Treatment and Assessment of Dominance and Monopoly in the EU and US: the application of ‘size’ and ‘bigness’

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Abstract

This thesis is an examination of the way dominance and monopoly are assessed in the EU and US antitrust law. In particular, it focuses on the two main factors which, in the view of this thesis, may play an important role in the application of antitrust rules. These factors are a firm's size and bigness. With the main focus on these two factors, this thesis assesses whether the EU Commission holds an antagonistic approach to dominant firms as a way to promote consumer welfare and economic efficiency which are the main aims of antitrust law. As a matter of comparison, this thesis similarly considers the US approach to firms in a monopolistic position.

This research is inclined to believe that 'size' and 'bigness' make a firm large in the context of antitrust law. Size is defined by the number of market shares a firm has in a relevant market. Bigness, on the other hand, is defined by a non-exhaustive list of all commercial and technological advantages a firm has over its rivals. Both elements, therefore, constitute dominance and monopoly, and place a firm into a privileged position over its competitors.

The belief that dominant firms are inherently detrimental to the primary goals of antitrust may itself harm consumer welfare and economic efficiencies. This is explained by the fact that large firms have access to more resources which may be necessary for some industries. The obstacles for their growth may lead to the stagnation in the progression of markets which, in turn, will be reflected on the consumers and economy.

Despite this being a common concern of various stakeholders, the Commission and the EU courts set low market share thresholds in order to measure a firm's size and admit all firm's privileges into the definition of a dominant position. It creates an impression that dominant firms are not welcomed in the EU internal market. US antitrust law, on the other hand, appears to have a less strict approach to firms in a monopolistic position by allowing firms to grow as long as there is no illegality behind it. The US market share threshold is much higher than in the EU and it has an almost complete disregard of a firm's privileges and advantages. This thesis, therefore, came to the conclusion that EU competition law has a strong distrust toward dominant firms, whilst US antitrust law holds a neutral position. This research then proceeds to find an explanation of such a disparity between two leading antitrust regimes.

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European Union

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Treaty establishing the European Economic Community and related instruments (EEC Treaty) (1 January 1958)

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Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature ________________________________

Printed name __Svetlana Nasibyan________

List of Abbreviations and Acronyms

AC	Average Cost
AmCham EU	American Chamber of Commerce to the EU
CJEU	Court of Justice of the European Union
DOJ	US Department of Justice Antitrust Division
DWL	Deadweight Welfare Loss
EAGCP	Economic Advisory Group on Competition Policy
ECSC	European Coal and Steel Community
EU	European Union
FC	Fixed Cost
FTC	Federal Trade Commission
GC	General Court
IPR	Intellectual Property Right
MC	Marginal Cost
MES	Minimum Efficient Scale
MR	Marginal Revenue
OEEC	Organisation for European Economic Co-operation
R&D	Research and Development
SCP	Structure—Conduct—Performance
SME	Small and Medium Enterprise
SSNIP	Small but Significant Non-transitory Increase in Price

TC	Total Cost
TFEU	Treaty on the Functioning of the European Union
US	United States
VC	Variable Cost

Chapter 1: Introduction

> "The work of the greatest artists may command the highest prices, their incentive has not been money. It has been the desire to achieve professional success. That will be the spirit of business in the future"—Louis D. Brandeis.[1]

Antitrust law is not just a set of economic principles which is applicable to a particular industry and which is confined to set limits on its application; rather, "as a movement, antitrust is cyclical […] antitrust has not been static, as a body of law, because it is addressed to markets that are dynamic and diverse".[2] Diversity, flexibility and efficiency are the main features of antitrust law. Diversity on a market should promote competitiveness and innovation, *i.e.* various market players bring new ideas which are likely to increase productivity on a relevant market. Flexibility is reflected more in the rules and principles of antitrust itself, *i.e.* the law should be flexible and adaptable in order to keep pace with developments such as globalisation and the emergence of new economy markets. Lastly, efficiency is a key to market success and development, *i.e.* only efficiently performing markets can provide consumers with maximum welfare. It has been argued that antitrust law is also "an expression of a social philosophy, an educative force, and a political symbol of extraordinary potency".[3] Therefore, antitrust law should be perceived as a flexible and necessary tool for controlling markets which embodies various notions, principles, rules and traditions derived from historical events and economic and political influence.

[1]Brandeis, L., D., *The Curse of Bigness* Miscellaneous Papers (The Viking Press, New York: 1934), p.40.
[2] Sullivan, E., T., *The Political Economy of the Sherman Act: The First One Hundred Years* (Oxford University Press, New York, Oxford: 1991), at p.4.
[3] Bork, R., H., & Bowman, Jr., W., S., "The Goals of Antitrust: A Dialogue on Policy. The Crisis in Antitrust" [1965] 65 Colum. L. Rev. 363 at p. 364.

1.1 Aims of the thesis

This thesis examines the extent to which the 'size' and 'bigness' of a firm are central to the establishment of dominance under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and, as a comparison, of monopoly under Section 2 of the Sherman Act 1890 (the Sherman Act).[4] In order to become subject to either legal provisions, a firm should hold a dominant or a monopolistic position[5] on a relevant market. Antitrust authorities[6] use various factors in order to identify a firm's market status and this thesis studies whether the size and bigness of a firm are one of those factors.

Section 2 of the Sherman Act (Section 2) and Article 102 TFEU (Article 102) permit the condemnation of unilateral anti-competitive action when, subject to other conditions being satisfied, the relevant actor is engaged in 'monopolisation', or is in possession of a 'dominant position'. Despite the employment of almost identical tools for the assessment of dominance or monopoly, differences in the results exist. [7] Neither Section 2 nor Article 102 expand on these requirements; and no indicators as to how 'monopoly' or 'dominance' are to be defined are provided in the primary legislation.

Therefore, a key question for the thesis is why in the application of competition law the EU recognises dominance as potentially arising at market share levels well below those which are in place before monopoly may be found to exist in the US. This thesis submits that the answer lies, at least in part, in different approaches taken towards the 'size' and 'bigness' of firms by the US and EU regimes. Neither of these words is found in the relevant legislation but this is simply a matter of terminology as 'bigness' and 'size' may create opportunities for abuse of dominance or monopolisation.

The originality of this research lies in the fact that it assesses the determination of dominance and monopoly in the EU and US through the application of two factors: size and bigness (both of which are defined below). The research into US antitrust law has

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[4] The precise research question is addressed in 1.4. below.

[5] According to Section 2, a firm can also become subject to its prohibitions if it attempts to monopolise.

[6] For the purposes of this thesis, 'antitrust authorities' relate to both the US Department of Justice (DOJ), the Federal Trade Commission (FTC) and the Commission of the European Union (the Commission). Furthermore, 'antitrust law' includes US antitrust law and EU competition law. 'Dominance' is used in the context of EU competition law and 'monopoly' is used in the context of US antitrust law, unless specified otherwise.

[7] Gifford, D., J., & Kudrle, R., T., "European Competition Law and Policy: How Much Latitude for Convergence with the United States?" [2003] The Antitrust Bulletin 727 at p. 732.

revealed that the word ‘size’ is used in various antitrust law cases, while the word ‘bigness’ is prevalent in academic writings. Meanwhile, research into the EU competition law on dominance did not reveal any use of either ‘size’ or ‘bigness’ in either case law or literature. Furthermore, no academic work is found to provide a comparative approach to the role ‘size’ and ‘bigness’ play in the assessment of dominance and monopoly in the EU and US. This thesis adds to the literature by offering both a comparative analysis of the assessment of dominance and monopoly in the EU and US, in general, and providing a focus on the importance of ‘size’ and ‘bigness’, in particular.

1.2. Terminology and Concepts: Dominance, Size, Bigness and Market Power

For the purposes of this research, the concepts of dominance, market power, size of a firm and bigness are defined separately.[8]

1.2.1. Dominance

The concept of a dominant position is a unique term which only exists in EU competition law. In *United Brands*, dominance was defined as “a position of economic strength”[9] on a relevant market. Dominance of a firm is assessed by two factors:[10] first, by the existence of a large market share;[11] second, the Commission takes other factors into account. Therefore, the combination of both elements will lead to the establishment of dominance for the purposes of Article 102. For the purposes of this research, the size of a firm is defined with reference to the size of a firm’s market share; bigness is defined by reference to the additional factors used by the Commission to identify dominance.

