

## Introduction

The application of Sherman Act Section 2<sup>1</sup> in the 1940s, 1950s and 1960s use to be structural following the S-C-P paradigm.<sup>2</sup> The Chicago School's push towards economic efficiency, and the Post-Chicago School's revision of some of the simplistic assumptions made by the Chicago School, made the application of Section 2 more efficiency-based. DG Competition is currently trying to change the application of Article 82 by adopting a more economics-based approach.<sup>3</sup> In its *Discussion Paper*, DG Competition made clear that the main objective of Article 82 is consumer welfare<sup>4</sup> – an objective which does not fit well with the current structural application of Article 82. This paper argues that the different transatlantic approaches to the process of competition, the different normative foundations of EC Competition Law and US Antitrust, and the juristic principle in Article 3(1)(g) of the EC Treaty make it difficult to change the application of Article 82 in a similar fashion. The paper does not consider whether the approach taken to Sherman Act Section 2, following the rise of the Chicago and Post-Chicago Schools, is the right one; neither does it consider whether or not a similar approach to Article 82 should be adopted.

The first section of this paper briefly discusses the economic thinking in the US from the 1940s to the 1970s and its influence on some US jurisprudence. The second section considers the rise of the Chicago School and its inspiration on some US Circuits in the 1970s and onwards. The third section observes a transition in US jurisprudence with the rise of the Chicago and Post-Chicago School. The fourth section examines whether a similar structural approach has been adopted in several early cases as well as in some recent cases under Article 82. Finally, section five looks at the different transatlantic views on the process of competition.

### I. The Harvard “structural” School and its influence on US jurisprudence

Early jurisprudence of Section 2 of the Sherman Act centres on the different meaning and influence given to both the structural and the conduct elements. For example, *Standard Oil* shows

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1 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...

2 The Economics of Antitrust Laws, in B. Bouckaert and G. De Geest, *Encyclopedia of Law and Economics* (Cheltenham: Elgar, 2000) Vol III, page 473; J. Faull & A. Nikpay, *The EC Law of Competition* (OUP, 2nd ed, 2007), page 6.

3 In this context, an economics-based approach is understood to be an approach that ‘requires a careful examination of how competition works in each particular market in order to evaluate how specific company strategies affect consumer welfare’, see EAGCP Report on *An Economic Approach to Article 82 EC* (July 2005) page 2. Available at: [http://europa.eu.int/comm/competition/publications/studies/eagcp\\_july\\_21\\_05.pdf](http://europa.eu.int/comm/competition/publications/studies/eagcp_july_21_05.pdf).

4 While the Discussion Paper is no authoritative source, it indicates DG Competition's current thinking on Article 82.

that the accumulation of wealth in the hands of a few was perceived as a threat to both the economic order and democracy.<sup>5</sup> Having to consider both the economic implications and the political dimension made it difficult for the courts to interpret Section 2. To make the application of Section 2 more orientated towards the industry and markets, a line of Industrial Organisation thinking – the so-called Harvard “structural” School<sup>6</sup> – developed the structure, conduct and performance (S-C-P) paradigm. This is in essence about there being necessarily a causal relationship between structure, conduct and performance where market structure influences a firm’s conduct, which in turn influences its performance. This is an approach focusing on process. It is contrary to the output approach, advocated by the Chicago School and elaborated below, where performance feeds back to structure. The S-C-P paradigm became dominant in the 1940s, 1950s and 1960s and associated with Harvard economists such as Bain,<sup>7</sup> Mason,<sup>8</sup> Kaysen and Turner<sup>9</sup> – hence the name the Harvard structural School.<sup>10</sup>

In developing the S-C-P paradigm, Bain showed that the role of market entry was important as high barriers to entry can lead to concentrated markets where collusion is expected.<sup>11</sup> Moreover, there is a relationship between profit and structural characteristics of the industry (profitability-concentration relationship).<sup>12</sup> The Harvard structural School argued that high concentration enables a firm to exercise market power and earn high profits, due to market power rather than better performance. A leading firm’s market shares provide a meaningful indication of the likelihood of market power – not superior efficiency. The aim of antitrust was a preservation of

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5 *Standard Oil of New Jersey v. United States*, 221 U.S. 1, 50 (1911).

6 Herbert Hovenkamp, ‘The Harvard and Chicago Schools and the Dominant Firm’ University of Iowa Legal Studies Research Paper No. 07-19 (September, 2007) page 1.

7 For example, J. Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (1956); J. Bain, ‘Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-40’ 65 *Quarterly Journal of Economics* (1951) 293.

8 For example, E. Mason, *Economic Concentration and the Monopoly Problem* (1964).

9 For example, C. Kaysen & D. Turner, *Antitrust Policy: An Economic and Legal Analysis* (1959).

10 The Harvard structural School is to be distinguished from the modern Harvard School, taking shape in the early 1970s and linked to scholars such as Areeda & Turner, see P. Areeda & D. Turner, ‘Predatory Pricing and Practices under Section 2 of the Sherman Act’ 88 *Harvard Law Review* (1975) 697. Unlike the Harvard structural School, the modern Harvard School share many similarities with the Chicago School, which has made Kovacic call it the Chicago/Harvard double Helix, W. Kovacic, ‘The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix’ *Columbia Business Law Review* (2007) 1. Both Schools embracing economic efficiency in their assessment of single firm conduct under Section 2 of the Sherman Act, M. Jacobs, ‘An Essay on the Normative Foundations of Antitrust Economics’ 74 *North Carolina Law Review* (1995) 219, pages 228-232.

