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Is the French Competition Authority a libertarian paternalist Court?

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Abstract

Competition law and policies are one of the main interdisciplinary fields within law and economics literature (Kovacic and Shapiro, 2000). Most of times, legal cases are analyzed by economists with neoclassical and game theory tools (Phlips, 1995; White, 2010). It is clear that the main academic and practical debates for an half of century (about for example the stability of cartels, the rationality of the predatory pricing strategy, the important of markets structure or the relevance of leniency programs) have been made within standard paradigms where people (consumers and firms) are assumed to be perfectly rational (Leslie, 2010).

However, some recent researches have insisted on the fact that behavioral economics (Diamond and Vartiainen, 2012) could be useful to better understanding decisions from the competition authorities (Petit and Neyrinck, 2010; Reeves and Stucke, 2011; Tor and Rinner, 2011) and to better

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characterizing anticompetitive behaviors. It could be the case, for example, when firms use the cognitive bias and heuristics suffered by consumers to abuse of their dominant position.

The paper provides a qualitative analysis of litigation before the French Competition Authority (Thereafter the FCA) to know whether these insights on have an empirical content. By analyzing the decisions held by the FCA, our paper tries to address two main issues. First, does the FCA consider the arguments from behavioral economics as relevant ones? Second, how does the FCA consider practices in these antitrust cases? Does the FCA consider competition policy as a set of rules which make it possible to make only debiasing or does the FCA go further and consider itself as a libertarian paternalism institution?

The paper is organized in three parts. First, we show that the potential uses by the private firms of the bias and heuristics suffered by consumers are cognitive mechanisms that the FCA considers as potentially anticompetitive. Obviously, it is mainly in the B to C cases that this argument is used by the FCA. Second, we show that a lot of classic behavioral effects are considered by the FCA: *statu quo* bias, heuristics, anchoring, framing *etc*. Third, when private firms are convicted by the FCA on these grounds, fines are not the more common sanction imposed by the FCA. On the contrary, the FCA imposes remedies to debiasing consumers.

This analysis of the FCA adjudications makes it possible to better consider the "cognitive role" the FCA plays in France. Our conclusion is that, most of times, the FCA considers itself more as a debiasing institution than as a libertarian paternalist one. However, some cases have to be noticed: the ones which imply public authorities at large. When the public authorities have decided to implement libertarian paternalistic policies, the FCA considers that its role is to improve libertarian paternalist policies and not to struggle against.

Key words : Behavioral Antitrust, Libertarian Paternalism, Antitrust

Classification *JEL* : D03, K21, K42, L13

Introduction

Competition law is traditionally considered as one of the oldest law and economics field: antitrust authorities are highly concerned with the evolution of economic theory and the academic debates in economics have deep effects on legal practices. Interdisciplinary researches mainly rely on the price theory and the game theory. In both cases, rationality is assumed to be perfect: consumers are supposed to maximize their utility and firms their profit.

However, more and more models question the use of perfect rationality hypothesis in competition law (Kahneman [2003], Camerer et *al*. [2004], Diamond et Vartiainen [2007]). Following the bounded rationality agenda and focusing on the bias and heuristics used by agents to make their choice, a literature – called *behavioral antitrust* – has recently emerged which tries to show that limited rationality may be a more convenient hypothesis to analyze antitrust practices (Bailey [2010], Armstrong et Huck [2010], Stucke [2007], Stucke [2010], Reeves et Stucke [2011]).

Behavioral antitrust has potentially two scopes, normative and positive. First, behavioral antitrust considers limited rationality of consumers should be taken into account by the competition authorities to assess antitrust practices. Second, behavioral antitrust considers behavioral sciences may explain how antitrust lawsuits are litigated and settled by courts. In that case, behavioral insights are implicitly or explicitly used by courts which consider that behavioral arguments are sufficiently serious to be accepted on the bench (Salinger et *al*. [2007])[3]. Antitrust law would join other branches of law and regulation – consumer law, banking law, libertarian paternalist regulations – which are explicitly inspired by behavioral sciences.

[3] Some of national competition authorities have explicitly mentioned their deep interest for such a behavioral approach of antitrust litigation (see OFT [2010]).