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[8] It should be noted from the outset that, for the purposes of clarity, a firm which possess both the size and bigness will be referred in this thesis as a large firm.
[9] Case 27/76, *United Brands* v *Commission* [1978] ECR 207, para. 65.
[10] Despite the fact that ‘dominance’ is used by EU competition law and ‘monopoly’ is used in US antitrust law, both terms are not interchangeable. However, when this thesis is employing both terms in the context of Article 102 and Section 2, they should be seen as having the same meaning, *i.e.* a firm with economic power. Therefore, for the purposes of this research, ‘bigness’ and ‘size’ are also considered as potential elements of the definition of monopoly under Section 2.
[11] Case 85/76, *Hoffmann-La Roche & Co* v. *Commission* [1979] ECR 461, para. 41.

1.2.2. Size

In the context of antitrust law, the word 'size' was firstly mentioned in *US Steel*[12] where the Supreme Court responded to the government's contentions that Steel's size contributed to its monopolistic growth and, therefore, monopolisation. Without direct reference, Steel's size was inferred based, according to the government, on the combination of firms which went under the corporation; thereby, granting the corporation with an unlawful monopoly power.[13] No economic assessment was offered at the time; therefore, the entire analysis was conducted based on the facts *albeit* in a very concise and shortened manner.

The subsequent influence of economics on antitrust law transformed "the fear from a concern about absolute size to one of relative size (market shares)";[14] with the latter is now being measured by market shares. Therefore, in US antitrust law, if a firm has ninety percent market share it is enough to infer market power; whilst, sixty or sixty-four percent might not be enough to trigger the application of Section 2.[15] Following this, it can be presumed that seventy percent market share[16] could be seen as a threshold where Section 2 might become applicable. In EU competition law, on the other hand, forty percent market share is seen as a threshold below which dominance is unlikely to exist.[17]

It should be noted from the outset that the way 'size' is perceived by antitrust authorities, is different from the way size may be assessed for other purposes. For instance, it has been suggested that "size approximation must be based on volume sales, capital investment, number of transactions, gross margin, or similar measures"[18] but, on the other hand, the Financial Times measures the size of a firm as being determined by its market value as compared with other firms irrespective of the market on which the particular firm operates.[19] The boundaries of the relevant market play a vital role in the determination of

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[12] *United States v United States Steel Corp* 251 US 417 (1920).
[13] Steel's monopoly power was in general assessed, in addition to its size, by its capital and power of production--*United States v United States Steel Corp* at p.450.
[14] Orbach, B., & Rebling, G., C., "The Antitrust Curse of Bigness" [2011-2012] 85 S. Cal. L. Rev. 605 at 605.
[15] *US* v *Alcoa* , 148 F.2d 416 (2nd Cir. 1945) 424.
[16] For instance, *US* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953)—seventy-five percent was enough to infer market power;
[17] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009/C 45/02, para. 14. The Commission, however, reserves the right to investigate a firm even below forty percent market share—see Chapter 4.
[18] Douglas, E., "Size of Firm and the Structure of Costs in Retailing" [1962] 35(2) The Journal of Business 158 at p. 159.
[19] See Chapter 7.

the firm's size in the antitrust analysis. In the early US case law on monopoly, 'size' was an aggregation of all factors which made that particular corporation as being 'too big to handle'.[20] It was mentioned earlier, that initially US antitrust law had dealt with an absolute corporate size where a firm was undoubtedly large in every possible way.[21] The breath of their capacity and ability to disregard rules were predominantly as a result of their size and influential market position.

1.2.3. Bigness

Like with the word 'size', 'bigness' comes from US antitrust law. Unlike 'size', however, 'bigness' was never expressly referred in the selected US antitrust law cases; rather, the term became an implied description of large trusts and corporations. EU competition law does not have any reference to the definition of bigness *albeit* offering a clear definition of Small and Medium Enterprises (SMEs). [22] This could only be explained by the fact that 'bigness' is a relative word; therefore, the difficulty in placing 'bigness' into a one single definition becomes undeniable.

Stigler perhaps provided the best explanation of bigness,

> "Bigness in business has two primary meanings. First, bigness may be defined in terms of the company's share of the industry in which it operates […] Second, bigness may mean absolute size—the measure of size being assets, sales, or employments as a rule".[23]

Stigler's definition of bigness can be interpreted as carrying two main explanations of bigness. First reflects modern assessment of market power by considering firm's market shares. According to Stigler,[24] a firm which has an absolute big size, *i.e.* Stigler's second

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[20] See Chapter 7.
[21] Standard Oil Trust is the best example of an absolute corporate size—see *Standard Oil Co. of New Jersey* v. *United States* 221 US 1 (1910).
[22] "Small and medium-sized enterprises (SMEs) are non-subsidiary, independent firms which employ fewer than a given number of employees [with] 250 employees, as in the European Union […] while the United States considers SMEs to include firms with fewer than 500 employees. Small firms are generally those with fewer than 50 employees […] Financial assets are also used to define SMEs"—OECD, 2005, OECD SME and Entrepreneurship Outlook: 2005, OECD Paris, at p. 17.
[23] Stigler, G., J., "The Case Against Bigness", [1952] Fortune, May, at p.123.
[24] *Ibid*, at p.123.

definition of bigness, may still be small if a market is wide and vice versa.[25] Whilst, second type of bigness includes various factors which reflect firm's overall size and which makes bigness absolute. [26]

Furthermore, large firms can be described as firms which "usually possess larger (organisational and technological) experience; they have well-established relationships with suppliers, customers, and distribution networks; and they usually have (access to) financial capital".[27] This description applies to firms which have not only established their presence but which have also achieved a certain level of recognition on a market and this definition corresponds with Stigler's perception of bigness.

In a globalised world, all firms which operate in multinational markets are of a considerable size, however measured. Their size becomes their asset as it correlates with success and their ability to do business. Such firms become well-known market players.[28] The appearance of multinational corporations which deliver their products and services into various markets is a reality of the 21st century; Google, for instance, is one of the best examples of such reality.[29] Bigness of such firms is not even disputable and their economic power is not only evidenced by market shares but also by other various indicators.[30] The public do not even need to have knowledge about such firms' market shares or turnover to consider those firms as being large. These firms can be labelled as *de facto* monopolists of absolute size with economic market power. There are other firms, however, which are not large on a worldwide market but which are getting too big for the particular market on which they operate. Therefore, bigness can be split into two groups, first, include firms which are considered to be *de facto* monopolists and second, firms which are growing very fast in terms of size and market influence, both on domestic and worldwide markets.

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[25] This reinforces the argument that in antitrust law, the narrower a market is, the larger (or more dominant) a firm gets—see Chapters 5 and 6 with reference to the case study.

[26] According to Stigler, both types of bigness overlap as some firms can have large market shares relative to their relevant markets is addition to absolute bigness due to the number of assets, sales and employees--Stigler, G., J., "The Case Against Bigness" at p.123.

[27] Blees, J., Kemp, R., Maas, J. & Mosselman, M., "Barriers to Entry: Differences in Barriers to Entry for SMEs and Large Enterprises", Scientific Analysis of Entrepreneurship and SMEs, Zoetermeer, May 2003, at p. 135.

[28] For example, Microsoft Corp. and Google Corp. For the EU antitrust proceedings against Microsoft Corp., see Case T-201/04 R, *Microsoft Corporation* v *Commission* [2005] judgment of 17 September 2007. See also the summary of the Commission's investigation on: <http://ec.europa.eu/competition/sectors/ICT/microsoft/investigation.html>. For the US antitrust proceeding against Microsoft Corp., see *United States* v *Microsoft Corporation* 253 F.3d 34 (D.C. Cir. 2001).

