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Doris HILDEBRAND: The emergence of the European School

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Interview

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Since 1992

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1987-1990

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@ See also Ronald A. Stern: "An in-house perspective on global competition law developments" and F. Hollande, N. Sarkozy : "Elections Présidentielles 2012: Quelle politique de concurrence pour la France et pour l'Union européenne?" on concurrences.com

Doris HILDEBRAND: The emergence of the European School

Doris Hildebrand, your book *The Role of Economic Analysis in the EC Competition Rules – The European School* is a landmark for European competition law scholars and practitioners. It is one of the few books that examine both the theoretical and practical integration of economic input in competition law practice.

In the first edition of your book, you called for the development of a "Brussels School"; a school of economic thought which would take into account the specifically European policy goals bearing on competition law enforcement, such as market integration, but also the pursuit of a "social market economy" as the treaty now states. Ten years and two editions later, how do you see the development of a European School? Would you say it has taken hold? Have economists been up to the challenging task of thinking about competition in a multi-goal policy framework, or do most economic works still make unrealistic hypotheses as to policy goals?

Economic schools of thought are evolving over time: society and values change too. The "modern" phase started for example with the classical school of thought in the late 18th century (Adam Smith). In the last century, the classical school developed into different schools of economic thought: the Marginalist School, the Neoclassical School, the Institutional School, the Austrian School, the Harvard School, the Chicago School, the Neo-Austrian School, etc. All these schools address objectives relating to the functioning of markets. Other issues dealt with are whether a "laissez-faire" approach is the best way to achieve the overall goals of an economy, or whether a more "dirigiste" policy with strong government intervention should be applied. Coincidentally, this is exactly the discussion we are currently facing in the EU financial crisis.

Economic research tries to find answers to these policy issues. Some answers are more appropriate than others. One answer to solve our current EU financial crisis might be to go back to the roots of the EU treaties. The Freiburg Ordoliberal School was the school of thought that served as the starting point for Articles 101 and 102 TFEU as well as for the EU economic integration project in general. After WWII, Ordoliberalism was applied in Germany to implement the idea of a Social Market Economy and to initiate the "Wirtschaftswunder", the German economic miracle. In the new EU Treaties, these topics are still valid and even "hot" today after 50 years of EU economic integration. If you consider the European School as successor of the Freiburg School, this school of thought is very up-to-the-minute: my book aims to bring this into perspective. I am currently working on the fourth edition, which will be a dedicated testimonial of what I call the "European School". The European School is based on Ordoliberalism as implemented in the EU Treaties, and uses more modern economic analytical tools than those that were available 50 years ago.

A school becomes a school of thought when more scholars contribute to such a theme. The names "Harvard School" and "Chicago School" are, for example, derived from the fact that the contributors to these schools were related to a specific US university. It is true that at the start of the more "economics based approach" in the mid 1990s, the majority of thoughts and contributions were coming out of Brussels. That is why the name "Brussels School" was at that time a more appropriate one. However, I think that today scholars – and more broadly speaking the competition community – throughout Europe are contributing to this European project focusing on the role of economics in EU competition law. It is not a project confined to Brussels only. That is why I think now that the term "European School"

Interview réalisée par Anne-Lise Sibony.

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is a more appropriate one. I see considerable developments among academics towards this European School, including a research initiative at my own university, the University of Brussels (VUB).

In your perception, what are the crucial differences today between US antitrust and EU competition law policies?

As far as competition policies are concerned, the crucial difference is that Europe adheres to the concept of social market economics. The assumption is that competition delivers the best market results but needs a certain mode of protection from self-destruction. The protection of free competition is the most important ‘social’ principle in a social market economy. Such a market economy, and such an economic program, presuppose the existence of a state that knows exactly where to draw the line between what does and what does not concern it; a state that prevails in the sphere assigned to it with the whole force of its authority, but refrains from all interference outside that sphere. It is an energetic umpire whose task is neither to take part in the game nor to tell the players how to move, who is completely impartial and incorruptible, and who sees to it that the rules of the game and of sportsmanship are strictly enforced. A genuine and real market economy cannot exist without such a state. Thus, a market mechanism needs to work within a pre-specified legal framework combining private entrepreneurship with government intervention. In this economic concept, social welfare is of concern too: strongly integrated competitive markets deliver wealth for all citizens by reducing risks related to war and social rebellions. These EU policy goals have been consistent for about 50 years.

