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CONSUMER SOVEREIGNTY IN COMPETITION LAW

Rapport de recherches

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Pour la rédaction de ce rapport en anglais, certains termes ont nécessité une traduction du français à l'anglais. Les éléments restants en français, non traduits, ont vocation à faciliter la compréhension des notions évoquées.

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Introduction

Montesquieu declared in its theory of political treaty De l'Esprit des Lois[1] « *It is competition that puts a fair price to goods and establish the relation between them* » in 1748. The competition topic has emerged between the economists, jurists and philosophers before being internalized in our laws and rules. Competition law finds its roots in antiquity[2]. If competition law is commonly perceived as a juvenile subject, Thales, who calculated the periods announcing abundant olive harvests, establishing low costs on oil presses granting him a regional monopoly, is the embodiment of concerns about competition issues. In France, the premices of competition have raised since the historical period of French revolution of 1789 where the public power weakened in favor of liberality[3]. The industrial activities and right of propriety grown and got materialized by documents such as the Décret d'Allarde of 1791, allowing for each citizen to exercice the profession they wanted. Resulting from the ideas of the enlightenment philosophers, the freedom of trade and industry became more concrete, and influenced greatly the vision of economy.

In the United States, the Chicago School is regarded as the founder of competitive thinking[4]. This university, made up of renowned economists, took an economic view of anti-competitive measures. Although economists and jurists do not necessarily pursue the same goals, they do agree on the need to regulate competition in favor of consumers. Many theories raised from economists, developing their own ideas about a fair competition and behavior of actors on a determined market. Adam Smith initiated its theory of the « *Invisible Hand* »[5] considering that the economic market doesn't need any exterior interventions, but will auto-regulate itself. The perception of the market created an ideal, for some, impossible to reach and not even wanted, and for others, the ultimate goal to achieve. Coming from these utopian believes, the concept of

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[1] De Montesquieu.C (1748) *De l'Esprit des Lois,* XX 9

[2] Spassova.V (2010) *Lessons from the past: how competition problems were solved before antitrust*

[3] French Constituant Assembly, Allarde Decree « From April 1 next, any person will be free to engage any trade or practice any profession, art or craft that he or she sees fit » , Pierre d'Allard, Decree's reporter

[4] P. Geoffron, R. Kovar, S.Poillo Peruzzetto, (février 2022) *Competition Policy - Essential Features of Community competition policy*, available at https://www-dalloz-fr.lama.univ-amu.fr/documentation/Document?id=ENCY/EUR/RUB000117/2022-02/PLAN/0007

[5] A. Smith (1776) *Research into the causes and nature of the wealth of nations*

homo oeconomicus grown up in the second half of the 19th century under the writings of John Stuart Mill[6], and later, defended by the american economist Gary Becker[7]. Indeed, humans are considered as rational in their choices, and behave in the only purpose to maximize their resources to reach an objective and useful function. This mathematical vision is based on rationality, and consumers are considered as thinkers and maximizers in their day life choices. However, this sight has been criticized as some people wont behave in this way of maximization of resources, and everyone's behavior can not be predicted[8]. These questions led the public authorities to regulate the markets, and in fact, the competition implied.

This raises the question of the consumer's place between economics and the regulation of competition. Consumers are the primary actors in competition, as their consumption drives the virtuosity of the economy, and the trade that goes with it. This is why consumer sovereignty is becoming increasingly essential.

Competition law was introduced to achieve a number of objectives. The aims of competition law vary from country to country, with some using it to guarantee economic efficiency for markets, and to achieve a certain economic well-being[9]. Others use the more general term such as "general interest"[10]. In this nebulous context, it is clear that the central objective is to create free and undistorted competition in a market. In fact, the pursuit is more of an economic nature, to encourage players to conduct a fair commercial policy on a market, integrating all new players who would like to enter it. The French Competition Authority defines the purpose of its policy as "*This is precisely the role of competition policy, which aims to guarantee the conditions of free and undistorted competition between companies on markets in order to*

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[6] J. Stuart Mill (1871) *The theory of political economy*

[7] Arthur Kramer. Gary Becker : homo oeconomicus and neoliberalism. Contribution to the ENS political philosophy seminar of Lyon organized under the direction of Arnaud Milanese and Nathanael Colin-Jäger. PhD France. 2019. available at https://shs.hal.science/halshs-02393549

[8] J-M. Keynes (1937) *The General Theory of Employment, Interet and Money*, quote « I also want to insist strongly on the idea that economics is a moral science. I have already indicated that it deals with introspection and values. I might have added that it deals with motivations, anticipations, psychological uncertainties »

[9] (2003). *The aims of competition law and policy*..., Competition law and policy Review, 5, 8-30. https://www.cairn.info/revue--2003-1-page-8.htm.

[10] WTO (7th june of 1999) *Fundamental Principles of Competition Policy*, WT/WGTCP/W/127, p.5, available at https://www.wto.org/french/tratop_f/comp_f/wgtcp_docs_f.htm

protect the interests of consumers"[11], emphasizing consumer protection. The definition of the purpose of competition law then suffers from its own weaknesses, in that the different interests apprehended by competition law must be weighed against each other. However, it is commonly accepted that there is no hierarchy between these interests, making the purpose of competition law elusive. Public institutions are responsible for assessing and controlling anti-competitive behavior in a market, in order to guarantee the interests of consumer protection.

France benefits from a dual system comprising the Autorité de la Concurrence (French Competition Authority) and the Direction Générale de la Concurrence de la Consommation et de la Répression des Fraudes (General Directorate for Competition, Consumer Affairs and Fraud Control). This duality pursues the goals of economic efficiency and consumer interests. Sovereignty is the keystone of competition law, personified by the public entities acting on its behalf. Sovereignty is defined as a supreme authority, a power enjoyed by an agent. The question of this power is major to every nation, and determines the free will of its citizens. In competition law, the consumer appears to be oblivious to the regulations imposed on the companies with which he consumes.

The consumer's habits have been shaken over the centuries. In the past, consumption was reduced to the bare minimum, due to a lack of means or purchasing power, but today's consumer is taking a completely new approach. After the war, the economy was weakened, so consumption was encouraged. Since then, a consumerist lifestyle has taken root in Western countries, encouraging the acquisition of new goods, services and loans. In the same vein, consumer loans became widespread to encourage impulse buying when consumers found it difficult to make a one-off purchase. This period, better known as the "Glorious Thirties"[12], was characterized by consumerist habits - sometimes excessive - and strong economic growth. Although this initial post-war system has been weakened by a number of economic crises (the 1970s and the sub-prime crisis in 2008), and consumers do not have as much purchasing power as they once did, the fact remains that the Western capitalist system continues to drive

[11] French Competition Authority, Competition History, available at https://www.autoritedelaconcurrence.fr/fr/la-decouverte-de-la-concurrence

[12] J. Daumas (2018). The Thirty Glorious Years: happiness trough consumption. *Project Review*, 367, 6-13. available at https://doi.org/10.3917/pro.367.0006

consumption. Consumption is not necessarily moderate, but it does need to be regulated. Faced with today's new challenges, consumers need to retain their free will, while benefiting from a degree of legal protection to guide them in their consumption habits.

In law, a consumer is defined in the introductory article of the Consumer French Code as « *any natural person who acts for purposes that do not fall within the scope of his or her commercial, industrial, craft, liberal or agricultural activity »*[13]. The legal definition of a consumer is therefore fairly restrictive, confining itself only to persons acting in a non-professional consumption context. This limitation makes it easier to identify weaker parties, those in need of support and legal protection. The consumer, presumed to be the weaker party, is therefore the final consumer. However, in economics, the notion of the consumer benefits from a certain flexibility. In fact, it is considered as the term "consumer" refers to "the economic agent (natural person or legal entity) who chooses, uses and consumes a service or a good, and thereby proceeds to their partial or total destruction"[14], thus allowing professionals to be included in the concept of consumer. Indeed, the economic definition refers not only to the final consumer in the legal sense, but also includes intermediary consumers such as companies that consume. Competition law will tend to retain the definition of the economic consumer because of its proximity to the economy. This is why the analysis of anti-competitive behavior must be carried out at a broader level, including all consumers in the sense of "those who consume".

Many philosophers have addressed the question of social relations, and the relationship with the state. From the theory of Leviathan[15] to Jean-Jacques Rousseau's concept of the "*social contract*"[16] in his political essay Du Contrat Social ou Principes du droit politique (The Social Contract or Principles of Political Law), published in 1762, questions about social organization and the free will of citizens have given rise to a number of reflections. In Rousseau's theory, we find the idea that citizens have agreed to relinquish part of their rights and freedoms in order to submit them to a public entity (personified by the State) which, in exchange, will grant them social peace through the exercise of a civil society. This conception deals with the relationship

[13] Available at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000034072545/

[14] Ministry of the Economy, Finance and Industrial and Digital Sovereignty available athttps://www.economie.gouv.fr/facileco/consommation

[15] T.Hobbes (1651) *Leviathan, or The Matter, Forme, & Power of a Common-wealth Ecclesiastical and Civil*

[16] J. Rousseau (1762) *The Social Contract of Principles of Political Law*

between citizens, and public entities designed to protect them in a climate potentially threatening to their freedoms. Rousseau's thesis could be applied metaphorically to questions of consumer sovereignty. **The issue of consumers' place in society has raised the question: to what extend is consumer sovereignty protected in competition law ?**

Placing these questions at the heart of competition and competition issues, our study focuses on public intervention in competition law, encouraging consumer protection and innovation (Part 1), and on consumers' increasingly direct action in the face of the new contemporary challenges they face (Part 2).

Part 1: The public intervention : between protection and innovation

The major purpose of regulation of competition, is the protection. Indeed, constructing rules around international trade allows to protect consumers but also the political power. The risk of letting the market completely free from law to respect the freedom of trade and industry is to lead to economical power by private actors, such as undertakers. In occidental countries, markets are opened, which can create economic powerful players able to threaten public power. Resulting from that idea, the world witnessed the need for increased protection, intensifying consumers' sovereignty (Chapter 1). Furthermore, even if these rules tend to protect and restrain too powerful protagonists, they are also a way to encourage investments, leading to innovation (Chapter 2).

Chapter 1: The need of an increased protection, intensifying consumer' sovereignty

Consumers are seen as the main target of any kind of protection. The consideration about their weak position has evolved during time. Indeed, we witnessed an evolution towards the moralization of business (Section 1) leading to the legal consecration of consumer's protection (Section 2).

Section 1: An evolution towards the moralization of business

Since freedom of trade and industry is anchored in occidental countries, exchanges of good and value creation have grown in importance. This is why the public power got more concerned about the potential risks of this growth, and decided to contain. The birth of competition law by the public actor started with the seek of economical efficiency (I) leading to the seek of welfare of the consumer (II).

I. The seek of economical efficiency...

Never before have economics and law intersected as much as in the field of competition law. It is from the practical economic facts that the legal protection necessary to guarantee its effectiveness will be derived. The risk of competition law, according to some economists, is the situation of legal blockage that does not allow complete freedom in commercial exchanges.

It is in part the Chicago school that has nourished the crossroads between economics and competition. Throughout the 19th century, until the middle of the 20th, the vision of competition law was limited to offering precise legal contours to frame potentially anti-competitive practices[17]. This is why many economists were for a long time reluctant to accept these rules limiting the economic hazards and the life of companies.

The proclamation of the Sherman Act in 1890 in the United States[18], aimed at limiting anti-competitive behavior, highlights the growing need for a legal framework for business by private actors. This act adopts two approaches to potentially anti-competitive behavior: the per se restriction and the rule of reason[19]. The per se approach consists of an arbitrary restriction of certain behaviors, considering them as inherently anti-competitive[20]. The rule of reason is more nuanced, and allows the positive effects of such behavior to be highlighted. That said, the per se approach was the most common from the enactment of the Sherman Act until the second half of the 20th century. In the 1911 U.S. Supreme Court case Doctor Miles[21], the justices held that a supplier's price restrictions were subject to the per se approach, and indeed prohibited by nature, as they limited the distributor's freedom in vertical contracts. Later, non-price restrictions, such as customer restrictions, fell under the per se approach.

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[17] F.Marty (2014). The consumer crierion as the exclusive objective of compétition policy.A perspective based on the history of American Antitrust. International economic law Review, XXVIII, 471-497. https://doi-org.lama.univ-amu.fr/10.3917/ride.284.0471

[18] Federal Trade Commission, *The Antitrust Laws*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws

[19] D.Spector (2006), Economic Analysis and legal certainty: between rules per se and rule of reason. *in Encaoua*, pp. 271-285.

[20] Ibidem

[21] Supreme Court Case, (1911) Dr Miles Medical Co v. John.D Park & Sons Co.

The severity of the Court's ruling on these restrictions raises questions about the effectiveness of competition law for the economy. Economists have therefore criticized the rigidity of the law, knowing that it does not necessarily go hand in hand with the ever-changing and virtuous economic circle.

In addition to being too restrictive of competition, the per se approach contained many issues that made it impossible to apply effectively. Indeed, the per se approach arbitrarily decided that a cartel between competitors should be qualified as anti-competitive even though these companies would not have significant market power because of their light economic weight. According to the saying "*de minis non curat praeto*", only significant behavior on a market deserves to be analyzed.

Moreover, an immediate per se analysis would open the door to abuse by plaintiffs who could use such severity to condemn players. This instrumentalization was denounced by William J. Baumol in 1985 in his article Use of Antitrust to Subvert Competition[22].

This is why, from the 1960s onwards, the Chicago school has adopted a more lax vision of these restrictions. Indeed, such legal restrictions can create blocking situations, even though certain behavior, prima facie anti-competitive, could also produce beneficial effects for competition and the economy[23]. Ronald Coase indicated that he preferred the firm to the market[24], implying in particular that the model of contractual integrations made it possible to limit opportunistic behavior, and therefore to produce beneficial effects for the market.

