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A. INTRODUCTION

This article considers how the US Circuits departed from their structural approach to the Sherman Act Sections 1 and 2 to embrace a more economics-based approach focusing on consumer welfare. This is to examine whether a similar departure from a structural approach is possible in Article 82 where the protection of competition is identified with the preservation of a particular market structure. 1 DG Competition is currently trying to change the application of Article 82 by adopting a more economics-based approach. 2 In its Discussion Paper, DG Competition made clear that the main objective of Article 82 is consumer welfare—an objective which does not fit well with the current structural approach. For consumer welfare to become a reality, the Commission and/or the Community Courts (the European Court of Justice (ECJ) and the Court of First Instance (CFI)) must assess a particular conduct in the market without prejudice for any particular structure. The article concludes that a similar transition as seen in the US is difficult within the area of Article 82 because of its normative foundation and the juristic principle in Article 3(1)(g) of June 2008 European Competition Journal 221

1 Sherman Act s 1 prohibits “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States”.

2 Sherman Act s 2 prohibits “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”.


4 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,” ibid, 2.

5 DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December, 2005). While the Discussion Paper is no authoritative source, it indicates DG Competition’s current thinking on Art 82.
In order to reach this conclusion section B outlines the strand of Industrial Organisation thinking influencing US antitrust from the 1940s to the mid-1970s to explain how the structural approach developed in the US. Section C considers the rise of the Chicago School and Post-Chicago School to show how the impact of a different line of Industrial Organisation thinking changed the US Circuits’ interpretation of the Sherman Act. Section D examines how the structural approach to Article 82 developed and section E why it is difficult to adopt a more economics-based approach within Article 82. Section F concludes. The article does not consider whether the approach taken to the Sherman Act, 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 article equates a per se approach with a formalistic approach and a rule of reason approach with an effects-based approach, but acknowledges that there are different degrees of rule of reason/effects.

B. ONE STRAND OF INDUSTRIAL ORGANISATION THINKING:
THE HARVARD “STRUCTURAL” SCHOOL AND THE S-C-P PARADIGM

This section outlines the strand of Industrial Organisation thinking influencing US antitrust from the 1940s to the mid-1970s to explain how the structural approach developed in the US. Some call this period the pre-Chicago thinking. Early jurisprudence of the Sherman Act Section 2 centres on the different meaning and influence given to both the structural and the conduct elements. For example, Standard Oil shows that the accumulation of wealth in the hands of a few was perceived as a threat to both the economic order and democracy. 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 the Sherman Act more orientated towards the industry and markets in general, a line of Industrial Organisation thinking—the so-called Harvard “structural” School—developed the 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

6 “A system ensuring that competition in the internal market is not distorted.”
8 Standard Oil of New Jersey v United States 221 US 1, 50 (1911).
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 (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, Mason, Kaysen and Turner—hence the name the Harvard Structural School.

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. Moreover, there is a relationship between profit and structural characteristics of the industry (profitability-concentration relationship). 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 at the time—amongst others—was a preservation of the competitive process as such and a prescription of norms to fair conduct. It was believed that markets are fragile and prone to failure. Given the fragility of the markets, antitrust authorities had large discretionary powers to control conduct by large firms. This led to an interventionist approach and divestitures in highly concentrated markets.

In the period from the 1940s to the mid-1970s, some cases reflect the developments of the S-C-P paradigm. It captured a wide range of conduct which sufficed to create liability for dominant firms, and expanded the rights of the perceived victims of economic exploitation.
Besides Section 2 of the Sherman Act, authors from the Harvard Structural School, such as Kaysen and Turner, adopted a generally negative view of vertical mergers. They advocated a prohibition of any vertical merger in which the acquiring firm had 20% or more of its market. The courts adopted a similar negative view towards vertical restraints such as tying, bundling, exclusive dealing, requirements contracts, territorial restraints, and resale price maintenance (RPM). A strict view was not only taken in Section 2 but also in Section 1. For example, in Northern Pacific Ry the court condemned tying as a per se illegal offence of the Sherman Act Section 1.