My insight is that US antitrust policies change more often over time. I consider this a crucial difference. In addition, enforcers value consumer welfare significantly higher in the US than in Europe. We in Europe follow a more holistic approach meaning that both consumers’ and companies’ concerns are important to consider. With respect to enforcement, my belief is that we have a more interventionist enforcement style in Europe. Since Europeans regulate the framework in which competition can prosper, such regulation requires active and even proactive approaches. This is not common in the US.

As far as competition law is concerned, the answer is quite simple: the law is different.

Twenty years ago, it seemed the US antitrust revolution had much to teach EU (then EC) competition law¹. Nowadays, do you think that influence is still flowing only one way or do you feel that European ideas cross the Atlantic? In particular, do you think the European attention to unilateral conduct is capable of inspiring US doctrine and/or enforcement practices?²

I have the same observations: in the last decade we were crossing the Atlantic quite often, eager to learn from and to share experiences with our US colleagues. Big changes in EU competition policy were indeed initiated in the US at conferences, for example the one organised by Barry Hawk at Fordham University. Nowadays – 15 years after the emergence of the more economics-based approach – we Europeans have “grown up”: considerable initiatives in Europe take place to “upgrade” the effects-based concept. My impression is that we travel less to the US to learn from our US colleagues, and more to speak about our European competition model. Today, leading US representatives like Eleanor Fox are crossing the Atlantic to speak at European conferences about our success story.

However, I am not that positive that European insights for instance on unilateral conduct may influence the US approach. The European approach is more interventionist and I do not think that US authorities will adapt their approach in this direction unless they change some fundamental positions.

In terms of economic theory and in practice, would you say the differences between the Harvard and Chicago Schools is a thing of the past? In the US, there seems to be a sense that some convergence is taking place. H. Hovenkamp, for example, writes “in the last twenty years, the Harvard School has moved rightward, closer to the Chicago position, while at least some Chicago School members have moderated their position to the left”³. Do you agree? How do you view the European School in comparison to this “third way” between Harvard and Chicago?

The setting of the European School differs significantly from the US schools.

Although it is quite a challenge to present the two dominant US schools in one paragraph, I’ll give it a try with the support of Piraino: Harvard scholars argue that an industry’s structure – that is the number of firms in the market and their relative size – determine how effectively firms will perform in the market: if markets are concentrated, firms are more likely to engage in anticompetitive conduct. Harvard scholars demand government intervention in this respect. Over the years, the structure-conduct-performance framework of the Harvard School was extended and refined, and may provide some useful guidance today. On the other hand, the

1 See e.g. Barry Hawk, System failure: Vertical restraints and EC competition law, CMLRev, 1995, Vol. 32. No 4. pp. 973-989.

2 In this vein, see, J. Baker, Exclusion as a Core Competition Concern, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001579.

3 P. Areeda et H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Aspen Publ., 2nd ed. 2000, at § 927. See also: T. Piraino, *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, Indiana Law Journal, Vol. 82, 2007.

arguments of Chicagoan scholars are that markets are likely to correct any competitive imbalances on their own – without any intervention by antitrust regulators. According to them, the only legitimate goal of antitrust policy is to increase economic efficiency, which in turn enhances wealth/consumer welfare: markets that are self-correcting will in any event reach that goal. The Chicago School partly uses the deductive approach of micro-economic models, unfortunately more concerned with theory than with empirical testing.

If you ask me whether a convergence of the Harvard School and the Chicago School is taking place in the US, I assume that recent economic developments indeed proved that a “laissez faire” approach as recommended by the Chicago School turns out to be problematic. In this respect, economic thought has lost touch with social and political reality. A solution is required to fix this problem. However, my opinion is that going back to the Harvard School approach offers no real way out: either “big is beautiful” (Chicago) or “concentrated markets are bad” (Harvard) and neither are very helpful.

In this context, our European model could serve as a blueprint – even for the US.