In a 1967 Supreme Court decision[25], the Court reversed its position and considered that non-tariff restrictions should be subject to the rule of reason approach. Moreover, it reversed its initial position and modernized its approach in 2000 in an other[26] case, where it considered that even contractual tariff restrictions should be subject to the rule of reason. This new vision of the

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[22] WJ Baumol & JA Ordover (1985) *Use of Antitrust to Subvert Competition* . https://www.journals.uchicago.edu/doi/epdf/10.1086/467083

[23] FH Easterbrook (1986) *Monopoly, Manipulation and Regulation of Futures Markets*, vol. 59, issue 2, S103-27. https://econpapers.repec.org/article/ucpjnlbus/v_3a59_3ay_3a1986_3ai_3a2_3ap_3as103-27.htm

[24] R. Coase (1937), *The Nature of the Firm*. http://econdse.org/wp-content/uploads/2014/09/firm-coase.pdf

[25] Supreme Court Case (1967) South Dakota v. Mayfair Inc . https://www.supremecourt.gov/opinions/17pdf/17-494_j4el.pdf

[26] Suprême Court Case (2000) Leggin Laser

Court makes it possible to temper the behavior of economic actors and not to pass too harsh and hasty a judgment on them.

The economic efficiency approach is therefore essential in a post-war context where the need for economic dynamism is felt. This vision has had difficulty gaining acceptance among judges, but it tends to be applied more and more in Western countries so as not to disadvantage its own private actors, facing international actors. The rule of reason approach therefore requires a more detailed analysis of the potentially positive effects of corporate behavior, while ensuring that these effects are not fictitious but effective[27].

Moreover, the positive effects must be felt for the good of the economy and the market, but for what purpose? This is where the consumer is implied[28]. Indeed, the consumer is not an upstream actor in the regulation of the market and competition law, and is not really sovereign in judging the potentially illicit and anti-competitive behavior of companies. That said, it serves as a formality. Certainly, the rule of reason approach is becoming more and more formalistic as it implies a precise search for positive effects and efficiency gains. This vision must therefore be led by a guide, a red thread, embodied by the consumer, and the perpetual search for his welfare (II).

II. ...leading to the seek go the consumer's welfare

The shift towards the search for economic efficiency in competition law has led to a relaxation of the per se approach to anticompetitive effects in favor of a more nuanced view. This new viewpoint offers a certain flexibility in the interpretation of such conduct, but is also accompanied by a lack of clear nomenclature for the prohibition of such conduct. Therefore, in order to aim for economic efficiency, the legislator must always have the "welfare of the consumer" as an end in view.

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[27] P. Bougette & C.Charlier (2016) The difficult Conciliation between competition policy and industrial policy: the support to sustainable energies. *Economic Review*, 67, 185-199. https://doi.org/10.3917/reco.hs01.0185

[28] European Court of Justice 16th sept.2008 case C-468/06 Sot. Legos kai Sia e.a. v. GlaxoSmithKline AEVE Farmakeftiton Proïonton §68 « In the light of the treaty aiming the consumer's protection trough undistorted competition and the intégration of national markets »

Indeed, in the United States, the Sherman Act has been interpreted in this sense by economists. It was Robert Bork of the new Chicago Chicago school who intended to combine the notion of economic efficiency with maximizing consumer welfare[29]. The question of the consumer is then left to the sovereign appreciation of the judges, as the texts do not make it clear.

In France and in the member countries of the European Union, the reference to the maximization of consumer welfare in the assessment of the behavior of private actors does not have to be clearly stated as these countries have a powerful social heritage. Indeed, Keynesian interventionism, which became increasingly popular after the end of the Second World War in France, marks a growing evolution of public action, particularly with the objective of economic growth. Especially in France, the Welfare State emphasizes the need for public power intervention with a protective aim for citizens[30]. From this French and European socialist tradition, the implicit desire to ensure the well-being of consumers is always present.

This vision of the consumer in competition law is interpreted even more broadly. Indeed, by consumer, we mean any person who is going to consume, to buy, without worrying about whether this person is acting in a professional or personal way (contrary to French common law)[31]. The welfare of the consumer is then understood as the welfare of the final consumer, but also any intermediate consumer company. The broadness of this definition makes it possible to make national and European legislators hear the need for action with a protectionist aim, not only of the final consumers blind to the commercial relations, but also in favor of small private actors.

On the other hand, this consumer welfare could be based on a paradoxical vision of pro-trust antitrust. We break with the classical liberalism necessarily induced by the logic of economic efficiency gains by putting forward a more social and consumer-friendly approach. Indeed,

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[29] K. Heyer (2014) Consumer Welfare and the Legacy of Robert Bork, Journal of law and economics. Vol. 57, No. S3, pp. S19-S32. https://www.jstor.org/stable/10.1086/676463

[30] J. Damon (2016). John Maynard Keynes. *The need for government intervention* . In, J. Damon, 100 thinkers os society (pp. 123-124). Paris cedex 14: Presses Universitaires de France. https://doi.org/10.3917/puf.damon.2016.03.0123

[31] Ministry of the Economy, Finance and Industrial and Digital Sovereignty available athttps://www.economie.gouv.fr/facileco/consommation

consumer welfare is economically based on the price theory developed by Stigler in 1961[32]. This theory implies that the consumer looks for the lowest price on the market, but does not search intensively because of the cost the research implies. In fact, there is a distortion between the welfare of the consumer, who aims at maximizing his welfare through reduced costs, and the private actors in a market seeking to maximize their profits. This is why judges have a role of regulator and allow to arbitrate between these interests in a sovereign way. Now that the pursuit of economic efficiency is a nebulous area with no precise nomenclature, the pursuit of consumer welfare is a way to guide judges and legislators in their policy and analysis of antitrust behavior.

These utopian visions of consumer welfare are nevertheless subject to certain reservations. Concerning the theory of prices, Rotshield [33] built an opposite model to Stigler's, indicating that prices to consumers can be between a competitive price and a monopolistic price. Indeed, firms knowing that consumers do not benefit from complete information, are destined to be exploited by these economic actors. The consumer would therefore not be sovereign of his consumption choices, but subject to the firms. Moreover, the aim of the well being of the consumer is only a contemporary interpretation of the texts of laws, without explaining explicitly this objective. Moreover, one could also admit that consumer welfare can be understood in unison with new notions, such as the increase of ecological objectives, leading to an important green consumption[34]. In fact, judges should take into account not only consumer welfare but also other related notions in the behavior of companies in order to adapt to consumer habits.

Thus, the consumer appears to be subject to the behavior of private actors, themselves interpreted in the light of legal texts and growing social needs. The sovereignty of the consumer is then exercised unconsciously. As the consumer's well-being being only an objective to be reached, it was necessary to concretize the protection of this one through public interventions (Section 2).

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[32] R. Garcia (2013) *The economic theory of information: a synthesis of the literature*. Volume 62, n° 1, March 1986. https://www.erudit.org/fr/revues/ae/1986-v62-n1-ae2710/601361ar.pdf

[33] M. Rotshield (1974) *Searching for the Lowest Price When the Distribution of Prices Is Unknown.* Vol. 82, No.4, pp. 689-711. https://www.jstor.org/stable/1837141

[34] French Study by OBOSCO, led by P. Moati showed that 59% of the consumer take account of environnemental issues in their consumption

Section 2: The consecration of consumer protection

In order to guarantee an effective protection for the consumer, wanted by the public institutions, these authorities had to intervene thanks to a policy of ordo liberalism (I) leading to its juridical concretization (II).

I. Ordo-liberal interventionism as guarantee for consumers' sovereignty

Competition law is marked by the impetus of public power. Faced with the different economic theories that oppose each other, the need to find a fair balance between the interests of companies and those of consumers is felt. Moreover, international competition requires a fair framework of competition rules.

This is why the European model regulating all competition rules is based on an ordo-liberal model. Ordo-liberalism combines state interventionism, while guaranteeing a margin of maneuver in the freedoms of economic actors. From the need to control competition, regulation is born, consisting of a variety of public interventions, of a sectorial nature, which affect the functioning of markets. Coming first from Germany, ordo-liberal thoughts tended to extend all over the continent.

France is internationally recognized as a producer of laws, where regulation is constantly increasing. Despite a movement towards deregulation, the OECD's PMR index[35] indicates that regulation is less effective in France than in its neighbors. In 2018, the French government obtained a score of 1.57, knowing that the higher the score, the more regulation hinders competition. On average, within the European zone, the score is 1.23.

Even if the trend is towards deregulation, Thomas Philippon points out that this can have harmful effects. In particular, taking the example of the excessive deregulation in the United

[35] OECD's Indicators of Product Market Regulation. https://issuu.com/oecd.publishing/docs/fra_country_note_-_tot_final?fr=sYmYxNTkzNTk1MQ

States[36], where he witnessed a weakening of consumer and SME protection. This economist notes a concentration movement in the United States as a consequence of insufficient competition policies that do not fight enough against anti-competitive mergers and acquisitions. In a 2019 note on "*Competition and trade: what policies for Europe?*"[37], the Council for Economic Analysis observes an increase in concentration in many sectors in the United States, and the distortion of the sharing of value added in favor of profits, contrary to what is happening in the European Union. These phenomena could reflect a general reduction in the intensity of competition due to a weakening of competition policies or an increase in barriers to entry.

Regulation is necessary to satisfy consumer sovereignty in their choices. Indeed, the ordo-liberalism of democratic countries allows for free state intervention in markets, whose policy has been previously determined democratically by the citizens. This regulation is also necessary according to economists. Even if it appears paradoxical that legal rules limit the virtuous circle of the market economy, and the inefficiencies of the said market. These inefficiencies to be corrected by law are numerous, we can cite some examples.

First of all, asymmetry of information, such as a noncompliance with the terms of a contract by a non-contractor, or externalities that may represent an advantage or damage caused by the action of one agent on another agent. Kahneman[38] evoked the irrationality of actors by highlighting their psychological biases, such as alienating dependence, which runs counter to the vision of the actor as homo oeconomicus. One factor that makes regulation necessary is the lack of competition in a market. Indeed, some markets are destined to be oligopolies or natural monopolies (such as aeronautics or telecommunications). In this regard, Baumol[39] expressed the importance of competition in an oligopolistic market, of the absence of barriers to entry.

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[36] T. Philippon (2022) quote « *The United States have left monopolization developed* » Media Interview in Franceinfo

[37] S.Jean, A.Perrot, T.Philippon (2019) *Competition and trade: Which policies for Europe?*. Notes form the coulee of economic analysis, 51, 1-12. https://www.cairn-int.info/journal--2019-3-page-1.htm.

[38] D. Kahneman (1974) *Judgement under Uncertainty* . explaining our ability to judge and take decisions based on two systems : the first system is fast and unconscious, the second produces cognitives bias

[39] WJ Baumol & JA Ordover (1985) *Use of Antitrust to Subvert Competition* . https://www.journals.uchicago.edu/doi/epdf/10.1086/467083

On the other hand, regulation must be careful not to be excessive and harm competition and economic growth. As previously stated, consumer sovereignty in competition law therefore goes hand in hand with the choices determined upstream by the public authorities. Ordo-liberalism thus appears to be the best political model for combining both state protection and market freedom. According to Stigler[40], risks persist in that the motives of public regulators pursue a private interest (such as re-election) and not a general interest, which would work against the consumer. Philippon [41] in turn mentioned the power of lobbying by large American firms to competition regulators in the United States, leading to a certain laxity in antitrust policy.

In the United States, the trend towards mergers creates inefficiencies in competition restrictions. Indeed, producers are increasingly becoming price makers rather than price takers. By setting prices higher than the market price, they penalize consumers. The consumer, as an actor such as a small business or a distributor, will therefore be subject to these prices, and will impose his own margin in order to make a profit. It is therefore the final consumer who will suffer this double marginalization and for whom the cost of consumption will be higher. Moreover, American companies are developing dominant positions in the labor market, allowing them to weaken wages. The sovereignty of the consumer is thus increasingly weakened[42].

Policy must therefore strike the right balance between regulation and economic dynamism. In the absence of regulation, as in the United States, consumers find themselves less sovereign in their consumption choices. In Europe, state interventionism must not constitute barriers to economic virtuosity at the risk of weakening consumer opportunities. Ordo-liberalism is the model that is most in line with this objective of arbitration between the economic and legal interests of competition law. It is in particular by this model that the rights of consumers and their protection have been legally guaranteed (II).

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[40] R. Garcia (2013) *The economic theory of information: a synthesis of the literature*. Volume 62, n° 1, March 1986. https://www.erudit.org/fr/revues/ae/1986-v62-n1-ae2710/601361ar.pdf

[41] S.Jean, A.Perrot, T.Philippon (2019) *Competition and trade: Which policies for Europe?*. Notes form the coulee of economic analysis, 51, 1-12. https://www.cairn-int.info/journal--2019-3-page-1.htm.

[42] Trésor-éco (2018) *Competition and merger of films in the USA*. n°232 quotes : « This increase in concentration could have negative effects on business investments. Its effect on real wages is more ambiguous, since, on the one hand, an increase in the market power of compagnies can translate into higher price or lower negotiated wages (...) » ; « Theses evolutions might rise inequalities of wages in USA (...) » . https://www.tresor.economie.gouv.fr/Articles/3f66e091-84e7-42f6-90a2-b010cf71733f/files/c214e31a-7293-4295-a41e-e0f09f9fb1a2

II. The legal concretization of consumer protection, weak part

All the efforts of the public authorities therefore allow for the regulation of competition, particularly with a view to protecting the consumer. These upstream actions of the public authorities lead to concrete legal protection, offering legal security for the consumer.

In the United States, laws govern consumer protection at the federal and national levels. In fact, several legal texts guarantee the protection of the latter.

First of all, the Fair Credit Reporting Act which ensures the consumer the accuracy, fairness, and privacy of consumer information that may be held in the files of consumer agencies[43]. This legislative text is completed by the Fair Debt Collection Practices Act which prohibits any form of abusive data collection[44]. In the health sector, the Federal Food Drug and Cosmetic Act regulates security in the above-mentioned areas.

Some states have adopted the Uniform Deceptive Trade Practices Act[45] which targets legal actions. Indeed, the latter encourages any person with an interest to take legal action in the field of misleading commercial advertising or unfair trade practices.