1. The Emergence of a Structural Approach in Early US Jurisprudence

The interpretation of Section 2 has developed over time. Currently, the key offence of monopolisation in Section 2 is the possession of monopoly power in the relevant market, and the wilful acquisition or maintenance of that power. It is interpreted to consist of two elements: a structural element (the possession of monopoly power in the relevant market) and a conduct element (the wilful acquisition or maintenance of monopoly power). The latter element was largely ignored in early jurisprudence. For example in Alcoa, Judge Learned Hand said.
Great industrial consolidations are inherently undesirable, regardless of their economic results. The debate in Congress . . . [shows] a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.

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 further said that “in order to fall within Section 2 the monopolist must have both the power to monopolize and the intent to monopolize”. However, the court did not require much in terms of exclusionary conduct or specific intent to monopolize. It established intent by saying that “no monopolist is unconscious of what he is doing”. The court found Alcoa’s large position in virgin aluminium ingot was the kind of conduct covered by Section 2, 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 the court was left open to criticism. Essentially, the court condemned active seeking of monopoly power, despite being by means of perfectly legitimate business conduct. The enactment of the Robinson-Patman Act in 1936 and judgments like Alcoa gave the impression that consumer welfare was not a goal of US antitrust.

The Supreme Court also endorsed the broad view of exclusionary conduct in American Tobacco, where it quoted large parts of Alcoa. A similar approach was taken in US v Griffith and Utah Pie. 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. In Utah Pie, the Court endorsed the view that evidence of subjective intent can establish liability and pricing below average

31 Ibid, 432.
32 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 (New York, The Free Press, 1993), 51–52.
36 United States v Griffith 334 US 100 (1948).
38 Supra n 36, 107.
39 Supra n 37, 696–97.
The same position was taken by the ECJ in *AKZO* where it held that prices above average variable costs (AVC) but below ATC are abusive if they are determined as part of a plan for eliminating a competitor. 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. This goes back to the profitability-concentration relationship important for the S-C-P paradigm. Like in *Alcoa*, there is little analysis of the effects on consumer welfare.

In *United Shoe Machinery*, the government challenged the terms on which the largest maker of shoe-making machines leased those machines. The court explained that the defendant “is denied the right to exercise effective control of the market by business policies that are not the inevitable consequences of its capacities or its natural advantages”. Federal District Court Judge Charles Wyzanski outlined three approaches to the interpretation of the Sherman Act: (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.

Kaysen, who was associated with the Harvard Structural School, was appointed as a law clerk to provide economic counselling to Judge Wyzanski in this case and these points may have been influenced by Kaysen. The third point highlighted by Judge Wyzanski is very similar to the approach take in *Alcoa* and by the ECJ in *Michelin I* imposing a special responsibility on dominant undertakings as discussed below in section D.

These few examples highlight the courts’ concern for the structure of competition, which led 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 improve consumer welfare.

The structural view that proof of monopoly itself should be sufficient to establish a violation of Section 2 reached its peak in the 1970s with the rise of

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40 Ibid, 698.
42 Supra n 37, 703.
44 Ibid, 545.
46 White, supra n 17, 12.
the Chicago School and the Post-Chicago School. These schools showed that the direction of causality is not clear. The Chicago School argued that there may be feedback loops, for example from performance to structure, ie performance can affect structure, as will be shown in the next section.

C. ANOTHER STRAND OF INDUSTRIAL ORGANISATION THINKING: THE CHICAGO SCHOOL AND POST-CHICAGO SCHOOL

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 and Post-Chicago School. This is to show how the impact of a different line of Industrial Organisation thinking changed the US Circuits’ interpretation of the Sherman Act.

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 intellectual leadership of Aaron Director: the so-called Chicago School. Associated with Director were economists such as Friedman, Stigler, Telser, Demsetz, McGee, Bowman, and Burstein. They were all sceptical of the S-C-P paradigm and more sympathetic to vertical restraints and generally supportive of market outcomes. 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. Bork—one of the protagonists of the Chicago School—identified consumer welfare as improving allocative efficiency without impairing productive efficiency.