The purpose of the article is to deepen knowledge of the rationale of antitrust law thanks to the contemporary approaches in behavioral sciences. We applied bounded rationality to antitrust practices and litigation by focusing on the second scope of behavioral antitrust. We show that behavioral antitrust is very useful tools kit to better understand how competition authorities settle antitrust cases. Then, the paper addresses issues about the new economic functions of antitrust law and the extension of the roles of competition authority in behavioral contexts: competition authorities are not only concerned with the market conditions of the exchanges between firms and consumers but become also concerned with the cognitive conditions of these exchanges.

For that purpose, we propose an analysis of the litigation before the French Competition Authority (thereafter the FCA). [4] We analyze all of the FCA decisions on five years from 2007 to 2012 (from the January 1st, 2007 to the December 31, 2012) but we focus only on the abuses of dominance ("*abus de position dominante*"). Among the abuse of dominance cases, we identify the cases where FCA uses implicitly or explicitly a behavioral approach. In these cases, the abuse of dominant position relies on the fact that the victims of the anticompetitive practices are rationally bounded. And it is precisely because of their limited rationality that some practices are considered as anticompetitive and condemned by the competition authority.

As such, the paper follows the recent literature on behavioral antitrust. We hope to be able to add on this literature on three issues. First, providing a quantitative measure of the importance of the "behavioral antitrust litigations" makes it possible to know whether behavioral arguments are quantitatively relevant on antitrust cases. To our knowledge, few previous articles have tried to provide a quantitative measure of the number of cases relying on behavioral mechanism. Second, providing a qualitative analysis highlights the most

[4] The French Competition Authority has been created in 1986.

important cognitive bias used by competition authority. The different cases studies provided in the paper explain how some of the traditional concepts of antitrust – barriers to entry for example – may be used in a behavioral manner and how classical biases in behavioral literature are used in antitrust context. Third, our analysis develops some arguments concerning the sanctions implemented by the FCA and opens on the issue of ability of a competition authority to struggle against the bias used by anticompetitive practices. The issue we address is to know whether the FCA function should be to debiase individual or to go further and to implement also libertarian paternalist frameworks. As such, our paper deals with the literature on normative issues of behavioral economics and the uses that public institution could make of behavioral findings.

The first part of the paper presents briefly the scope and the methodology of behavioral economics and how to apply behavioral insights in antirust context. In the second part, we apply behavioral way of thinking to cases settled by the FCA. Then we conclude on the normative stakes of behavioral economics for law.

I. Behavioral antitrust: scope and methodology

By behavioral economics, we refer mainly to the "psychology and economics" literature initiated by Kahneman and Tverski and then developed both by them and by a lot of other scholars[5]. This research agenda considers the assumption of perfect rationality is too strong and is more relevant to assume bounded or limited rationality. However, assuming people be not rational does not mean science is impossible. On the contrary, the aim of behavioral economics is to show there is "predictable irrationality" (Ariely [2008]) in the sense people share common cognitive mechanisms which influence their behavior in a more or less predictable way. Behavioral economics precisely tries to enhance our understanding of such cognitive mechanisms and their consequences on behavior. Following the classical presentation from Sunstein, three main categories of limitations may be distinguished: cognitive skills are limited, will-power is limited and selfishness is limited (Sunstein, ed. 2001).

First is concerned with limited cognitive skills. In that case, the issue is people are not able to correctly compute the available information. Bias or heuristics (Kahneman and Tverski [1974]) are examples of such mechanisms. Heuristics for example are rules of thumb used by people to compute information. They are useful because they are often quick and immediate but they also induce irrationality like for example non-bayesian processes of formation and revision of belief, idem for biases which are incorrect perceptions of reality inducing also irrationality. This is the case when judgments or assessments are concerned (evaluation of a probability for example). Second is concerned with bounded will-power. In that case, people have difficulties to commit with themselves and to respect what they have decided to do in the future. Procrastination mechanism illustrates the mechanism of bounded

[5] See for example (Sunstein (ed) [2001]) for a comprehensive view of behavioral law and economics.

will-power. Third is concerned with bounded selfishness. That means people do not search their maximization of utility in all circumstances. On the contrary, they obey moral norms, reciprocity obligations or are able to trust other people. These findings notably developed in experimental economics are criticisms against neo-classical *homo oeconomicus* assumption. Concerning the antitrust cases, we will elaborate on the two first categories of bounded rationality namely bounded cognitive skills and bounded will-power and put aside the moral or social norms phenomenon.

