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# Ideologies & EU competition law - An unavoidable pair

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# Ideologies

- Political – social – economic – religious
- US: conservative (Chicago) v. liberal approach (post-Chicago)
- EU: effects-based approach v. ordoliberalism – right v. left?
  - But see President Sarkozy: “*Competition as an ideology, as a dogma, what has it done for Europe?*”
- Role of State & public authority (Judge Legal 2005)

# “Ideologies” specific to EU law

- Market integration
  - *Consten/Grundig* (absence of horizontal direct effect of free movement rules)
  - Gradual integration into EU competition policy
- Effectiveness of enforcement
  - *Treuhand*

# Other ideological elements

- Open source movement v. IP
  - Commissioner Kroes 2009
    - *“Standards should be as open as possible. This is not a black and white choice but a question of degree, and it is in society's best interest that standards should be as open as possible.”*
- Big data
- Geo-blocking

# Ideologies in the EU Courts

- Clash of Advocates General in Greek GSK case
  - AG Jacobs (appointed by the UK Conservative Govt) – 2004 *Syfait*
  - Opinion premised on incentives:
    - *“Given the specific economic characteristics of the pharmaceutical industry, a requirement to supply would not necessarily promote either free movement or competition, and might harm the incentive for pharmaceutical undertakings to innovate. Moreover, it cannot be assumed that parallel trade would in fact benefit either the ultimate consumers of pharmaceutical products or the Member States, as primary purchasers of such products.”*

# Ideologies in the EU Courts

- AG Ruiz-Jarabo Colomer (appointed by the Spanish Socialist Govt) – 2008 *Lejos* – Opinion diametrically opposed:
  - “[O]ne has the impression that the real battle is about winning back these profit margins which the rivals of the **big** pharmaceutical companies have appropriated [...] Against this background, I find the argument that the loss of income resulting from parallel imports of patented medicines acts as a disincentive misleading, since it is aimed only at seducing public opinion, which is sensitised to the vital importance of R&D for competitiveness, by shifting the focus from business rivalry to research policy”

# Ideologies in the EU Courts

- See also AG Ruiz-Jarabo Colomer – 2008 GSK counterfeits case
  - *“In the legal debate to be addressed here, the undertakings engaging in parallel trade could, with a little imagination, be compared to pirates and those protecting their intellectual property rights to privateers, who were individuals licensed by their government to hunt down the ships of enemy powers. However, in European law the two terms are reversed, since although the analogy holds true for trade with third countries, in intra-Community trade the parallel importer is acting within the law and has carte blanche to pursue companies which try to hinder such freedom of movement. It all depends on your point of view as, in the eyes of these **big** companies the ‘free riders’ or parallel traders are the real filibusters”.*

# Ideologies in the EU Courts

- AG Kokott (appointed by the German Social Democratic Govt) – 2015 *Post Danmark II* – Strong rejection of new economic approach:
  - “*These questions are particularly important at a time when there are mounting calls for European competition law to adopt a more economic approach. It is my view that, in its replies, the signal effect of which is likely to extend well beyond the present case, (3) **the Court should not allow itself to be influenced so much by current thinking (‘Zeitgeist’) or ephemeral trends**, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law.*”

# Ideologies before enforcers

## □ Non-competition concerns

- Environment
  - Culture (cultural diversity)
  - Public health
  - Security
  - Employment
  - Industrial policy (national champions)
- Sport
- “Public interest”
- Quality assurance
- Data protection
- Media plurality

# Ideologies before enforcers

- Role of competition authorities as liberalising agencies
- Privatisation
- Action against regulatory barriers to competition
- Special laws on abuse of economic dependence / below cost selling / unfair dealing, etc.