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Some Thoughts on Article 82 Jurisprudence—If the Government Always Wins, Should Private Litigants Win As Well?

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I. INTRODUCTION

If you want to know where you are going, it helps to know where you are. As we see the European Commission moving deeper into limiting what allegedly dominant companies can and cannot do, the question arises whether the same rules being applied in cases brought by the Commission should also apply if and when such cases are brought by private parties. To answer this question, we start with the current law under Article 82. We then take a step back to examine the philosophical underpinnings of the doctrines that are leading to the court decisions, and we then examine whether those underpinnings justify applying the same rules to private party suits.

Over 40 years ago, United States Supreme Court Justice Stewart criticized the Court majority's assertion that its decision in the case before it was consistent with the Court's precedent, noting that "the sole consistency that I can find is that in litigation under Section 7, the Government always wins."² The decision of the European Court of Justice in the *France Telecom (Wanadoo)* case³ brought that old quote back to mind. To paraphrase Justice Stewart, in litigation under Article 82 the Commission always seems to win. Why, and what that means if the EU moves towards a system of private antitrust litigation, is what we will be exploring below.

Before we get into the details of the *Wanadoo* case, we have to recognize one fairly brutal fact. Regardless of who is on the other side, the Government (Commission) wins its Article 82 cases—not just some, but practically all of them.⁴ Indeed, Damien Neven, Chief Economist of DG Competition, noted that the Commission won some 98

¹ BA 1972 Colgate University; JD 1975 University of Pennsylvania. In January 2008, the author retired as Vice President and Assistant General Counsel of Pfizer Inc. The opinions expressed herein are solely my own. I would like to thank Thomas Janssens for helping me work through the facts of the *Wanadoo* case, and Christian Ahlborn for sharing his insights into Ordoliberalism. Any errors or omission are totally my responsibility, of course.

² *United States v. Vons Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

³ *France Telecom SA v. Commission*, Case T-340/03 (Court of First Instance, 30 January 2007) (hereinafter "CFI Decision"), *affirmed*, Case C-202/07 P (European Court of Justice, 2 April 2009) (hereinafter "ECJ Decision").

⁴ When I asked one experienced EU Barrister what was really going on here, he simply replied "res ipsa loquitur." It is hard to improve on that for brevity.

percent of its Article 82 cases.⁵ And by some measures, the Commission has not lost a single such case in the modern era.⁶

Unlike many great legal and philosophical questions, the reasons for the Commission's success rate are really not that deep a secret. As Neven pointed out, Article 82 cases remain focused on "form," whereas Article 81 cases (other than horizontal price fixing cases) are looking more to "effect."⁷ Combine this with the Commission's freedom to determine how it will measure "costs" and other data (discussed below), and the defendant litigating an Article 82 case does not have a great potential for ultimate success.

Of course, since the ECJ has retained its formalistic approach to Article 82 cases, the Commission's valiant attempt to provide effects-based guidance as to Article 82 ended up as just that—guidance as to when the Commission will bring a case, not a Guideline as to the state of the law.⁸

Still, we want to explore *Wanadoo* for what it can teach us about acceptable approaches in Article 82 cases, and look at how the case does (or does not) fit within both the overall EU jurisprudence and the philosophical underpinnings of that jurisprudence. That leads us to a broader question—regardless of what one thinks of the underpinnings of the EU's Article 82 approach for cases brought by the Commission, should the rules designed to facilitate Commission control of economic power automatically apply if and when private party actions come to the EU?

II. A LOOK AT WANADOO

The *Wanadoo* case arose out of a 1999 sector inquiry. At the time, Wanadoo Interactive (or WIN) was majority owned by France Telecom (the ownership later reached 99 percent). The Commission sent WIN a Statement of Objections in December 2001, alleging that its pricing was too low (predatory) and that such conduct constituted an abuse of its dominant position in the French market for high speed internet access. On July 16, 2003 the Commission fined Wanadoo 10.35 million Euros for such predatory (below cost) pricing and the resultant abuse of its dominant position on the relevant market, a decision that was affirmed both by the Court of First Instance ("CFI") and the European Court of Justice ("ECJ"). But before we get to the legal issues of what

⁵ See Ahlborn and Evans, *The Microsoft Judgment and its Implications for Competition Policy Toward Dominant Firms in Europe*, 75 ANTITRUST L.J., 887, 925 (2009), citing Damien J. Neven, *Competition Economics and Antitrust in Europe*, 21 ECON. POL'Y 741, 761-762 (2006). While the approach taken in this article may have applicability to understanding what happened in the Microsoft case, we do not propose to discuss that case here. Not only has it been discussed at length elsewhere, but the facts may well make it unique in modern day case law

⁶ *Ibid.*, See Table at 925. According to the authors, there has been no fully successful challenge to the Commission on substantive points in a modern Article 82 case.