[29] The case against Google is examined in Chapter 7.

[30] *E.g.*, market value, number of employees and products, industry standard, network effect, volume sales and so on.

Therefore, for the purposes of this research, bigness is going to be assessed by all commercial advantages and privileges a firm has over its competitors; and these advantages and privileges, in this thesis, will be referred as 'other factors'.[31] These factors which are used to define bigness, as derived from the case law, vary; therefore, it is difficult to decide which one would be the best to address the research question. EU case study revealed that the courts are willing to consider all privileges a firm has in its possession, for instance, access to capital, advertising, economies of scale, vertical integration, Research & Development (R&D) and Intellectual Property Rights (IPRs). Some of those privileges can be achieved illegally like, for example, in *Standard Oil* where the Supreme Court found an illegality behind the formation of a trust.[32] However, bigness may also be achieved via business acumen and success which, in turn, provide a firm with commercial, technological and financial advantages over its competitors. Such firms, for the purposes of this research, are large in antitrust law context and, therefore, such firms become the focal point of the analysis.

1.2.4. Market Power

Antitrust law offers clear economic based definition of market power. In US antitrust law, market power is "the power to control prices or exclude competition"; [33] whilst, in EU competition law market power is an ability "to raise price above the competitive level".[34] Both definitions feature a firm's ability to price above the competitive level thereby excluding competition. Therefore, in antitrust law, dominance or monopoly will not be found unless a firm possesses market power in a relevant market. The clear similarity between the EU and US is that for a firm to be able to price anti-competitively, such a firm needs to have power. 'Bigness' and 'size', in this context, may place a firm in a superior market position, thereby, granting it with a required level of market power. Antitrust law relies on market shares and, possibly, other factors; therefore, the larger the firm the more factual evidence antitrust authorities and the courts rely on to infer the existence of market power. Additionally, since EU competition law subjects firms with low market share to its prohibitions and includes almost all of a firm's privileges into the examination, its growth

[31] It should be noted that antitrust law may label 'other factors' as barriers to entry and it will be discussed in Chapter 3.
[32] *United States v United States Steel Corp*.
[33] *United States* v *E. I. du Pont de Nemours & Co.,* 351 US 377, 391-92, 76 S. Ct. 994, 1005 (1956).
[34] Landes, W., M., & Posner, R., A., "Market Power in Antitrust Cases" 94 Harv. L. Rev. 937 1980-1981, at p. 937.

and further expansion and acquisition of various assets can lead to an assumption that such a firm is dominant. If the Commission holds an antagonistic approach to large firms, then this strategy always leaves space for the Commission to intervene.[35] This scenario could also be justified if the Commission fears size and believes that bigness provides a firm with an opportunity to abuse; then having flexibility in the assessment of market power becomes an important part of the strategy. Therefore, for the purposes of this research, market power is defined in a conventional way and 'bigness' and 'size' are seen as possible elements in the assessment of market power and, accordingly, dominance.

1.3 Historical Context and Background

US antitrust law and EU competition law have different origins. At the end of the 19th Century the US was dominated by private economic power which resulted in anti-competitive practices leading to poor market performance and harm to consumers. Private economic powers, in this context, were large trusts or corporations which had considerable, if not total, control over markets they operated on. The size of those trusts, in that sense, was absolute and it had triggered serious concerns on the need to control the spread of monopolies in the US market.

The EU, on the other hand, was created in order to unite countries and uphold peace after World War II (WWII). The political instability and damage caused by the war had required extreme changes in order to prevent further aggression and creation of new superpower nations. For the purposes of fulfilling the objectives of the new EU project, competition law project was tasked with promotion of market integration and protection of the internal market. Therefore, EU competition law was drafted with the above purposes in mind and with a certain influence from US antitrust law, as discussed later.

Significant differences behind the creation of EU competition law and US antitrust law have certainly influenced the way the law is applied by antitrust authorities. The US was significantly affected by large firms which led to the adoption of the Sherman Act, whilst

[35] The Commission has been criticised on various occasions for pursuing an interventionist policy "with the fundamental, broad objective of market integration underlying all policy considerations"-- Willimsky, S., M., "The Concept(s) of Competition" [1997] E.C.L.R. 54 at p. 55.

the EU did not have the same problem. This part of the US and EU history is just a foundation for further examination and it creates an important starting point for this thesis.

US antitrust law has an extensive list of academic writings on 'size' and 'bigness' in the context of market power.[36] EU competition law, on the other hand, does not.[37] This fact can lead to an assumption that EU competition law has no concerns about size and bigness; however, this thesis argues otherwise; the thesis considers that the Commission has developed a certain level of distrust for dominant firms with market power and the EU courts fully support the Commission. The fact that EU competition law, and in particular Article 102, is applied very strictly may also lead to an established tendency towards large firms being confined once their power reaches a certain level.

The most prominent US anti-bigness commentator was Louis Brandeis[38] whose belief that bigness of corporate size or a monopoly led mostly to inefficiencies which resulted in his employment of the term.

Brandeis' position toward bigness or corporate size could be summarised by the quote from his famous essay *The Curse of Bigness*,

> "Regulation is essential to the preservation of competition […] Unlicensed liberty leads necessarily to despotism or oligarchy. Those who are stronger must to some extent be curbed. We curb the physically strong in order to protect those physically weaker".[39]

Brandeis wrote in support of regulation of competition and eradication of illegal trusts[40] which were heavily featured in *The Curse of Bigness*. He did not believe that mere size could be efficient and bring success to the US economy as he perceived bigness as a threat

[36] This research has revealed a considerable number of journal articles and books where the size of a firm and bigness were discussed in the context of Section 2. Despite the fact that this research might not cover all available resources, all the relevant sources are discussed throughout this research.
[37] The research on EU competition law and its assessment of bigness and size in the context of market power under Article 102 has not revealed extensive list of literature. This fits with the topic of this research as terms 'bigness' and 'size' are purely American; therefore, this research was focusing on the context and various sources which discussed market power.
[38] Brandeis, L., D., *The Curse of Bigness.*
[39] *Ibid.* at p. 110.
[40] *E.g.*, the Newspaper Trust, the Writing Paper Trust, the Upper Leather Trust, the Sole Leather Trust, the Woolen Trust, the Paper Bag Trust and the International Mercantile Marine.

to market liberty and prosperity. Brandeis' opinion[41] on bigness has inspired the writing of this thesis as *The Curse of Bigness* is still regarded as a powerful piece of academic work on the matter.[42]

Business actions of powerful firms may be seen as being aggressive due to the level of influence such firms have on markets. Their dominance may become their own obstacles to making, for instance, lawful price decisions because the larger the firm the more limitations are placed by antitrust law. These firms may reach such a significant size for various reasons and not all those reasons are necessarily unlawful. It has been argued, for example, that "with every dollar we spend we decide which companies shall grow and which shall shrink and die […] that's how giants are born".[43] In this observation, the consumers are seen to take some responsibility for the growth of certain firms. However, the observation is not without flaw. Sometimes consumers may purchase goods due to the lack of choice caused by a monopolist being present on a market. In such situations, antitrust intervention is very important. It will be seen that in the US, there was recognition that some firms grow due to their business acumen and skills and, in that case, such firms should not be punished. The dilemma here lies in the fact that a firm should be allowed to enjoy fruits of its labour without excessive intervention from government. Meantime, power indeed may be easily abused especially if a firm reaches the point when its size and bigness become its primary bargaining power by, for instance, excluding competitors or setting unfavourable terms and conditions in a contract with other firms. It is undeniable that it might be difficult to distinguish between legal and illegal growth; however, US antitrust law seems to be tackling this well because over-enforcement of antitrust rules might itself lead to consumer detriment.

Thus, in the application of antitrust rules to firms with market power, the discussion of size does not appear to be relevant even though a general distrust of large firms with significant market power cannot go unnoticed, especially in the EU. It is submitted that there is, perhaps unconsciously, an assumption that the size of a firm does matter when antitrust rules are applied to a single firm's behaviour.