In addition to these specialized legal texts for consumers, there are federal provisions aimed at antitrust in a more general way. It is the Sherman Act[46] that particularly regulates antitrust provisions, prohibiting all restrictions of competition and prohibiting monopolies. The Sherman Act adopts a per se vision, and therefore treats these anti-competitive behaviors with severity. It also provides for penalties that would be imposed on those who interfere with its provisions,

[43] Consumer Protection and Antitrust Law, Chapter 5 . https://www.coursesidekick.com/business/study-guides/wmopen-introbusiness/consumer-protection-and-antitrust-laws#:~:text=The%20Sherman%20Act%20outlaws%20%22every,trade%2C%20only%20those%20that%20are

[44] Ibid

[45] Ibid

[46] Federal Trade Commission, *The Antitrust Laws*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws

ranging from fines to imprisonment. Along with the Sherman Act is the Federal Trade Commission Act[47], which prohibits all unfair methods of competition

In France, the consumer is considered by nature as the weak party to the contract. As they are dealing with professionals, they are supposed to be in a position of asymmetry of information and not to benefit from the knowledge of the contracting professional who imposes his conditions. Moreover, the power of a professional co-contractor sometimes implies that the consumer in a situation of necessity, prefers to contract under less advantageous conditions, rather than not to contract. This is why the French legislator has intervened to regulate these relationships considered as "unbalanced"[48].

First of all, in ordinary contract law, there are provisions designed to protect the weaker party, without referring directly to the consumer. We focus here on the contractual field, with article 1171 of the French Civil Code, in its first paragraph, providing that « *In a contract of adhesion, any non-negotiable clause, determined in advance by one of the parties, which creates a significant imbalance between the rights and obligations of the parties to the contract is deemed to be unwritten*. » [49]

The hypothesis referred is an unbalanced relationship in a contract, due in part to non-negotiable clauses. It is then assumed that clauses inserted into the contract and imposed by one party, without the other having been able to negotiate them, are considered unwritten. This provision creates difficulties for professionals who tend to offer a standard contract to their co-contractors. The objective is to ensure that the contracting party is not put in a weak position. The significant imbalance mentioned in the paragraph of the same article emphasizes that the assessment of this imbalance should not relate to the subject matter of the contract or its performance. It is therefore on the imbalance of the rights and obligations of the parties that the

[47] Consumer Protection and Antitrust Law, Chapter 5 . https://www.coursesidekick.com/business/study-guides/wmopen-introbusiness/consumer-protection-and-antitrust-laws#:~:text=The%20Sherman%20Act%20outlaws%20%22every,trade%2C%20only%20those%20that%20are

[48] C. Rondey (2000) Conception of the Consumer according to the Bruxelles' Convention. Recueil DALLOZ, p. 374

[49] Article 1171 French Civil Code. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000036829836#:~:text=Dans%20un%20contrat%20d'adh%C3%A9sion,contrat%20est%20r%C3%A9put%C3%A9e%20non%20%C3%A9crite.

judge will focus. In fact, the French protectionist vision is manifested in domestic contract law, representing a major part of competition law.

More generally, consumers are protected from professionals, imposing on the latter obligations of advice and information. The professional must act as a "compensator" and offer any information to the consumer that would be useful to him in order to contract[50]. The same logic is applied to insurance contracts. The insurance code imposes on the professional a duty of advice, but also that the contract respects particular conditions to the writing such as the highlighting of the exceptions in big character[51] These legal steps aim at protecting the consumer and try to make sure that they are aware of the contracts they are signing.

The HAMON law of March 2014[52] also comes to strengthen the rights of consumers by rectifying the Consumer Code. The goal is explicit, there is a clear desire to "rebalance the powers between consumers and professionals." All these provisions must necessarily be articulated. Even if certain texts are of common law, and others derogate from it, they all aim at ensuring the protection of the consumer.

The « infantilizing » vision of the consumer is also felt in competition law. This law, which is mainly governed by European provisions, aims to respect fair competition, without prejudice to consumers. Consumers in the sense of competition law also benefit from this protection, in

[50] X. Delpeche (2010) Consecration of the duty to advise. *Dalloz Actualités,* referring to French Cour de Cassation case, Civ. 1re, 28 oct. 2010, F-P+B+I, n°09-16.913.
https:wwwdallozfr.lama.univamu.frdocumentationDocumentctxt=0_YSR0MD1kZXZvaXIgZGUgY29uc2VpbCBwcm9mZXNzaW9ubmVswqd4JHNmPXNpbXBsZS1zZWFyY2%3D&ctxtl=0_cyRwYWdlTnVtPTHCp3MkdHJpZGF0ZT1GYWxzZcKncyRzb3J0PSNkZWZhdWx0X0Rlc2PCp3Mkc2xOYlBhZz0yMMKncyRpc2Fibz1UcnVlwqdzJHBhZ2luZz1UcnVlwqdzJG9uZ2xldD3Cp3MkZnJlZXNjb3BlPUZhbHNlwqdzJHdvSVM9RmFsc2XCp3Mkd29TUENIPUZhbHNlwqdzJGZsb3dNb2RlPUZhbHNlwqdzJGJxPcKncyRzZWFyY2hMYWJlbD3Cp3Mkc2VhcmNoQ2xhc3M9&id=ACTU0138111

[51] Articles L111-1 and next of the French Code of Insurance. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000024376802

[52] Law 2014-344, 17th march of 2014 about consumption. https://www.legifrance.gouv.fr/loda/id/JORFTEXT000028738036

particular through the provision of Article L420-2 of the French Commercial Code[53]. It describes the situation where a company will take unfair advantage of the state of dependence in which its business partner is. It is a right that has no equivalent in European law, thus marking the French protectionist vision. This abuse of dependence is characterized by the presence of an economic situation, an exploitation of it, and an affection on the structure of the competition of the market. The consumer as a commercial partner is thus protected in the same way by the competition law, and has rights allowing him a greater sovereignty. Indeed, the challenge of the abuse of economic dependence allows the consumer, as a weak party, to no longer be subjected to an operator in a dominant position on a market. In fact, he can regain a certain contractual freedom through legal protection, guaranteeing him, in fine, a greater sovereignty.

Public intervention makes it possible to reinforce the consumer sense of protection. Whether the consumer is the final consumer, or the commercial partner in the situation of a weak party, the guarantee of their protection serves as the ultimate objective of competition law. It remains to be seen how sovereignty is materialized in practice. Indeed, the numerous legal provisions guarantee an effective regulation of competition. On the other hand, the consequences of regulated competition must allow to offer consumers a certain sovereignty. This is why the regulation of competition has consequences for innovation, making it possible to assert consumer sovereignty (Chapter 2).

[53] Article L420-2 of the French Commercial Code quote « The abusive exploitation by an undertaking or group of undertakings of a dominant position in the domestic market or in a substantial part of it is prohibited under the conditions laid down in Article L. 420-1. Such abuse may include refusal to sell, tying or discriminatory conditions of sale, as well as the severance of established commercial relations, for the sole reason that the partner refuses to submit to unjustified commercial conditions.

The abusive exploitation by an undertaking or group of undertakings of the state of economic dependence in which a customer or supplier finds itself is also prohibited, insofar as it is likely to affect the functioning or structure of competition. Such abuse may include refusal to sell, tied sales or discriminatory practices as referred to in article L. 442-6. »
https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038725501

Chapter 2: The consequences on innovation: materialization of consumer' sovereignty.

In order to guarantee a certain sovereignty in favor of the consumer, competition law must align itself with the need to institute control while allowing economic investment. This is why European policy imposes an institutional control that encourages competition (Section 1) and provokes innovation with effects for consumers (Section 2).

Section 1: Institutional control as an incentive to competition

As mentioned above, competition law is subject to state and European regulation. This legal architecture is expressed by the control, by the public power, before and after the so-called anticompetitive behaviors (I), and by the taking into account of the consumers' habits in this regulation (II).

I. Anterior and posterior control limiting anti-competitive behavior

Within the European Union, each State has a public entity aimed at controlling and regulating anti-competitive behavior. However, these behaviors can quickly take on a supra-national scope, and must be apprehended by a common European entity: the European Commission[54]. It is therefore in charge of the analysis of anti-competitive behavior when it involves more than one European member state.

It is the TFEU that regulates the abusive behavior of private actors on a market. It makes it possible to control the behavior of private actors on the European market with a view to condemning them. In this way, the regulation prohibits concerted practices between companies within the meaning of Article 101 TFEU[55], intended to distort or restrict competition within the internal market. The article goes on to provide a list of manifestations of concerted practices, which is not exhaustive, allowing the regulatory authorities to rely on it and interpret in

[54] European Union, Preserve and promote antitrust behaviors. https://european-union.europa.eu/priorities-and-actions/actions-topic/competition_fr#:~:text=La%20Commission%20europ%C3%A9enne%20contr%C3%B4le%20les,des%20prix%20justes%20aux%20consommateurs.

[55] Eur-Lex. https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX%3A12008E101

concreto the anti-competitive practices that might fall within the scope of Article 101 TFEU. Here again, the objective is not to restrict competition, and *a fortiori*, not to subject consumers to consumption from anti-competitive companies.

Most frequently, cartels concern prices, also called in competition law "price cartels". Companies come together in order to set a common price for their products or services. As a result, consumers, captive of the products or services of a company, ovulating to leave this one to approach a competitor with lower prices, finds itself in a situation of blockage. By this effect, the companies put themselves on the same footing with regard to price, and leave no room for freedom to the consumer. Consumers who cannot do without certain products, feed these companies, which can exploit this submission in their own interest. The European or national institutions therefore sanction this type of abusive behavior which will only have a negative effect on the consumer. They allow to enforce a free and fair competition, in which each actor would submit to the preferences of consumers, and thus reverse the balance of power.

In the same way, there is a control concerning the abuse of dominant positions by certain companies. Some economic actors are considered as being unavoidable on a given market, and can therefore take advantage of this situation to impose conditions that are favorable to them, and often prove to be detrimental to all types of consumers. Article 102 of the TFEU states[56]: « *Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States* ». The idea of the European legislators is to ensure that potential companies in a monopoly position do not abuse this position in order to impose their prices and conditions on final consumers, but also to block consumers in the sense of commercial partners. The price maker approach then takes precedence over the price taker.

It should be noted that abuse of dominance can apply to any economic agent. Therefore, even nationalized public firms can be subject to control for abuse of dominance. In the Lietuvos case of January 2023[57], in which a state-owned freight forwarding and management company

[56] Eur-Lex. https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX%3A12008E102

[57] Info Curia Jurisprudence (2023) European Commission, Case C-42/21 P, on date of 12th January 2023, Lietuvos geležinkeliai / Commission. https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=fr&num=C-42/21%20P&jur=C

indirectly blocked its train lines due to construction work, private companies transporting goods over these lines were in a blocking position. This is similar to the theory of essential infrastructure, which emphasizes that an actor cannot have access to a market when another actor in a position of superpower in that market limits access. Consumers, in the sense of agents who consume, are in fact restricted in their ability to compete with other agents. In order to balance these relationships, the European Commission as well as the national public entities are working to analyze the abuses of dominant position in order to restrict their effects and guarantee fairer competition. Article 102 thus allows final consumers to avoid the weight of a commercial agent's individualism (the 1979 European Commission Decision Hoffman-Laroche expressed the notion of "independent behavior" as granting a company the power to hinder the maintenance of effective competition[58]) in a market, and more broadly, allows free access to competition for consumers.

A regulation 139/2004[59] on the approximation of two economic entities in order to converge, also allows to control a potential monopoly. First, a prior control is required for companies wishing to merge through the notification system. Indeed, Article 4 of the Regulation states that « *concentrations with a Community dimension covered by this Regulation must be notified to the Commission* ». By this Regulation must be notified to the Commission before they are implemented and after the conclusion of the agreement, the publication of the public bid or the acquisition of a controlling interest. This notification allows the European Commission to analyze the effects of such a merger in depth, and to determine its potentially anti-competitive effects. In fact, the public authorities are working to anticipate the future dangers of such mergers in order to protect consumers and ensure that the merger will not crush them. This prior notification is mandatory at the national level, when the companies meet the notification criteria, but is often referred to the European Commission because of the fact that the European thresholds are exceeded and the influence of such a merger on the European market. In addition, the Concentrations that are not even European can also be apprehended by the European Commission thanks to the judges' interpretation of article 22 of Regulation 139/2004[60]. In order to anticipate a merger project that would threaten the European market,

[58] (1979) European Commission Case 85/76, on the date of 13th february 1979 Hoffmann-Laroche & Co v. Commission. https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:61976CJ0085

[59] Eur-Lex (2004) . https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:fr:PDF

[60] Ibid

Member States can ask the Commission to be competent and thus make a referral to the European institution. This use of Article 22 was notably marked in the Grail Illumina case[61], which worried the European States because of an American merger in the pharmaceutical sector.

The advantage of such an analysis is that it prevents a market from being crushed by a concentration of two economically powerful agents that would absorb a large part of the consumers, making them captive, and limiting access to other competitors on the same market. This is why the American tendency to open up mergers adopts a more economically vision, but may be part of a potential risk of weakening consumer sovereignty.

The government's approach to potentially anticompetitive practices therefore makes it possible to protect end consumers and to guarantee more effective competition for all other consumers. If consumers are the recipients of this regulation, they are also unconsciously the actors of it (II).

II. Consumer behavior as a determinant of competition regulation

Dick Benschop, the Dutch Minister of Foreign Affairs, declared in an essay on a new vision of Europe « Enough paternalism! » [62]. Indeed, Europe is inclined to preserve the interests of its citizens by protecting them. In competition law, we have witnessed such a tendency towards consumers. However, it would be wrong to assume that consumers are only passive actors in competition law, and only consume.

Homo oeconomicus thinks of the consumer as a rational being, capable of limiting his risks, maximizing his happiness, and facing only his budgetary constraints. Opposed to this interpretation is the European socialist vision that tends to consider the consumer as a being subject to powerful economic agents from which he cannot escape because of his captivity.

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[61] European Commission (2022) Grail Illumina Case T-227/21, Judgment of the General Court (Third Chamber, Extended Composition) of 13th july of 2022, Illumina, Inc. v European Commission . https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=;ALL&language=en&num=T-227/21&jur=T

[62] D. Benschop (2001) *Théorie New European Union seen by Dick Benschop*. https://ec.europa.eu/dorie/fileDownload.do;jsessionid=6KLiIVPTpy629gVbSvs9NN4kD0yrL2IYXeGmCyT9zVZJSENbAT3I!-2142749860?docId=3682&cardId=3682

How to find the right balance in the appreciation of the consumer? And what is its influence on competition?

Even though the final consumer never speaks directly to companies, he appears to be blind to the regulations imposed on them, and implemented in order to protect his interests. This being said, the consumer is in reality an essential actor of the competition law. Indeed, competition law relies on many "tests" to establish an anti-competitive practice.