⁷ *Ibid.*, citing Damien J. Neven, *Competition Economics and Antitrust in Europe*, 21 ECON. POL'Y 741, 761-762 (2006)

⁸ *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, (February 9, 2009), available at http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf

constitutes predatory pricing and abuse, it is helpful to clarify a couple of factual issues and terms.

Much is said in the CFI and ECJ opinions about “cost” and what it means to sell “below cost.”⁹ However, to anyone who has spent time working in a large business, the concept of “cost” is almost magically flexible. It is the hat into which the magician, or enforcer, can place his rabbit pretty much at will. At one end, we have what may be called “cash costs.” These are what you pay for raw materials and other directly measurable parts of the product. Then we move to look at manufacturing costs that include labor. Here is where things begin to get interesting. Softer elements begin to enter the picture—sick fund contributions, pension accruals, overtime....real costs, to be sure, but harder to pin down.

Now, what if you are launching a new product? When it is up and running (if it succeeds, that is), you can make it with moderately skilled labor. But you use highly skilled labor in your other fields, and it would not be reasonable to hire an entire new work force until you know that the product will be a success. So is your “cost” the cost of the employees that you are using for the start up, or the cost of the employees that you will use later?

But this is really only the start. What do you do with company-wide research expenses and overheads? Under U.S. law at least, research costs in pharmaceuticals have to be expensed—charged against the year that they are incurred (rather than allocated to the project if and when the drug emerges). So these have to be accounted for. And let’s not forget the Chief Executive’s salary, Board of Directors meetings, and everything else. How you allocate these costs is an art.

For competition law purposes, this squishiness led us to set up some proxy measures. We have “average total cost” which is designed to capture everything. Then we have “average variable cost,” which is designed to get down to the so-called “real” costs of the product or service. Economists would prefer to measure “marginal cost,” but the real world seldom gives us that level of precision.

So before we get to the legal issues of which version of cost to apply, and how, we need to take a look and see if what the Commission was calling “cost” bears any relationship to what Wanadoo called its “cost” in the business.¹⁰ Interestingly, there is a somewhat spectacular debate about cost accounting reflected in the CFI Decision,¹¹ but

⁹ CFI Decision, ¶¶ 30, 42, 123, 125-128, 134, 137; ECJ Decision ¶¶13-15, 45, 64-68.

¹⁰ Unless there is some ex-ante agreement on what will be defined as “costs”, then the party who gets to define the term wins the case. The author had an experience in Latin America where a competition authority reallocated costs in a way that not only was not used in the business, but made no business sense. The authority then claimed that the company was selling product “below cost,” although the client’s books showed a profit from the product and (I believe) that it was treated as a profit for tax purposes. It took over 10 years to get the case thrown out, and the “creative” definition of costs taken off the record.

¹¹ CFI Decision ¶¶ 123, 125-129.

the Court then punts and simply says that the Commission must have broad discretion in making complex economic assessments.¹²

With all due respect, that is not enough. It is one thing to have broad discretion in making assessments. It is quite another to have freedom to determine what shall be counted in making an assessment. As the preceding discussion should have made clear, if you let me define what counts as “cost” I can make your sales appear to be above or below cost fairly easily. So we need to know if the Commission and the parties are working from the same definition of costs.

It appears from the discussions in the various opinions that the Commission did start from data in Wanadoo’s files. However, there was a real dispute over how to treat that data. Wanadoo argued that it was launching a new service/product, and that for a relatively short period it might well not cover its “costs” because of the expenses of the rollout. However, once a critical mass of customers was signed up, the revenues would comfortably exceed total costs. It argued for a forward-looking approach. The Commission appears to have taken a modified historical approach, treating this as an existing product for cost and price purposes. The problem with the Commission approach is that over time the “costs” used in the analysis will no longer be applicable because the product has moved onto the market and is past rollout. This may well have happened here, and may be the explanation for the somewhat odd debate over how Wanadoo did, or did not, use various accounting techniques in showing the costs and revenues from this particular part of its business.