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[41] See, Schroeder, M., M., "The Brandeis Legacy" [2000] 37 San Diego L. Rev. 711; Burnett, Jr., D., D., L., "The Brandeis Vision" [1998-1999] 37 Brandeis L.J. 1.

[42] It has been argued that Brandeis' "approach to business size has left its mark on modern antitrust law" in Orbach, B., & Rebling, G., C., "The Antitrust Curse of Bigness" at p. 624.

[43] Adams, P., *Is Bigness Bad?* (Republic Steel Corporation, New York: 1949) at p. 15.

1.4 Research Questions and Methodology

This thesis examines the extent to which the 'size' and 'bigness' are central to the establishment of dominance under Article 102 and, as a comparison, of monopoly under Section 2. In order to pursue this examination, it is important to identify and answer whether EU competition law holds a hostile approach to firms with market power by setting out low market shares to determine firms' size and admitting firms' advantages over their competitors as evidence of their bigness. If yes, the next question is to identify the reasons behind the Commission's and the European Courts' distrust of firms in a dominant position. Any evidence gathered will be compared with the position of the US toward monopoly under Section 2.

The thesis is therefore focused on the following research questions:

a) Whether a firm's size and bigness are central to the establishment of the existence of dominance and monopoly in the EU and US?
b) Why the EU and US, despite having considerable similarities in the tools used for the assessment of market power, apply different market share thresholds for the finding of a dominant position and monopoly?
c) What role do 'other factors' play in the finding of dominance and monopoly?
d) Whether the Commission and the EU courts hold an interventionist and antagonistic approach to firms with private economic power and, if yes, what are the reasons for such a strict approach and general distrust toward dominant firms?

The answers to the above questions will enable conclusions to be reached on the extent to which the 'size' and 'bigness' are central to the establishment of dominance under Article 102 and the reasons behind such conclusions.

It should be noted from the outset that this thesis is neither pro nor anti-bigness and, unless an analysis of every industry is conducted, it is impossible to estimate whether bigness and, in fact, size benefit markets.[44]

[44] Arguably, high technology and pharmaceutical markets may be in need of large firms with substantial resources available at their disposal.

The historical formation of EU competition law and US antitrust law is used as a starting point in demonstrating the approaches taken in each jurisdiction to the use of private economic power in markets. Both jurisdictions were formed for entirely different reasons which left an imprint on the way the EU and US deal with dominant firms and monopolists. In particular, it will be examined whether differences in the reasons behind the adoption of EU and US antitrust provisions provide any explanation for divergence in the determination of the extent of market power which must be present before Section 2 or Article 102 may be applied.

The aims and objectives of antitrust law, as shaped by economics, are also going to be examined in order to learn how market power prevents those objectives to be satisfied. Since economics plays an important role in the analysis of market power, it is vital to examine why economics considers market power to lead to inefficiencies.

The undertaken research is doctrinal and comparative. The comparative strategy was chosen due to the globalised level of trade among multinational firms because the same global firm can be subjected to different antitrust rules due to divergence between the EU and US which could lead to inconsistencies, disruption of business transactions, extra financial burden and, possibly, to economic inefficiencies. In addition, the comparison between two jurisdictions will help to identify if the EU is in fact pursuing anti-bigness approach by setting low market share thresholds, using all advantages in the firm's possession to reinforce the finding of market power and, possibly, defining relevant markets narrowly.

Relevant EU and US case law was selected based on a market share threshold for detailed case study on the assessment of dominance and monopoly respectively. EU cases in which at least a forty percent market share was present, and US cases in which a market share of at least seventy percent was present, provide the evidential foundation for this research. That this evidence skews towards older EU and US cases does not affect the accuracy of the findings. The chosen methodology traces the assessment of dominance and monopoly to its initial application in order better to demonstrate and analyse subsequent developments. In particular, the focal point of the analysis will be placed on a firm's size and bigness in order to see how the two elements were perceived in the past and whether those perceptions changed over time. Notwithstanding the influence of economics on antitrust law, it will be seen that the assessment of dominance and monopoly remained unchanged and there are no indications that change is imminent. It will be seen that the study of US cases stops at *du Pont* (1956) and EU cases at *British Airways* (2003). The focus of the present research has been on the development of the rules on the assessment of dominance and monopoly, with analysis starting from the earliest cases. A very thorough selection procedure was then applied in order to identify those cases which shaped the development of approaches to dominance and monopoly in the EU and US. Since this research's methodology was to focus on the development of the rules on the assessment of dominance and monopoly, the analysis started from the earliest case. Then, a very thorough selective procedure had to be applied in order to identify those cases which shape the development of dominance and monopoly in the EU and US.[45] A review of post-1956 US cases and post-2003 EU cases demonstrated that their inclusion in the analysis set out in this thesis would not significantly contribute to the research, and that their omission would not detract from the validity of the research presented here.

As discussed earlier, a noticeable gap exists between the EU and US market share thresholds and, for the purposes of the analysis, US antitrust law's market share is taken as seventy percent whilst the EU competition law's market share as forty percent. This methodology permits analysis as to whether other factors play any role in the assessment of dominance and monopoly in addition to a market share level which is already considered to be at least indicative of monopoly or dominance. This approach will reveal that the EU and US have different approaches to size, in respect of which market share threshold disparities are simply one indicator of difference. The EU and US approaches to bigness are less evident; therefore, the chosen methodology seeks to permit an analysis of whether there is also a disparity in the use of 'other factors' or bigness in the assessment of a firm's dominant or monopolistic position. The latter assessment becomes even more acute when a firm's dominant or monopolistic position is presumed based on the number of market shares in a relevant market. Lastly, this methodology will also show that cases the Commission has dealt with in the past will not become subject to Section 2, and vice versa, that firms with market shares above seventy percent will automatically be presumed to hold a dominant position in the EU. This approach will be further supported by comments and arguments of various economic and legal literatures for the purposes of clarification, discussion and criticism.

[45] Please not that in addition to the selected case law, this thesis also includes other EU and US cases.

1.5 Structure of the Thesis

The thesis consists of eight chapters. Chapter 1 introduces the thesis and Chapter 8 gathers the findings of the preceding chapters.

Chapter 2 of the thesis provides the historical context for the assessment of market power in the EU and the US and thus seeks to answer the first research question The political and economic situations which led to the adoption of two main antitrust legislations is at the core of Chapter 2. The chapter also highlights the original aims and objectives of antitrust law before the influence of economics began to be felt. It is important to learn the reasons behind the adoption of the TFEU and the Sherman Act in order to trace the development of the law on market power in the following chapters. In other words, the importance of history cannot be ignored as it offers the first explanation of the manner in which dominance and monopoly are determined and regulated in the EU and the US.

Chapter 3 focuses on the main economic principles applied to the assessment of market power in order to understand why economics considers market power to be contrary to the main goals of antitrust law and thus provide answers to the second research question This chapter does not provide any economic analysis of 'size' or 'bigness'; however, it covers, *inter alia*, various types of economic efficiencies, different economic schools of thought and two economic models of competition in order to show how markets perform for the consumer benefit. However, the thesis is a legal rather than an economic-based project and as such economics is only discussed where necessary and for the sake of completeness.

The following four chapters seek to answer the third research question.

Chapter 4 provides a preliminary discussion of the identified economic and non-economic tools developed to assess market power in the EU and US. The analysis is based on cases and academic literature and it creates a framework for the specific case studies that follows in chapters 5 and 6. The delineation of a relevant market and the application of market shares and barriers to entry are heavily featured in Chapter 4.

As already stated, chapters 5 and 6 discuss selected cases on market power in order to learn how a firm's 'size' and 'bigness' are considered by the Supreme Court, the European Commission and the EU courts with US cases analysed in Chapter 5 and EU cases in

Chapter 6. Both chapters examine only selected cases and start with the oldest moving to the most recent case. After careful consideration, the following US cases were chosen for the purposes of this research: *Standard Oil,*[46] *US Steel Corporation,*[47] *Swift,*[48] *Alcoa,*[49] *United Shoe*[50] and *du Pont*.[51] These cases are used as primary sources of the Supreme Court's analysis of the finding of monopoly power. Chapter 6 contains a number of selected EU cases[52] which are used as a source of evidence of the way EU competition law addresses dominance: *Continental Can,*[53] *United Brands,*[54] *Hoffmann-La Roche,*[55] *Michelin I,*[56] *British Airways,*[57] *Hilti*[58] and *AKZO.*[59] The case studies are structured in the way which focuses on the discussion of bigness and size in the context of establishing market power.

