcement, has no support in the prevailing legal context, at least for the foreseeable future).

3. THE CONTROL OF UNILATERAL PRACTICES AND PUBLIC INTERVENTION AND THE INTERNATIONAL ECONOMIC CRISIS

3.1. General Overview

The non consolidated parameters of enforcement and interpretation of the regimes of monopolization and abuse of dominant position in the two sides of the Atlantic do not benefit from the conditions of the current economic crisis arising from the credit crunch. On the whole, this systemic crisis has led to major doubts about the repercussions of such a serious economic disruption on competition law and policy, breaching somehow the consensus that had apparently been generated around the core objectives of competition policy, either around the US antitrust model, either around the EU competition model [a consensus epitomised by the works and membership of the International Competition Network (ICN) over the last decade and the transition from the XX to the XXI century].

There has been, in fact, widespread speculation about a possible major shift in terms of safeguards of market values and competition on account of the rather extreme economic conditions occurred in the course of 2009, despite the signs of economic recovery in the last quarter of the year (which are yet to be confirmed).[75]

As far as we are concerned, we do not share views sustaining a major paradigm shift in this domain due to the conditions of the economic crisis. Conversely, we admit that these conditions may affect, in different ways, certain areas of enforcement of competition Law (leading to contradictory pressures, either to more or less intervention of competition authorities).

75 On that widespread discussion – which we have no room here to develop – see, *inter alia*, Freeman OECD (2009); Vickers (2008).

Furthermore, a recession period, increasing the fragility of some undertakings and expelling some undertakings from the market, is bound to reinforce the market power of the remaining undertakings in some markets (or the dominant position of undertakings which were able to adjust in time to the new conditions). In some of the more affected economic sectors – as the financial sector which has been at the centre of the crisis – the rapid return to high profits, and in some cases to extremely high profits, of a restricted group of undertakings,[76] may well signify that such undertakings are having ideal conditions for monopolising or abuse of dominant position practices that should be carefully scrutinised despite the context of economic crisis.

In other cases, public intervention in the context of the crisis may even facilitate or lead certain undertakings with dominant positions and with special connections to the State to incur in abusive practices [which are to be scrutinised under the cumulative application of article 102 of the TFEU (article 82 EC) and article 106, par. 1, of the TFEU (article 86, par. 1 EC)].

In general, we may consider that the peculiar conditions of the economic crisis and subsequent exit strategies to the crisis may induce or facilitate abusive conducts of the exclusionary type. The downturn period may, even, facilitate predation strategies, reducing the short term costs and increasing the long term expected gains. However, the conditions of such downturn will significantly increase the difficulties in identifying predation strategies or other exclusionary strategies (because apparently more aggressive commercial conducts may just represent a response to the drop in demand or to other economic troubles). In this context, and given these difficulties, the differences between application of competition rules to unilateral practices associated with exclusionary conduct in the US and the EU may assume disproportionate importance and induce undesirable distortions in the process of economic recovery in the two sides of the Atlantic.

3.2. New Developments and Remaining Shortcomings in terms of Control of Unilateral Practices – A Brief Comparative View Between the EU and the US

3.2.1. Regardless of the peculiar circumstances of the downturn, it should be stressed that in the EU, in the course of the latest years, there were some specific factors dictating a more interventionist approach in terms of mono-

76 We may refer as a particular example, among others, the exceptionally positive results obtained by financial institutions like Goldman Sachs or JP Morgan in the second semester of 2009.

polisation and control of exclusionary conducts and enlarging, somehow, the divide with the US.

We may, in fact, consider that in the EU there was something of a 'momentum' in terms of abuse of dominance control, which was brought up through the overriding goal of actively controlling former state monopolies transformed in dominant firms in a recently liberalised environment.[77]

This overriding goal and the corresponding 'momentum', or activism in terms of a more intense enforcement of article 102 of the TFEU (article 82 EC), has, somehow, been channelled to an intense scrutiny of the market practices carried out by the biggest global undertakings in multiple economic sectors, comprehending also major north American entrepreneurial groups companies, which nowadays tend to receive a more benign treatment in the US (in this context, it is to be emphasized, for instance, that the EU "Intel" case was originated or fuelled by US complainants, which, by the way, developed litigating procedures in US Courts, in order to ascertain elements of proof that could be presented to the European Commission).