11 Bain (1956), *supra* note 7.

12 Bain (1951), *supra* note 7.

the competitive process as such and a prescription of norms to fair conduct. It was not aimed at protecting economic efficiency, but restricting growth of large firms as markets are fragile and prone to failure.

Given the fragility of the markets, antitrust authorities should have large discretionary powers to control conduct by large firms. This led to an interventionist approach embracing *per se* rules and divestitures in highly concentrated markets.<sup>13</sup> In the period from the 1940s to the 1970s, the concept of illegal conduct was interpreted broadly. It captured a wide range of conduct which sufficed to create liability for dominant firms,<sup>14</sup> and expanded the rights of the perceived victims of economic exploitation.<sup>15</sup>

Authors from the Harvard structural School, such as Kaysen and Turner, adopted a generally negative view of vertical mergers.<sup>16</sup> They advocated a prohibition of any vertical merger in which the acquiring firm had twenty percent or more of its market.<sup>17</sup> A similar negative view was also adopted towards vertical restraints such as tying, bundling, exclusive dealing,<sup>18</sup> requirements contracts,<sup>19</sup> territorial restraints,<sup>20</sup> and resale price maintenance.<sup>21</sup> This view was upheld by the courts in a majority of circuits through the decades from the 1940s to the 1970s. For example, in *Northern Pacific Ry*<sup>22</sup> the Court condemned tying as a *per se* illegal offence of the Sherman Act

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13 See L. Weiss, 'The Structure-Conduct-Performance Paradigm and Antitrust' 127 *University of Pennsylvania Law Review* (1979) 1104, page 1105; J. Bain, *Industrial Organization* (Wiley, 2nd ed, 1968) pages 462-463.

14 Kovacic, *supra* note 10, page 6.

15 E. Fox and L. Sullivan, 'Antitrust – retrospective and prospective: where are we coming from? and where are we going?' 62 *N.Y.U. L. Rev.* (1987) 936, page 954.

16 The Court condemned vertical mergers in *U.S. v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962); *Ford Motor Co. v. U.S.*, 405 U.S. 562 (1972).

17 Kaysen & Turner, *supra* note 9, page 133.

18 Exclusive dealing was condemned by the courts in *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653 (1922); *Standard Oil Co. of California et al. v. U.S.*, 337 U.S. 293 (1949); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

19 The Court condemned requirement contracts in *Standard Oil Co. of California et al. v. U.S.*, 337 U.S. 293 (1949); *Richfield Oil Corp. v. U.S.*, 343 U.S. 922 (1952). However, in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), the Court said that a requirements contract and exclusive dealing should be judged by a rule of reason.

20 The Court prohibited territorial restraints *per se* in *U.S. v. Arnold Schwinn & Co. et al.*, 388 U.S. 365 (1967).

21 The Court condemned retail price maintenance as a *per se* violation in *Dr. Miles Medical Co. v. John D. Park and Sons Co.*, 220 U.S. 373 (1911). This was reaffirmed in *U.S. v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *U.S. v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

22 *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1, page 5; 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

## Section 1.<sup>23</sup>

Cases in this period reflect the developments of the S-C-P paradigm.<sup>24</sup> This became apparent in the famous *Alcoa* case.<sup>25</sup> Judge Learned Hand said:<sup>26</sup>

[G]reat industrial consolidations are inherently undesirable, regardless of their economic results. [T]he debate in Congress... [shows] a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.

Judge Learned Hand continued:<sup>27</sup>

Throughout the history... it has been constantly assumed that one of their purposes [antitrust laws including the Sherman Act] was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.

Judge Learned Hand held that “in order to fall within Section 2 the monopolist must have both the power to monopolize, and the intent to monopolize”. The court did not require much in terms of exclusionary conduct or of specific intent to monopolize. It established intent by saying that “no monopolist is unconscious of what he is doing”.<sup>28</sup> The court found Alcoa’s large position in virgin aluminium ingot was of the kind of conduct covered by Section 2 of the Sherman Act, but without examining the effects of the conduct. Instead, it based its finding on Alcoa’s ability to maintain a huge market share. Without a thorough examination of intent and the methods employed by the dominant company to acquire or maintain its monopoly as well as the emphasis on the structural element of Section 2 left the court open to criticism.<sup>29</sup> Essentially, the court condemned active seeking of monopoly power, despite being by means of perfectly legitimate

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23 This view on tying was upheld by the Court in *U.S. v. Loew's, Inc.*, 371 U.S. 38 (1962); *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 85 S.Ct. 1498, 14 L.Ed. 443 (1965); *FTC v. Texaco*, 393 U.S. 223 (1968); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

24 L. White ‘The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion’ Working Paper 08-05 (February 2008) page 6. Available at the Reg-Markets Center's website at [www.reg-markets.org](http://www.reg-markets.org).

25 *U.S. v. Aluminium Co. of America*, 148 F.2d 416 (2d Cir. 1945).

26 *Ibid.* page 428.

27 *Alcoa*, *supra* note 25, page 429.

28 *Ibid.* page 432.