50 For a good article on the distinction between the Harvard and Chicago schools, see R Posner, “The Chicago School of Antitrust Analysis” (1979) 127 University of Pennsylvania Law Review 925.
57 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 objective is likely to be applied more consistently and effectively.
58 Supra n 32, 91 and 427.
To be clear, this is a concern for total welfare and not consumer welfare in form of consumer surplus.\footnote{Fox and Sullivan, supra n 19, 946, have pointed out that consumer welfare in the Chicagoan sense is not consumer welfare at all. For a discussion and critique of Bork’s definition of consumer welfare, see R Lande, “The Rise and (Coming) Fall of Efficiency as the Rule of Antitrust” (1988) 33 Antitrust Bulletin 429, 433–35.}

The Chicago School rejected the structural 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.\footnote{The post-Chicago economic literature has shown that the theory of the single profit monopoly is not as robust as the Chicago School suggests as it relies on the assumption that the market is perfectly competitive, which is rarely the case.} Moreover, there are no or few artificial barriers to entry, thus private monopoly can only be temporary.\footnote{Jacobs, supra n 14, 228–32.} The Chicago School believed that the basic tenets of firms were rationality and profit maximisation. For example, firms would engage in vertical price fixing to avoid free-riding.\footnote{H Marvel, “Exclusive Dealing” (1982) 25 Journal of Law & Economics 1.} 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.\footnote{The Chicago School’s economic analysis of predation was accepted by the US Supreme Court in Brooke Group Ltd v Brown & Williamson Tobacco Corporation 509 US 209 (1993).} Rational firms will not engage in predatory pricing since they are not necessarily going to be successful. Given this, 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.\footnote{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” (1985) 54 Antitrust Law Journal 21, 24.} Bork argued that it was only workable to view markets from an economic efficiency point of view, since the social-political framework is amorphous.\footnote{F Easterbrook, “Workable Antitrust Policy” (1986) 84 Michigan Law Review 1696, 1700.} Its focus on making the law effective made Judge Easterbrook rename it “The Workable Antitrust Policy School”.\footnote{F Easterbrook, “Workable Antitrust Policy” (1986) 84 Michigan Law Review 1696, 1700.}
Like the Chicago School, Easterbrook favoured the single goal of economic efficiency.67

The Chicago School reliance on neo-classical economics has been criticised for relying on unrealistic assumptions,68 which fail to explain strategic behaviours taking advantage of market imperfections, where firms can make profits without being efficient.69 This and the Chicago School’s philosophy that antitrust should only protect economic efficiency have led to some criticism.70 The main criticism came from the so-called Post-Chicago School.

The Chicago and Post-Chicago Schools agree that the essence of antitrust is economics71 and consumer welfare should be the goal of antitrust. Both schools rejected the relevance of subjective inquiries which they attributed to the political approaches of the past. Regardless of the political or distributive consequences, conduct should be left alone unless it raises prices or limits output.72 However, they disagreed on market failures. The Chicago School believed that markets tend toward efficiency, that market imperfections are normally temporary, and that intervention should proceed cautiously.73 Contrary, the Post-Chicago School believed 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. Moreover, that the distortions to competition made possible by market imperfections should prompt intervention to scrutinise a wider variety of conduct.74

1. Some Indications of a More Economics-based Approach in US Jurisprudence

The Chicago School’s push towards a more economics-based approach and the Post-Chicago School’s revision of some of the simplistic assumptions made by

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67 This is supported by Baxter (former Assistant Attorney General in Antitrust Division, DOJ), who said that “the sole goal of antitrust is economic efficiency”: Wall Street Journal, 4 March 1982, 28. This was opposed by 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: H Thorelli, The Federal Antitrust Policy (Baltimore, MD, Johns Hopkins University Press, 1955).

68 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.


72 Ibid.


74 Jacobs, supra n 14, 223.
the Chicago School made the US Supreme Court implement some of the Chicago School philosophy during the late 1970s and onwards.\textsuperscript{75}

The shifting in attitude in applying Section 2 can be seen in \textit{Eastman Kodak}.\textsuperscript{76} The Second Circuit adopted a wider approach by examining how the prospect of market success spurred competition and innovation. The defendant, Eastman Kodak, sold cameras and held a monopoly in the film market. The plaintiff, Berkey Photo, sold cameras and competed with Kodak in the market for other photo-related services. When Kodak developed a new kind of film compatible with only one of Kodak’s cameras, Berkey alleged that Kodak had violated Section 2 by not giving Berkey advance notice of its new product design. The Second Circuit held that “a firm may normally keep its innovations secret from its rivals as long as it wishes, forcing them to catch up on the strength of their own efforts after the new product is introduced”.\textsuperscript{77} Furthermore, firms’ incentives to innovate rely on the prospect of market success:\textsuperscript{78} “If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavours, this incentive would very likely be vitiated”.