US undertakings and competitors to potentially monopolising firms have, thus, reacted to the narrow approach followed in the US towards monopolies and its unilateral practices, whereby issues of public control over monopolies tend to be entrusted to sectoral regulators with the exclusion of antitrust agencies or courts.

On the contrary, in the EU the liberalization and re-regulation process of former state monopolies under article 86 EC (article 106 of the TFEU) – corresponding to the fourth major evolutionary trend of EU competition Law, referred *supra*, **1.1.2., (iv)** – has led to an *active interplay between sectoral regulation and competition rules*. Such interplay generates some undeniable issues of coordination between the interventions of sectoral regulators and competition authorities,[78] but with the fundamental merit of maintaining, and even enhancing in the course of time, the scrutiny of these situations, on the basis of competition rules and reducing, in due time, the requirements

77 On this connection between active control of incumbent companies with dominant positions in certain sectors and resulting from former state monopolies in the context of the liberalization of a fundamental group of economic sectors in the EU, see, *inter alia*, Geradin (2000). See also Ferreira Morais (2009: 7 ss.).

78 On this interplay and its complexity, Geradin (2004).

of sectoral intervention (as the evolution of the electronic communications sector after its liberalisation epitomises in the EU[79]).

3.2.2. What would be of paramount importance in this EU context would be to ensure that the legal activism of the Commission – or even of a significant part of the Member States Competition Authorities – towards an intense and demanding control of abuse of dominant position is duly counterbalanced by an effective and consistent scrutiny by the EU Courts [in particular by the GC (CFI) as regards Commission activities).

We refer here, in particular, to an adequate and balanced scrutiny by the GC (CFI) of the factual economic aspects which are relevant for the legal assessment of cases. In this field, while it should be recognised that the GC (CFI) has shown in previous years some signs of a willingness to assert that control, that judicial scrutiny is by no means consolidated (in terms of article 102 of the TFEU enforcement and ensuring a minimum of predictability to undertakings in this area).

Beside that, it would also be important to achieve in this field a minimum degree of consolidation of an effects based approach and predictable tests regarding the assessment of exclusionary practices covered by the prohibition established under article 102 of the TFEU (article 82 EC). However, the follow up of the December 2005 "Discussion Paper" of the Commission towards possible "Guidelines on exclusionary abuses"[80] has, on the one hand, taken too much time and, on the other hand, it has not produced results that may be deemed as entirely satisfactory and ensuring an actual and stable level playing field for dominant undertakings or for undertakings affected by the practices of the former entities.

As we have already referred (*supra*, **1.2.3.**), the Commission December 2008 "Guidelines on the application of Article 82 of the EU Treaty to abusive exclusionary conduct by dominant undertakings", have serious shortcomings which may reduce their apparent contribute to a less formal analysis of abusive conducts. It is to be acknowledged that the "Guidelines", at face value, establish fundamental principles in this field, e.g. when stating that what really matters is protecting the competitive process and not simply protecting competitors, which "may well mean that competitors who deliver less

79 On the paradigm that the process of liberalization and re-regulation of the electronic communications sector has represented in the EU see, in general, Bavasso, (2003).

80 On the debate generated by the December 2005 "*Discussion Paper*" see, *inter alia*, Gerber (2008).

to consumers in terms of price, choice, quality and innovation will leave the market (…)".[81] In accordance with this essential principle, the "Guidelines" introduce a distinction between 'foreclosure' of the market and 'anticompetitive foreclosure' (the later implying some form of harm to consumers).

Furthermore, the "Guidelines" introduce a dichotomy between price and non price abuses, establishing a particular benchmark which is limited to the former category and which corresponds to the "equally efficient competitor" (with the less efficient competitors in principle not being entitled to competition law protection in the context of the enforcement of abuse of dominant position regimes).

Despite the apparent signs of positive revaluation of commercial conduct aimed at maximizing profits in the short term, and taking advantage for that purpose of the efficiencies underlying some forms of market power – following an apparent line of convergence with US treatment of unilateral conduct by firms with market power – the "Guidelines", on the whole, do not provide a clear and consistent model of analysis.