29 The criticism of the case was not immediate, but came with the rise of the Chicago School in the 1970s. Criticism of the *Alcoa* case can be found in R. Bork, *The Antitrust Paradox: a Policy at war with itself* (The Free Press, 1993) pages 51-52.

business conduct. A similar approach was taken by the ECJ in *Continental Can*.<sup>30</sup> The American metal-packing company Continental Can, the world's largest producer of metal containers,<sup>31</sup> acquired 91 per cent interest in a Dutch metal can manufacturer – Carnaud of France and Thomassen & Drijver-verblifa NV (TDV) through its holding company Europemballage Corporation (Europemballage). Continental Can had transferred its 85 per cent share of a Germany company Schmalbach-Lubeca-Werke AG to Europemballage to buy the shares of TDV. This acquisition was found to be an abuse of a dominant position even though the ECJ consequently found that the Commission's market definition was faulty and found in favour of Continental Can.

The *Alcoa* case in conjunction with the enforcement of the Robinson-Patman Act in 1936 made protecting competitors a goal of the law.<sup>32</sup>

The structuralist approach in *Alcoa* continued in *US v. Griffith*<sup>33</sup> and *Utah Pie*.<sup>34</sup> In *Griffith*, the Supreme Court held that the power to exclude competitors if “coupled with the purpose or intent to exercise that power” violates Section 2.<sup>35</sup> In *Utah Pie*, the Court endorsed the view that evidence of subjective intent can establish liability<sup>36</sup> and pricing below average total cost can be unlawful predation.<sup>37</sup> The same position was taken by the ECJ in *AKZO*.<sup>38</sup> In *Utah Pie*, the court found that the market in question had featured a “drastically declining price structure” as a consequence of the defendant's pricing tactics.<sup>39</sup> This goes back to the profitability-concentration relationship important for the S-C-P paradigm. Like in *Alcoa*, there is little analysis on the effects on consumer welfare.

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30 Case 6/72 *Europemballage Corp'n and Continental Can Co Inc v Commission* [1973] ECR 215, [1973] CMLR 199.

31 Founded in 1904 and incorporated in New York in 1913.

32 On the grounds that the Robinson-Patman Act protects competitors and harms consumer welfare by prohibiting and discouraging price discrimination that lowers prices for consumers, has led the Antitrust Modernization Commission (AMC) in its recent Report and Recommendations to call for the formal abolition of the Robinson-Patman Act. Antitrust Modernization Commission, Report and Recommendations (April 2007) page 312. Available at [http://www.amc.gov/report\\_recommendation/amc\\_final\\_report.pdf](http://www.amc.gov/report_recommendation/amc_final_report.pdf).

33 *United States v. Griffith*, 334 U.S. 100 (1948).

34 *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967).

35 *Griffith*, *supra* note 33, page 107.

36 *Utah Pie*, *supra* note 34, page 696-97.

37 *Ibid.* page 698.

38 In Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR-I 3359, [1993] 5 CMLR 215.

39 *Utah Pie*, *supra* note 34, page 703.

In *United Shoe Machinery*,<sup>40</sup> Federal District Court Judge Charles Wyzanski outlined three different approaches: (1) An enterprise has monopolized if it has acquired or maintained a power to exclude others as a result of using an unreasonable restraint of trade in violation of Section 1 of the Sherman Act; (2) A monopolization offence is committed where an undertaking with effective market control uses this control, or plans to use it, to engage in exclusionary practices, even if these are not technically restraints of trade; (3) the acquisition of an overwhelming market share is a monopolization under Section 2, even if there is no showing of any exclusionary conduct.<sup>41</sup> The third point is very similar to the special responsibility imposed on dominant undertaking in *Michelin I*.<sup>42</sup> These points may have been influenced by Kaysen, who was associated with the Harvard structural School. Kaysen was appointed as a law clerk to provide economic counselling to Judge Wyzanski in this case.<sup>43</sup>

These few examples highlight the courts' focus on S-C-P. They show little concern for the welfare of consumers. The S-C-P approach leads to a strict approach to conduct by dominant firms. Such an approach runs the risk of discouraging dominant firms from competing aggressively pursuing price-cutting in form of discounts, innovating in product development, or pursuing other strategies which may actually improve consumer welfare. With the rise of the Chicago School and the Post-Chicago School, the S-C-P paradigm does not hold much validity in the US as the direction of causality is not clear. The Chicago School has shown that there may be feed-back loops, for example from performance to structure, i.e. performance can affect structure.<sup>44</sup>

## II. The Chicago School and its influence on US jurisprudence

This section shows the differences between the structural approach advocated by the Harvard structural School and the efficiency orientated approach promoted by the Chicago School.<sup>45</sup>

While the Harvard structural School was dominant in the decades following World War II, there was another line of Industrial Organisation thinking developing in the 1950s, under the

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40 *U.S. v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (1953), 347 U.S. 521 (1954).

41 L. Sullivan and W. Grimes, *The Law of Antitrust: an integrated handbook* (West Group, 2nd ed, 2006) pages 101-102.

42 Case 322/81 *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461, [1985] 1 CMLR 282, paragraph 57.

43 White, *supra* note 24, page 12.

44 Stephen Davies, Bruce Lyons, Huw Dixon, Paul Geroski *Economics of Industrial Organization* (Longman, London and New York, 1988).