What the case teaches us, however, is that you have to win this fight at the Commission level. The Courts simply do not want to get into cost accounting, and will defer to the Commission unless the Commission gets it so howlingly wrong that it would be embarrassing to let it stand. So perhaps those Article 82 Guidelines may be a more useful tool than one might have thought.

So, now that we know what “cost” is, we move to the question of whether Wanadoo was “dominant” and whether there were sales “below cost.”

On dominance, the debate seems to be on the use of market share data, but in the opinion a very significant factual finding is buried. The Commission apparently took an approach made popular by the U.S. enforcement agencies and asked customers whether they would switch away from the product at issue (here, Wanadoo high speed internet access) in response to a 5-10 percent price increase; some 80 percent said that they would not do so.¹³ This is a standard for defining a product/service market set out in the 1992 Merger Guidelines issued by the U.S. Department of Justice and Federal Trade

¹² CFI Decision ¶ 129. *See also* ECJ Decision ¶¶ 70-73.

¹³ CFI Decision ¶ 90.

Commission.¹⁴ We want to stress that this conclusion does not mean that Wanadoo did anything other than put out what was perceived as a superior product at the price. But it does indicate that on those terms, high speed internet access was a legitimate economic market.

Then the Commission moved to whether there was dominance. Here, two things came into play. First, there is a classic discussion of market shares, concluding that Wanadoo had a 50 percent share on March 31, 2001, a 72 percent share on March 31, 2002, and then a 63.6 percent share in October 2002.¹⁵ Those numbers are relatively high by EU terms, but they cannot tell the whole story. Wanadoo's defense was, after all, that it was introducing a new product and a successful one at that. You would expect it to gather a high market share until competitors reacted. Here the Commission takes what seems to be a wrong turn and starts rummaging through the files to find "bad" documents to show evil intent.¹⁶ However, about the most that they could find were documents stating that Wanadoo wanted to preempt the market, was concerned that its prices not be too high, and that it wanted to get and hold a very high market share,¹⁷ all exactly what you would expect in a competitive market and really not a sign of anything wrong.

While the opinions are not overwhelmingly persuasive in showing that Wanadoo was dominant, there isn't much more that we can add on the point. Let us assume for the sake of analysis that Wanadoo had a dominant position. The potential abusive conduct is sales below cost. Let's go there now.

It seems fairly clear that the pricing was below some measure of total cost.¹⁸ Indeed, it would be stunning if it wasn't below total cost given the time and effort in the case. The question of whether prices exceeded variable cost came down to a question of how one does the analysis. As we noted earlier, Wanadoo wanted to use an approach which took into account that Wanadoo was launching a new service/product, and that for a relatively short period it might well not cover its "costs" because of the expenses of

¹⁴ U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION HORIZONTAL MERGER GUIDELINES (1992). The test is set out in Section 1.11, and is expressed as whether a hypothetical monopolist of the product or service—if the terms of prices of potentially competing products were held constant—could impose a "small but significant, nontransitory increase in price" without losing so much business as to make the increase unprofitable. If the seller could do this, then the product or service in question can be treated as a market. The numbers used in running this "SSNIP" test are generally a 5-10 percent price increase; *see* *FTC v. Staples, Inc.*, 970 F.Supp. 1066, at 1076 n.8 (D.D.C. 1997).

¹⁵ CFI Decision ¶¶ 103-104.

¹⁶ From a U.S. perspective, even an express intent to crush the competition and dominate the world, is not bad thing—it is overstatement most time, but also is what we expect from strong competition. As Judge Easterbrook noted approvingly in *Ball Memorial Hospital*, "competition is a ruthless process. A firm that reduces cost and expands sales injures rivals—sometimes fatally. ...[but] the antitrust laws are for the benefit of competition not competitors." *Ball Mem'l Hosp. v. Mutual Hosp. Ins.*, 784 F.2d 1325 (7th Cir. 1986).

¹⁷ CFI Decision ¶¶ 199-200.