Chapter 7 gathers and reassesses some points covered in the previous chapters; for the sake of clarity a certain level of repetition is unavoidable. The chapter sets out arguments in relation to the possible benefits from having large firms operating on a market. This will be further linked to the discussion and to a brief analysis of the recent proceedings against Google Corporation (Google) which are taking place in the EU and US.

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[46] *Standard Oil Co. of New Jersey v. United States*, *supra* para. 1.2.2.
[47] *United States v United States Steel Corp*., see para. 1.2.2. *supra.*
[48] *United States* v *Swift & Co.,* 286 US 106 (1932).
[49] *United States* v *Aluminium Co of America (Alcoa)* 148 F.2d 416 (2nd Cir. 1945).
[50] *United Shoe Machinery Corporation* v *United States, supra* para. 1.2.2.
[51] *United States* v *du Pont & Co.* 351 US 377 (1956).
[52] *Microsoft* would have been another case relevant for this research; however, it was deemed unnecessary to study the General Court's decision despite the fact that Microsoft was a large US corporation which undeniably possessed both elements of dominance: size and bigness. This is explained by the fact that Microsoft held Intellectual Property Right (IPR) over its product which automatically contributed to a dominant position on a relevant market. In other words, the presence of Microsoft's copyright and its large size made it easier for the Commission and the GC to establish the existence of a dominant position. *Hilti*, on the other hand, was considered to be a better case for this research despite the fact that it also had IPRs. In *Hilti* market shares were lower and the case was the example of a narrow definition of a relevant market. *Microsoft* is however referenced on several occasions throughout the research.
[53] Case 6/72, *Europemballage Corp & Continental Can Co Inc* v *Commission* [1973] ECR 215.
[54] Case 27/76, *United Brands* v *Commission*, *supra* para. 1.2.2.
[55] Case 85/76, *Hoffmann-La Roche & Co AG.* v *Commission*, *supra* para. 1.2.2.
[56] Case 322/81, *NV Nederlandsche Banden-Industrie Michelin* v *Commission (Michelin I)* [1983] ECR 3461.
[57] Case T-219/99, *British Airways* v *Commission* [2003] ECR II-5917.
[58] T-30/89, *Hilti* v *Commission* [1991] ECR II-1439.
[59] Case C-62/86, *AKZO Chemie BV* v *Commission of the European Communities* [1991] ECR I-3359.

Chapter 2: Historical Evolution of EU and US Antitrust Law

The historical background of antitrust law is undeniably an important starting point for this research with EU and US antitrust law creating a foundation for further analysis on the establishment of dominance and monopoly respectively. This chapter relies on the main events which led to the adoption of the Sherman Act and TFEU with a primary focus on law of monopoly and dominance in order to identify the reasons behind antitrust intervention with private economic power. The importance of antitrust as an effective tool against monopolisation and abuse of dominance is going to be highlighted along with the primary aims behind antitrust intervention.

US antitrust law was heavily featured with private economic power and the approach antitrust authorities adopted to fight market power in the past became an important foundation to the way monopoly power is treated in the present. Trusts and corporations were deemed to be harmful to competition in the US and several attempts were made to put them under governmental control.

EU competition law did not have an issue with private economic power at first. The EU was created for predominantly political reasons and its competition law was created based on common knowledge and certain experience derived from, as argued, US antitrust law. It is with the growth of the EU and the expansion of markets that antitrust law took a more serious role in promotion of the internal market.

2.1. History of US Antitrust Law

The era of US antitrust law, as a positive body of law, begun with the rapid formation of monopolies.[60] Monopoly grants its holder with an exclusive privilege which becomes its distinguishing feature. At first, it was a legal privilege granted by the state and then transformed into exclusively maintained private privilege following individuals' own efforts and success.[61] In any case, despite all the changes monopoly went through, it has always been perceived as an obstacle to the liberty of the marketplace, to equality and to fairness.

The period from 1890 to 1914 was the most crucial time in the creation of the most significant principles of antitrust law. Before the formation of antitrust policy as a positive law, there was a significant debate in Congress, "in a historical period rife with political and economic conflict".[62] Public outcry against the misuse of private economic power required a solution that would be appropriate to the market situation in the US at that time. There was a balance that was required to be upheld and the US policy makers turned to various jurisdictions to derive an example of the positive law that might address the public's concerns.

The US policy makers tried to follow a pattern of balancing the 'public interest' and 'freedom of contract' in the law when deliberating on the future antitrust rules. The main concern was the fact that there was a thin line between two principles, itself creating an obstacle to finding the appropriate balance. This was as a result of the prevalent view in the US where the market was seen a place where any player was allowed to contract without government restrictions, the notion at the heart of *laissez-faire* economics. This is strongly related to the principle that a party should be allowed to reap the profits of its own success. The dilemma starts when the question arises as to whether a private party is willing to share success with the public, when the 'public interest' principle becomes of paramount importance. Peritz argued that "competition policy, […], has long been one way of

[60] The earliest definition of monopoly was provided in 1598 as "an engrossing of any merchandise into ones hand that no man may sell but he, or the place where such Monopolies are kept"-- John Florio's 1611 Italian/English Dictionary: Queen Anna's New World of Words, p. 321.
[61] Letwin, W., L., "Congress and the Sherman Antitrust Law: 1887-1890" [1956] 23(2) University of Chicago Law Review 221 at p. 226.
[62] Peritz, R., J., R., *Competition Policy in America, 1888-1992: History, Rhetoric, Law* (OUP, New York, Oxford: 1996) at p.9.

mediating tensions between our commitments to liberty and equality".[63] In this context, 'liberty' reflects the recognition of the principle that markets should be generally free from government intervention, except where the government should protect the market and its stakeholders from the misuse of private economic power.

Whilst the maximisation of consumer welfare is posited as being the only legitimate goal of US antitrust law,[64] antitrust in fact encompasses a number of other different goals.[65] The maximisation of economic efficiency through the promotion of healthy competition is also believed to be an important aim of antitrust.[66] The importance of having competition on a market should not be underestimated as "competition provides society with the maximum output that can be achieved at any given time with the resources at its command [...] competition is desirable, therefore, because it assists in achieving a prosperous society and permits individual consumers to determine by their actions what goods and services they want most".[67] Nevertheless, it was argued that when the courts have to choose between the promotion of consumer welfare and maximisation of economic efficiency, the preference will be given to the former as it is the fundamental goal of antitrust.[68] Therefore, these goals of antitrust had become the core foundation behind antitrust intervention and courts' reasoning in their control of private economic power.

2.1.1. English Common Law

The principles and rules of the English common law on monopolies were used as a basis for the creation of antitrust rules in the US which focused on four different types of violation: the law on monopolies; the law on forestalling, engrossing, and regrating; the law on contracts in restraints of trade; and the law on combinations in restraint of trade.[69]

[63] *Ibid.* at p.3.
[64] Bork, R., H., *The Antitrust Paradox: A Policy at War with Itself* (The Free Press, New York: 1993), at p. 51.
[65] E.g. political and moral goals, see Hofstadter, R., "What Happened to the Antitrust Movement?" re-printed in Sullivan, E., T., *The Political Economy of the Sherman Act: The First One Hundred Years* (Oxford University Press, New York, Oxford: 1991).
[66] *Ibid.* at p.24.
[67] Bork, R., H., & Bowman, Jr., W., S., "The Goals of Antitrust: A Dialogue on Policy. The Crisis in Antitrust" at p. 365.
[68] Kirkwood, J., B., & Lande, R., H., "The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency" [2008-2009] 84 Notre Dame L. Rev. 191 at p.192.
[69] For the purposes of this thesis, the discussion is only going to be focused on the law on monopolies.