45 For a good article on the distinction between the Harvard and Chicago schools see R. Posner 'The Chicago School of Antitrust Analysis' 127 *University of Pennsylvania Law Review* (1979) 925.

intellectual leadership of Aaron Director: the so-called Chicago School. Associated with Director were economists such as Friedman, Stigler,<sup>46</sup> Telser,<sup>47</sup> Demsetz,<sup>48</sup> McGee, Bowman,<sup>49</sup> and Burstein.<sup>50</sup> They were all sceptical of the S-C-P paradigm and more sympathetic to vertical restraints and generally supportive of market outcomes.<sup>51</sup> Unlike the Harvard structural School, which believed in multiple goals, the Chicago School believed that the ultimate goal of US antitrust law is the maximisation of consumer welfare only.<sup>52</sup> Bork – one of the protagonists of the Chicago School – identified consumer welfare as improving allocative efficiency without impairing productive efficiency.<sup>53</sup> To be clear, this is a concern for total welfare and not consumer welfare in form of consumer surplus.<sup>54</sup>

The Chicago School rejected the structuralist approach by arguing that performance may dictate the existing market structure. For example, a concentrated market structure may reflect efficiency and not necessarily market power. Higher profits can be due to the lower costs of larger firms, because they have economies of scale. Even if dominant undertakings had the ability to leverage their market power, they would have no interest in doing so as there is only a single monopoly profit. Moreover, there are no or few artificial barriers to entry, thus private monopoly can only be temporary.<sup>55</sup>

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46 G. Stigler, 'The Dominant Firm and the Inverted Price Umbrella,' 8 *Journal of Law & Economics* (1965) 167.

47 L. Telser, 'Why Should Manufacturers Want Fair Trade?' 3 *Journal of Law & Economics* (1960) 86.

48 H. Demsetz, 'Two Systems of Belief about Monopoly' in Harvey J. Goldschmid, H. Michael Mann, and J. Fred Weston, *Industrial Concentration: The New Learning* (New York: Columbia University Press, 1974) pages 164-184.

49 W. Bowman, 'Tying Arrangements and the Leverage Problem,' *Yale Law Journal* (1957) 19.

50 M. Burstein, 'The Economics of Tie-In Sales' 42 *Review of Economics and Statistics* (1960) 68; M. Burstein, 'A Theory of Full-Line Forcing' *Northwestern University Law Review* (1960) 62.

51 S. Peltzman, 'Aaron Director's Influence on Antitrust Policy' 43 *Journal of Law & Economics* (2005) 313.

52 The proponents of one single objective (that of economic efficiency) do not all necessarily mean to imply any disparagement of other objectives, such as more equitable distribution of income and the diffusion of economic power. They simply believe that a competition policy concentrated on the efficiency objective is likely to be applied more consistently and effectively.

53 Bork, *supra* note 29, pages 91 and 427.

54 E. Fox and L. Sullivan have pointed out that consumer welfare in the Chicagoan sense is not consumer welfare at all, see E. Fox and L. Sullivan, 'Antitrust – Retrospective and Prospective: Where are we coming from? Where are we going?' 62 *New York University Law Review* (1987) 936, page 946. For a discussion and critique of Bork's definition of consumer welfare in R. Lande, 'The Rise and (Coming) Fall of Efficiency as the Rule of Antitrust' 33 *Antitrust Bulletin* (1988) 429, pages 433-435.

55 Jacobs, *supra* note 10, pages 228-232.

The Chicago School believed that the basic tenets of firms were rationality and profit maximisation.<sup>56</sup> For example, firms would engage in vertical price fixing to avoid free-riding.<sup>57</sup> Thus, vertical price fixing should not be prohibited, as it guarantees better services to consumers. In relation to predation, the Chicago School believed that aggressive prices are generally pro-competitive and enhance consumer welfare, except in rare situations where the predator has sufficient market power to recoup its losses through long-term, supra-competitive prices achieved after its rivals have been eliminated.<sup>58</sup> Thus, rational firms will not engage in predatory pricing since they are not necessarily going to be successful. Thus, predation should be of no concern for competition policy. Finally, the Chicago School believed that collusion is difficult to enforce for market players and thus unlikely, except in regulated industries.

In short, the Chicago School reviewed business practices in terms of their effects on efficiency and prices. It relied on the neo-classical price theory, which developed models of perfect competition and monopoly, to explain firms' behaviour and practices in real-life markets.<sup>59</sup> Bork argued that it was only workable to view markets from an economic efficiency point of view, since the social-political framework is amorphous.<sup>60</sup> Its focus on making the law effective made Judge Easterbrook rename it 'The Workable Antitrust Policy School'.<sup>61</sup> Like the Chicago School, Easterbrook also favoured the single goal of economic efficiency.<sup>62</sup>

### III. Transition in jurisprudence

This section shows the transition in US jurisprudence.

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<sup>56</sup> The Chicago School relied on neo-classical economics which relies on three assumptions: people have rational preferences among outcomes that can be identified and associated with a value; individuals maximise utility and firms maximise profits; and people act independently on the basis of full and relevant information.

<sup>57</sup> H. Marvel, 'Exclusive Dealing' 25 *Journal of Law & Economics* (1982) 1.

<sup>58</sup> The Chicago School's economic analysis of predation was accepted by the US Supreme Court in 1992 in *Brooke Group Ltd v Brown & Williamson Tobacco Corporation* 509 U.S. 209 (1993).

<sup>59</sup> Jacobs, *supra* note 10, pages 228-229.