We do not have room here to an '*ex professo*' analysis of the "Guidelines", but considering only its potential role as the basis for a distinctively EU more interventionist model of scrutinizing abusive conduct, following an intermediate perspective, not excessively dependent on formal parameters of evaluating the behaviour of such undertakings – something of a middle ground between the recent US non interventionist and benign antitrust stance in terms of Section 2 and the traditional EU enforcement of article 82 EC (current article 102 of the TFEU) – the aforementioned "Guidelines" are not up to that role and may have represented a missed opportunity (which is to be negatively emphasized after such a long period of debate as the one that followed the Commission's "Discussion Paper" of December 2005).

In the first place, the "Guidelines", in the important field of price abuses, establish cost tests and parameters for assessing rebates that are prone to operational and practical difficulties. In line with those practical difficulties for enforcing the model cost tests, the language and concepts used in a significant part of the "Guidelines" may be considered excessively vague (particularly when covering more complex economic assessments). Bearing in mind the sensitive and thin line dividing conduct leading to innovation and potentially beneficial to consumers from anticompetitive exclusionary be-

81 See Guidelines, par. 6.

haviour reproducing dominance in several related markets, it would have been useful guidance to establish same safe harbours to undertakings (although a group of much more limited safe harbours that the ones established in the DOJ 2008 Report on Section 2).

Moreover, the "Guidelines" also use an excessive number of exceptions to the general principles established and supposedly based on substantive economic criteria (e.g. as regards the aforementioned "equally efficient competitor test"). While in complex legal assessments based on economic factors and criteria, some exceptions would have to be retained, in order to preserve some flexibility of analysis, a more balanced use of such legal technique of exceptions should have been made (an aspect which is aggravated by the lack of practical examples that could somehow enhance the coherence and illustrative power, in terms of induction analysis, of the analytical models to be offered by the "Guidelines").

Due to those shortcomings, the "Guidelines" pave the way for a more substantive and economically driven analysis of exclusionary abuses, but at the cost of a serious uncertainty and lack of legal security to the undertakings. This new instrument may have the merit, notwithstanding those drawbacks, of initiating the discussion of an effects based and less ordoliberal approach in the field of article 102 of the TFEU, that may in time lead to a more balanced analytical model.

What is also particularly striking is that, in contrast with what happened in the recent past with several Commission "Guidelines" on the interpretation and enforcement of article 101 of the TFEU, the 2008 "Guidelines" on exclusionary abuses are only scarcely intertwined with the Court of the EU and the GC (CFI) jurisprudence in this field (which enhances the problems of uncertainty that plague most undertakings in this field and are highly undesirable as such).

Without multiplying the examples here, it is undeniably hard to conciliate an effects based approach in the field of article 102 of the TFEU with recent Court precedents, such as the "Michelin II" or the "British Airways" cases.[82] The least that can be said here is that there is a long road ahead in order to progressively build – through an active interplay of, on the one hand, precedents and refinements of analytical models by the Commission and, on the other hand, the jurisprudence of the Court of the EU and the GC (CFI) – a

82 See "*Michelin II*" case (T-203/01) and "*British Airways v. Commission*" case (T-219/99 and C-95/04).

new paradigm in terms of interpretation and enforcement of article 102 of the TFEU. That new paradigm would ideally correspond to an EU model of treatment of unilateral practices in convergence with the US – such convergence coming from an expected and desirable dual movement, involving more effects based analysis in the EU, in line with what happens in the US, and a less lenient approach in the US, more in line with the EU stance, following the May 2009 withdrawal of the DOJ 2008 Report on Section 2.

3.3. The Control of Public Intervention and the International Economic Crisis

Considering the EU 'momentum' – briefly stated above (**3.1.** and **3.2.**) – in terms of article 102 of the TFEU (article 82 EC) enforcement to incumbent undertakings that correspond to former state monopolies – sometimes in conjunction with article 106 of the TFEU (article 86 EC), which reinforces the scrutiny of entrepreneurial practices under article 102 – it is curious to verify that the EU, being allegedly more prone to public interventionism, has put in place effective means to curb state or public intervention, that, conversely, the US is deprived of. This is the result of the Supreme Court having established a "state action doctrine", which, somehow, limits the action of competition agencies as regards forms of antitrust monitoring of State created monopolies.[83] Accordingly, the US antitrust regime has no counter part whatsoever to the EU state aids rules or even to the regime on public intervention in the economy of article 106 of the TFEU (article 86 EC).[84]

While some renowned authors, like Kovacic (2008: 10) refer in this field an alleged "shared suspicion of government restraints on competition" on the part of US and EU competition agencies, and even consider – although with some caveats – this area as an area of "substantive similarity" between US and EU competition rules and cultures, we strongly disagree with such views.