There was a general perception that common law always protected freedom of trade and condemned monopoly. This perception was introduced by Sir Edward Coke, who significantly contributed to the development of common law. It was Sir Edward who argued that Magna Carta outlawed monopoly, basing his argument on its 29th and 30th Articles.[70] Common law, on the other hand, had only begun to oppose monopoly at the end of the sixteenth century.[71] Over time, English common law underwent a series of changes and adjustments in response to the economic and political situation at the time, reflecting the community's desires and preferences.[72] The congressmen who were involved in drafting the Sherman Act were also affected by the then current economic and political situation; thereby, interpreting the common law rules in the way which appeared to them to be most appropriate in the prevailing circumstances of late 19th Century America.

Initially, for example, the common law did not oppose monopolies granted by monarchs. Monopoly was originally an exclusive privilege granted by monarchs to merchants in the form of the letter-patent on the payment of generous fees. At that time, the letter-patent had a very broad scope,[73] such that it was impossible to trade equally with the letter-patent holders. It was not until the end of the sixteenth century that the unfettered discretion of the monarch to grant letter-patent monopolies was controlled. By the end of the seventeenth century, the letter-patents were only given to those who contributed to the economic development. It has been argued that the shift in the tendency in granting the letter-patent monopoly changed mainly due to "disturbances within the monopolistic system administered largely by the guilds, and by objections [...] to the political power which the crown exercised in granting them".[74] This shows, therefore, that the common law's negative attitude toward monopoly was developed over time which, in turn, shows that the common law had to go through various stages of social and political development in order to start recognising that what monopoly represented was, in fact, an offence.

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[70] Wagner, D., O., "Coke and the Rise of Economic Liberalism" [1935] 6(1) The Economic History Review 30 at p.39.

[71] Letwin, W., L., "The English Common Law Concerning Monopolies" [1953-1954] 21 U. Chi. L. Rev. 355 at p.355.

[72] Letwin, W., *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Edinburgh University Press, Edinburgh: 1967) at p.18.

[73] Walterscheid, E., C., "The Early Evolution of the United States Patent Law: Antecedents (Part 1)" [1994] 76 J Pat.& Trademark Off. Soc'y 697 at p.700.

[74] Letwin, W., *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* at p. 23.

The first case on monopoly which was recorded and subsequently cited was *Davenant v Hurdis*[75] ('The Merchant Tailors' case). This case was the first example of the judicial examination of the monopolistic power exercised by the guilds.[76] This case, in particular, was concerned with the question of whether the by-law, "An Ordinance for Nourishing and Relieving the Poor Members of the Merchant Tailors Company" passed in 1571 created a monopoly in the cloth-finishing trade. It was then decided that if the by-law did in fact create a monopoly then it would be void. It was argued that this decision brought an innovative perspective to both the relevant law and economic policy[77] since it raised questions about the relationship between law and monopoly.

The next important case, *Darcy v Allen*[78] ('The Case of Monopolies') was the decision that took the development of the common law of monopolies to the next level. In this case it was held that if a royal grant of patent provided an exclusive privilege of monopoly then it would be invalid. This decision clearly attacked monopoly granted by the royal letter which showed the beginning of the developing recognition of the harm associated with grant of Royal privileges in a commercial context. The attack on the royal prerogative to grant patent letters was not direct; but rather, relying on the fact that the Queen Elizabeth was deceived in her making of the grant.[79] It was argued that during that time, "the right to work was protected by giving each guild a monopoly, and Darcy's grant was condemned not because it was a monopoly and therefore necessarily bad, but because it was a bad monopoly".[80] This shows that initially, the existence of 'monopoly' was generally based on the simplest idea of providing the public with the right to work which, in turn, was achieved by providing the public with monopoly. It seems as if monopoly was not considered as being harmful for the market operation; but rather, being the only means to ensure that the public was protected from outside competitors.

The common law experience, therefore, showed the gradual formation of the law on the control of monopolies.[81] Importantly, it did not stop the power and the spread of

[75] [1598] 11 Co Rep 86a, Moore KB 576.
[76] *Davenant* v *Hurdis,* [1598] 11 Co Rep 86a, Moore KB 576-- It was argued that this case was one of the earliest cases "in which monopolies were outlawed under that name"—see Wagner, D., O., "The Common Law and Free Enterprise: an Early Case of Monopoly" [1937] 7(2)The Economic History Review 217.
[77] Letwin, W., L., "The English Common Law Concerning Monopolies" at p 362.
[78] [1602] 1 Web Pat Cas 1, 11 Co Rep 84b, Noy 173, Moore KB 671.
[79] Letwin, W., L., "The English Common Law Concerning Monopolies" at p 363.
[80] Letwin, W., *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* at p.29.
[81] See also *Ipswich Tailors'* case 11 Co. Rep 53, Godbolt 252 (1614).

monopolies as the common law remedies were insufficient to address fully the problem. It was still an era in which the 'freedom of trade' was controlled by the Crown, the discretion of Parliament, and the Royal Assent. For such reasons, rules on governing competition within the market required more solid form, *i.e.* statutory legislation. In 1624, the Statute of Monopolies was passed which stated that "all monopolies and all commissions, grants, licenses, charters, and letters patents, [...], are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in use or execution".[82] This was the first codified attempt to tackle the monopoly situation in England, and has been described as "'the ancient and fundamental law' against monopolies".[83] Although, it was argued that this attempt was not based on the promotion and protection of competition but rather on "constitutional objections to the power which the Crown presumed in granting monopolies and to the arbitrary reasons for which it had granted them".[84] Gradually private monopolies established by Royal grant were brought under Parliamentary control. Therefore, the Statute of Monopolies did manage to put the fast-growing tendency of private monopolisation under the Parliamentary control; albeit, it neither outlawed nor abolished the spread of corporate monopoly which continued to exclude competitors.

2.1.2. Corporations

In the 19th Century, American markets started experiencing various events which led to drastic changes in the manufacturing industries.[85] This also led to the appearance of a large market which created the possibility for firms to greatly expand the size of their business. It, in turn, created the favourable conditions for the creation of private powers within the certain industries.

Following English common law experience, US antitrust law heavily relied on the common law rules on the control of monopolies. Monopolies tend to take various forms,[86] being different in nature but having similar effects on a market.[87] Monopolies are always

[82] Section I, Statute of Monopolies (21 Jac. I, cap. 3. A. D. 1623-24).
[83] Price, W., H., *The English Patents of Monopoly* (Houghton, Mifflin & Company, Boston and New York: 1906) at p. 34.
[84] Letwin, W., L., "The English Common Law Concerning Monopolies" at p 366.
[85] *E.g.* transportation and communication systems.
[86] *E.g.* patent monopolies which originated from the English history when the Crown was granting privileged "letter patents" in relation to any type of trade.
[87] The relevant economics relating to monopoly power and its exercise is dealt with below.

considered to mean “some sort of unjustified power, especially one that raised obstacles to equality of opportunity”.[88] Over time growing impatience with monopolies led to a public outcry demanding government’s intervention. Interestingly, the public did not really understand the actual harm caused by monopoly; however, the general perception of treating monopoly as evil, a view promoted and reinforced by substantial media coverage led to the public’s antagonistic attitude toward monopolies.