First of all, there is the substitutability test[63]. In order to determine whether companies are competing on a market, we try to know if they are indeed acting on the same market. To do this, the public authorities have been led to question the notion of substitutability. Indeed, if two products of two potentially competing firms are considered "interchangeable", "substitutable", then we conclude that the firms are acting on the same market, with the same products, and are competing[64]. In order to take into account the substitutability of products, we look at the sociology of the consumer. In fact, it is the final consumer who is the recipient of these products, so only he can decide whether the products are equivalent. This assessment of the substitutability of products is therefore placed downstream, at the level of consumer consumption. It was in the toys case that the French Competition Council questioned the substitutability of a baby doll and a Barbie. In order to elucidate the question, it was necessary to place oneself in the shoes of the consumer and the final use of the two products. Professor Bougère concluded that Barbies were designed to interpret stories, while dolls were designed to adopt a parenting role. In fact, the products are not considered to be substitutable[65].

In the same way, in order to delimit a market, we look at consumer habits. Indeed, if we want to capture the Coca-Cola market in France, we will have to determine whether it is part of a broad market for soft drinks, or a more restricted market for cola-based soft drinks. Economists are working to delimit these markets, while relying on consumerist empiricism.

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[63] A. De Moncuit (2023) Substitutability, *Concurrences Dictionary* n°12371. https://www.concurrences.com/fr/dictionnaire/substituabilite

[64] M. Cartapanis Thesis (2017) *Innovation and Competition Law*, p.27. https://theses-univ-amu-fr.lama.univ-amu.fr/171208_CARTAPANIS_103kcmk284hx755iy441nftju_TH.pdf

[65] Competition Council (1999) Decision n°99-D-45, 30th june of 1999 about behaviors into toys' sector. https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//99d45.pdf

Another test is useful in competition law: the cross-price elasticity of demand test[66]. For the same purpose of market delineation, one asks how a user of a product would react to a small but significant increase in the price of that product. If the price of the product becomes higher, and the consumer does not switch to another product, he or she remains captive to the original product, and does not consider apparently similar products as potential competitors. On the other hand, if following a slight but significant increase in the price of the initial product, the consumer turns to another product, this means that he considers them to be competitors of each other, that the products are equal. This test, called the SSNIP test, is very common in determining markets. Once again, the consumer becomes the source of the competitive analysis.

In addition, economists take on the task of studying consumer habits in merger law. Indeed, a geographic analysis of markets must be conducted. As part of this research, economists analyze consumer behavior and their ability to travel to the relevant outlet. In the decision rendered by the French Competition Authority on March 21, 2022[67] concerning the acquisition of the Stokomani bazaar and decoration store, the geographic analysis showed that consumers were willing to drive forty minutes to reach the store. The geographical analysis also varies depending on whether the location is in a metropolitan area or in a smaller town, as it is believed that consumer behavior varies enough depending on their environment to change the interpretation. Consumers thus appear as a keystone of the competitive analysis.

Despite a strict analysis of consumer behavior, François Lévèque emphasizes the need to modernize the consideration of the consumer. In fact, the homo oeconomicus approach deserves to be reconsidered, according to him, in that the "imperfect consumer" would impose itself as a new norm. Consumers are thus indirectly active in competition analyses and competition law regulation. From this activity arises a European objective, which is innovation. In addition to being beneficial to the economy, innovation offers many benefits to consumers (Section 2).

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[66] Vogel&Vogel, Elasticity of the demand. https://www.vogel-vogel.com/faq-items/elasticite-de-la-demande/

[67] French Competition Authority (2022) The Authority allow the purchase of the Stokomani Group by the Zouari family. https://www.vogel-vogel.com/faq-items/elasticite-de-la-demande/

Section 2: The effects of innovation on consumers

The control of competition makes it possible to protect the consumer, but for what precise purpose? The protection of the consumer is not intended to direct his actions, but rather to give him a free will that he would not have without state intervention. Thanks to this legal architecture of competition law, the consumer benefits from efficiency gains (I) and guarantees the integration of smaller players on the market (II).

I. Efficiency gains for the consumer

The legalization of competition results in the control of the behavior of economic actors on a market. The interest is to guarantee free and fair competition on the market, thus ensuring the sovereignty of the consumer in his choices. To do so, the public authorities have expressed a final objective: efficiency gains for the consumer.

As mentioned above, the interpretation of competitors' behavior in a market has evolved greatly. The per se approach of competitors has evolved into a more nuanced approach, subject to the rule of reason[68]. This new vision of competition ensures a more economic approach, understanding the potential benefits that companies can bring to a market. The efficiency defense approach thus authorizes behaviors that would be prohibited because of their potential positive effect on the market. But this vision of efficiency gains is not endless. Indeed, these efficiency gains must be beneficial for the market, in that the final recipients of the market are the consumers.

So, competition law will guarantee consumers lower prices, better quality products and a wider range of products[69].

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[68] B. Deffains, O. d'Omersson, T. Perroud (2020) *Competition Policy and Innovation Policy: reform of European Law.* p.35
https://www.robert-schuman.eu/fr/doc/diversFRS_Pour_une_reforme_du_droit_europeen_de_la_concurrence.pdf

[69] European Commission, Importance of Competition Policy for the Consumer.
https://competition-policy.ec.europa.eu/consumers/why-competition-policy-important-consumers_fr

Lower prices[70] are characterized first of all by the fact that competition policy implies that all actors in the same market compete to attract consumers. In order for consumers to tend to choose a particular economic agent, they can take several elements into account. But it is particularly the price that will be retained by the consumers in that the budget of the consumers represents their principal brake of consumption. Competitors are then encouraged to lower their prices to attract a certain clientele. On the other hand, competition law also limits the abuses that would result from excessively low prices. This is what is known in competition law as the "predatory pricing" technique[71]. This pricing practice consists of lowering prices in a significant way to drive competitors out of the market. Once the competitors are out of the market, the company will be able to raise its prices and recover the losses incurred during the first phase. The law condemns this practice according to article L462-5 of the French Commercial Code[72] in order to guarantee a fairer competition.

Moreover, low prices are also guaranteed by the regulation of monopolies and cartels which could incite companies to use their position on the market to behave independently on it, to the prejudice of consumers (see Hoffman Laroche ruling).

In the same perspective of attracting consumers, companies are encouraged to provide good products. As a result, the products are more qualitative and the customers who consume them are more satisfied. Nowadays, product recipients place green consumption and responsible consumption as a consumption criterion. Indeed, ecological and social issues encourage consumers to be concerned about the goods and services they consume, so that they feel like actors of the causes they defend. This is why consumers are not only sovereign of their consumption choices, but also initiate legal and moral evolutions of competition law. This consumer impulse has pushed companies to seize these new challenges. Indeed, CSR[73] (RSE: responsabilité societal de l'entreprise) is commonly accepted within any company in order to

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[70] French Competition Authority, Vertus of the Competition. https://www.autoritedelaconcurrence.fr/fr/les-vertus-de-la-concurrence#:~:text=La%20baisse%20des%20prix%20qu,leurs%20prix%20pour%20rester%20comp%C3%A9titifs.

[71] B. Deffains, O. d'Omersson, T. Perroud (2020) *Competition Policy and Innovation Policy: reform of European Law*. p.35 https://www.robert-schuman.eu/fr/doc/diversFRS_Pour_une_reforme_du_droit_europeen_de_la_concurrence.pdf

[72] Article L462-5 of French Commercial Code. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033745294

[73] A.Binninger. & I.Robert, (2011). *Perception of CSR by the clients: wich aims for the « stakeholder marketing theory »?. Management & Avenir,* 45, 14-40. https://doi.org/10.3917/mav.045.0014

align itself with this new consumption. In the same way, some agents have committed to include it in their status. The fact that the company has a "raison d'être" under French law, and that it has been granted the title of "company with a mission"[74], guarantees that the objectives defended by the companies are concrete.

In this way, consumers push companies to provide ever higher quality products on the market, ensuring their sovereignty within competition law.

Finally, consumers benefit from a wider choice in the range of products offered to them. Indeed, the competition law reinforces the free access to the market of competitors, and in fact, of their products. Moreover, competitors, in order to distinguish themselves, will innovate, and try to develop more and more ranges in order to attract the consumer. The latter will thus have the choice among several companies, and within these, among several ranges and products.

François Lévèque[75] shared his reservations about the consumption choices of end consumers. According to him, the guarantee of a wider range of products is not always favorable, and competition law could even be detrimental to the consumer. He develops his argument based on the economics of happiness having demonstrated that offering a wide choice in television channels was not necessarily more favorable for the consumer, as well as the transparency of products sold to the consumer not necessarily encouraging end consumers to consume.

Beyond the direct benefits for the consumer, the public institutions wanting to prohibit certain behaviors, take into account the wishes of the consumers. This is why, through commitment procedures, the public authorities authorize potentially anti-competitive behavior, provided that it respects commitments in order to preserve competition and, ultimately, to preserve the consumer's well-being.

Thus, the legal nomenclature promotes greater sovereignty for the consumer. Even if economists relativize this observation, the public authorities keep for finality the well being of

[74] Ministry of the Economy, What are the mission-driven companies ?. https://www.economie.gouv.fr/cedef/societe-mission

[75] F. Levêque (2022) Is it time for the competition authorities to modernisez their definition of the consumer ? *Review Concurrences* , n°2-2022

the consumer, and the guarantee of his free will in his consumption choices. Moreover, the dynamism of competition benefits the integration of smaller players in the market (II).

II. The integration and protection of small players in the market

Beyond the final consumer, competition law aims at integrating economic agents who try to make a place for themselves on a market. Indeed, the consumer, in the broadest sense of the term, is often a victim of submission to more economically powerful competitors. This is why competition law allows for the integration of these smaller companies, but also to protect them and to push them to innovate.

The European Union has taken over the interests of consumers and intermediate buyers. Faced with larger competitors, small European players must be able to integrate into a market and defend their products and services. The promotion of these economic agents also contributes to the virtuous circle of competition in that it allows them to compete with agents already established on the market, and to encourage innovation by seeking to distinguish themselves from competitors. But faced with certain "giants", small economic actors must benefit from guarantees in order to participate in the game of free and undistorted competition.

The Regulation 2016/1037 dated June 08, 2016[76], deals with imports subject to subsidies in non-EU countries. The exact title of the Regulation uses the term "defense against imports (...)" clearly evoking the will to protect its own actors. It is within article 31 of the said regulation that the European Union marks its will to pursue interests going beyond the simple final consumer " *1. In order to determine whether it is in the Union's interest that measures be taken, all the interests at stake taken as a whole, including those of the Community industry and of users and consumers, should be assessed, and a determination for the purposes of this article can only be made if all the parties have been given the opportunity to make their views known in accordance with paragraph (...)* ". The interests referred to are quite general, they speak of "interests of the Union". One can understand by this formula the need to defend all the actors of

[76] Eur-lex (2016) Regulation dealing with defense against imports subsidizes by non-European countries. https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32016R1037

the European Union contributing to the European economy. This is why consumers, in the sense of those who consume, intermediate buyers, importers and final consumers are the object of such a regulation. The regulation highlights the risk of distortion between European actors and foreign actors benefiting from subsidies. This is why the text imposes a legal care in order to admit the subsidies of such companies on its European market.

The issue of subsidies has raised questions within the European Union about calls for tender. Member States use this technique to offer an advantageous contract to a private company for the execution of a public service. Public tenders represent a real conciliation between private economic actors and the law of regulated public competition. By this means, the public authorities not only encourage innovation and economic dynamism, but also promise security to the company winning the tender. Indeed, in this case, the State offers an opportunity to private companies to seize an important market. The public authorities thus open greatly the participation of private companies in the execution of its contracts. In addition, competition is always guaranteed during the selection process of the candidates for the tender. In fact, one could think that the Member States encourage economic agents to invest and participate, regardless of their economic weight, as long as they respect the criteria of the tender[77]. The defense of enterprises therefore requires the opening of markets, notably under the impetus of the State. In fact, consumers, in the broad sense of the term, benefit from this positive action, in addition to being protected by the guarantee of respect for competition law. The agents are therefore sovereign, and are not reduced to withdrawing under the weight of larger companies.

Within the European Union, there is also special protection for certain sectors in difficulty. This is notably the case of the written press, which is experiencing an unprecedented crisis since the appearance of news in digital format and their more attractive accessibility. The case of Google against the press publishers in front of the French Competition Authority in 2020[78], reveals the importance of the protection of certain economic actors in front of giants in order to re-establish

[77] Ministry of the Interior, Procedure of calls of tender. https://www.demarches.interieur.gouv.fr/professionnels/procedures-marches-publics#:~:text=L'appel%20d'offre%20peut,sont%20transmises%20par%20voie%20%C3%A9lectronique.

[78] French Competition Authority (2020) Decision 20-MC-01, 9th april of 2020 Google v. French press publishers. https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/remuneration-des-droits-voisins-lautorite-sanctionne-google-hauteur-de-500

a balanced order on a market. As a reminder, the French press publishers had acted against Google in order to obtain a more important remuneration following the publication of their articles on Google's tabs, as well as clarifications of the said remuneration. The lack of transparency of Google and its reluctance to negotiate with press publishers highlights the lack of defense of some European agents when they are crushed by the economic weight of their co-contractor. The authority condemns Google to respect some injunctions pronounced on April 09, 2020 against it, such as the respect of the transparency on the remuneration. In addition, the competition authority admits the argument of "neighboring rights"[79], in theory applicable to the intellectual property sector and trademark law, to the field of the press. The imputability of this notion thus allows to justify a higher remuneration for publishers already suffering from great economic difficulties. With this decision, the authorities show a real will to protect its actors, European or national, against foreign or economically important companies on a market. It is through competition law and its application that the authorities guarantee the integration and protection of its consumers. They therefore benefit from a wide margin of manoeuvre and are not subject to the hazards of a monopolistic market.

Thus, the numerous actions of public institutions encourage protection. Starting from the will to gain economic efficiency in competition law, from a protective legal nomenclature, with the aim of the consumer's well-being, of respecting his free will, and of integrating him into the markets, the public authorities guarantee the sovereignty of their actors in competition law. Even if the sovereignty can be contested in that the consumer is not a direct actor of the texts imposed on the economic agents, his habits motivate the decisions of the judges and legislators. But the consumer turns out to be more and more an actor, and in fact more and more sovereign. Indeed, he can exercise his own choices downstream on the market, in the framework of more direct concrete actions (Part 2).