The latest case under Section 2—\textit{Trinko} concerned refusal to deal.\textsuperscript{79} The Supreme Court reiterated the need for caution as it stressed that wrongly condemning of legitimate competition may chill aggressive competition.\textsuperscript{80} The court stated that false positives counselled against an undue expansion of Section 2 liability.\textsuperscript{81} In an attempt to constrain the scope of Section 2 the government urged the Supreme Court to adopt a narrow view of it, maintaining that a refusal to deal with a competitor should not constitute unlawful monopolisation “unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition”.\textsuperscript{82} Although the Supreme Court did not adopt this position, the Opinion represents a clear retreat from \textit{Aspen Skiing}.\textsuperscript{83} According to the Supreme Court, the difference between the two cases was that the evidence in \textit{Aspen Skiing} “suggested a willingness to forsake short-term profits to achieve an anticompetitive end” and “revealed a distinctly anticompetitive bent” while, in contrast, Verizon’s conduct “sheds no light upon the motivation

\textsuperscript{75} It even cited Bork in \textit{Reiter v Sono-tone Corporation} 442 US 330 (1979) 343: “Congress designed the Sherman Act as a ‘consumer welfare prescription’” followed by citing Bork’s \textit{The Antitrust Paradox}, supra n 32.

\textsuperscript{76} \textit{Berkey Photo, Inc v Eastman Kodak Co} 603 F2d 263 (2d Cir 1979).

\textsuperscript{77} Ibid, 281.

\textsuperscript{78} Supra n 76.

\textsuperscript{79} \textit{Verizon Communications v Law Offices of Curtis v Trinko LLP} 540 US 398 (2004).

\textsuperscript{80} \textit{Matsushita Elec Industrial Co v Zenith Radio} 475 US 574, 594 (1986).

\textsuperscript{81} Supra n 79, 414.

\textsuperscript{82} Brief for the United States and the Federal Trade Commission as Amici Curiae supporting petitioner in \textit{Verizon}, supra n 79.

\textsuperscript{83} \textit{Aspen Skiing Co v Aspen Highlands Skiing Corp} 472 US 585 (1985).
of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice”.

It is not only in applying Section 2 that the court’s interpretation has changed. This is also the case when applying Sherman Act Section 1. For example, the rule of reason found its way in Continental TV. The court declared that territorial restraints should be examined under a rule of reason, rather than being condemned as per se illegal as in Schwinn. As regards tying arrangements the court did not suspend the per se rule adopted in Northern Pacific Ry. However, in United States Steel Corp, 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. In the area of maximum retail price maintenance, the court’s previous strict view in Albrecht condemning conduct per se was loosened to a rule of reason in State Oil v Khan.

Since Dr. Miles in 1911 resale price maintenance (RPM) agreements have been considered per se illegal under Section 1. While the Supreme Court continued to adopt a per se rule when interpreting minimum RPM in Monsanto and Sharp Electronics Corp, it did raise the standard of proof needed by plaintiffs to succeed. The federal authorities have been trying to abolish the per se approach to RPM since the 1980s through both legislative proposals and amicus briefs filed to the courts. However, states are strictly opposed to this strategy as vertical restraints generally have local effects. This is one of the reasons why per se prohibition of RPM survived until quite recently.

In its 2007 ruling in Leegin, the Supreme Court overruled nearly 100 years of precedent and held that RPM agreements do not per se violate Section 1. The Leegin case arose from a leather goods manufacturer’s decision to cut off sales to a retailer that had been cutting prices in violation of an alleged RPM agreement. Both the District Court and the Fifth Circuit declined to apply the rule of reason to Leegin’s vertical price-fixing agreements. They affirmed that the per se rule in Dr. Miles made irrelevant any pro-competitive justifications for Leegin’s policy. The Supreme Court reversed and explicitly overruled Dr. Miles. Both the federal authorities and the states submitted rival amicus briefs.