¹⁸ ECJ Decision ¶ 15. The Court then takes this far over the rainbow, concluding that because sales were below total cost Wanadoo loses its appeal on cost methodology, which would be both wrong and irrational if that is truly what the Court was trying to say.

the rollout. However, once a critical mass of customers was signed up, the revenues would comfortably exceed total costs. It argued for a forward-looking approach. The Commission took modified historical approach, treating this as an existing product for cost and price purposes.¹⁹ Since we now know that the Courts give the Commission broad discretion in making these determinations, if you can't convince the Commission to adopt your approach, you have a major problem.

So, let us say that we have dominance and sales below some legal measure of cost. What next? Well, there are at least two levels of defense that the Commission and Courts rejected here, but are worth exploring for the broader issues they raise.

The first defense is normally described as the need to show the possibility of recoupment. And it is clear that the ECJ rejects the idea that the Commission needs to show that the alleged predator had a reasonable possibility of recouping its losses from the predation in order to make out a case of abuse of dominance.²⁰ So, is there anything left to argue? I would submit that the argument should be shifted to whether indeed the sales were below cost at all.

A company is not going to sell product at a loss (at least not for very long) unless it believes that it will recoup that loss later.²¹ If there is no possible recoupment, then the conduct is irrational—perhaps a topic for a ban, but not necessarily a competition law issue, because what we have is a consumer benefit (low prices).

So if you have a rational company, and it is selling in a situation where it has no reasonable possibility of recoupment, isn't this the best possible evidence that the sales should not be deemed below cost? In other words, rather than arguing it as a defense, I would suggest arguing it as part of the cost analysis. After all, Wanadoo argued that its prices would be above total costs once the rollout was complete.²² This is not simply semantics. The question of what items go into the appropriate definition of cost is not an exact science (to put it kindly). It is perfectly rational to include in the mix the business judgment of where the pricing falls since what you are judging is the conduct of a business rather than the constructs of accountants or even economists.

To take the opposite position leads to situations where pricing can be deemed to be "abusive" even if (to the business offering that pricing) it is profitable. Surely the Commission is not saying that a business must *raise* its prices as high as possible. And this would suggest that something deeper than mere accounting is at stake. But before

¹⁹ CFI Decision ¶¶ 125-128.

²⁰ Besides the Wanadoo case itself, ECJ decision at ¶ 110, there is a whole line of cases making this point. This one is not changing any time soon.

²¹ Under U.S. law, this is the essence of the situation: Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced; *Brook Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993).

²² See CFI Decision ¶ 125.

we get there, let's look at the second defense rejected in the *Wanadoo* case; the right to meet competitive pricing.

We have to admit that even to a U.S. lawyer, arguing about a right to meet competition may require the use of pain killers or alcoholic beverages. That is because almost all of the law on this topic had been developed under a ghastly U.S. pricing law called The Robinson Patman Act (after its legislative sponsors). For anyone wanting a quick, non-specialist overview of what that legislation does and why, a brief overview may be found in the article cited in the footnote.²³

But what is going on here is a little different from what a U.S.-centric position would lead one to expect. There seems to be at least some EU law allowing even a dominant company to meet the prices offered by its competitors.²⁴ But what the Commission and courts seem to be asserting now is that you cannot use that right/defense to meet competition if it leads you to sell below cost.²⁵

So we are getting to know the "what." Let's move on to the "why."

III. AN UNDERLYING PHILOSOPHY?

The Commission and Court approach in these cases does suggest that something more is happening than the Commission simply winning each case that it brings. It would appear that there is indeed an underlying philosophy at work here, and that understanding that philosophy and dealing with it expressly is very important if the EU is to come up with the "European" solution to private antitrust litigation that Commissioner Kroes was talking about back in 2007.²⁶

Let's start with the "special responsibility" of dominant companies. As expressed in *Wanadoo*, it is as follows:

Therefore, since Article 82 EC refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure [citation omitted], an undertaking which holds a dominant position has a special responsibility not to allow its behavior to impair genuine undistorted competition [citation omitted].

As the Court has already stated, it follows that Article 82 EC prohibits a dominant undertaking from eliminating a competitor and thereby

²³ See Bernard, *Handling Modern Buyers*, 44 ALBANY L. REV. 89, 90-92 (1979). The basics here don't change much over time.