[79] O. Wang (2022) Neighboring rights of the French press publishers and Competition: new perspectives after the Google Case, *Dalloz Actualité*. These rights allow the publishers to benefit from an other wage thanks to intellectual property. https://www.dalloz-actualite.fr/node/droit-voisin-des-editeurs-de-presse-et-concurrence-quelles-perspectives-apres-l-affaire-google

Part 2: The consumer: increasingly actor of his own sovereignty

Upstream, public authorities guide behavior in a competitive market. Downstream, consumers are becoming increasingly aware of their power in a knowledge-based economy. This is why they are adapting to the changes of their time. The digital age offers a new form of sovereignty for consumers (Chapter 1), which they can manifest through legal action (Chapter 2).

Chapter 1: The challenges of contemporary era as a new form of sovereignty

In the growing era of globalization, and also new technologies, the rapid development of digital technology, end-users of digital platforms are becoming increasingly overwhelmed. This is why they need to be aware of the use they make of certain platforms, and the objective to be reached by these platforms. The legal legislation being heavy and rigid, it is sometimes difficult to apply to contemporary issues. Moreover, the speed of these digital spheres can quickly render the rules of law obsolete. But, the protection and the sovereignty of the consumer must always be protected. This is why there is a growing need to take into account international and digital issues (Section 1), supported by a new form of adapted regulation (Section 2).

Section 1: The growing need to take into account international and digital issues

In our time, the world has become completely liberalized. From the international transport of goods, to the contacts multiplied by the birth of the Internet, borders are increasingly porous. Against this backdrop, competition must face up to foreign imperialism (I), and resist the rise to power of major companies, embodied by the GAFAMs (II).

I. International competition threatening consumer sovereignty

Competition law is a central determinant of a country's economy. It can encourage investment, innovation and economic dynamism, or, on the contrary, restrain players in a market through the severity of its regulation. Distortion of competition between different countries is a cause for concern. In a context of globalization, states are trading and transporting goods with unprecedented ease, threatening consumer sovereignty and even national sovereignty.

Indeed, not all states have the same regulations concerning competition. This is why, as expressed earlier, European regulation 1037/2016[80] comes to control subsidies enjoyed by foreign companies. In the United States, for example, the trend is towards market liberalization. Judges are more inclined to admit American business concentrations, whereas European protectionism will express reservations about business concentrations, thus limiting the actions of economic agents on a market. The purpose of the European Union is to protect consumers and ensure their well-being. This objective has been respected in telecommunications, where member states have performed exceptionally well, initiating numerous consumer benefits[81]. However, this concern for the consumer also weakens the European Union, in that it has lost leadership in mobile telephony, and is becoming the target of systematic delays in new technologies (notably in the late transition to 5G)[82]. China, the last major bloc in international relations, is adopting a tougher policy and opting for stricter regulation, particularly with regard to foreign players.

The Alstom-Siemens affair is a case in point[83]. The intention of the two European players in the railway sector was to join forces to create a European leader, capable of competing with foreign agents such as the Chinese. Together, Alstom and Siemens account for €15 billion of the rail

[80] Eur-lex (2016) Regulation dealing with defense against imports subsidizes by non-European countries. https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32016R1037

[81] M. Perrault (2006) Regulation of Competition into telecommunications, *Notary Review*, 108(3), 443–468. https://doi.org/10.7202/1045607ar

[82] J. Bertolus & T. Del Jesus (2001) Is France late ?, newspaper article 01Net, comparing France lags with its european neighbors. https://www.01net.com/actualites/la-france-est-elle-en-retard-144044.html

[83] European Commission Case (2019) M.8677 - SIEMENS/ALSTOM on the 6th February of 2019. https://ec.europa.eu/competition/mergers/cases1/20219/m8677_9376_7.pdf

market. The number 1 player in this same market is the Chinese company CRSC, capitalized at over 30 billion euros, the result of a merger between two national companies. Knowing that CRSC was increasingly being approached by Californian and Australian tenders, Germany and France looked favorably on the merger of the two European leaders, which was necessary to compete with Chinese agents. In the absence of agreement, the European Commission rejected the merger, deeming the risk of harm to European competition too great. Indeed, the merger of the two players would have placed them in a monopoly situation, to the detriment of other European competitors.

In fact, national sovereignty, and ultimately consumer sovereignty, is increasingly under threat from international players pursuing a more liberal global competition policy. The Commission's lack of an industrial policy reflects its own limitations in the face of international companies. This is why the German and French ministers are considering a reform that would introduce political control of the refusal decision.

What's more, the failed attempts at global regulation of competition law following the WTO's projects in the late 1990s have not facilitated international relations in terms of competition law[84]. Jurisdiction is therefore allocated in a rather flexible way. Take the case of mergers: each entity wishing to enter into a merger must notify the competent authority. In the European Union, mergers must be notified to the Commission once certain thresholds have been exceeded. However, if the merger could have potential effects beyond the European territory, companies must also declare themselves to the competent authorities potentially concerned by the merger projects. The Alcoa Case handed down by the U.S. Supreme Court in 1945[85] endorsed the effects doctrine, whereby any potentially anti-competitive behavior on a market must be reported by the companies involved to the relevant U.S. authorities. Following the adoption by the US Congress of the Foreign Antitrust Act, Sherman is considered to apply when the anti-competitive effects on its territory are direct, substantial and reasonably foreseeable. This new interpretation is known as "qualified effects".

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[84] A. Heinemann, (2004). The need of a international competition law , *Revue internationale de droit économique*, XVIII,3, 293-324. https://doi.org/10.3917/ride.183.0293

[85] US Court of Appeal Second Circuit (1945) Alcoa Case v. United States. https://law.justia.com/cases/federal/appellate-courts/F2/148/416/1503668/

Faced with this U.S. doctrine, the European Union has had to adopt its own position. It similarly adopted the doctrine of qualified effects in the Intel ruling of 2009[86], in which the European Commission accepted its jurisdiction over anti-competitive contracts between the United States and China. In addition, in its 1999 Gencor decision[87], the European Court acknowledged that if anticompetitive behavior - in this case, a cartel - had taken place on its territory, the European authorities were competent to rule on it.

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[86] European Commission (2017) Case C-413/14 P Intel Corp. Inc. contre Commission européenne, 6th September of 2017. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0413

[87] European Court Decision (1999) Case T-102/96. Gencor Ltd v. Commission of European Communities , 25th march of 1999
https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61996TJ0102

[88] European Commission (2017) Case C-413/14 P Intel Corp. Inc. contre Commission européenne, 6th September of 2017. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0413

A difficulty arises in that a refusal by a single competent authority can compromise a company's project. This is particularly true of the P3 case, where the merger of shipping companies was accepted by the United States and the European Union, but refused by China[89]. As a result, the project failed.

National sovereignty is therefore being challenged in the face of these international relations. The risk of such a weakening of sovereignty lies in the ultimate sovereignty of consumers. They become passive to arbitration decisions by European authorities that could be prejudicial to them (such as the Alstom Siemens decision, which could have created a real dynamic for European consumers, and a significant increase in business), but also to international decisions.

Similarly, the European Commission showed its limitations in the Google v. Ireland tax case[90]. The European authority, wishing to limit the tax evasion suspected by the giant Google, found itself in difficulty in proving it, as Google benefited from a tax establishment in Ireland, far more favorable to the company than the French tax system. Once again, the impossibility of taking action against this kind of foreign company, a key player in the digital economy is proven. In fact, the European authorities find themselves further weakened in their prosecutions, and are unable to complete the desired objective of consumer protection and sovereignty.

In addition to these major contemporary international issues, competition law must also deal with the growing digital economy. Since the late 1990s, the digital economy has undergone a meteoric rise, and competition law has caught up with it. The European authorities have been particularly concerned about GAFAM (II).

[89] Les Echos (2014) Maersk renonces to the P3 Alliance, also refused by China https://investir.lesechos.fr/actu-des-valeurs/la-vie-des-actions/maersk-renonce-a-lalliance-p3-refusee-par-la-chine-1679989

[90] Toute l'Europe (2021) Compagnies' taxation : understanding of the competition fiscality in Europe. https://www.touteleurope.eu/economie-et-social/taxation-des-entreprises-comprendre-la-concurrence-fiscale-en-europe/

II. The rise of GAFAM as a danger to European sovereignty in competition law

The rise of Sillicon Valley companies has been exceptional since the 1980s. This influence of the web giants has led political governments to take up the emerging issues of these digital players. The acronym GAFAM (originally just GAFA)[91], also known as the "big five", stands for Google, Apple, Facebook, Amazon and Microsoft. Together, these companies are worth over 4.5 trillion dollars, making them digital giants[92].

Competition law has been used to understand this phenomenon[93]. The GAFAMs represent digital companies in a dominant position, a situation controlled by competition law in the light of Article 102 of the TFEU, which anticipates the risks of abuse of such a position. Their position of market dominance is partly explained by their economies of scale, virtually zero incremental costs for users, and the benefit of significant network effects[94]. In digital law, this is also referred to as the "winners take it all"[95] effect, making competition from the leading players in a market virtually unassailable. Indeed, GAFAMs are such powerful players that they are hardly subject to competition that is "at least as effective" (in the sense of the Intel ruling that coined the term for the first time).

The influence of such digital agents can also be explained by their two- or multi-sided nature. Indeed, the complexity of competition law lies in defining the relevant markets. Because of their multi-faceted nature, these players occupy so many markets that, when they act in an anti-competitive manner, there is an initial difficulty in delimiting the relevant market[96]. Plus, fines

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[91] E. Inacio (2023) GAFAM, *Concurrences Dictionary* . https://www.concurrences.com/fr/dictionnaire/gafam-106804

[92] N. Smyrnaios (2021). The GAFAM: What Geopolitis ? , *La Géographie*, 1580, 18-23. https://doi-org.lama.univ-amu.fr/10.3917/geo.1580.0018

[93] B. Deffains, O. d'Omersson, T. Perroud (2020) *Competition Policy and Innovation Policy: reforme of European Law*. p.40 https://www.robert-schuman.eu/fr/doc/diversFRS_Pour_une_reforme_du_droit_europeen_de_la_concurrence.pdf

[94] D. F. Spulber et C. S. Yoo, « Antitrust, the Internet, and the Economics of Networks », Univ. of Pennsylvania Institute for Law and Economics, Research Paper Series no568, 2013, p. 8. referring to the situation in which the value is taken in consideration by the services, but mainly by the number of users of the services and platform.

[95] M. Cartapanis Thesis (2017) *Innovation and Competition Law,* p.40. The innovation responds to 4 criterion such as: speed of technological evolution, the fix prices in intellectual property, market permeability, and the winner takes it all effect. Resulting from this effect, the first company ruling over a market benefits from 'the pioneer's advantage' From this, the firm with major new technology will tend to be in a monopole situation. https://theses-univ-amu-fr.lama.univ-amu.fr/171208_CARTAPANIS_103kcmk284hx755iy441nftju_TH.pdf

[96] D. Encaoua, (2015) Market Power, strategies and regulation : the contribution of Jean Tirole, Nobel price of economy 2014 , *Review d'économie politique*, no1, janv.-fév. 2015, p. 176.

imposed on companies for anti-competitive behavior are not a deterrent. Indeed, Google's sales for the last quarter of 2021 amounted to $75,325 billion, while the three proceedings brought by the European Commission against Google resulted in a total fine of €8.25 billion.

In addition to these stable, long-lasting positions, concerns are also focused on killer acquisitions[97]. These are acquisitions by large companies that allow them to seize promising start-ups in order to kill innovation and strengthen their market position. These killer acquisitions benefit from a legal vagueness concerning their status. Indeed, in order to interpret them as mergers, it is necessary to verify that the sales thresholds are exceeded. If the sales of the acquiring company always meet the thresholds, the sales of the acquired company tend never to exceed the thresholds, as it is only a small company. As a result, killer acquisitions fly under the radar of merger control, even though they have the potential to crowd out other competitors in the market[98]. These predatory acquisitions threaten consumer sovereignty by strengthening the dominant market position of the economic agent absorbing the new company, and by offering fewer players on the same market.

The GAFAMs are therefore unavoidable players on the digital market, in a dominant position that is virtually impossible to challenge. When competitors bring to the attention of the institutions the abuse of a dominant position by these companies, they are only fined an amount that is insignificant in relation to their profits. This is why European consumers are less and less sovereign. In fact, they too are end-users of these major players, subjecting them to them without being able to divest themselves of them. European digital competitors are struggling to find their place in such a digital economy, not least because of the capture of this economy by American giants.

Beyond the GAFAMs, there is the question of future companies destined to establish themselves in the digital economy over the long term. Recently, Netflix has been seen as a

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[97] C. Picart (2023) Killer Acquisition, *Concurrences Dictionary* . https://www.concurrences.com/fr/dictionnaire/killer-acquisitions

[98] In the case Facebook/WhatsApp, WhatsApp represented a market power of 20/30% into the direct messages in Europe (biggest market power) with low sales figures. In theory the merger should be accepted, but the danger of this approval interrogates about killer acquisitions and merger with small firms. See: European Commission 3rd of October of 2014, M.7217, Facebook/Whatsapp.

major player, comparable to the GAFAMs, but in the "consumer service" sector, not the digital sector. Indeed, some now speak of FAANG (Facebook, Apple, Amazon, Netflix, Google), with Netflix replacing Microsoft[99]. Questions are now being asked about the company governing Facebook, which has become Meta, with the aim of popularizing its Metavers. The question of sovereignty was repeatedly raised following Meta's announcement of its new project. The danger of digital services in general, which is becoming more acute with Metavers, lies in the attention economy. Justin Rosenstein initiated the concept of Facebook's "dynamic like", pointing out that this attention economy is based on the amount of time the user spends on the platform[100]. With the birth of the Metavers, users are immersed in a whole new digital world, where actors are present to feed the Metavers and encourage users to maximize their time on the platform. Users consuming on platforms therefore run the risk of becoming captive to them, further weakening their sovereignty. This weakening of consumer sovereignty by the attention economy in the digital domain was demonstrated by the Google Shopping affair[101]. Indeed, Google favored its products through more advantageous referencing on its platform. For Google, good referencing means visibility, and therefore attention. Consumers who stick mainly to the first listings offered by Google unconsciously submit to the platform's goodwill.

Faced with these new dangers, particularly in an increasingly digital age, European law has had to react. Even though competition law has a rigid scope of application, it is being transferred in part to apply to contemporary digital phenomena, in order to limit the dangers. But European legislators, aware of their shortcomings in terms of digital regulation, have intervened by creating a necessary new regulation (Section 2).