<sup>60</sup> Bork even pronounced all contrary views as being so incapable of use as to be 'unconstitutional', R. Bork, 'The Role of the Courts in Applying Economics' 54 *Antitrust Law Journal* (1985) 21, page 24.

<sup>61</sup> F. Easterbrook, 'Workable Antitrust Policy' 84 *Michigan Law Review* (1986) 1696, page 1700.

<sup>62</sup> This is supported by W. Baxter (former Assistant Attorney General in Antitrust Division, DOJ) who said that 'the sole goal of antitrust is economic efficiency' in the *Wall Street Journal* on 4 March 1982, page 28, but opposed by H. Thorelli who concluded that, in the absence of a single-minded legislative intent to pursue efficiency goals, antitrust should manifest concern for other social values, see H. Thorelli, *The Federal Antitrust Policy* (Johns Hopkins Press, 1955).

The US Supreme Court started implementing the Chicago School philosophy during the late 1970s and onwards.<sup>63</sup> This can be seen for example from the courts more sympathetic view of vertical restraints. While the Supreme Court continued to adopt a *per se* rule when interpreting minimum retail price maintenance in *Monsanto*<sup>64</sup> and *Sharp Electronics Corp.*,<sup>65</sup> it did raise the standard of proof needed by plaintiffs to succeed. And in 2007, the court decided in *Leegin*<sup>66</sup> that minimum retail price maintenance should be judged under a rule of reason. In the area of maximum retail price maintenance, the court's previous strict view in *Albrecht* condemning such conduct *per se* was loosened in *State Oil v. Khan*.<sup>67</sup> The Court declared that maximum retail price maintenance should be judged under the rule of reason.

The rule of reason also found its way in *Continental T.V.*,<sup>68</sup> where the court declared that territorial restraints should be examined under a rule of reason, rather than being condemned as *per se* illegal as done in *Schwinn*.<sup>69</sup> As regards tying arrangements the court did not suspend the *per se* rule adopted in *Northern Pacific Ry.*<sup>70</sup> However, in *United States Steel Corp.*,<sup>71</sup> the court upheld that in the absence of market power in the tying market a tying arrangement was acceptable. This was reinforced in *Jefferson Parish Hospital*.<sup>72</sup>

### **Post-Chicago School**

The Chicago School relied on neo-classical economics in order to make the enforcement of competition law objective and to exclude political values from competition law. Neo-classical economics have been criticised for relying on unrealistic assumptions,<sup>73</sup> which fail to explain strategic behaviours taking advantage of market imperfections, where firms can make profits

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63 It even cited Bork in *Reiter v. Sonotone Corporation* 442 U.S. 330 (1979) page 343: 'Congress designed the Sherman Act as a "consumer welfare prescription"' followed by citing Bork's *The Antitrust Paradox*, *supra* note 29.

64 *Monsanto Co. v. Spray-Rite Corp.*, 465 U.S. 752 (1984).

65 *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

66 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

67 *State Oil v. Khan*, 522 U.S. 3 (1997).

68 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) in particular pages 50-59 and footnote 21.

69 *Schwinn*, *supra* note 20.

70 *Northern Pacific Ry.*, *supra* note 22.

71 *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977).

72 *Jefferson Parish Hospital District No. 2 v. Edwin G. Hyde*, 466 U.S. 2 (1984).

73 The Chicago School relied on neo-classical economics which relies on three assumptions: people have rational preferences among outcomes that can be identified and associated with a value; individuals maximise utility and firms maximise profits; and people act independently on the basis of full and relevant information.

without being efficient.<sup>74</sup> This and the Chicago School's philosophy that antitrust should only protect economic efficiency have led to some criticism.<sup>75</sup> The main criticism came from the so-called Post-Chicago School.

The Chicago and Post-Chicago Schools agree that the essence of antitrust is economics<sup>76</sup> and consumer welfare should be the only goal of antitrust. Both schools rejected the relevance of subjective inquiries which they attributed to the political approaches of the past. Thus, regardless of the political or distributive consequences, conduct should be left alone unless it raises prices or limits output.<sup>77</sup> However, they disagreed on market failures. The Chicago School believe that markets tend toward efficiency, that market imperfections are normally temporary, and that intervention should proceed cautiously.<sup>78</sup> Contrary, the Post-Chicago School believe that market failures are not necessarily self-correcting, and that firms can therefore take advantage of imperfections to produce inefficient results even in competitive markets. They argue that the distortions to competition made possible by market imperfections should prompt intervention to scrutinise a wider variety of conduct.<sup>79</sup>

#### **IV. A structuralist application of Article 82**

To avoid a structural approach to Article 82, as taken towards monopoly power in the interpretation of Section 2 during the 1940s, 1950s and 1960s, early legal scholarship on Article 82 suggested a purely behavioural interpretation. A study by Joliet in the late 1960s argued that the protection of competition in Article 82 means prohibiting exploitative behaviour which harms consumers.<sup>80</sup> It did not mean preventing competitors' exclusion from the market.<sup>81</sup> He specifically argued that "the major objective of Article 86 [Article 82] is to ensure that dominant firms do not

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74 H. Hovenkamp, 'Antitrust Policy after Chicago' 84 *Michigan Law Review* (1985) 213, page 261.

75 For example, R. Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged' 34 *Hastings Law Journal* (1982) 65; J. May, 'Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918' 50 *Ohio State Law Journal* (1989) 257, page 260; R. Peritz, 'A Counter-History of Antitrust Law' 1990 *Duke Law Journal* 263, pages 272-274.