If behavioral economics has deeply renewed a lot of subfields in law and economics – consumer law, contract law, liability, bargaining, jury's analysis *etc*. –, antitrust law and economics appears to be less concerned. How antitrust law and economics may use its findings and methodology? Three applications may be distinguished. First, it could be argued that competition authorities themselves are biased and consequently applying behavioral mechanism consists in assessing whether the judges in charge of the enforcement of antitrust law are biased or not. This method is similar to the researches on the cognitive limitations on civil judges or jurys for example (Guthrie, Rachlinski and Wistrich [2001]). Second, another type of application of behavioral insights would be to consider the classical models of competition and of industrial organization with biased agents. In that case, the aim of the research is mainly to modelize the interactions of biased agents and to predict the output of such interactions in terms of collective well-being. For example, the works about the use of cognitive skills to build new barriers to entry belong to this type of use of behavioral law and economics in the antitrust field (Reeves and Strucke [2011]). The consequence of these researches is to show that competition authorities should use behavioral findings to better settle litigation. The third type of application is to see whether behavioral mechanisms are *actually* used by competition authority to settle true cases. Behavioral antitrust means the behavioral literature is used as arguments by courts to demonstrate that a practice is

anticompetitive. Behavioral economics provides insights, mechanisms or stylized facts to better understand and to rationalize court's decision on the grounds of alternative assumptions about the relationships between firms and consumers.

Our own research belongs to this last methodology. In other words, we do not build normative arguments as such about the necessity to take account behavioral economics to settle antitrust cases but we analyze whether competition authorities have already used such argument in their decisions. As such, our aim is mainly positive in the following sense: do we need behavioral economics to better describe the actual legal decisions from the competition authorities? We implicitly assume that the competition authority itself is not biased by limitations of its cognitive skills.

The main difficulty of the issue we address is that competition authority is not necessarily explicit about the true reasons of its decision. In the French case, the FCA does not explain the economic model it uses and it does not quote any economists or academic works to demonstrate the solution. We have to make explicit arguments which are sometimes implicit. That is the reason why our methodology to analyze French antitrust litigation is mainly qualitative. This first step is required to go further and to provide a quantitative analysis about the length of behavioral arguments in antitrust law.

More precisely, we analyze only the abuse of dominant position that is to say the abuse from a monopoly position. In that case, the main scenario used by the FCA is to assume that firms are completely rational and consumers are not. Consumers are seen as agents who suffer cognitive bias. We are close to the classical scenario from Sunstein (Sunstein [2001]) where cognitive bias entrepreneurs try to use bias suffered by individuals to pursue their own agenda and to maximize their profit without the natural forces of market be sufficient to make the bias disappear (Gabaix et Laibson [2006]). That is why intervention by a public authority is required.

II. Behavioral antitrust on the Bench: The French case

The methodology previously exposed is now applied to the antitrust cases before the French competition authority. First we present the data used concerning the settlement before the FCA. Then, we provide some descriptive analysis of several cases which are illustrative of a lot of well-known behavioral mechanisms. As we will see, we cover a large spectrum of bias and heuristics and this is suggestive about the large use of behavioral insights by the FCA.

II.1. Data

We focus on the abuse of dominance cases which are ones of the main practices forbidden by the French competition law[6]. These cases are judged by a public authority, the French Competition Authority (FCA) which plays the role of a judge. We show that a significant number of cases are – at least implicitly – settled by the FCA by using behavioral arguments. For that purpose, we made an exhaustive analysis of all the cases settled by the FCA on five years (2007-2012). On this period, the French Authority are settled about 170 cases. Among these 170 cases, 75 are concerned with abuses of dominant position *stricto-sensu,* 60 are concerned with collusive behaviors between several firms and about 25 are more complex and are concerned both with abuse of dominant practices and collusive behavior. Indeed, firms may be sued by the French competition authority on several reasons. Therefore, the decisions are mostly complex with a lot of different practices for a same firm within a same case. We have excluded purely collusive behavior cases and we have focused on the hundred cases concerned by at least one practice belonging to the abuse of dominant position category.

[6] French competition law distinguishes three main practices: collusive behavior, abuse of dominance, and merger.

After analyzing these decisions, about 40 imply behavioral arguments. We have here to notice an important point. The case settled by the FCA are often complex implying a lot of different practices and consequently, several reasons why the firms are finally condemned. There are few "purely" behavioral case that is to say cases where the main argument is only founded on behavioral considerations. However, it remains true that there are a lot of decisions where usual arguments about monopoly and its abuses are completed by behavioral considerations. We now present some illustrative cases to show how it is possible to identify behavioral well-known mechanisms behind legal argumentation.