The European model is based on historical observations. One observation is that concentrations of power in both public and private sectors distorted the functioning of economies. In particular our cruel experiences during WWII, when big, private firms smoothly turned into “war machines”, motivated us to thoroughly safeguard the workings of our economies. The foundation of the European Communities as an economic system goes back to these considerations. Ordoliberalism suggests that an economic order based on competition is required in order to achieve sustained economic performance and stability. Competition, however, cannot fulfil its integrative function if it is not of the appropriate form. A structure or framework becomes necessary. Such a framework is used to prevent the creation of monopolistic power, to abolish existing monopoly positions where possible and, where this is not possible, to control the conduct of monopolies. The monopoly prohibition is directed primarily at cartels and other anti-competitive agreements between competitors. Thus, the Ordoliberalism of the Freiburg School starts from the very premise that market order is constitutional order, i.e. that it is defined by its institutional framework and, as such, subject to (explicit or implicit) constitutional choice. It assumes that the working properties of market processes depend on the nature of the legal-institutional frameworks within which they take place. Thus, the long-term viability of European free markets requires a rule-bound and limited yet powerful form of government intervention. This government intervention is implemented in Articles 101 and 102 TFEU as well as in the Merger Regulation.

The European model is more concrete and stable than the system implemented in US antitrust law. In the US, a significantly broader assortment of even diverging economic insights is applied over time – ranging for example from the Harvard School to the Chicago School. On the other hand, the European model – based on the interplay of economic

and legal ordering concepts – has remained the same over the last 50 years; the economic model of the Freiburg School determined the rules necessary for the market to function effectively and serve as the standard for most economic policy decisions. The legal ordering concept serves to assure that the government acts appropriately to translate this economic model into reality. In this Ordoliberal language, economic policy decisions are dictated not by powerful institutions and interest groups, but by *general principles* chosen by the community and designed to integrate the market into society.

Our challenge is that, according to Freiburg scholars, the economic theory at the time of the development of the Ordoliberal concept (the static neo-classical price theory) is not suitable for an analytical model. This assumption, which is grounded on failures of this neo-classical model, is justified. Nevertheless, economic theory has developed over the years and today provides more sophisticated microeconomic models and analytical tools that can be used for the European model. Findings of industrial organisations may serve, for example, as standards of reference. In recent academic work, more attention is being paid to the behavior of companies, in particular the possible strategic behavior of companies in oligopolistic situations. With the help of game theory we can determine what the most likely company strategies are and whether collusion is likely or not. This pragmatic approach fits in well with the moderate, less ideological and more technical approach to problems in the new century.

Taking current EU competition law as an institutional framework and European integration policy as a background, an appropriate theoretical European competition model can be defined. My ambition is to refine this concept in the fourth edition of my book.

What do you think was the driving force behind the move of the Commission towards an “effects-based approach”? How much of it was economic tools becoming more usable and allowing for this new approach to be implemented? How much of it was effective self-promotion on the part of economists?

I do not agree that self-promotion of the part of economists was the motivation to implement this “effects-based approach”. Actually my understanding is that the European Courts took the leadership in this context. In their review procedures, judges detected a couple of manifest errors in law in Commission decisions in the 1990s. I recall several decisions, for instance, where the General Court saw the economic analyses of the Commission as flawed. Reading those judgments as an economist, I find more thoughtful economics in these judgements than applied in Commission decisions. Thus, it was simply a must for the Commission to improve its analytical skills. Karel van Miert, EU Commissioner for competition at this time, started this overall modernisation process in the mid 1990s. His first project was the modernisation of the vertical regime in Article 101 TFEU. By introducing market share caps, for example, the application focus changed from the previously used more legalistic approach with tight clauses, towards an economics-based approach as already required by the Treaty. The judges of the European Courts – supported by the work

of the Advocates General – reversed the development towards the roots of the TFEU by requiring more sound economic analyses. It took about ten years to modernise all areas of EU competition policy including state aid provisions. It can quite rightly be argued that this development is supported by the fact that economic tools are becoming more usable. On the other hand, the use of these economic tools as market simulations needs more sophistication and economic expertise. Thus, one result of this “effects-based approach” is that in the new century lawyers and economists are working together – as they have been accustomed to doing in the US for decades.

Now the *second wave* to reform the EU system is about to start - probably also based on a judgment, namely that of the European Court for Human Rights in the Menarini case. This judgment mandates a more thorough review of Commission decisions by the General Court. Whereas in the past the General Court used to focus on manifest errors only, it is now asked – according to my understanding – to perform a full facts-based economic analysis of the effects of anti-competitive behaviour *itself* in order to determine fines in accordance with the Menarini judgement. The Commission will need to face a more extensive review of its decisions in the future. The question is whether the guidelines and notices of the Commission are up to date for these new requirements. I guess they are not. Since judges with limited resources would need to apply complex economic analyses in competition law cases, the guidelines should more effectively address these specific requirements.