²⁴ See CFI Decision ¶¶ 171-172.

²⁵ See CFI Decision ¶¶ 174, 176, 179-180; ECJ Decision ¶¶ 46-48. There is a really fascinating question buried here that is beyond the scope of this article—when would a dominant seller have **higher** costs than a smaller competitor?

²⁶ Speech by Commissioner Kroes of March 8 2007 at the Commission/IBA Joint Conference on EC Competition Policy, Brussels, entitled *Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe*. It should be stressed that while we describe the underlying philosophy as existing and coherent, that does not mean that we find it to be correct or valid. Those are questions for another forum and another time. What we need to do here is take what exists, and see what it means.

strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, not all competition by means of price can be regarded as legitimate [citation omitted].²⁷

There is more packed into these words than first meets the eye. But to understand it, we need to dig into a particular German Philosophy that has had a very large impact on EC jurisprudence, and that is Ordoliberalism.

Ordoliberalism is an economic and political system that developed and flourished in the period of the 1930s -1950s and exerted significant influence in Germany and at the EU level for several decades thereafter. In 1933 two lawyers (Franz Bohm and Hans Grossmann-Doerth) and an economist (Walter Eucken) met, and began to formulate an interdisciplinary approach combining law and politics that created a “third way” between the centrally-planned economy of socialism and the unregulated free market approach. They called it a system of complete competition in a market economy. It would ensure a prosperous and humane society.²⁸

The key questions are the proper role, and proper goals, of the state in managing or limiting entity behavior. And the key point for our purposes is the role of competition. Unlike much current analysis, the ordoliberal approach does not view consumer welfare as a concept that should have a large part in shaping competition policy, regarding consumer welfare as at best an indirect goal. Rather, it sees competition as a means of deprivation of power and a way to prevent concentration of power from developing.²⁹ It looks to an ideal situation where all market participants are “price takers” (that is, no one has market power in the traditional sense).³⁰ Under Ordoliberalism’s “as if” principle, if a company does have market power, it has a positive obligation to behave as if it did not have that power.³¹ Hence the much reviled “special obligation” of dominant companies to not unduly hinder their competitors.

But the principles of ordoliberalism stretch farther than this:

In contrast to the policy of the *laissez-faire*, the central task of the economic policy is the creation of conditions within an industrialized

²⁷ ECJ Decision ¶¶ 105-106.

²⁸ Christian Ahlborn and Carsten Grave, *Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective*, 2 COMPETITION POL’Y INT’L 197, 198, (Autumn 2006). For anyone interested in diving deeper into Ordoliberal doctrine and how it influenced German and the EC competition law than is feasible here, see Gormsen, *Article 82 EC: Where are we coming from and where are we going to?*, 2 THE COMPETITION L. REV., 5 (, March 2006); Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New” Europe*, 42 AM. J. COMP. LAW 25, 69-84 (1994). And for those who are interested in original sources, there are always the old volumes of the academic journal ORDO, for which the philosophy took its name.

²⁹ Ahlborn and Carsten, *supra* note 27, at 200.

³⁰ *Ibid.* This also serves to explain ordoliberalism’s hostility to patents. Patents create a situation where the patent owner has some degree of market power, at least over the precise invention covered by the patent. See *Id.*, at 203.

³¹ *Id.* at 208.

economy which allow development of functioning and humane economic orders.³²

It is more than just a way to avoid what Eucken calls the “battle for a monopoly.”³³ It is a whole different way of looking at the entire economic and political landscape. To these U.S. eyes, it is a way of looking that assumes a base case that all goods and services are fungible, and that by setting up structures to prevent the exercise of pricing power, the state can create a functioning price system of complete competition.³⁴

Where innovation (and the incentives to innovate), much less intellectual property, fit into such a system, is a topic for debate in a different context. All that we are saying here is that these principles underlie the law, and provide an explanation for what seems to be the solid trend of current Article 82 case results.