II.2. Qualitative analysis of litigation

Reading and analyzing antitrust settlements thought behavioral glasses lead to consider that the FCA may have in mind behavioral mechanisms which explains why some practices can be viewed as anticompetitive. In the following, we insist on four heuristics and bias which are the most used by the FCA and for each, we develop more extensively one or two illustrative cases. We will focus successively on representativeness, persuasion bias, availability and *statu quo*.

Representativeness heuristic

Representativeness heuristic is quite often used by the FCA. The representativeness heuristic takes place when the individuals make judgments based on a shortcut which is influenced by the apparent similarity between an event and a larger class of events. The keystone of the representativeness heuristic is the fact that events may be described in such a way that individuals think the event belongs to a broader class of events and make their

decisions on this base while the similarity relies only on the "appearances" and not on true features. To understand the consequence of representativeness heuristic for antitrust, we analyze the Plavix case implying the pharmaceutical laboratory Sanof-Aventis[7].

In this case, the FCA was confronted to Sanofi-Aventis product advertising on Plavix, one of the most sold drug in the world and especially in France. 15% of the total sales of Sanofi in France is concerned by the Plavix (§21). Plavix was protected by the industrial property laws from 1999 to 2008. In 2008, generic drugs laboratories enter the relevant market of Plavix and sell their own drug, similar to Plavix on the French market. In 2008, two generic drugs existed: the one produced by Sanofi itself and the one produced by an authentic generic laboratory, Teva-Santé. Both were authorized by the French Health Authority. However, there is a slight difference between the two drugs: the one produced by Sanofi used the original excipient which was still protected by the industrial property laws while the one produced by Teva-Santé used another excipient because Sanofi had refused to licensing Teva-Santé.

Teva-Santé argues Sanofi tried to exclude it from the market of the generic drug by product advertising campaigns which focused on the differences between the two generic drugs because of the difference of excipient. The argument is followed by the FCA. In behavioral terms, the FCA blames on Sanofi for creating a representativeness heuristics to mistaken general practitioners, specialists, pharmacists and drug makers. First of all, the FCA focus on the cognitive framework on this market and insists on the "*imperfect information of health professionals*" (§33) and on their difficulties to correctly use the information[8]. The professionals are described as reluctant about generic and subjected to "*hesitations*" (§94),

[7] We refer to the paragraph of the text of the decision available on the internet site of the French competition Authority (www.autoritedelaconcurrence.fr), the decisions are in French and are not translated in English yet). In this section, we provide English translation of the most significant texts of the decision.

[8] As Philippe Mongin clearly states: two imperfections have to be distinguished, the one relies on imperfection information, the other on imperfect skills to compute information. Only this last imperfection is a challenge for the standard theory of rationality (Mongin [2012]).

"*doubts*" (§93), "*confusions*" (§43) and "*mistakes*" (§105). In such a context, their beliefs are influenced by the diffusion of information by Sanofi. According to the FCA, the advertising product campaign from Sanofi was trying to bias health professionals against the Teva Santé generic drug: "*the issue is to know whether the advertising developed by Sanofi, insisting mainly on the objectives features of the princeps drug – features which are irrelevant about the substitutability between the princeps drug and the generic drug – made it possible to insinuate that substituting the two drugs was risky*" (§98). Even if the FCA does not employ the term of heuristic or bias, Sanofi is blamed for practices relying on what a behavioral analyst would call a representativeness heuristic (§104)[9].

The Sanofi case is not isolated. Other cases implicitly using a representativeness heuristic may be found. For example, in the *Arrow-generic* case, Schering Plough laboratory, producer of *Subutex*, is blamed for trying to drive away Arrow from the market by his advertising which insisted on the fact that the generic drug "*had not the same taste nor the same form*". The FCA concluded that people "*could distrust the generic drug*" and consequently, "*it was difficult for pharmacist to convince people to substitute the generic drug to the original one*" (§106).