In reversing Justice

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84 Supra n 79, 409.
86 Schwinn, supra n 24.
87 Northern Pacific Ry, supra n 26.
91 Supra n 25.
95 Brief for the United States as amicus curiae supporting petitioner No 06–480 in the Supreme Court of the United States, available at: http://www.usdoj.gov/atr/cases/f221000/221027.htm
Kennedy explained that, in its recent jurisprudence, the court has applied the *per se* rule only when an agreement “would always or almost always tend to restrict competition and decrease output”. The Supreme Court reviewed recent economic literature and found that, though RPM agreements may harm competition in some circumstances, they often enhance competition by giving retailers incentives to promote the manufacturers’ products, facilitating entry by new competitors and otherwise stimulating competition among rival suppliers of branded products. The court then held that because RPM agreements may have either pro- or anti-competitive effects depending on the circumstances, they should be evaluated under the rule of reason, not prohibited *per se*.

Compared to legal standards in the 1940s, the 1950s and 1960s the Supreme Court has since adopted and applied legal standards and rules for both Sections 1 and 2 that are more sensitive to the possible efficiencies of business conduct and more attuned to the potential for consumer harm. A similar transition as seen in the US is yet (if ever) to take place within Article 82. The following section explains how the structural approach to Article 82 developed. This is important for the argument advanced in section E that a similar transition as seen in the US is unlikely to take place within Article 82.

D. A STRUCTURAL APPLICATION OF ARTICLE 82

To avoid a structural approach as taken towards monopoly power in 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.\(^{96}\) It did not mean preventing competitors’ exclusion from the market.\(^{97}\) He specifically argued that “the major objective of Article 86 [Article 82] is to ensure that dominant firms do not use their power to the detriment of... consumers”\(^{98}\) Advocate General Roemer came to the same conclusion in his Opinion in *Continental Can*,\(^{99}\) the first case

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\(^{97}\) Joliet's study was comparative in scope—in particular a comparative analysis of s 2 of the Sherman Act and Art 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 Art 82.

\(^{98}\) Supra n 96, 131.

before the ECJ under Article 82. The ECJ did not adopt Advocate General Roemer’s Opinion:

“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.”

Like in Alcoa, the focus was on the structural element. The American metal-packing company Continental Can, the world’s largest producer of metal containers, acquired 91% 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% share of a German company Schmalbach-Lubeca-Werke AG to Europemballage to buy the shares of TDV. At the time, there was no Merger Regulation in EC Competition Law, so the ECJ had to assess whether a dominant position realised through a merger falls within the scope of Article 82. This would require the court to examine whether the concept of “abuse” could refer also to changes in the structure of an undertaking, which led to the disturbance of competition in the common market.

The court found it did even though it consequently found in favour of Continental Can because of the Commission’s wrong market definition.

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 fall foul of Article 82. Mestmäcker argued that an abuse of dominance can be found:

1. where 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.

Mestmäcker’s first suggestion is very much the approach taken in, for example, Hoffmann La-Roche where the ECJ confirmed that...
Article 82 can be applied to prohibit conduct affecting the structure of the market.\(^{105}\)

“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.”

This was reiterated by the ECJ a couple of years later in *Michelin I*.\(^{106}\)

“[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.”

In *Michelin I*, the ECJ imposed a special responsibility on dominant undertakings not to allow their conduct to impair genuine undistorted competition on the common market.\(^{107}\) This is a focus on the protection of the structure within the market. By imposing a special responsibility on a dominant undertaking, the court imposed an obligation not to negatively affect an already weakened competitive structure. More than 25 years later, the focus is still on the structure of the market as recently seen in *Microsoft*:\(^{108}\)

“[I]t is settled case-law that Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure . . . In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.”

Mestmäcker’s third suggestion that it can be an abuse to expand a dominant position into adjacent markets was adopted by the ECJ in *Tetra Pak II*.\(^{109}\) Tetra Pak was dominant in the market for aseptic machinery and cartons, but not in the market for non-aseptic liquid repacking machinery. The ECJ broadened the scope of Article 82 by holding that Tetra Pak’s tying practices and predatory pricing strategies could amount to an abuse of dominance where conduct on a

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\(^{105}\) Case 83/76 *Hoffmann-La Roche AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211, para 91.

\(^{106}\) Supra n 47, para 70.

\(^{107}\) Ibid, para 57.


market distinct from the dominant market produces effects on that distinct market.\footnote{Ibid, para 27.}

“It is true that application of Article 86 [Article 82] presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market. In the case of distinct, but associated, markets, as in the present case, application of Article 86 [Article 82] to conduct found on the associated, non-dominated, market and having effects on that associated market can only be justified by special circumstances.”