This means that the Commission’s current “effects-based approach” will be extended (again), not only addressing economic effects in a market but the whole scope of competition issues as manifested in the TFEU.

In your perception, has the use of economic tools in EU cases changed over the past years, say since you opened your own economic consultancy? Would you say there is still a gap between merger and antitrust cases? Do you think abuse cases are still the last “steam-powered train”⁴ in terms of use of economics?

I started up my economic consulting company in 1992 in the Netherlands and 1999 in Germany. Today we have also offices in Brussels and Vienna.

With respect to changing economic tools, there are rare cases where we do not apply market simulation models. Whereas about five years ago the use of modelling was an exception to the rule, the situation today is quite the reverse. Modelling is applied for example in article 101 cases to prove with hard facts/figures that economic efficiencies are passed on to consumers in cases where the agreement concerned restricts competition. I do not see a gap between merger cases and antitrust cases. If you qualify an antitrust case as a case where the company concerned would like to enter into a possible anti-competitive agreement, we have a couple of months to assess such a market. During this time market

simulations are easy to perform. This currently represents the majority of our economic consulting work. If an antitrust case relates to a cartel that was detected with the support of a “whistle-blower”, our possibilities are limited from the very beginning. On the other hand, in a merger case everything has to be “speedy”. The time available to collect data in the field and to analyse it is limited. Professionals need about 2-3 months to run market simulations in merger cases. However, this is the luxury version. Practice differs. I recall a multi-billion merger in which we have had only about *two weeks* to analyse more than 1.5 million price data points for thousands of retail products. Based on this analysis we successfully showed which company was the price leader and – after serious concerns on the part of the authority in the beginning – the transaction was cleared. To raise these serious concerns, the authority itself analysed 90 price data points for seven products over four months. If you mention a gap, my experience is that because of these time constraints the scope of economic analyses in merger cases is more limited than in Article 101 cases. Usually we use one or two tools from our economic tool kit in a merger case, whereas in antitrust cases we are able to use our *full assortment* of economic tools.

I do not agree either that Article 102 cases are the last “steam-powered train” in terms of use of economics. As a consulting company we do a lot of work in *rebate* cases: dominant companies use our economic tools to precisely determine the point when a rebate might become unlawful under article 102 TFEU. As court expert, I am involved in a couple of dominance cases too. In these cases we use our economic tools in particular for market definitions and cost tests. Last month, for example, I applied the “as efficient competitor test” which is now almost standard in dominance cases. This month I am working on another dominance case, using all the economic tools available.

In your perception, taking into account the national systems you are familiar with, is economics being used differently at EU and at national levels?

My answer for Germany is yes and no.

When it comes to the use of competition economics by *lawyers*: German lawyers are reluctant to ask economists to support their cases. Sometimes my experience is that such negative advice does not benefit the client at all. In my opinion, clients should get all the support they need – in particular in billion € cases – to win such a case, irrespective of whether such support comes from a lawyer or an economist. As in other jurisdictions, we should work together to achieve the best results for our clients.

On the other hand, German authorities and courts are very open to economic analyses. The authority I work closely with is the German Bundeskartellamt. My experience with this authority is that the majority of heads of units are extremely open to insights based on thorough factual analysis. Knowledge on market simulation models in general or statistical tools such as regression analysis, etc., is extremely high in the Bundeskartellamt – in particular on the part of trained legal staff! This was not the case about three years ago. I have the

⁴ B. Sher, “The Last of the Steam-Powered Trains: Modernising Article 82”, ECLR, 2004, pp. 243-246

same observation related to German judges: the other day, one of the heads of a cartel senate of the Higher Court in Düsseldorf gave a presentation about damage calculations, and I was really impressed by his deep economic insights. To conclude, economics is even used in different ways within a single member state.

My experiences of Austria and the Netherlands are that the level of application of economics is the same at European level as at national level. The knowhow of the competition community – lawyers, competition authorities and judges – is extremely high in all those countries.

I also would like to take the opportunity and thank Anne-Lise Sibony and Jean-Christophe Roda for their thoughtful questions. I have really enjoyed this interview, and I hope that your readers will share the same experience. ■

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