This divergence is especially important in the current context of economic crisis, since, while both the US and the EU have engaged in massive public interventions of financial assistance to the financial sector and to certain industrial sectors (e.g., the car industry) -albeit in different forms and intensities, as the EU responses were less coordinated and more State driven due

83 On the so called *state action doctrine*, see, *inter alia*, the precedent that somehow stated it – *"Parker v Brown, 317 US 341 (1943)"*.

84 On this point and emphasizing this contrast see Sappington, Sidak (2003: 479).

to the limitation of European integration – the potential competition distortions associated with such interventions are to be actively monitored in the EU and that will not essentially happen in the US.

In fact, in the EU context we may even consider a potential paradox here, because, although the crisis undeniably puts under strain the market mechanisms and forces and the legal instruments that safeguard it – as it typically happens with competition rules – conversely the conditions of the downturn have led to a 'de facto' tremendous expansion of the monitoring powers of the European Commission, acting as the EU competition authority.

We refer here, in particular, to the domain of state aid control and, more specifically, to state aid control related with the financial sector, with the Commission defining an extensive framework in order to monitor complex restructuring processes that are imposed to financial institutions beneficiaries of state aid (as the one which arises from the important "Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under State aid rules").[85] The fact that the US has no corresponding schemes or instruments to monitor competition distortions potentially arising from public financial assistance of such magnitude may be a further and undesirable element of imbalance in the exist strategies to the crisis followed in the two sides of the Atlantic.

REFERENCES

Ahlborn, Christian, Evans, David

2008 «The Microsoft Judgment and its Implications for Competition Policy Towards Dominant Firms in Europe», Working Paper Series, April, available at SSRN (Social Science Research Network) – http://ssrn.com/abstract=1115867 (Accessed, November, 10, 2009).

Azcuenaga, Mary

1992 «Market Power as a Screen in Evaluating Horizontal Restraints», in *Antitrust Law Journal*, vol. 60, pp. 935-975.

85 See "*Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under State aid rules*" – OJ C 195/9 of 19, 8, 2009.

Baker, Donald
2009 «An Enduring Antitrust Divide Across the Atlantic over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists», in *European Competition Journal*, vol. 5, n.º 1, pp. 145-199.
Bavasso, Antonio
2003 *Communications in EU Antitrust Law – Market Power and Public Interest*, The Hague/London/New York: Kluwer Law International.
Blundell-Wignall
2008 «The Subprime Crisis: Size, Deleveraging and some Policy Options», in *Financial Market Trends*, vol. 1, nº 94, Paris, pp. 24-45.
Brodley, Joseph
1995 «Post-Chicago Economics and Workable Legal Policy», in *Antitrust Law Journal*, vol. 63, pp. 683-712.
Desanti, Susan
2007 «Whither Antitrust in the Supreme Court?», in *www.theantitrustsource.com* (Accessed, March,10, 2009).
Doern, Bruce & Wilks, Stephen Editors,
1996 *Comparative Competition Policy*. Oxford: Clarendon Press Oxford.
Drahos, Michaela
2001 *Convergence of Competition Laws and Policies in the European Community*, The Hague/London/New York: Kluwer Law International.
Ehlermann, C.D.
2000 «The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution», in *Common Market Law Review*, vol. n.º 37, pp. 537-590.
Elhauge, Einer
2007 «Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions», in *Competition Policy International*, vol. n.º 2, Autumn, pp. 59-82.
Faull & Nikpay, Editors,
2007 *The EC Law of Competition – Article 82*, Oxford: Oxford University Press.
Ferreira, Eduardo Paz, Morais, Luís Silva
2009 «A Regulação Sectorial da Economia – Introdução e Perspectiva Geral», in Paz Ferreira, Eduardo *et al.* (ed.), *Regulação em Portugal – Novos Tempos, Novo Modelo?*, Coimbra: Almedina, pp. 7-38.
First, Harry
2008 «Strong Spine, Weak Underbelly: The CFI Microsoft Decision», in *New York Law and Economics Research Paper*, n.º 08-17-April.