76 J. Baker, 'Recent Developments in Economics that Challenge the Chicago School Views' 58 *Antitrust Law Journal* (1989) 645, page 646.

77 *Ibid.*

78 F. Easterbrook, 'The Limits of Antitrust' 63 *Texas Law Review* (1984) 1, page 2.

79 Jacobs, *supra* note 10, page 223.

80 R. Joliet, *Monopolization and Abuse of Dominant Position* (Martinus Nijhoff, 1970) pages 250-251.

81 Joliet's study was comparative in scope – in particular a comparative analysis of Section 2 of the Sherman Act and Article 82 – and consisted of three parts: American law on single-firm monopolies, a survey of the national laws of the Common Market countries and of Great Britain and lastly, an analysis of the system of abuse of dominant position under Article 82.

use their power to the detriment of... consumers.”<sup>82</sup> Advocate General Roemer came to the same conclusion in his Opinion in *Continental Can*.<sup>83</sup> This view however was contradicted by the ECJ:<sup>84</sup>

The provision [Article 82] is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1)(f) [3(1)(g)] of the Treaty.

At the time of *Continental Can*, Ernst-Joachim Mestmäcker – an ordoliberal scholar – was advising the Commission. He argued that Article 82 must be interpreted in the light of ‘undistorted competition’ as set out in Article 3(1)(g). A teleological interpretation of Article 82 meant that dominant firms’ conduct which is incompatible with a system of undistorted competition would also fall foul of Article 82.<sup>85</sup> Mestmäcker argued that an abuse of dominance can be found where: (1) the residual competition in a particular market is restricted; (2) where a dominant position is defended against current or potential competition, especially by hampering market entry; or (3) in expanding a dominant position into adjacent markets.<sup>86</sup> This is very much the approach taken in for example *Hoffmann La-Roche*:<sup>87</sup>

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of commercial operators has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition.

The ECJ confirmed that Article 82 can be applied to prohibit conduct affecting the structure of the market. This was reiterated by the ECJ a couple of years later in *Michelin I*:<sup>88</sup>

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82 Joliet, *supra* note 80, page 131.

83 Opinion of Advocate General Roemer in *Continental Can* delivered on 21 November 1972, page 254.

84 Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215, [1973] CMLR 199, paragraph 26.

85 The Community Courts continue to apply a teleological interpretation of the competition rules, for example, Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755, [1997] 4 CMLR 726, paragraph 114: ‘Article 86 of the Treaty must accordingly be interpreted by reference to its object and purpose as they have been described by the Court of Justice, ...in accordance with the general objective set out in Article 3(f) [Article 3(1)(g)] of the Treaty as it was then worded’.

86 Ernst-Joachim Mestmäcker, ‘Die Beurteilung von Unternehmenszusammenschlüssen nach Artikel 86 des EWG-Vertrags’ reprinted in Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union* (2nd, 2006) 597, page 603ff.

87 Case 85/76 *Hoffmann-La Roche AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211, paragraph 91.

88 *Michelin I*, *supra* note 42, paragraph 70.

[I]t must be stated first of all that in prohibiting any abuse of a dominant position on the market in so far as it may affect trade between member states Article 86 [Article 82] covers practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders' performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market.

Mestmäcker stressed that to ensure the establishment of a common market and ensure economic rights and freedoms in the form of the freedom to provide services, free movement of goods and freedom of establishment, barriers to trade had to be abolished and undistorted competition ensured.<sup>89</sup> By linking market integration with the competition rules, the latter rules became a tool to protect the results flowing from eradicating barriers to the markets within the common market. It was understood that the elimination of barriers would not be achieved if private agreements or economically powerful firms were permitted to manipulate, or not prevented from manipulating the flow of trade within the common market.<sup>90</sup> Mestmäcker suggested that third parties shall be protected against harm which they would not risk to suffer in a competitive market. The dominant firm should not be allowed to engage in conduct which was not possible in a competitive market.<sup>91</sup> This idea was adopted by the ECJ in *Michelin I* where it held that dominant undertakings have a special responsibility not to distort competition.<sup>92</sup>

Mestmäcker argued that a finding of an abuse should not depend on whether an elimination of a competitor had a negative effect on the market. In other words, competition law does not protect a certain degree of market efficiency, but protects individual economic freedom against types of conduct that endanger competition. The protection of individual economic freedom is linked to the protection of competition as an institution. This presupposes the protection of residual competition.<sup>93</sup> This approach is in line with the ordoliberal competition policy model, where the aim is 'the protection of individual economic freedom of action as a value in itself, or vice versa,

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89 This is very much inspired by the Spaak Report – *Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères* (in English: Report of the Heads of Delegation of the Governmental Committee) set up by the Messina Conference, named after Paul-Henri Spaak, then the Belgian prime minister. Paul-Henri Spaak was the chairman of the preparatory committee in charge of its preparation. The Report was presented on 21 April 1956 and led to the Treaty of Rome of 1957, which came into force 1 January 1958.

90 Mestmäcker, *supra* note 86, page 606

91 *Ibid.* pages 607-608

92 *Michelin I*, *supra* note 42, paragraph 57.