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.\footnote{This is very much inspired by The Spaak Report, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères [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.} By linking market integration with the competition rules, the latter 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.\footnote{Supra n 104, 606.} 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.\footnote{Supra n 47, para 57.} As seen above, this idea was adopted by the ECJ in \textit{Michelin I}.\footnote{Supra n 104, 608.} A dominant firm’s special responsibility towards the competitive process may account for some of the more formalistic and interventionist judgments adopted by the Community Courts.

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 should not protect a certain degree of market efficiency, but should protect 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.\footnote{Supra n 104, 608.} 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, the restraint of undue economic power". 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". This philosophy underpins Advocate General Kokott’s Opinion in *British Airways*, in particular her reference to competition as an "institution". In her view, the primary beneficiaries of Article 82 are not consumers. 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.

1. **Some Positive Developments under Article 82 . . . and then not**

The Community Courts have taken a less formalistic and somewhat more nuanced approach in some cases under Article 82. For example in *Oscar Bronner*, the ECJ recommended that the national court reject access to the essential facility—a newspaper delivery system. Advocate General Jacobs’ Opinion had highlighted the detriment to innovation if access to a production, purchasing or distribution facility is allowed too easily. In *Volvo Veng* the ECJ held that in the context of an intellectual property right (IPR) there is no general duty to license dominant undertakings. A mere refusal to license could not, in itself, be an abuse. The ECJ dismissed the claim that Volvo’s refusal to grant Veng a license for the registered design was an abuse. However, the court held: “[T]he exercise of an exclusive right by the proprietor of a registered design . . . may be prohibited under Article 82 if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of the prices for spare parts at an


119 ibid, para 68.


121 Opinion of Advocate General Jacobs in *Oscar Bronner*, supra n 120, delivered on 28 May 1998, para 57.

122 Case 238/87 AB *Volvo v Erik Veng (UK) Ltd* 1988 ECR 6211.

123 ibid, para 8.

124 Supra n 122, para 9.
unfair level or a decision no longer to produce spare parts for a particular model . . . still in circulation. In the present case no instance of any such conduct has been mentioned by the national court.”

On the balance between an IPR and Article 82, the ECJ was not absolute. It did leave itself room for future cases where Article 82 may prevail over the exercise of an IPR.

One explanation for Volvo Veng could be that it concerned an IPR (UK registered design for the front wing panels of Volvo series 200 protected by the Software Directive) and on a balance between Article 82 and the exercise of an IPR, the ECJ favours the latter. This explanation is however doubtful given later cases such as in Magill where the ECJ found that the exercise of an exclusive right by the proprietor may involve abusive conduct and IMS Health confirming Magill. A more likely explanation for Volvo Veng is that it was referenced from the national court under Article 234 where the ECJ is unable to review the facts. This is supported by the court’s statement “in the present case no instance of any such conduct has been mentioned by the national court.”

The Magill and IMS cases were upheld in the recent Microsoft judgment although it did—unlike Magill and IMS—discuss the prejudice of consumers. While competition law and IPR law ought to share the same objective of promoting innovation and enhance consumer welfare, as highlighted in Advocate General Gulmann’s Opinion in Magill, this is not immediately obvious in Article 82. Instead, the general approach to Article 82 was reaffirmed in British Airways, Michelin II and France Télécom. Although the ECJ’s judgment in British Airways contains some promising indications, such as the need to establish some form of competitive impact and an appreciation of economic benefits, it confirmed that there is no requirement of direct harm to consumers. In Michelin II, the CFI said that to establish an infringement, it is enough to show that conduct of the dominant undertakings tends to restrict competition, or is capable of having that effect. In other words, for the purposes

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125 Directive 91/250/EEC.
127 Ibid, para 50.
129 Supra n 122.
130 Supra n 108.
131 Opinion of Advocate General Gulmann in Magill, supra n 126, delivered on 1 June 1994.
135 Supra n 132, para 107.
136 Supra n 133, para 239.
of Article 82, anti-competitive object and anti-competitive effect is one and the same thing.\(^{137}\) In *France Télécom*, the CFI recognised that the Commission was “right to take the view that proof of recoupment of losses was not a precondition to making a finding of predatory pricing”.\(^ {138}\) Contrary to the legal position in the US,\(^ {139}\) there is no recoupment requirement in relation to predatory pricing under Article 82.\(^ {140}\)

These cases show that the ECJ is unwilling to change the framework of Article 82 towards a more economics-based approach. The following section explains why it may be difficult for the Community Courts to change the framework of Article 82.