Fox, Eleanor

1998 «Antitrust Regulation Across National Borders: The United States of Boeing Versus the European Union of Airbus», in *Brookings Review*, vol. 16, Winter, pp. 30-32.

2001 «GE/Honeywell: The US Merger that Europe Stopped – A Story of the Politics of Convergence», in *Columbia Business Law Review*, 257, pp. 331-360.

2007 «Monopolization and Dominant Position: US and EU Views», in Mateus, Abel & Moreira, Teresa (ed.), *Competition Law and Economics – Advances in Competition Policy and Antitrust Enforcement*, The Hague / London / New York: Kluwer Law International, pp. 329-342.

2008 «The Efficiency Paradox», in *How the Chicago School Overshot the Mark – The Effects of Conservative Economic Analysis on US Antitrust*, Oxford: Oxford University Press, pp. 75-110.

Freeman, Peter

2009 «Competition Night?», in *Concurrences*, n.º 1-2009, pp. 1-2.

Furse, Mark

2006 «Issues Relating to the Enforcement and Application of Criminal Laws in Respect of Competition», in Mardsen, Philip (Editor), *Handbook of Research in Trans-Atlantic Antitrust*, Cheltenham / UK-Northampton / MA, USA: Edward Elgar, pp. 466-492.

Geradin, Damien,

2000 *The Liberalization of State Monopolies in the European Union and Beyond*, The Hague / London / New York: Kluwer Law International.

2007 *Global Competition Law and Economics*, Oxford / Portland, Oregon: Hart Publishing.

Geradin, Damien (ed.)

2004 *Remedies in Network Industries: EC Competition Law vs. Sector Specific Regulation*, Antwerp / Oxford: Intersentia.

Gerber, D.J.

2008 «The Future of Article 82: Dissecting the Conflict», in Ehlermann, CD & Marquis, M. (ed.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, Oxford – Portland, Oregon: Hart Publishing, pp. 56-91.

Grady, Kevin

2006 «Lessons Learned from the US Experience *in Private Enforcement of Competition Laws*», in Marsden, Philip (ed.), Handbook of Research in Trans-

Atlantic Antitrust, Cheltenham,UK-Northampton,MA, USA: Edward Elgar, pp. 515-540.

Harber, Pamela Jones

2007 «The Supreme Court's Antitrust Future: New Directions or Revisiting Old Cases?», *www.theantitrustsource.com* (Accessed, December, 2, 2009).

Hawk, Barry

2007 «EC Modernisation and Antitrust Law», in Mateus, Abel & Moreira, Teresa (ed.), *Competition Law and Economics – Advances in Competition Policy and Antitrust Enforcement – Part I – Antitrust Enforcement: The Modernisation Package*, The Hague / London / New York: Kluwer Law International pp. 41-60.

Hawk, Barry (ed.)

2008 *Fordham 2007 Competition Law Institute – International Antitrust Law & Policy*, *PANEL DISCUSSION – Remedies and Sanctions for Unlawful Unilateral Conduct*, Huntington, NY: JurisPublishing, pp. 613-651.

International Competition Network

2008 Cartel Settlements – Report to the ICN Conference, Kyoto, Japan.

Jordana & Levi-Faur (ed.)

2004 *The Politics of Regulation in the Governance of the European Union*, Cheltenham, UK-Northampton,MA, USA: Edward Elgar.

Komninos, Assimakis

2008 *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts*, Oxford – Portland, Oregon: Hart Publishing.

Kovacic, William

2001 «Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy», in *Antitrust Law Journal*, vol. 68, pp. 805-831.

2008 *Competition Policy in the European Union and the United States: Convergence or Divergence?*, Bates White Fifth Annual Antitrust Conference, Washington DC.

Lao, Marina

2005 "Aspen Skiing and Trinko: Antitrust Intent and 'Sacrifice'", in *Antitrust Law Journal*, vol. 73, pp. 171-208.