93 Mestmäcker, *supra* note 86, page 608.

the restraint of undue economic power'.<sup>94</sup> Another scholar has agreed with this position by arguing that "the protection of competition against restrictions is intended to safeguard competition as an institution or to guarantee the freedom of the individual."<sup>95</sup> This philosophy underpins Advocate General Kokott's Opinion in *British Airways*, in particular her reference to competition as an 'institution'.<sup>96</sup> In her view, the primary beneficiaries of Article 82 are not consumers.<sup>97</sup> Priority is given to the process of competition, and if this 'indirectly' protects consumers, then this is a bonus, but not an aim. This shows that the ECJ statement in *Continental Can*, cited above, has come to stand for the protection of the competitive process, the degree of residual competition that persists in the market as such, without a requirement of direct consumer harm.

Some cases have moved in another direction, for example *Oscar Bronner*,<sup>98</sup> starting with Advocate General Jacobs' Opinion highlighting the detriment to innovation if access to a production, purchasing or distribution facility is allowed too easily.<sup>99</sup> Also, in *IMS Health*<sup>100</sup> the ECJ held that between the protection of the intellectual property right and free competition, priority is given to free competition only if consumers would otherwise be harmed.<sup>101</sup> This followed the recommendation of Advocate General Tizzano.<sup>102</sup> The Community Courts seem to treat cases involving essential facilities differently from the general approach taken to Article 82. This may have two explanations. First, the courts are dealing with the interaction between two areas of law: competition and intellectual property rights, with very different policies driving the law. These cases are different from cases concerning "pure" competition law. Second, the courts

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94 W. Möschel, 'The Proper Scope of Government Viewed from an Ordoliberal Perspective: the Example of Competition Policy' 157 *Journal of Institutional and Theoretical Economics* (2001) 3.

95 A. Deringer, *The Competition Law of the European Economic Community: a Commentary on the EEC Rules of Competition (Articles 85 to 90) Including the Implementing Regulations and Directives* (New York: Commerce Clearing House, 1968) page 14.

96 Opinion of Advocate General Kokott in Case C-95/04P *British Airways plc v Commission*, delivered on 23 February 2006, paragraph 69.

97 *Ibid.* paragraph 68.

98 Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791, [1999] 4 CMLR 112.

99 Opinion of Advocate General Jacobs in *Oscar Bronner*, *supra* note 98, delivered on 28 May 1998, paragraph 57.

100 Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2002] ECR I-3401, [2002] 5 CMLR 44.

101 *Ibid.* paragraph 48.

102 Advocate General Tizzano's Opinion in *IMS Health*, *supra* note 100, delivered on 2 October 2003, paragraph 62: '[e]ven where those circumstances obtain, in weighing the balance between the interest in protection of the intellectual property right and the economic freedom of its owner, on the one hand, and the interest in protection of free competition, on the other, the balance may in my view come down in favour of the latter interest only if the refusal to grant the licence prevents the development of the secondary market to the detriment of consumers'.

may find it more important to preserve a dominant firm's investment in an essential facility than a general investment, because of the very nature of the essential facility. Given the difference between cases concerning "pure" competition law and cases also involving intellectual property rights, it would be a mistake to include them in defining the general approach to Article 82 as it would be to compare the incomparable.

Leaving the essential facilities cases on one side, the general approach to Article 82 was reaffirmed in *British Airways*,<sup>103</sup> where the ECJ confirmed that there is no requirement of direct consumer harm.<sup>104</sup> The hesitation from the Community Courts makes it unlikely that earlier case law will be overruled to the effect that those who would like to see a reorientation of the law were disappointed by the missed opportunity in *British Airways* and *Michelin II*.<sup>105</sup>

## V. The process of competition

This section argues that a similar transition to the one seen in the US seems unlikely in Europe given the different transatlantic views on the process of competition.

The EU and the US have a different understanding of the process of competition. As mentioned above, the protection of the process of competition and the opportunities to compete on the merits under Article 82 results from the realisation of the free movement rules.<sup>106</sup> It is believed that the process of competition is protected by the exercise of individual rights. This approach has been linked to Kantian philosophy<sup>107</sup> – a philosophy preferring the protection of human dignity and fight against the instrumentalisation of human nature rather than a neo-classical position, which values efficiency without any consideration of the position of individuals in its utilitarian calculus.<sup>108</sup> Protecting the competitive process in this way makes it difficult to make consumer harm the ultimate test of anticompetitive conduct.

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103 Case C-95/04P *British Airways plc v Commission*.

104 *Ibid.* paragraph 107.

105 Case T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission* (Michelin II).

106 Articles 28, 39, 43 and 49 of the EC Treaty.

107 E. Mestmäcker, 'Bausteine zu einer Wirtschaftsverfassung – Franz Böhm in Jena' in *Wirtschaft und Verfassung in der Europäischen Union* (2 ed. 2006) 116, pages 123-127.

108 W. Möschel, 'Competition Policy from an Ordo Point of View' in H. Willgerodt & A. Peacock (eds), *German Neo-liberals and the Social Market Economy* (Macmillan, 1989) pages 148-149.

The conception of the competitive process as resulting from the exercise of individual economic liberties is close to ordoliberalism, which has influenced EC competition law.<sup>109</sup> The aim of ordoliberalism was not economic efficiency as confirmed by Franz Böhm, one of the founding fathers of ordoliberalism:<sup>110</sup>

The real motives behind the enactment of antitrust law were...not economic efficiency and the effectiveness of economic control, but social justice and civil liberties which were held to be threatened by monopolies.