**E. The Process of Competition**

This section explains why it is so difficult to change the interpretation of Article 82 to a more economics-based approach with a methodology capable of showing harmful effects on consumers. It argues that a similar transition to the one seen in the US seems unlikely in Europe given the normative foundation of Article 82, the juristic principle in Article 3(1)(g) and 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.\(^ {141}\) It is believed that the process of competition is protected by the exercise of individual rights. This approach has been linked to Kantian philosophy.\(^ {142}\) This is a philosophy preferring the protection of human dignity and fight against the instrumentalisation of human nature rather than a neo-classical position. The latter position values efficiency without any consideration of the position of individuals in its utilitarian calculus.\(^ {143}\) Protecting the competitive process in this way makes it difficult to make consumer harm the ultimate test of anticompetitive conduct.

The conception of the competitive process as resulting from the exercise of individual economic liberties is close to ordoliberalism, which some would argue

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\(^{137}\) *Ibid*, para 241.

\(^{138}\) *Supra* n 134, para 228.

\(^{139}\) *Supra* n 63.

\(^{140}\) *Supra* n 109.

\(^{141}\) Arts 28, 39, 43 and 49 of the EC Treaty.


have influenced EC competition law\textsuperscript{144} or the principles underlying Article 82.\textsuperscript{145} The aim of ordoliberalism was not economic efficiency. This was confirmed by Franz Böhm, one of the founding fathers of ordoliberalism: \textsuperscript{146} “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. They argue that the undistorted competitive process will generally tend to maximise wealth and consumer welfare, at least in the medium term.\textsuperscript{147} 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. While the protection of individual economic freedom 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.\textsuperscript{148}

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,\textsuperscript{149} 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 whether the exclusion results in verifiable harm to consumers or efficiency in the marketplace. The danger of such an approach may be a chilling of the incentives of firms to compete for dominance by innovation (dynamic competition). One commentator has argued that “[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.151

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 82.152 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 in itself) 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.

F. CONCLUSION

Looking across the Atlantic may not offer much help in modernising Article 82. There are several reasons. First, the US Supreme Court specifically has accepted that the Sherman Act is designed as a “consumer welfare prescription”:153

“A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.”

The Community Courts have never done that within the scope of Article 82.154 Second, the courts’ different role in the EU and the US. While the Community


151 For example, the Supreme Court in US v Topco Associations 405 US 596 (1972) 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 . . .”

152 Within the scope of Art 82 it is unclear who the consumer is. In some Art 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 article—not because it is irrelevant but because it would require another volume.

153 NCAA, supra n 149, 107–108.

154 Although the CFI has done so within the scope of Art 81, case T–168/01 GlaxoSmithKline Services Unlimited v Commission, paras 118 and 273.
Courts can change the framework of Article 82 by developing the law, they cannot drive competition policy. Only the Commission can develop its policy.\textsuperscript{155} As it is well-known, the ECJ did not act upon Advocate General Kokott’s invitation in \textit{British Airways} to change its framework of Article 82 to give the Commission some room to develop its policy.\textsuperscript{156} The judges of the US federal courts have been moulding and developing policy over time through their construction and interpretation of the provisions of the Sherman Act. This has allowed the interpretation to be influenced by modern thinking and has meant that the goals underpinning that interpretation and application have changed and evolved over time. This has made the Supreme Court more willing to reconsider its previous decisions where necessary to make antitrust a rational enterprise.

Third, the different ways the respective courts have interpreted the Sherman Act and Article 82. Since \textit{Continental Can} the Community Courts have interpreted the basic objective of protection of competition in Article 82 by adopting a teleological interpretation, as opposed to a literal, historical or contextual interpretation.\textsuperscript{157} The teleological interpretation has given the Community Courts an opportunity to develop the law and implement suitable objectives, for example the intermediate goal of integrating the common market. The US courts never had to consider the Sherman Act in the light of an intermediate goal such as integration of the common market.

\textsuperscript{155} Case C-234/89 \textit{Stergios Delimitis v Henninger Braü AG} 1991 ECR I-935.
\textsuperscript{156} \textit{Supra} n 118, para 28.
\textsuperscript{157} \textit{Supra} n 103, para 114.