Persuasion Bias

A second type of bias is represented by the persuasion bias. This bias may be described as the lack of consideration of the incentives of the people providing information. This bias may be reinforced by the 'confirmation bias' or by the 'beliefs persistence' mechanism" (Gabaix *et al*. [2012], p. 51). The GEG case provides a good illustration of this bias. This case is concerned by power market and by historical operator (GEG) practices

[9] Elsewhere, one can read « *the advertising campaign from Sanofi, and the manner by which the professionals have received it, seems to have a deterrent effect on a number of pharmacists who express a doubt on the possibility to substitute without risk the generic and the princeps* » (§93) ». An advertising asserted about the generic produced by Sanofi itself "*it is the same as the* original" (§35).

against one of his competitor, Poweo[10]. In the advertising campaign, GEG publicly doubts on the qualities and technical skills of Poweo and insists on the fact that GEG is mainly driven by the quality of public services contrary to Poweo which is presented as an actor seeking his own profit. The heart of the decision from the FCA is to know whether such messages addressed to consumers belong to normal competition or may be characterized as anticompetitive practices.

According to the FCA, such a campaign was intended to exclude Poweo from the power market. The keystone of the FCA reasoning is to show that GEG tried to build a persuasion bias in the mind of consumers by using informational context and advertising. First, there is no doubt for the FCA that the information provided by GEG about his competitor is all the more doubtful than the informational context about regulation is complex and unclear for consumers. But such false information could not succeed if consumers were aware of the economic motivations of GEG. For the FCA, it was not the case: GEG was "*notorious*" (§56), a lot of consumers "*trusted it*" (§59) because consumers make confusion about the true role of GEG in production and distribution of electricity: while GEG acts for the count of the State for power distribution (power network), GEG is a completely private actor for the production in competition with others firms. GEG advertising implied it was more or less a public firm producing for the count of the State while it was not the case concerning power production. And the FCA concludes: "*the warnings from GEG to consumers lead to persuade them of the reality of the alleged danger which threatened them because of the trust they have to their traditional power provider*" (§59). This confusion is due to the seniority of GEG on the market (§59) and more precisely to the fact that, for a long time, GEG was a public monopoly. Persuasion bias has been reinforced by beliefs persistence.

[10] After the liberalization of the power market in France, free entry on the power market was possible for any power company. The historical provider of electricity in Grenoble (GEG), a city of the east of France, decided to begin an advertising campaign which is considered by Poweo to a smear campaign.

For the FCA, the biases have had a lot of consequences on the consumers choices and the causal effects of the biases seem to have been important (§80).[11]

The GEG case is illustrative of a second bias used by the FCA, persuasion bias. A significant number of FCA settlements were driven by such reasoning. The following cases are similar: *Pompes funèbres de la Manche* (october, 20, 2011) ; *Expedia Inc and SNCF*, February, 5, 2009) ; *France Telecom* (october 15, 2007). In all these cases, a same issue is addressed by the FCA: advertising or signaling practices with the aim to confuse consumer's minds about the true incentives followed by the dominant firm. These practices are not always smear campaign but they share the same cognitive aim.

Availability heuristic

In their seminal contribution on heuristic and bias, Kahneman and Tversky defined availability heuristic as the mechanism by which an individual will wrongly evaluate the probability of an event because of his tendency to evaluate this probability thanks to the examples of such events available in his mind. Availability heuristic is often associated with others bias like the salience bias, familiarity bias or the building of scenario (Kahneman et Tversky [1974]).

Salient bias is the consequence of the bias of limited attention. Confronted with complex contexts, individuals may have tendency to focus on the most salient elements of the issue and to forget the "hidden attributes" (Gabaix et Laibson [2006]). The Jansen-Cilag case is illustrative of such a bias. The practices were an informational campaign to health professionals (pharmacists, general practitioners and specialists) about the risks of substitution between his princeps drug (Durogesic) and the generic drug produced by a competitor (Ratiopharm). For his campaign, Jansen-Cilag used a warning from the French Health

[11] From a factual point of view, Poweo signed 1 contract in February, 14 in March, 107 in April and then only 68 in May, none on June and received 36 demands of rescind of contracts. For the FCA, these facts are due to the campaign of Poweo.

Authority concerning the risks of some restricted cases of substitution between the two drugs. But the warning was not a general warning about the risks of the generic drug itself. On the contrary, Jansen-Cilag used strategically the warning in order to question the bio-equivalence between the two drugs. The FCA considers Jansen-Cilag had introduced "*ambiguïty*" and "*doubt*" in the Health Authory warning (§135). The text quoted by the FCA shows that the Jansen-Cilag had used only some part of the French Health Authority text.