Some argue that a focus on competition as an institution does not imply that EC competition law is insensitive to economic efficiency, because the undistorted competitive process will generally tend to maximise wealth and consumer welfare, at least in the medium term.<sup>111</sup> This implies that the protection of an undistorted process of competition and the competitors participating in it, is an intermediate goal of consumer welfare and not an end in itself.<sup>112</sup> While the protection of competitors to safeguard an undistorted process of competition may not necessarily conflict with the promotion of consumer welfare, the two goals are based on fundamentally different normative views and may not always lead to the same outcome.<sup>113</sup>

With the rise of the Chicago and Post-Chicago Schools, the position in the US is different. The US denies the significance of factors leading to consumer welfare as intermediate goals. It relies on an ultimate goal of consumer welfare, which requires a showing of verifiable effect in the marketplace and excludes considerations of individual liberties. This is an approach focusing on the market outcome not the process.

The Commission does not focus on the protection of a particular market outcome, but accepts an individual right of each competitor not to be excluded regardless of the exclusion results in

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109 J. Kallaugher and B. Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82' 5 ECLR (2004) 263, page 268; see also D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Clarendon Press Oxford, 1998); Möschel, *supra* note 108, page 142.

110 F. Böhm, 'Democracy and Economic Power' in *Cartel and Monopoly in Modern Law* (CF Muller Karlsruhe, 1961) page 28.

111 T. Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: in Search of Clearer and More Coherent Standards for Anti-competitive Abuses' 42 CMLR (2005) 129, page 135.

112 Whether something is a means to an end or an end in itself is a frequent debate in moral philosophy.

113 L. Lovdahl Gormsen, 'The conflict between economic freedom and consumer welfare in the modernisation of Article 82 EC', 3(2) European Competition Journal (2007) 329.

verifiable harm to consumers or efficiency in the marketplace. For example in *Irish Sugar*, the Commission said:<sup>114</sup>

The maintenance of a system of effective competition does, however, require that competition from undertakings ... be protected against behaviour by the dominant undertaking designed to exclude them from the market not by virtue of greater efficiency or superior performance but by an abuse of market power.

The danger of such an approach may be a chilling of the incentives of firms to compete for dominance by innovation. One commentator has argued that:<sup>115</sup> “[t]he Commission attributes comparatively lower weight to a dominant player’s freedom to run its own business, and comparatively more weight to the protection of competitors than U.S. courts”. It is assumed that the commentator refers to recent US jurisprudences rather than early jurisprudence.<sup>116</sup>

A consequence of protecting competition as an ‘institution’ and the competitive process in itself, instead of making consumer harm the ultimate reference point, is that it becomes extremely difficult to find a proper legal framework for Article 82.<sup>117</sup> This approach falls short especially under the influence of economics and bears difficulties of application and measurement. To provide means that seem easier to measure, an approach focusing on the outcome (and not the process) seems more suitable. Moreover, focusing on competitors’ freedom to compete instead of harm to consumers, presupposes that an effective protection of competitors against exclusionary acts will increase the incentives of non-dominant market players and potential newcomers to invest and compete. Unless, there is good evidence that a specific market is characterised by innovation and high entry such an assumption may be dangerous.

This paper concludes by asking whether the way in which the process of competition is protected under Article 82 means that the application of the provision is destined to be structural. The

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114 Commission Decision 97/624/EC *Irish Sugar plc*. OJ [1997] L 258/1, paragraph 134. See also Eilmansberger, *supra* note 111, page 133: The purpose of Art. 82 is “to ensure that the exercise of market power does not impair competitors’ possibilities to succeed or prevail on the market on the basis of superior business performance”.

115 I. Forrester, Article 82: Remedies in Search of Theories? 28 *Fordham Int’l L.J.* (2005) 919, page 920.

116 See for example the Supreme Court in *US v Topco Associations*, 405 U.S. 596 (1972) page 610: “Antitrust laws in general... are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete...”

117 Within the scope of Article 82 it is unclear who the consumer is. In some Article 82 cases harm on the intermediate level becomes a proxy for harm to the final consumer. This question will not be answered in this short paper – not because it is irrelevant but because it would require another volume.

answer depends on the willingness from the Community Courts. If the application of Article 82 is to become less structural and more economics-based,<sup>118</sup> the impetus cannot be expected to come from the Commission alone whether through future enforcement decisions or through guidelines.<sup>119</sup> Only if the Community Courts decide to overrule earlier case law and support DG Competition's move to consumer welfare will it be a reality. The Commission certainly has the freedom to decide its enforcement policy, but if its administrative practice were to change, the Commission would still have to act within the framework prescribed for it by Article 82 as interpreted by the ECJ.<sup>120</sup>

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118 *EAGCP Report*, *supra* note 3.

119 Guidelines are not legally binding according to Article 249 EC only regulations, directives and decisions are legally binding measures in the Community. However, guidelines would help create a unified body of decisions, rather than a set of individual ad hoc and inconsistent measures. As a result, the underlying objectives are more likely to be realized, see Commission Report on *the Action Plan for Consumer Policy 1999-2001* and on the General Framework for Community Activities in Favour of Consumers 1999-2003 COM(2001) 486, pages 17-19.

120 This was highlighted by Advocate General Kokott in her Opinion in *British Airways*, *supra* note 96, paragraph 28.