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[99] B.L (2022) Press Article online: GAFAM : Who are they and who do they rule the world thanks to BigData ? https://www.lebigdata.fr/gafam-tout-savoir#:~:text=L'empire%20GAFAM%20repose%20sur,sur%20le%20web%20pour%20Google.

[100] The Guardian (2017) ‘Our minds can be hijacked': the tech insiders who fear a smartphone dystopia. In this interview, Justin, one of the main engineer of Facebook pleads against the attention economy, showing that it initiates deconcentration. https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia

[101] European Commission (2917) CASE AT.39740 , Google Search (Shopping), 27th June of 2017. https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

Section 2: The need for contemporary regulation

In view of the many difficulties encountered by contemporary issues, the need for regulation is becoming apparent. Competition law in particular has been applied, in the belief that it is best suited to the evolutions of its time. New texts have been introduced to guarantee consumers greater sovereignty (I), even if this remains questionable (II).

I. New regulation as a positive action of sovereignty

As previously stated, in order to combat international competition, documents such as regulation2016/1037, make it possible to limit the influence of foreign companies on European territory while guaranteeing the sovereignty of its consumers. Similarly, international jurisdiction rules and effects doctrines, while imperfect, are effective tools for attempting to control the influence of international competition. On the other hand, digital law, being new, has had to be the subject of regulations supplementing the initially applicable competition law.

Indeed, because of the strong innovations linked to digital technology, public authorities have unduly thought that competition law would naturally apply. But competition law has shown itself to be lacking in its regulation. Indeed, companies such as GAFAM sometimes tend to use tools that are not illegal under competition law, in order to establish an anti-competitive strategy. Examples include algorithm manipulation games and killer acquisitions. The political will in Europe to take up such issues lies in the absence of European champions on the same scale as American companies. It is against this backdrop that member states have introduced new legislation to deal with the complexities of the digital world.

First came the European Union's GDPR, which has been in force since May 2018[102]. This Europe-wide text focuses primarily on the harvesting and processing of user data.

[102] Regulation (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016,on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679

This text in part comes to make consumers more responsible in their use of digital platforms, and the information they transmit to them. In 1936, William Harold Utt evoked the idea that consumers determined a company's production of goods and services through the consumption of their desires and preferences. The emergence of dominant positions in the digital marketplace is countering this classic scheme. Consumers are no longer merely passive; they must take positive action to express their sovereignty. This is what the GDPR provides in Articles 6 and 7[103], invoking that consumers must have consented to the collection and processing of their personal data. The platform must have evoked the reasons, explicitly, for the usefulness of the data and their purpose. In the event of a dispute, the burden of proving consent must be borne by the data controller. In addition to unambiguous and explicit consent, new rights are granted to end-users, such as the right to withdraw consent, or the right to be forgotten. These rights give users the possibility of withdrawing their consent, or requesting the controller to delete or dereference their data. The regulation also requires the provision of clear, intelligible and accessible information to data subjects. The intention is to empower consumers once again. Data controllers must not only provide consumers and users with the tools they need to understand, but also give them the option of opting out of the processing policy pursued by the platform. European legislators are thus making consumers active in their digital consumption, and aware of the issues involved in using their data.

What's more, the GDPR has established an "equivalence theory"[104] imposing the same obligations on foreign states responsible for processing European users' data as those imposed by the European regulation.

Other texts are also used for the same purposes. The major innovation in competition law, which comes into force on May 2, 2023, is the DMA (Digital Market Act), which directly combines the digital sector and competition law. Indeed, competition law makes it possible to

[103] Regulation (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016,on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).p.36 and p.37 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679

[104] E. Thelisson (2019). Extraterritorial scope of the General Data Protection Regulation, *Review internationale de droit économique*, XXXIII, 501-533. https://doi.org/10.3917/ride.334.0501

regulate "gatekeepers" as defined in Article 3[105] of the Regulation. These gatekeepers appear as essential access controllers in the digital domain, and must submit to competition rules.

Not only are gatekeepers obliged, under Article 6 of the DMA[106], not to hinder competition from new players by abusing their position as gatekeepers on the market, but they are also required to initiate the integration of other competitors on the market: "*The gatekeeper shall technically authorize and permit the installation and effective use of third-party software applications or software application stores using or interoperating with its operating system (...)*".

On top of that, the DMA is applied ex ante, meaning that, unlike the original competition rules, it regulates and intervenes before any anti-competitive action is taken. This text marks the need to seize the new digital challenges, opening up the possibility for new players to compete with the giants, but also for consumers, whoever they may be, to regain their sovereignty in the face of foreign imperialism.

Finally, the AI Act, signed in 2022 and due to come into force in 2024[107], aims to regulate artificial intelligence. These are booming[108], as demonstrated by the new artificial intelligences developed in the field of language, or services such as ChatGPT. For a long time, concerns have focused on the ability of artificial intelligences to interfere in the lives of consumers. It is in response to these increasingly concrete questions that the European Union has signed this document clarifying how AI works. In particular, the document aims to make consumers aware of the risks of the new artificial intelligences, so that they can be sovereign in their use.

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[105] REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act) , 15th December of 2021, p.36-38 . https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842

[106] Ibid, p.40-41

[107] REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts, 21th April of 2021. https://eur-lex.europa.eu/resource.html?uri=cellar:e0649735-a372-11eb-9585-01aa75ed71a1.0001.02/DOC_1&format=PDF

[108] S.Merabet (2018) Thesis , *Towards Artificial Intelligence Law.* https://theses-univ-amu-fr.lama.univ-amu.fr/181123_MERABET_325avywz954mtqjp382kqtws816qvfu_TH.pdf

Although the new texts emanate from the will of member states to combat foreign influences, or from companies that are inescapable from the point of view of competition law, consumer sovereignty remains to be relativized in its concrete application (II).

II. Consumer sovereignty challenged

Even as top-down sovereignty endeavors to regulate the new players and new challenges it faces, the direct application of sovereignty remains somewhat elusive. Consumers are increasingly active in a market that imposes itself on them, and is difficult for public authorities to control. In fact, they are encouraged to actively participate in their sovereignty, even though they are supposed to exercise it on an extremely powerful platform, in a context of extremely dynamic information circulation. This is why the consumer's sovereignty in the face of the challenges of our time remains nuanced.

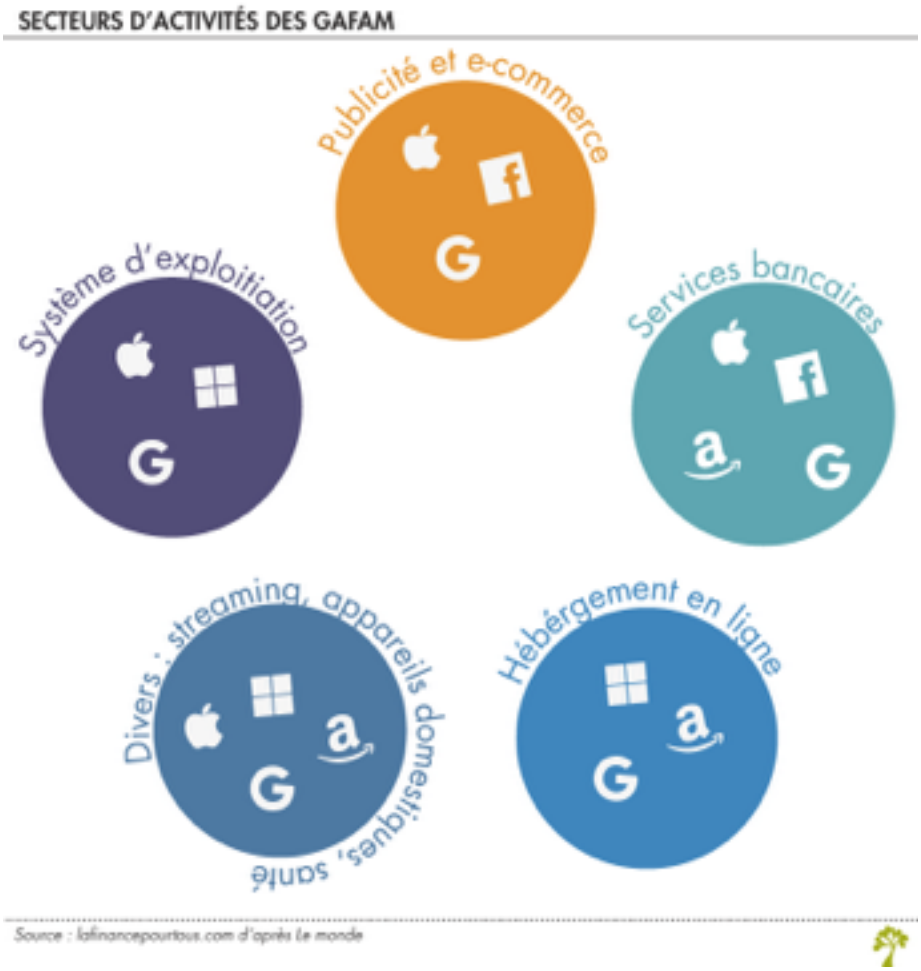
Indeed, beyond the law, it is the empiricism of consumer habits that will bear witness to the difficulty of re-appropriating sovereignty. Consumers are increasingly sourcing goods and services via Internet networks and platforms. These new communications between the consumer and the professional trader are particularly dematerialized, and tend to restrict the information available to the consumer. The main concern continues to be consumption from powerful companies. Indeed, even if competition law regulates the potential abuse of dominant positions by such entities, we have seen that the fines imposed on them are minimal compared to their capitalization. These economic agents can therefore behave as they wish on a market, in the knowledge that consumers will continue to use their goods and services because of their power, and that in the event of anti-competitive action, they will suffer only a tiny penalty. This observation encourages companies such as GAFAM to pursue their individualistic policies, without concern for anti-competitive issues[109].

Beyond the limits of competition law, we need to look at the sociology of the consumer. Consumption, even if it is becoming increasingly responsible and thoughtful, is still based on

[109] M. Cartapanis (2017) Innovation and Competition Law, Thesis, Aix-Marseille, 2017, p. 89. deals with the « super dominant » undertaking as they detain a major power market.

the capitalist consumerist model. Consumers consume to meet their needs at a given moment. When consumers browse the various digital platforms, or consume through GAFAM companies, they rarely restrict their consumption habits because of the recipient with whom they will be investing.

In addition to that, consumers face a particular difficulty: information asymmetry. Consumers are not necessarily aware of anti-competitive actions taken against certain companies, and continue to feed them. Worse still, they may be aware of it, but not concerned about it. So, whatever regulation is necessary, the end consumer will have full influence over his or her consumption choices, even if they mean going against the current of his or her own sovereignty. What's more, consumers are sometimes unaware of the different sectors in which the companies they buy from are acting.



In this model, we can see, for example, that Microsoft, Google or Apple are active in various digital sectors, imposing themselves on consumers' daily lives and, ultimately, on their

consumption habits. What's more, the excessive presence of GAFAMs in the consumer landscape makes them even more attractive on the attention market[110].

What's more, in an economy as fast-moving as the digital one, transparency concerning the collection of their data can be manipulated or instrumentalized. Indeed, the appearance of messages concerning the cookies to be accepted for browsing on the website more often than not emphasizes the acceptance of cookies, to the detriment of their rejection. Consumers who simply want to enjoy the website will tend to accept the collection of their data mechanically, in order to consume more quickly. This is what Harry Bringull calls "dark patterns" - interfaces designed to deceive users[111]. The cloud issue also worries the authorities, as users hand over the collection of their data to a foreign platform. Indeed, no European cloud champion can yet compete effectively with foreign clouds. Beyond the competitive threats, there are also fears for European sovereignty, particularly in terms of the danger of cyber-attacks, software ransomware, etc.

Faced with international competition and digital challenges, consumers are subject to new regulations to guarantee their sovereignty and protection. That said, consumer habits continue to feed companies threatening their sovereignty. The sovereignty of European consumers is once again under threat, despite attempts by public authorities to guarantee it. On the other hand, to counterbalance these negative effects, consumers benefit from the opening up of actions they can take to assert their rights, in the name of competition law (Chapter 2).

[110] La Finance Pour Tous (2022) GAFA, GAFAM ourNATU : the new world master. https://www.lafinancepourtous.com/decryptages/finance-et-societe/nouvelles-economies/gafa-gafam-ou-natu-les-nouveaux-maitres-du-monde/

[111] E. Hary (2019), Dark Patterns: How to regulate them ? , *LINC* , https://linc.cnil.fr/fr/dark-patterns-quelle-grille-de-lecture-pour-les-reguler

Chapter 2: Actions available to consumers

In addition to the legal provisions designed to protect them, consumers have concrete actions at their disposal to enforce their rights. Thanks to the availability of private enforcement (Section 1) and the liberalization of other dispute resolution methods (Section 2), consumers can exercise their rights in the public sphere.

Section 1: Consumer legal action through private enforcement

Private enforcement authorizes any private individual who feels he or she has suffered a loss to take legal action against the perpetrator of the loss. In competition law, it is generally accepted that it is mainly public institutions that prosecute companies for anti-competitive behavior. That said, private enforcement has become increasingly popular, thanks in particular to an evolution in competition law (I), and extending to a wide field of application of competition law (II).

I. Freedom of legal action

While actions by public players are becoming more frequent in competition law, private actions are tending to develop. The aim is to give consumers full exercise of their sovereignty when they feel they have been the victim of anti-competitive action, and to bring their dispute before the national courts.

This possibility for private parties to take action against companies was confirmed in the CJEU decision of September 20, 2001[112]. The case concerned a dispute between two parties to a distribution contract. One wanted to declare his contract null and void on the grounds that his commercial partner had infringed Article 101 of the TFEU. The CJEU adopted a bold position in its ruling, aligning itself with the wishes of the European Commission: "*Everyone has the right to compensation for damage caused by the infringement of Articles 101 and 102. This is in*

[112] European Union Court of Justice (2001), Case Courage C-453/99, 20th September 2001, Ltd v. Bernard Crehan & Bernard Crehan v. Courage Ltd et autres. https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:61999CJ0453

the interest of the principle of effet utile. These actions for compensation reinforce the deterrent effect and therefore the enforceability of articles 101 and 102"[113]. This Decision provides two major indications for competition law.