Building scenario

Another cause of the availability heuristics is due to reasoning by scenario. The easiness for the individuals to build credible scenario about the occurrence of an event may influence their evaluation of probability of this event, whatever the true probability is. By implying and suggesting scenario, some firms are able to influence the beliefs of people and their behavior. The *Santéclair* case is illustrative. The case opposed an insurance company providing insurance contracts for health professionals and the professional order of these professionals. The letter sent by the organism to his members was a warning against contracts proposed by the firm which implicitly threatens professionals who would not follow it, to use professional sanctions. The FCA blames the organism for having intentionally wrongfully biased the risk of sanction insofar as the disciplinary sanctions depend on judiciary and not on the professional order[12]. According to the FCA, such practices lead to exclude Santéclair from the insurance markets[13].

[12] In a text sent November 22, 2004, the professional order indicated to his members that disciplinary sanctions could be pronounced against the members of the professional order who do not follow the recommendation (§85). This text undermines that the members of the professional order who would sign contracts with the firm could suffer disciplinary sanctions (§148).

[13] And the scenario seems all the more credible that the following mention « *the deontological advice from the deontological commission needs to be confirmed by the civil courts* » (§137, §55-56) has been suppressed from the text sent by the professional order.

Familiarity preference

Habits of consumption may have strong consequences on individual behaviors. Familiarity induces salience and availability heuristic. Familiarity preference may have consequences on liberalization of markets and may be understood as a "cognitive" barrier to entry. Telecom liberalization is illustrative on the fact that the FCA tries to build cognitive contexts which favor competition and free entry. In the telecom case, the FCA had to decide whether the old numbers of directory inquiry service should be the same or should be changed. Traditionally, in France, then number of the directory inquiry service was the 12. It was the number well-known by all French people when the historical operator was in monopoly. To enhance competition between the operators, once the telecom market has been liberalized, the FCA imposed that the new numbers for the directory inquiry services do not refer to this salient point and should adopt the following form (118 XYZ) to change the salience point of the consumers.

Statu quo bias

The *statu-quo* bias insists on the fact individuals may have tendency to prefer the existing option and have reluctance from modifying it (Thaler et Benartzi [2004]). The issue of *statu-quo* bias is preference reversal situations where the final choice depends on the initial context of choice. Destruction of dominant position by free entry is all the more difficult than *statu-quo* bias is important. For antitrust law and economics, *statu-quo* bias challenges the traditional results of the contestable markets by insisting on the cognitive barriers to entry (Reeves et Stucke [2010]).

In law, different mechanisms by which firms try to use *statu-quo* bias in their own profit exist: default rules, contractual clauses of tacit consent, difference between "omission"

and "action". First, concerning the default rules, the FCA considers it should check if such default options do have or not anticompetitive effects. In Microsoft case, the FCA agrees the European antitrust authority reasoning about the consequences of default rules exiting in Windows. In banks case, the issue was concerned by the price practices from banks about the checks rejection. The default rules on prices are considered as abuse of dominant position.

Second, concerning contractual clauses, the FCA analyzes the potential effects of contractual agreements on competition. This is the case where tacit consent and exclusivity clauses exist. As such, exclusivity clauses are not anticompetitive by themselves. However, they become anticompetitive if their duration leads to lock-in the relationships and prevents the consumers from changing partner. By the effects of *statu-quo* bias and tacit consent, the effective duration of exclusive contracts become larger. For the FCA, "*the exclusivity clauses are likely to lead to lock-in effects whatever the initial duration of contract is. The effective duration of contracts have to be taken account: the duration is all the more large than the initial duration is large and than tacit consent clauses exist*" (§109). This is the case even if the "*formal ending of the contract is easy*" (§105). The Kadeos or Photomaton cases are illustrative of such arguments.

Third is concerned by the difference between "omission" and "action". The psychological cost to do something is larger than doing nothing. Such a bias exists in the Jansen-Cilag case where it is more difficult for pharmacist to decide substitution of drug from the princeps to the generic drug than "*doing nothing*" i.e. staying with the initial prescription of drugs.[14]

To conclude, we have shown that behavioral arguments are useful to better understand the arguments of the FCA. Even if the terms "bias", "heuristic" are not explicitly quoted by

[14] Lastly, the use of *statu-quo* arguments is sometimes more subtle and are used to prove the non-anticompetitive practices as in the Bledina case.

the FCA, a lot of well-known heuristics and bias are implicitly used to demonstrate that some practices are anti-competitive. Our qualitative analysis is meaningful insofar as the panel of effects covers a large spectrum of behavioral mechanisms and a lot of antitrust practices.