IV. APPLICABILITY TO PRIVATE ACTIONS

So how does all of this come together when we look at the idea of private damages action (and class damages actions) under Article 82? The private litigation system that is being considered was born and raised in the United States. Indeed, the lawyers pushing for the EU to adopt that system in many cases are U.S. lawyers seeking a new market.³⁵

U.S. antitrust law is based on a common law tradition; a broad statute with details to be filled in by case law. Freewheeling competition is allowed and encouraged. Only if the party challenging the conduct can prove that the adverse impact on competition (not just a competitor) outweighs the pro-competitive impact, is the contested conduct banned. There are some exceptions (such as cartel price-fixing which is condemned as illegal *per se*), but these are indeed the exceptions, and the rule of reason is the general rule for evaluating potentially anticompetitive conduct. Because the system was developed with (and out of) a system of private litigants seeking to vindicate their own private interests (rather than government cases seeking to set up a structure for competition), the U.S. courts have narrowed the scope of liability and

³² Eucken, *The Competitive Order and Its Implementation* (English Translation by Ahlborn and Carsten), 2 COMPETITION POL'Y INT'L 219, 224 (Autumn 2006) [Originally published in ORDO (1949)].

³³ *Id.* at 228.

³⁴ *Id.* at 232.

³⁵ See, e.g., Smith, *Will Europe Provide Effective Redress for Cartel Victims?*, 4 COMPETITION POL'Y INT'L, 65 (Autumn 2008). Mr. Smith is identified as being a partner in London, but the firm is Cohen Milstein Hausfeld & Toll LLP. Their website describes the firm as follows:

For over 37 years, Cohen Milstein Sellers & Toll PLLC has been a pioneer in plaintiff class action lawsuits on behalf of victims of such abuses. By creating a group or class, individuals join to fight companies in court and enhance their ability to fight corporations who often have larger resources. As one of the premier firms in the country handling major complex class actions, Cohen Milstein, with more than 50 attorneys and offices in Washington, D.C., New York, Philadelphia, and Chicago....

The London office is affiliated with the U.S. firm; <http://www.city.ac.uk/law/llmprogramme/cmhtinternship.html>.

raised the bar as to what must be pleaded and proven to justify recovery. The clear message is to let the market play out.³⁶

However, the U.S. antitrust litigation model is very expensive. Many cases are brought as “opt out” class actions, in which claims of many allegedly injured people are combined into one large case. In such litigation, not only is there no government interest but there may not be any effective client control at all, with the case being effectively run by the lawyers. The combined costs of discovery and exposure to treble damages (and joint and several liability) are a drag on the economy (a “litigation tax”) and may lead to settlements without evidence of wrongdoing. Discovery costs routinely run into the millions of dollars per defendant, and the potential exposure (trebled, for the entire alleged violation) can mount to the heavens.

The point here is simply to note that while we all recognize the U.S. substantive law is wrapped up in U.S. procedure, we might want to see if the same analysis should apply in the EU. In the United States, we are private party driven, but we compensate by setting higher hurdles to win. In the EU, especially in Article 82 cases, the process is government case driven and the substantive rules reflect the ordoliberal ideal of the government creating the environment of perfect competition.

Indeed, there is a very respectable argument that ordoliberal policies do not support the idea of private parties being involved in or enforcing the rules and structures set up by government actions. Ordoliberals viewed an independent competition agency as the key for competition policy enforcement, and further believed that once the structural elements for ordoliberalism were in place (including sound monetary policy), there would be limited need for active intervention. Opt-out class actions law suits do not fit comfortably in such a system.

By this, we do not suggest that mid-twentieth century German philosophers and economists were focusing on the issues of private litigation. We only suggest that whatever compensatory or punitive policies are construed as allowing for private damages actions under EC Competition Law, they are not supported by the philosophy and policies underlying the substance of Article 82 law.

Euken warns in several places about the dangers of letting private parties influence the creation of the ordoliberal competitive framework. Indeed, when the state and private parties cooperate there is a great danger that the power of the state will be used to create a dam to close supply.³⁷ Indeed, the description of the competitive order under ordoliberalism seems to exclude the enforcement of rules by private parties:

The situation is totally different in the competitive order. Here the main impact leads to another direction. The creation of monopolistic power

³⁶ See generally Bernard, *Private Damages Actions: A U.S. Perspective on Importing U.S. Damages Actions to the EU*, ECCP October 2007.