Majoras, Deborah Platt

2008 «Convergence, Conflict and Comity: The Search for Coherence in International Competition Policy», in *2007 Competition Law Institute – Fordham University School of Law – International Antitrust Law & Policy*, pp. 1-24.

Morais, Luís
2006 «La Défense de la Concurrence au Portugal – Les Relations entre l'Autorité de Concurrence et les Autorités de Régulation Sectorielle – Les Sanctions en Cas d'Atteintes à la Concurrence», in *Estudos em Homenagem ao Professor Doutor Marcello Caetano no Centenário do seu Nascimento*, Coimbra: Coimbra Editora, pp. 127-149.
2010 (forthcoming) *Joint Ventures and EU Competition Law*, Oxford – Portland, Oregon: Hart Publishing.
Mosso, Carles Esteva *et al.*
2007 *The EC Law of Competition – Article 82*, Oxford: Oxford University Press.
Motta, Massimo
2004 *Competition Policy – Theory and Practice*, Cambridge: Cambridge University Press.
Muris, Timothy
2001 *Merger Enforcement in a World of Multiple Arbiters*, Remarks before the Brookings Institution Roundtable on Trade and Investment Policy, Washington DC, December.
Neven, Damien
2008 «Managing the Financial Crisis in Europe: Why Competition Law is Part of the Solution, Not Part of the Problem», in *Global Competition Policy* (online magazine).
Neven, D. & Röller, L-H
2000 «Consumer Surplus versus Welfare Standard in a Political Economy Model of Merger Control», in WZB Working Paper FS IV 00-15.
O'Donoghue, Robert & Padilla, Jorge
2006 The Law and Economics of Article 82 EC, Oxford – Portland, Oregon: Hart Publishing.
OECD
2003 Hardcore Cartels: Recent Progress and Challenges Ahead, Paris: OECD
2009 Competition and the Financial Crisis, Paris: OECD.
Oliver, Geoffrey
2009 «The EU Commission's Guidance on Exclusionary Abuses: A Step Forward or a Missed Opportunity», in *Concurrences*, n.º 2-2009, pp. 27-29.
Pitofsky, Robert, Editor
2008 *How the Chicago School Overshot the Mark – The Effects of Conservative Economic Analysis on US Antitrust*, Oxford: Oxford University Press.

Rochefordiere, Christophe de la
2001 «Structural versus Behavioural Remedies: American Hesitations in the Telecommunications Sector», in *Competition Policy Newsletter*, N.º 2- June, pp. 11-14.
Sappington, David & Sidak, Gregory
2003 «Competition Law for State Owned Enterprises», in *Antitrust Law Journal*, vol. 71, pp. 479-523.
Ridyard, Derek
2009 «The Commission's Article 82 Guidelines», in *European Competition Law Review*, Volume 30, Issue 5, pp. 230-236.
Schoen, Frank
2005 «Exclusionary Conduct After Trinko», in *New York University Law Review*, vol. 80, n.º 5, pp. 1625-1660.
Shelansky, Howard & Sidak, Gregory
2001 «Antitrust Divestiture in Network Industries», in *University of Chicago Law Review*, vol. n.º 68, pp. 1-99.
Siragusa, Mario & Rizza, Cesare, (ed.),
2007 *EU Competition Law*, Volume III, *Cartel Law*, Leuven, Belgium: Claeys & Casteels.
Veljanovsky, Cento
2004 «EC Merger Policy after GE/Honeywell and Airtours», in *The Antitrust Bulletin*, vol. n.º 1, pp. 152-185.
Vickers, J.
2008 «The Financial Crisis and Competition Policy: Some Economics», in *Global Competition Policy*, Release: Dec-08(1), pp. 1-10.
Weinberg,Jeremy
2006 «Judicial Review of Mergers in Europe: Tetra Laval, GE Honeywell and the Convergence Towards US Standards», in Marsden, Philip (ed.), Handbook of Research in Trans-Atlantic Antitrust, Cheltenham,UK-Northampton, MA, USA: Edward Elgar, pp. 153-194.
Wils, Wouter
2005 *Principles of European Antitrust Enforcement*, Oxford-Portand, Oregon: Hart Publishing.