In the period between the founding of the US, and the enactment of the Sherman Act, the US government, although recognising the spread of monopolies, did not interfere significantly in powerful firms’ activities. A firm of a considerable size and which had various advantages over its competitors used to be occasionally referred as ‘big business’ which entailed the idea of a corporate body that took control over an entire industry; thereby, squeezing weaker rivals out of a market. According to Louis Brandeis, big business “is size attained by combination, instead of natural growth, which has contributed so largely to our financial concentration”.[89] This argument signifies an illegality behind a firm’s growth which is going to be discussed by the Supreme Court in a several leading cases under Section 2.[90]

The post-revolutionary political and economic situation did dictate the market environment; thereby allowing powerful firms to play according to their own rules. The establishment of two Banks of the United States[91] in 1791 could be used as an example as it became prominent monopoly in the financial sector. In fact, the first Bank mostly consisted of private business despite the fact that it was regarded as a government bank.[92] One of the Bank’s charters had a non-compete or monopoly clause which required the Federal Government not to create rival banks. Such a clause clearly provided the Banks with an exclusive monopolistic position in the financial market. The attempts to delete the monopoly clause failed and no further attempts were made until 20 years after the operation of the banks was terminated. One of the reasons for their termination related to

[88] Letwin, W., *Law and Economic Policy in America: the evolution of the Sherman Antitrust Act* at p.59.
[89] 1 Brandeis, L., D., *The Brandeis Guide to the World,* Alfred Lief ed. 17 1941 at p.18.
[90] See Chapter 5.
[91] There was also the Bank of North America which was created in 1781 for the purposes of financing the American Revolution in the last half of the 18th Century.
[92] Hammond, B., “Jackson, Biddle, and the Bank of United States” [1947] 7(1) The Journal of Economic History 1 at p.1.

Congress' constitutional powers to create banks.[93] During the renewal of the second Bank of the United States' charter, President Jackson vetoed such a renewal on the grounds that "an exclusive privilege of banking under the authority of the General Government, a monopoly of its favour and support, and, as a necessary consequence, almost a monopoly of the foreign and domestic exchange"[94] was inimical to the public interest. Therefore, President Jackson relied, *inter alia*, on a monopoly clause in the charter in order to justify the refusal to renew the charter.

The economic and social situation in the US at that time required a tighter and codified control over the US markets as they started being affected by the accumulation of wealth and power in the hands of powerful corporations. The 'corporation' was the main example of a firm which possessed both elements of a monopoly power, *i.e.* size and bigness. They had always been disliked by the public due to the common belief that every corporation was monopolistic because it *was* a corporation.[95] The development and growth of corporations was not spontaneous; rather, the political environment along with the development of earlier corporate institutions[96] influenced the formation of the present kind of corporation. [97] The royal monopolies, for instance, could be a substantial contribution to the first business entity that shaped the development of corporations. Most of the large entities which were holding exclusive rights of trade were also considered to be monopolists. For such reasons, due to the fact that large firms were making up the largest part of the private power in the US market, the view developed that all corporations were monopolies.[98] Furthermore, before the nineteenth century corporations were granted monopolies by special legislation which defined their rights and duties. Corporations could not be formed by anyone without permission; therefore, those receiving the permission to form a corporation were granted a pure monopoly over their business. Therefore, the privileges, the separate legal personality, the state's protection and stability could be very appealing factors in favour of incorporation. After considering this, it is unsurprising that the general public was against corporations. At that time, the general public did not benefit

[93] Letwin, W., L., "Congress and the Sherman Antitrust Law: 1887-1890" at p.227. See also: St Clair Clarke, M., & Hall, D., A., *Legislative and Documentary history of the Bank of the United States: Including the Original Bank of North America* (Gales & Seaton, 1832)
[94] President Jackson's Veto Message Regarding the Bank of the United States (Washington, July 10, 1832). Available at: <http://avalon.law.yale.edu/19th_century/ajveto01.asp>.
[95] Letwin, W., *Law and Economic Policy in America: the evolution of the Sherman Antitrust Act* at p.63.
[96] *E.g.* the development of the earliest English corporate entities known as guilds.
[97] Williston, S., "The History of the Law of Business Corporations before 1800" 1-Committee of the Association of American Law Schools, Select Essays in Anglo-American Legal History, [1909] vol. 3.
[98] Letwin, W., L., "Congress and the Sherman Antitrust Law: 1887-1890" at p. 229.

from corporations' business and not any one could incorporate as such a business deal was reserved to very high-ranked and wealthy people. The public's antagonism toward corporations was further supported by the argument that "a corporation may be too large to be the most efficient instrument of production and of distribution"[99] which reflects the economic side of the argument. Despite the fact that at that time, corporations were providing the largest employment positions in the US, they were still perceived as not being beneficial for the both the consumer and the US market.

2.1.3. Trusts

After the Civil War,[100] the public's perception of corporations worsened; therefore, the public started demanding the control of monopolistic corporations by government regulation.[101] The reason behind the increasing public outcry was the rapid development of private corporations which were believed to be entirely monopolistic. One of the most infamous types of monopolistic private corporations were trusts which started to be formed in response to a general price war and market instability. In order to maintain high prices and respond to the market situation, trusts were formed with the purpose of maintaining high prices. Eventually, this brought the US to the era of revolutionary industrialisation. The end consumers were hit by high prices; while small businesses were affected by anti-competitive practices of the leading and powerful firms. For instance, farmers were largely affected by high prices charged on transportation of their goods by railroads. These trusts were, thus, taking the form of business trusts which developed into an excellent tool to take control over the entire industry.

Trusts started to be formed by a major oil corporation, Standard Oil, in 1880, a move which was followed by other oil corporations.[102] A board of the specialised trustees was set up in order to control all Standard Oil's property. In return, stockholders were given trust certificates for each share of the company's stock, while the company's profits were given to trustees who in turn set the dividends. This system ensured a complete monopoly for Standard Oil. Despite all the concerns and public outcry about the harm created by

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[99] 1 Brandeis, L., D., *The Brandeis Guide to the World* at p.19.
[100] 1861-1865.
[101] Letwin, W., *Law and Economic Policy in America: The evolution of the Sherman Antitrust Act* at p. 67.
[102] "The Cotton Oil Trust was formed in 1884, the Linseed Oil Trust in 1885, the Sugar Trust and the Whiskey Trust in 1888, the Envelope, Salt, Cordage, Oil-Cloth, Paving-Pitch, School-Slate, Chicago Gas, St Louis Gas, Paper Bag and New York Meat Trusts in 1889", Carey, R., "The Sherman Act: what did Congress intend?" [1989] 34 Antitrust Bull. 337 at p.339.

monopolistic trusts, the Sherman Act historian John Davidson Clark argued that the public was not 'hysterical', but was, rather indifferent to the trusts.[103] There were various arguments about public's reaction toward trusts; however, the fact that trusts did affect the US economy was an undisputable fact. It was argued, for example, that financial concentration was one of the most harmful effects of trusts as they destroyed financial independence by providing only a few banking entities with a privilege to undertake trusts' finances.[104] The access to the profits by the general public and the ability for others to compete with such large private corporations as trusts was the distinctive feature of the trusts' monopolistic position within the US market.[105]

The formation of trusts triggered various responses and the proposition that trusts were simply the results of natural growth[106] was vigorously rejected by Louis Brandeis. The rejection was based on the argument that "not a single industrial monopoly exists today which is the result of natural growth […] competition has been suppressed either by ruthless practices or by an improper use of inordinate wealth and power".[107] It rested on the fact that trusts had proved to be detrimental to the consumer welfare by monopolising the markets.

Before the government took control over trusts, there were different opinions as to the appropriate remedies to stop trusts abusing their power. There were supporters for two types of remedies: the regulation of monopoly and the regulation of competition.[108] Some believed that monopoly in business of private corporations was inevitable; therefore, the only way left to the government was to regulate monopoly; rather than fight it. This remedy could be an appropriate one only if the government had enough resources to control the monopoly of private corporations. However, considering that trusts were also accused of bribing legislators and corrupting civil servants,[109] such a remedy would pose risks. Others, meanwhile, thought that trusts' monopoly was not an inevitable process; therefore, arguing that the most appropriate remedy would be to control the regulation of competition. This entails the maximum eradication of monopoly in private power; thereby,

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[103] Clark, J., D., *The Federal Trust Policy* (The Johns Hopkins Press, 1931).
[104] 1 Brandeis, L., D., *The Brandeis Guide to the World* at p.184.
[105] The Supreme Court in *Alcoa* held that Congress "did not condone 'good trusts' and condemn 'bad' ones; it forbad all"-- *US* v *Alcoa* at p. 427.
[106] The definition of "natural monopoly" and its implications are discussed in Chapter 3.
[107] Brandeis, L., D., *The Curse of Bigness* at p.105.
[108] 1 Brandeis, L., D., *The Brandeis Guide to the World* at p.181.
[109] Letwin, W., *Law and Economic Policy in America: The evolution of the Sherman Antitrust Act* at p.70.

promoting free-from-monopoly competition within the US market. It could be argued that Congress chose this remedy; although, it never prohibited monopoly altogether. It could also be argued that Congress preferred to play safe and chose neither of them; rather, it passed a legislation that regulated both monopoly and competition at the same time.