³⁷ Euken, *supra* note 31, at 233.

entities is prevented. Not only by prohibitions of cartels, but also—and far more importantly—by an economic and legal policy which breaks through the strong forces of competition, as exist in a modern economy, by applying the constitutive principles. In this way the state largely escapes the influence of private pressure groups. Its ability to supervise monopolies is disproportionately greater if the leaders of the coal, potash, iron syndicates, etc., of the large groups and trusts and trade unions, do not have a right to take part in the decision-making process. At the same time the task is far more moderate. Only for the aforementioned unavoidable monopolies is the problem of monopoly supervision topical. The chance of its success is thus far greater.³⁸

Nor would this idea that there are one set of standards for government cases and another set for private damages actions be exceptional (except in terms of its being laid out explicitly). Even under U.S. practice, there are some areas where only the government can bring a case,³⁹ and other areas where the courts have expressly stated that the burden on the government in a case is lower than the burden on a private party.⁴⁰

V. CONCLUSIONS

This article is not intended as a defense of ordoliberalism, or the legal standards that are derived from it. Indeed, if there is one thing that experience should have taught us, it is that the ideal of a uniform, overarching construct from which you can confidently derive the “best” outcome in every given case is a philosopher’s dream, but not a reality. Unintended consequences are part of every system. For ordoliberalism, there is the problem of how one encourages innovation. Not only would it deprive innovators of their traditional rewards (money and power), but taken to its logical outcome of requiring companies to act as if they had no market power,⁴¹ ordoliberalism would require compulsory licensing of all intellectual property if that property represented an advance over the prior art, or indeed the abolition of patents completely.⁴²

³⁸ *Id.* at 239. It could be argued that this is not what the ordoliberals really had in mind, that what we call “private” enforcement is still done through the courts (part of the state). Ordoliberals were more directly concerned with private pressure groups influencing the rules which would be put in place by the state. But even on this view, an administrative enforcement process is more consonant with their views than is open-style private litigation.

³⁹ Section 5 of the Federal Trade Commission Act outlaws unfair methods of competition. It is enforceable *only* by the FTC.

⁴⁰ Section 13 of the FTC Act authorizes the Commission to seek preliminary injunctions pending adjudication of an FTC administrative complaint. The standards for granting such preliminary relief may not be totally clear, but they do seem to be easier than those applied when a private party seeks preliminary equitable relief. *See* Bernard, *Gatekeeper Issues*, 4 ECLR 189, 190 (2009).

⁴¹ *See* text accompanying notes 28-29, *supra*.

⁴² Combine the “as if” principle with the ordoliberal hostility to patents and other intellectual property (*see* Euken, *supra* note 31, at 236) and you have a complete train wreck if you believe that the reward of patents and even some market power is a price that needs to be paid to have the sort of innovation that, for example, leads to cures for diseases.

Since almost everyone recognizes that taking the doctrine to that logical extreme would lead to a real mess (and a total freeze on innovation and new product development in the EU), the Courts have tried to come up with rules that allow for innovation but limit the exploitation of the fruits of that innovation (in good ordoliberal fashion). This has led to the series of cases trying to define what is an abusive refusal to supply goods or license intellectual property (for example, the Microsoft decision, and the commentary that it has spawned).⁴³ Whether the courts have succeeded in their attempts is a topic for another day.

As noted earlier, all that we are trying to do in this article to provide a coherent explanation of where we are with the Court's Article 82 jurisprudence, and why, and to begin the discussion of what this means going forward. The tension between ordoliberal antipathy towards market power and the desire to encourage innovation will remain. But regardless of that tension, to take substantive law created under the ordoliberal concept of government role and action, and place it in the hands of private parties whose only goal is the maximizing of monetary awards, is both bad policy substantively and doctrinally inconsistent as well. It would take the EU far away from that "European" solution to private antitrust litigation that Commissioner Kroes was talking about back in 2007.⁴⁴

⁴³ The literature here is rich. See, e.g., Fox, *Microsoft (EC) and Duty to Deal: Exceptionality and the Transatlantic Divide*, 4 COMPETITION POL'Y INT'L 25 (Spring 2008); Beard, *Microsoft: What Sort of Landmark?*, 4 Competition Pol'y Int'l 33 (Spring 2008). It is more than slightly ironic that the law here springs in large part from the *Magill* case back in 1995 [1995 E.C.R.II-485], where the "intellectual property" at issue was television program listings—something that we would venture any teenager today would regard as public information.

⁴⁴ See note 25, *supra*, and accompanying text.