III. Final comments: debiasing or libertarian paternalism?

Behavioral antitrust appears to be a relevant approach of antitrust litigation. First, behavioral antitrust rationalizes some decisions settled by the competition authorities by providing implicit or explicit arguments used by the courts. Second, behavioral antitrust deepens the social and economic role of a competition authority: its function is not only to deter and prevent antitrust practices by fines but also to control cognitive issues about the framing of the markets and the bounded rationality of consumers.

From this point of view, there are two normative models that behavioral economics proposes for competition authority. First is the *debiasing model*: the aim of the competition authority should be to *debiase* irrational consumers by controlling the practices of firms in monopoly and enhance rationality of individual. Second is the *libertarian paternalist* model. Libertarian paternalism consists in using cognitive bias to enhance well-being of individuals. In our analysis, we have shown that French competition authority is more concerned by debiasing than by libertarian paternalism. The analysis of the sanctions policy implemented by the FCA illustrates the fact it tries to struggle against firm cognitive practices by debiasing measures. In most of the cases implying behavioral considerations, firms condemned have to pay fines but they are also compelled to take measures to make an end of their use of the bias. Sometimes, the sanctions consist not in monetary fines but are reduced to commitment or changes in the practices. For example, firms have to change their use of tacit consent in their contract; they have to deliver information to consumers by following a form imposed by the

authority to prevent any misunderstanding, commitments by firms are imposed about their contracts…[15].

The last issue we would like to address is to know whether the FCA goes further and uses the libertarian paternalist model? Indeed, liberatarian paternalism appears to be another intervention paradigm rooted in behavioral economics. The aim of the public institutions and the judges is not to debiase individuals but to use their bias in favor of their own well-being. This was the main proposals by Thaler and Sunstein in their famous book *Nudge*. Our analysis is not able to completely answer to this issue. It does not seem that the FCA considers systematically its role through the libertarian paternalist glasses. But, at the same times, the FCA does not seem to be completely opposed to this normative position. The case of drug prescription illustrates the fact that, when another public authority uses libertarian paternalists schemes, the FCA considers that its role is to prevent the private monopoly to struggle against. Indeed, in France, the legislation about drug and medication prescription has the aim to develop generic drug for the well-being of the agent who is both patient and taxpayer[16]. For that purpose, the French Health Authority regulates this market by playing on the heuristic of representativeness and the *statu-quo* bias. In an advice (April, 26, 2012), the FCA considers that the fact for a drug laboratory to indicate on the packaging that his generic is the equivalent of the *princeps* does not violate French law on intellectual property (§22). Accepting that the generic uses the name of the *princeps* leads to make easier the representativity of the generic. More importantly, the FCA controls the application of the default rule decided by the legislator. Indeed, in France, the physician does not need to

[15] In Kadeos case, tacit consent contractual clauses were the heart of the anticompetitive practices. The FCA compels the firm to change their contracts and to suppress the clauses. In the same vein, the FCA requires commitments from firms in the cases of banks or in the case *Pompes funèbres de la Manche* in order to make an end to the default rule. Another illustrative case is about telecom operators.

[16] For Jansen-Cilag, « *the deficit of Health Insurance is not relevant for the Competition Authority. Competition Authority is not mandated to defend the interests of Health Insurance insofar as Health Insurance is able to protect itself its own interests* » (§157). To this argument, the FCA answers: "*The Authority is in charge of the control of market to the benefit of the consumers. And the patient is also a taxpayer. Therefore, any reducing of the cost of medication is favorable for him* » (§158).

explicitly write on his prescription that the drug is substitutable by a generic. Even in the absence of such written mention, the pharmacist is authorized to substitute the *princeps* by the generic. On the contrary, if the doctor does mention explicitly that the *princeps* is not substitutable for the patient, the pharmacist cannot substitute. For the FCA, "*all the practices from a pharmaceutical company trying to struggle against this substitution mechanism are potentially considered as anticompetitive practices*" (Sanofi Case, §87).

This example illustrates the relevance of behavioral issues on antitrust law. As we have seen, the FCA tries more to debiasing individuals than to play a libertarian paternalist role. However, in some cases, it is possible to see such a justification behind its decisions. We have shown that our initial hypothesis that behavioral insights are largely used by competition authority is sufficiently strong to be more systematically tested. Our research has now to goes further and we would like to extend our data both in time and in space by analyzing the European antitrust litigation.