On the legal side, it endorses the possibility of private actors taking legal action in the name of competition law. Where competition law is marked by numerous actions brought by the authorities, this judgment authorizes private players to take advantage of it for the first time. While the Courage ruling concerns an action by a co-contractor, the latter is assimilated to the notion of consumer according to the competition law definition, which is not limited to "non-professional consumers". That said, it evokes the idea of an action available to any person seeking redress against an economic agent, potentially targeting end consumers. Indeed, the latter are the first victims of the consequences of anti-competitive behavior on the part of companies, so it is only right that they should be able to challenge it.

On a more expedient point, we note that the Court of Justice refers to the notion of "effet utile" (useful effect)[114], illustrated in paragraph 26 of the judgment: « *The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contractor by conduct liable to restrict or distort competition* »[115].. This idea of useful effect gave rise to the need to make legal rules concrete. Indeed, the legislator designs new rules so that they are effective and tend to be applied. The useful effect therefore makes it possible to grasp European developments, and is intended to ensure that everyone can exercise their rights in this territory. In fact, the rules make the legal provisions more effective, which every European citizen can use to assert his or her rights. Judicial assessments enable consumers to re-appropriate their sovereignty, by asserting it in practice within a judicial framework of their choosing. Public institutions thus emphasize the freedom of consumers to assert their rights, through the flexibility of discretionary prosecution in competition law. Behind this logic lies the same purpose: to protect the consumer, and to challenge anti-competitive economic agents who tend to abuse their positions.

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[113] European Union Court of Justice (2001), Case Courage C-453/99, 20th September 2001, Ltd v. Bernard Crehan & Bernard Crehan v. Courage Ltd et autres. https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:61999CJ0453

[114] *Review Lamy de la Concurrence*, n°112, 1st January of 2022

[115] European Union Court of Justice (2001), Case Courage op.cit, p.10

In line with this decision, the European Parliament decided to initiate a new regulation in 2014: the Damages Directive 2014/104[116]. This directive concerns the rules governing damages under national law for infringements of the competition laws of member states and the European Union. This new regulation confirms the need for private players to take action against breaches of competition law.

It lays down a number of principles, such as freedom of action for any claimant (Article 1)[117]. But beyond the purpose of the directive, there are other interesting provisions guaranteeing consumers' right to redress. Article 3[118] imposes full compensation, which applies quite broadly in that it "*(...) therefore covers the right to compensation for actual damage and loss of earnings, as well as the payment of interest*" within the meaning of paragraph 2. The intention is not to punish companies that fail to comply with competition law, but rather to restore consumers to what they would have been had they not suffered the consequences of such infringements. In addition, Article 4[119] emphasizes the principle of equivalence, so that every citizen can challenge the anti-competitive effects of a company before any court. That legal action before the courts must not be made impossible or excessively difficult, according to the same article.

In fact, the Directive officially enshrines the consumer's right to take action before private courts, going beyond pre-torical law. Other rulings have followed in the same vein, with the Manfredi case in 2006[120], and the Otis case in 2012[121]. That said, case law has continued to evolve, offering ever more opportunities to consumers.

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[116] DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104

[117] Ibid p.10

[118] Ibid p. 12

[119] Ibid

[120] European Union Court of Justice (2006) 13th july of 2006, Case C-296/04, Manfredi v. Lloyd Adriatico Assicurazioni SpA . https://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:62004CJ0295 Gazette du Palais 2006, nº 305-308, p. 12 obs. J. Phillipe & Th. Janssens

[121] European Union Court of Justice (2012) Case C−199/11, Europese Gemeenschap v. Otis NV e.a. , 6th November of 2012. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0199

Indeed, the consumer's right to sue is not limited to taking legal action against the company in breach of competition law. Since the 2019 Skanska[122] ruling handed down by the Court of Justice of the European Union, it has been permissible to sue an absorbing company for the anti-competitive actions of the absorbed company.

More recently, in 2022, in the Sumal case[123], the possibility was left to the acting consumer to call subsidiaries to account for the actions of the parent company. While it is more common to see legal action taken against the parent company (due to potentially higher damages) as a result of its subsidiaries, European praetorian law guarantees both possible avenues. In fact, the consumer is sovereign in the legal action he wishes to take, according to what seems to him to be the most advantageous. European law thus safeguards consumers' rights, focusing on their ability to take legal action against any company, regardless of jurisdiction.

Competition law is partly composed of antitrust law. However, in French law, competition law can also be understood as any unfair action. Popularized as the "little law of competition", competition law also enables competitors to appropriate legal rules in order to defend their interests. Private enforcement thus enables consumers to take action against a specific company under competition law, but also provides for a broader application of the latter (II).

II. The broad scope of private enforcement

Generally speaking, competition law is used to thwart economic agents who tend to violate the obligations incumbent upon them under European provisions and the French Commercial Code. Faced with antitrust law, consumers may be wary of enforcing it against major platforms, as it may seem out of reach for a private player. That's why consumers can take action in a number of areas against these over-powerful economic agents.

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[122] European Union Court of Justice (2019) Case-724/17, Vantaan kaupunki v. Skanska Industrial Solutions Oy e.a., 14th March of 2019. https://curia.europa.eu/juris/liste.jsf?num=C-724/17&language=FR

[123] European Union Court of Justice (2022) Case882/19, Sumal, S.L. v Mercedes Benz Trucks España, S.L., 6th October of 2022. https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-882/19&jur=C

As mentioned above, antitrust law is available to consumers, and anyone else interested, to enforce their rights against players in breach of competition law.

On the other hand, "little competition law" can also be used by consumers to take action against these economic players. Although literally downplayed in favor of the big antitrust law, these provisions can still bend the big platforms. The effectiveness of this law against large American companies is best illustrated by a court decision handed down by the Paris Commercial Court on March 28, 2022. In 2015 and 2016, the DGCCRF had conducted an investigation into the commercial relations between Google and app developers selling their promised apps via the Google Play platform[124]. The investigations focused mainly on the clauses inserted in the contracts of developers who contracted with Google companies. In 2018, the French Minister of the Economy sued the companies in question on the basis of the former article L442-1 of the French Commercial Code, invoking significant imbalance: « *I. - Any person engaged in the production, distribution or provision of services who, in the course of commercial negotiations or in the conclusion or performance of a contract, commits an offense and is liable for damages: (...)*

2° To subject or attempt to subject the other party to obligations creating a significant imbalance in the rights and obligations of the parties. »[125]. In particular, the Minister points to the abusive clauses contained in the contract, which would create an imbalance to the detriment of the rights and obligations of the Google companies' co-contractors.

The Commercial Court ruled that several clauses were unlawful. These included clauses allowing unilateral modification and suspension of the contract, as well as asymmetrical termination conditions. Indeed, the absence of bilateralization makes it impossible for the contracting party to benefit from conditions similar to those of the Google companies in the contract. The sovereignty of the consumer, in the sense of the person who consumes and is a potential co-contractor of these companies, is therefore not respected.

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[124] Press Release (2018) European Commission : Antitrust behavior , The Commission fines Google with 4.34 billion euros on mobile devices to strength the search engine's dominant position. https://ec.europa.eu/commission/presscorner/detail/fr/IP_18_4581

[125] Article L442-1 of the French Commercial Code, current version https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038414278/2019-04-26

But it is above all a particular clause that is attracting the attention of the courts: the one that allows Google to receive 30% corresponding to "transaction costs", according to the company, on each sale made via the platform. This is a fairly well-known tax, as it is widespread in the digital sector, known as the "30% tax", which Apple also applies to the AppStore, and which is the subject of a dispute in the United States.

In the USA, on the other hand, the main difficulty is that it is necessary to characterize the relevant market, and to demonstrate market power and anti-competitive effects. The advantage in French domestic law is that none of these elements is required. Indeed, in the context of the new Article L442-1 of the French Commercial Code[126], judges must be content to characterize the submission or attempted submission and the imbalance between the parties' rights and obligations arising from the contract.

In addition, case law now allows judicial review of the price in the context of significant imbalance. This is what the court ruled, stating that « *the significant imbalance may result from a mismatch between the price and the service, which is the case here since the commission rate charged by Google characterizes an asymmetry between the parties »*. As Google was unable to justify this taxation in a fair and transparent manner, it was penalized for it. All the more so as Google's co-contractors have no room for negotiation regarding their commission rate.

The same kind of decision was handed down after a Subway ruling in 2020[127], where the company was fined 500,000 euros by the Paris Commercial Court, as well as having 6 of its clauses in franchise agreements declared null and void. Among the clauses targeted were territorial exclusivity clauses in franchise agreements, insurance clauses requiring franchisees to take out specific insurance, and unilateral termination clauses in favor of the Subway franchisor.

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[126]Article L442-1 of the French Commercial Code, current version https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038414278/2019-04-26

[127] Franchise Magazine (2020) The Subway franchise agreement judged imbalanced, https://www.franchise-magazine.com/news-franchise/contrat-subway-clauses-annnulees-desequilibre-significatif-octobre-2020

So, while antitrust law requires a fairly sophisticated economic analysis, and involves uncovering any behavior that might alter competition law and consumer welfare, French judges use the flexibility of "small competition law" to make it a frighteningly effective instrument. Thanks to this small body of law, consumers of all kinds are able to take legal action in respect of the damage they have suffered, even against large firms.

However, there is still some doubt as to how the sovereignty of consumers can be reconciled with antitrust law. Indeed, in antitrust matters, companies can benefit from several forms of procedure encouraging them to engage in a process of negotiation of their anticompetitive behavior, with commitment procedures, and redemption processes with leniency procedures which enable companies having participated in predatory effects on a market, to immunize themselves from prosecution and fines by the public authorities, in exchange for close collaboration with them to dismantle the anticompetitive networks of which they were a part.

Although after a leniency procedure, a company in an anti-competitive situation is immunized by public enforcement, it nevertheless remains the target of potential actions for compensation by consumers[128]. Indeed, immunity under the leniency procedure does not guarantee protection against civil law suits. However, the leniency procedure is no incentive if it does not provide complete protection against legal action. This is why companies that have followed a leniency procedure are only jointly and severally liable for the damage suffered by their buyers or suppliers. What's more, statements made in order to obtain leniency cannot be used as part of an action for damages. That said, in order to confer effective sovereignty on the applicant, the benefit of protection for firms through their leniency declarations is limited to the declarations themselves, implying that information may still come to light concerning the commission of the infringement by virtue of the applicant's action.

In fact, consumers, or any plaintiffs for that matter, can turn to private courts to assert their rights. They are reclaiming their sovereignty through a variety of legal tools, in the face of over-powerful corporations. In addition to these classic methods of dispute resolution, there are new ways of resolving competition law disputes (Section 2).

[128] T. Plat (2023) Leniency, *Concurrences Dictionary* . https://www.concurrences.com/fr/dictionnaire/Clemence-programme-de

Section 2: The liberalization of alternative dispute resolution methods in competition law.

Consumers have other legal means of asserting their rights. In a context of legal modernization, alternative dispute resolution methods are favored. This is why some consumers call on third parties, acting on their behalf, to assert their sovereignty in amicable disputes, notably through associations (I). In addition to these external interventions, consumer law is increasingly seeking to give consumers a voice against major economic players, through the creation of class actions (II).

I. Supporting consumer sovereignty through new methods of dispute resolution

Consumers are becoming increasingly aware of the companies with which they can contract. These companies represent a significant weight on the market, which is difficult to circumvent or attack. In order to maintain the importance of consumer action, new methods of settling disputes with professionals have been democratized.

This is why, in order to help consumers, protect them and assert their sovereignty, organizations have been set up to represent them. In France, approved associations provide consumers with information to help them assert their rights with professionals, and take action against companies to win cases for the members they represent. Among the best-known association representatives are 60 millions de consommateurs[129] and UFC QUE CHOISIR[130]. The purpose of these associations is to handle disputes amicably, by contacting the professional. While consumers are sometimes discouraged by the idea of legalizing their problem, or are bullied by the dishonest promises of professionals, associative means enable them to gain recognition from the defendant company. These associations are now considered to be privileged interlocutors for promoting contact between professional companies and consumers, in that they carry particular weight in the French national landscape. Indeed, the reputational risk of

[129] French consumer association 60 million de consommateurs https://www.60millions-mag.com/

[130] French consumer association UFC QUE CHOISIR https://ufc.quechoisir.org/?at_medium=sl&at_campaign=139857629&at_platform=google&at_creation=10613762429&at_variant=591707958367&at_network=search&at_term=ufc%20que%20choisir&gclid=EAIaIQobChMI7pXpgYid_wIVLwgGAB36MQ5xEAAYASAAEgIMvPD_BwE

companies is a major factor in consumer choices, and the publication of associations of litigious companies and their practices is a deterrent for professionals. Indeed, the volunteers and jurists of such associations try first to inform the consumer about his dispute, but also to contact the litigious company in order to assert the consumer's rights. This is why disputes are often settled out of court, with the consumer representing the association.

These associations also make frequent visits to other organizations, such as "La Maison de la Justice et du Droit", which can be found in every french cities. These public entities enable consumers to appear before a number of legal professionals, including the associations' legal managers, for free assistance and guidance. The ultimate aim is to enable consumers to assert their rights in the face of sometimes overwhelming business pressure.

In addition to their mediation work, these associations can call on the services of conciliators when consumers wish to take the matter further. The conciliator will decide between the interests of the consumer and those of the company, in order to avoid a court case. This procedure is free of charge, and allows consumers to exercise their rights without constraint.

Mediation has become the new preferred method of dealing with disputes, especially between consumers and professionals. Indeed, Article L612-1[131] inserted by Directive 2013/11 RELC thanks to the 2015 ordinance, states that « *any consumer has the right to have recourse free of charge to a consumer mediator with a view to the amicable resolution of the dispute which opposes him to a professional. To this end, the professional guarantees the consumer effective recourse to a consumer mediation scheme »*. In addition, the obligation to mediate must be implemented by professionals. They must indicate, often in their general terms and conditions of sale, which mediators they are affiliated with, so that the consumer can approach them, free of charge, to resolve the dispute. This obligation derives from the minimum harmonization Directive 2013/11[132], which originally laid down thresholds to be met by consumers before they

[131] Article L612-1 of the French Consumption Code

[132] DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0011

can refer a dispute to a mediator. France, on the other hand, has decided to refrain from incorporating thresholds into legislation, so as not to jeopardize actions by consumers who do not meet the defined criteria.

However, alternative dispute resolution methods are being addressed by case law to ensure that they remain affordable for consumers. Article R212-1[133] of the French Consumer Code lists 10 clauses presumed to be unfair. Such is the case with the clause that makes a consumer's right to take legal action subject to arbitration. As private justice is costly, obliging consumers to resort to it would constitute a limitation on the exercise of their rights, and ultimately on their sovereignty. To simplify the method of proof, abuse is presumed against the professional imposing the clause, so the consumer does not have to demonstrate that the professional has exceeded his or her authority, as this is presumed.

In addition to these alternative dispute resolution methods, associations can also be used to bring competition into play, or to alter competition violations. Indeed, associations are in frequent contact with public authorities such as the DGCCRF[134], reporting information on misleading practices by certain companies. What's more, they can call on the Conseil de la Concurrence (French Competition Council) on issues that raise both competition and consumer concerns.

For example, UFC QUE CHOISIR asked the French Competition Council for an opinion on the increase in back margins in the retail sector[135]. Back margins are commercial practices aimed at offering suppliers a special promotion of their products in supermarkets, in return for a fee paid to the suppliers after the sale. The consumer association had questioned the potential restriction of competition resulting from this practice, and its influence on consumers. These practices can have a major impact on the end consumer, who, according to the associations, is subject to increasingly high costs in the supermarket sector. They also strengthen the position and

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[133] Article R212-1 French Consumption Code https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000032807196/

[134] Ministry of the Economy, Finance and Industrial and Digital Sovereignty, La DGCCRF, https://www.economie.gouv.fr/dgccrf/dgccrf

[135] Board Decision about increase in back margins in the retail sector, published the 18th October of 2004 à l'UFC-Que Choisir.https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/la-demande-de-lufc-que-choisir-le-conseil-rend-un-avis-sur-laugmentation-des

purchasing power of distributors towards suppliers. In opinion 04-A-18 of October 18, 2004, issued by the French Competition Council (Conseil de la Concurrence)[136], the institution established the actual risk of potential restriction of competition on the market through resale at a loss, collusion between two competing brands, or the eviction of a company in a dominant position. The result is higher prices for consumers, who are often blind to such practices.

In the same way, UFC, through its local presidents, defended the need for competition between energy suppliers by 2020[137]. Indeed, given the rising cost of energy for consumers, the association warned of the need to open up the market to the smallest energy players, so as not to nurture a dominant position for one player in this sector. In this way, external players are working both for greater competition in the market and for the sovereignty of consumers, who are often subjected to the practices of professionals.

In the United States, most states have a Department of Consumer Affairs[138] dedicated to regulating certain industries in order to protect consumers of goods and services from certain companies. In addition to the effectiveness of these entities in informing and guiding American consumers, they also encourage them to contact lawyers to settle their disputes. Most federal states have also passed legislation imposing reasonable contract wording, so as not to mislead the consumer in his or her commitment.

Consumer representatives, such as associations, conciliators and mediators, act to preserve consumer sovereignty. They enable consumers to defend themselves, even in the face of professionals whose power in a given market is daunting. What's more, associations and other bodies working on behalf of consumers also alert public authorities to potential risks of foreclosure in certain sectors. In this way, consumer sovereignty is more asserted than through

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[136] Board Decision French Competition Council n°04-A-2018, 18th October of 2004 about an opinion request presented by association UFC QUE CHOISIR about competition conditions into specialized retail sector https://www.autoritedelaconcurrence.fr/sites/default/files/commitments//04a18.pdf

[137] Press article France 3 Bourgogne : UFC Que Choisir's mission is to promote competition between suppliers and select the best offer for consumers, while defending them in the event of a dispute. In Côte d'Or, 76,000 households saw their gas bills cut by 14% last year. The national "énergie moins chère ensemble" campaign covers both gas and electricity. All consumers have to do is register onsite chosirensemble.fr • ©France 3 Bourgogn

[138] Consumer Protection and Antitrust Law, Chapter 5 . https://www.coursesidekick.com/business/study-guides/wmopen-introbusiness/consumer-protection-and-antitrust-laws#:~:text=The%20Sherman%20Act%20outlaws%20%22every,trade%2C%20only%20those%20that%20are

traditional legal action. That said, the advantage of legal action is that it can have a major impact when it involves several consumers (II).

II. Implementing class actions

Class actions have been slow to make their mark in France. They represent a means of civil procedure enabling an association to represent in court, without a mandate, an unorganized group of people with similar claims against the same defendant[139]. These class actions are the subject of much debate at European level. Indeed, while in France the class action movement is struggling to develop, the United States is tending to accept them more leniently.

It is often said that the law of a country is a reflection of its culture. In the United States, the legal culture is fairly flexible, and less sacralized. Lawyers are seen as real businessmen, who accumulate cases, being paid by the damages of their winning litigations. Their aim is therefore to initiate all kinds of proceedings with a view to winning their cases, which is why American lawyers do not hesitate to defend "frivolous" litigation. A term has been developed by Americans to designate these trials as "frivolous lawcases"[140], in which lawyers take legal action for disputes that may seem abstract or ridiculous. American culture emphasizes this common practice of legal action[141]. In fact, American lawyers tend to take advantage of consumer actions against the same professional. Indeed, it is not uncommon for professionals to commit consumer abuses and anti-competitive actions, which lawyers will use as grounds for admitting the professional's liability in a dispute.

Collective actions of this kind benefit consumers by guaranteeing the exercise of their rights, and highlight the power of a group against a company. Indeed, a consumer acting alone can easily be discouraged by the power of the firm he is attacking. These actions turn the balance of

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[139] Class Action (2023) *Concurrences Dictionary* https://www.concurrences.com/fr/dictionnaire/recours-collectif

[140] One of the most known frivolous law case is Roy Person v. a small clean dry over a pair of pants. He sued the shop owner has he considered they misplaced his pants after he brought them for an alteration, and returned him an imitation. Thanks to the « Satisfaction Guaranteed » , the case lawsuit totaled 67 million dollars, ruling in favor of the shop owner.

[141] Thomas.A (2010) Frivolous Cases, 59 DePaul L. Rev. 633. Available at: https://via.library.depaul.edu/law-review/vol59/iss2/13

power on its head: the professional feels threatened by the mass demand for redress, but also by the fear of a bad reputation. This is why class actions were so successful in the United States.

In France, on the other hand, several obstacles prevent class actions from being launched in the same way as in the United States. Firstly, in France, it is the associations that take responsibility for bringing actions against the professional, and not the lawyers under article L623-1[142] of the Consumer Code. Associations initiate such proceedings not with a view to reparation of a collective loss, but of a sum of individual losses they represent. However, associations, which are made up of volunteers, do not have the substantial financial resources needed to bring legal action to a successful conclusion. This lack of means represents a primary difficulty for class actions. Next, the idea was mooted of subjecting defendants responsible for anti-competitive actions to consumer redress, as well as a supplementary payment allocated to a fund available for future actions of this form, in the same way as punitive damages under American or English law[143]. On the other hand, here again, cultures differ, with France having a principle of fair compensation for damages. In a decision handed down by the French Constitutional Council on January 26, 2017, the judges ratified the prohibition on the constitution of a fund to be used for subsequent actions, through previous awards of damages.

There is also a procedural obstacle. In France, the interest to sue allows anyone to exercise his or her right to take legal action against any defendant, if he or she can show an interest in doing so. In terms of class actions, the interest to sue must therefore be widely understood[144]. That said, in order to be apprehended by the judge, each consumer must justify his or her interest, a prejudice, and this must have a direct link with the subject of the dispute. However, to rule on these elements would be tantamount to ruling on the merits before ruling on jurisdiction. There is therefore a fine line between admitting an action and ruling on its merits.

At European level, member states have reported difficulties in applying class actions to their national legal systems. From France to Germany, hopes for the emergence of class actions are

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[142] Article L623-1 French Consumption Code https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000037670662

[143] Lacresse. A (2018) , The practical guide to quantifying damages in the event of anti-competitive practices: how should it be used ? A lawyer's perspective, *Review Lamy Concurrence*, n°74

[144] Parmentier.H (2021) Claims for compensation: harmonization of legal precedents to complement the Damages Directive, *Review Lamy de la concurrence*, n°101

fading[145], and a European failure is looming. However, the Commission does not despair of seeing the emergence of such actions. In order to maintain this consumer protection objective, which is becoming increasingly necessary in the face of big business, European legislators have decided to institute a new Directive, in the hope of guaranteeing a certain effectiveness of the latter's power. Directive 2020/1828 of November 25, 2020[146] has been carefully thought through by the Commission. Following the receptive response to group actions, and the growing desire of European institutions to compete with foreign imperialism, the new Directive aims to protect the collective interests of consumers, repealing Directive 2009/22[147]. Moreover, fearful of abuses by professionals and the new digital challenges, legislators wanted to punish abusive practices that would affect the single market.

Among the rights offered by the Directive is a fairly common sanction in competition law: the cessation of the unlawful act, which consumers can easily invoke through their class action. What's more, the Directive's broad scope means that abuse of personal data can also give rise to class action litigation.

This transposition of the directive will make class actions effective, and will give new impetus to the latter. However, there is still some criticism, as these actions do not allow lawyers to initiate them. On the other hand, the Directive lays down a minimum framework for harmonization, so we can "hope" that the State will go further.

Class actions offer consumers a new means of asserting their rights in the face of anti-competitive behavior by major economic players. Even if they are not as frequent as desired in France, the desire to strengthen them in a context of weakening consumer sovereignty is asserting itself through the creation of new legal frameworks.

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Conclusion

The study of consumer sovereignty in competition law has highlighted the complexity of exercising this power. Indeed, competition law is a nebulous field in which many players are involved, raising numerous difficulties as it intermingles with administrative law, private litigation, economics and the contemporary issues to which it is subject. As a result, legal nomenclature is becoming increasingly necessary.

Historically, questions of competition have arisen as a result of the ever-increasing number of commercial exchanges, leading to attitudes on the part of economic agents that distort competition on the markets. The interest of such regulation lies in punishing immoral players, but also in protecting competitors wishing to enter a market, and consumers. Over the centuries, public authorities have endeavored to create a protective regulatory framework. Through ordo-liberalism, legislators have sought to reconcile the imperatives of law and the market economy, while at the same time protecting the consumer. Of course, these restrictions initially enable us to control the reprehensible behavior of players in the economic sphere. However, the safeguarding of consumer rights is subject to a new interpretation. Consumer protection is no longer just an end in itself, but also a guide to anti-competitive policy.

Sovereignty is exercised by various means. First and foremost, it is public power, embodied in national state institutions and supra-national institutions, which sets the conditions for access to a market in terms of competition law. In the same democratic way, consumers, who are also electing citizens, designate their representatives, who will enact and promulgate laws in line with their policies. That's why the HAMON law, reinforcing the consumer code, came into being under the influence of the socialist Hollande government. Consumers indirectly empower state authorities to determine the rules that apply to them, and to firms in the economic landscape.

Beyond this indirect exercise of sovereignty, we are witnessing an evolving vision of the consumer. Initially interpreted as the rational homo oeconomicus in his choices, the consumer appears increasingly accompanied by state and European power. Placed in a position of assistance, criticized by many but necessary for others, consumers seem to have lost their

autonomy. However, new contemporary developments seem to be reaffirming their ascendant sovereignty. In a knowledge-based society, consumers benefit from more flexible access to the products and services they consume. At the same time, they are no longer complete strangers to the commercial practices of the professionals with whom they contract. The consumer thus oscillates between the position of the weaker party, and that of the thoughtful consumer, intensifying the complexity of his position. Thanks to the intervention of new legal tools, public authorities are deliberately leaving the exercise of direct sovereignty to the consumer, such as the GDRP where the consumer becomes an actor in his or her data with companies. That said, the observation of public intervention making consumers more active remains to be put into perspective. Indeed, direct consumer activity is only established because public entities cannot interfere in the management of user data against companies. Such a situation would create the potential for interference and infringement of corporate rights, as well as the freedom of trade and industry enshrined in French law.

Thus, the consumer (in the sense of the person who consumes) has a sovereignty that is increasingly supported in appearance. Indeed, public authorities allow them to safeguard the exercise of their rights, and give them a wide freedom of choice in their consumption. Even if there are limitations, they are seen in a positive light, in terms of "consumer welfare". What's more, in the face of the power of large corporations, we must never forget that consumer behavior is the primary production factor for economic agents. Indeed, the phenomena of boycotts, denunciations on social networks and reputational risk condition companies to provide ideal conditions for their consumers. Similarly, their habits guide innovation and competition policies.

They play a major role in the economy and legal nomenclature, by asserting their ascendant sovereignty. Within the framework of competition law, which indirectly conditions consumer choices upstream, consumers benefit from a political and economic system that is favorable to safeguarding their sovereignty, notably through the benefit of legal action to assert their rights against major economic powers.

However, this observation needs to be put into perspective. The questions raised by new technological developments are increasingly calling consumer sovereignty into question. In

fact, the sustained digital and numerical movement implies a great deal of flexibility in the law, which by its very nature is rather rigid. There is a contrast between the urgent need for regulation in the face of digital superpowers, and the backwardness of the law. The application of competition law to an unsuitable field, and the adoption of new regulations, are an admission of national and European failure in tackling these phenomena. This is the case with Metavers and the new artificial intelligences that the European Union has decided to regulate, already lagging behind their expansion. The major risk is the obsolescence of the law and over-regulation in an attempt to make up for these shortcomings, risking weakening potential investment in Europe. On top of that, the legal tools as GDPR must be balanced, as in the end of the day, the consumers' habits will determine the real use of the platforms. Indeed, our fast consumer behavior tends to capture consumer into platforms, and not encourage consumer to act into procedure offered by the regulation.

Moreover, consumer sovereignty in competition law has been particularly concentrated in Western countries, mainly France, the United States and the member states of the European Union. However, even if divergences are noted (notably between member states and the USA), these same countries benefit from a democratic system that more readily admits free trade on their territory, allowing greater choice for the consumer. On the other hand, the study did not focus on other countries, such as China, which are major players in international trade and marketing, and where the issue of consumer sovereignty does not appear to be flagrant.

So, even if consumer sovereignty in competition law manifests itself in different ways, it remains nuanced in the face of technological and international evolutions that can greatly weaken it. For the time being, sovereignty seems to be guaranteed by the intervention of national and European legislators regulating competition law, but risks being undermined in the future by the metamorphosis of traditional modes of consumption.

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