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Annex 1 : List of the decisions from the French competition authority implying behavioral bias

Décision n°12-D-17 du 5 juillet 2012 relative à des pratiques relevées dans le secteur des moyens de paiements scripturaux (prélèvement, titre interbancaire de paiement, télérèglement, virement et lettre de change)

Décision n°12-D-14 du 5 juin 2012 relative à des pratiques mises en œuvre par Microsoft Corporation et Microsoft France

Décision n°11-D-16 du 25 novembre 2011 relative à des pratiques mises en œuvre dans le secteur de la téléassistance aux personnes âgées

Décision n°11-D-14 du 20 octobre 2011 relative à des pratiques mises en œuvre dans le secteur des pompes funèbres dans le département de la Manche

Décision n°11-D-08 du 27 avril 2011 relative à des pratiques mises en œuvre par la société Accentiv'Kadeos (1)

Décision n°10-MC-01 du 30 juin 2010 relative à la demande de mesures conservatoires présentée par la société Navx

Décision n°10-D-37 du 17 décembre 2010 relative à des pratiques mises en œuvre sur le marché de la cétirizine en comprimés

Décision n°10-D-16 du 17 mai 2010 relative à des pratiques mises en œuvre par la société Sanofi-Aventis France

Décision n°10-D-02 du 14 janvier 2010 relative à des pratiques mises en œuvre dans le secteur des héparines à bas poids moléculaire

Décision n°09-D-28 du 31 juillet 2009 relative à des pratiques de Janssen-Cilag France dans le secteur pharmaceutique

Décision n°09-D-14 du 25 mars 2009 relative à des pratiques mises en œuvre dans le secteur de la fourniture de l'électricité

Décision n°09-D-07 du 12 février 2009 relative à une saisine de la société Santéclair à l'encontre de pratiques mises en œuvre sur le marché de l'assurance complémentaire santé

Décision n°09-D-06 du 5 février 2009 relative à des pratiques mises en œuvre par la SNCF et Expedia Inc. dans le secteur de la vente de voyages en ligne

Décision n°07-MC-06 du 11 décembre 2007 relative à une demande de mesures conservatoires présentée par la société Arrow Génériques

Décision n°07-D-42 du 30 novembre 2007 relative à certaines pratiques mises en œuvre par les sociétés Blédina, Nestlé, Sodilac, Nutricia-Milupa et leur syndicat professionnel sur le marché des laits infantiles

Décision n°07-D-41 du 28 novembre 2007 relative à des pratiques s'opposant à la liberté des prix des services proposés aux établissements de santé à l'occasion d'appels d'offres en matière d'examens anatomo-cyto-pathologiques

Décision n°07-D-33 du 15 octobre 2007 relative à des pratiques mises en œuvre par la société France Télécom dans le secteur de l'accès à Internet à haut débit

Annex 2 : List of the advices from the French competition Authority

Avis n°12-A-11 du 26 avril 2012 relatif à trois projets de décret concernant la publicité des médicaments à usage humain, des dispositifs médicaux et des dispositifs médicaux de diagnostic in vitro

Avis n°11-A-02 du 20 janvier 2011 relatif au secteur des jeux d'argent et de hasard en ligne

Avis n°05-A-16 du 28 juillet 2005 relatif à une demande d'avis de l'Autorité de régulation des communications électroniques et des postes relative à la transition vers un nouveau format de numérotation pour les services de renseignements téléphoniques.

I argue that libertarian paternalism is in fact paternalism, or hard paternalism, rather than a form of soft paternalism. I do so on the basis of an analysis of the paternalist act according to which the paternalist act neednâ€™t violate the will of the agent who is the target of that act and the paternalist actor need only suspect that her action may improve the welfare of that target. The paper considers and rejects interpretations of libertarian paternalism as soft paternalism. I then provide an outline as to how libertarian paternalism may be reformed in light of the finding that current lib... Definition of paternalist in the Financial Dictionary - by Free online English dictionary and encyclopedia. What is paternalist? Meaning of paternalist as a finance term. What does paternalist mean in finance?Â The inclusion of the last Romanian leader among the 'signposts' of nostalgic memories was the result of two reasons: his leadership of almost 25 years represented for the majority of nostalgics a consistent part of their life and also a period when they enjoyed a limited economic prosperity under the care of the paternalist state. Assessing communist nostalgia in Romania: chronological framework and opinion polls.