2.1.4. The Sherman Act 1890

On January 21, 1888 during the first session of the 50th Congress, a resolution was suggested in order to ask the House Committee on Manufactures to start an investigation and to recommend legislation for the control of the trusts. Following the investigation on trust operations, the House Committee on Manufacture produced an interim report based on the information uncovered in relation to the trust. This led to John Sherman (R. Ohio) and other Senators putting forward antitrust bills. For 15 months after the introduction of the Sherman bill, the Senate was involved in serious negotiations and debates. The bill was later referred to the Committee on the Judiciary which returned it in an unrecognisable form introducing drastic changes to the statutory language of the bill. Senator George Edmunds stated that "without amendment it would not afford a remedy to the real parties injured".[110] In any case, despite all the disputes and difficulties around the bill, the Sherman Act was successfully passed and, up until now, its realm covers many aspects of anticompetitive behaviour which go beyond the formation and operation of trusts. In the 1890s, the Sherman Act was considered to be a "dead letter";[111] therefore, it took it many years of development and interpretation before getting a strong hold over antitrust violations in the US markets.

The Sherman Act was an innovation created with a particular purpose in mind. At the time of the negotiation, there was no single piece of legislation which covered various antitrust points. Several states already had similar rules regulating monopolistic movements which were only applicable to intrastate commerce. The Sherman Act, on the contrary, has a direct link with Congress' power to regulate interstate commerce and commerce with foreign nations as provided in the US Constitution.[112] However, it was argued that "the Sherman law, [...], is not a law to *regulate* interstate commerce, but is a law to *prevent* certain private regulations of or interferences with interstate commerce which anticipate

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[110] Libert, D., J., "John Sherman's Legacy: 100 Years of the Sherman Act" [1990] 4 Ohio Law. 6 at p. 9.
[111] *Ibid.* at p.34.
[112] Article 1, Section 8, Clause 3 of the United States Constitution.

the action of Congress, leaving all others untouched".[113] Therefore, some stakeholders perceived the Sherman Act as simply Congress' way to obtain more control over interstate commerce and to create legal basis in order to punish disobedience. It could be argued that at the initial stage of the Sherman Act's existence, Congress' intentions could have been interpreted as aiming at tighter control over interstate commerce; rather than of trusts. In any case, the Sherman Act was very much needed as it did give the government a legal framework for a tighter and more harmonised control over antitrust violations in domestic and foreign markets.

It was, therefore, argued that the Sherman Act was a necessary tool required to control the monopolistic tendency created by trusts and corporations. In *Apex Hosiery Co*,[114] it was held that:

> "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had to come to be regarded as a special form of public injury".[115]

It was recognised early on that the Sherman Act was not created for the benefit of individual competitors, but rather, for the protection of the public interest as a whole.[116] Bork, for instance, argued that 'consumer welfare' was a primary legislative intent behind the Sherman Act and that "[...] in case of conflict, other values were to give way before it".[117] The fact that Congress made consumer welfare as the primary goal of the Sherman Act is not surprising as it was consumers and public that drew government's attention to the spread of monopoly.

Furthermore, Congress was concerned with a relationship between law and business efficiency. Congress was of the opinion that law should not become an obstacle to business efficiency. This led Congress to decide that "monopoly itself was lawful if it was gained

[113] Pagan, O., E., "What the Sherman Law is, and What it is Not" [1923-1924] 12 Geo. L. J. 79 at p. 80.
[114] *Apex Hosiery Co* v *Leader Et al*., 310 US 469 (1940).
[115] *Ibid* at p. 490.
[116] *Spectrum Sports* v *McQuillan* (9-10), 506 US 447 (1993) 458.
[117] Bork, R., H., "Legislative Intent and the Policy of the Sherman Act" 9 J.L. & Econ. 10 (1966) at p.10.

and maintained only by superior efficiency".[118] This leads to the above argument in relation to appropriate remedies on the control of trusts. Congress did not prohibit monopoly; rather it prohibited certain methods of the attainment of monopoly.

Although the Sherman Act was passed unanimously in the Congress (save for one vote against in the Senate), it still left some uncertainty in relation to its interpretation. It was founded on the old doctrines derived from the English common law which were dealing with monopoly and various restraints of trade. As Senator Sherman said "it does not announce a new principle of law, but applies old and well-recognised principles of the common law to the complicated jurisdiction of our State and Federal Government".[119] It was argued that the Sherman Act "reflects not only the uncertainty present in every general law because its authors cannot foresee the particular cases that will arise, but also the ambiguity that colours many democratic laws because the authors cannot completely resolve the divergent opinions and cross purposes that call it forth".[120]

Initially, the Sherman Act had been subject to many discussions due to the common law terminology used in drafting its antitrust provisions. The principles of the common law on the control of monopolies had always been diverse and contradictory; therefore "many of them obviously irrelevant and even hostile to the policy of fostering competition".[121] This however did not prevent the law makers to use the common law principles in the Sherman Act. The Sherman Act had its own supporters and critics, the latter arguing that antitrust laws "are clear enough, but they have gone beyond the purpose which brought about the enactment of the Sherman Law".[122] This argument stems from the fact that the scope of the Sherman Act extended beyond monopolistic trusts; thereby, ending up covering various antitrust issues.[123] For such reasons, it is not surprising that the expanding scope of the Sherman Act was criticised. The Sherman Act was innovative in its sense, despite being entirely consistent of common law principles. Its initial plan was to cover monopolistic trusts; although, it would be completely unimaginable if the Sherman Law did not develop along with the situation. Currently, monopolistic trusts *per se* no longer exist; therefore, the

[118]*Ibid.* at p. 12.
[119] 21 Cong. Rec. 2,458 (1890) as cited in Letwin, W., L., "Congress and the Sherman Antitrust Law: 1887-1890" at p. 256.
[120] *Ibid.* at p. 222.
[121] Bork, R., H., *The Antitrust Paradox: A Policy at War with Itself* at p.20.
[122] Levy, F., H., "The Sherman Law is Outworn. It Should be Amended" [1926-1927] 13 Va. L. Rev. 597at p.600.
[123] This argument also relates to Section 1 of the Sherman Act.

Sherman Act was meant to be abolished. However, the courts kept developing the Sherman Act by applying various interpretations in order to both clarify its terms and scope, and in order to respond to changing economic understanding, and to changing circumstances.

When the Sherman Act was enacted, various stakeholders tried to delineate those groups that would benefit from the Sherman Act rules. It was, for instance, suggested that the small firms would be the direct beneficiaries of the rules as the Sherman Act was perceived as being "an anti-big business statute".[124] Frankly, such a perception of the Sherman Act was not to be entirely unexpected as the main target of the Sherman Act was clearly the most powerful market players. The monopoly problem became so acute that in 1903 a special division of the Department of Justice (the DOJ) was especially created to deal with antitrust issues. Furthermore, the antitrust system also required good appeals procedures which were established alongside the Department of Commerce and Labour a Bureau of Corporations which was assigned with investigating and gathering information regarding corporate enterprise.

Section 2 of the Sherman Act provides,

> "Every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanour, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court".

It is clear that section 2 is open to interpretation, *i.e.* it does not set out very detailed and precise rules on the control of monopolies. It does not dictate the rules on conducting business; employing rather somewhat cursory, simple, legislative language. Due to its broad and open-ended language, it is seen "to possess substantial elasticity, allowing the courts to adjust their [the key words in the Sherman Act] meanings as their experience grows".[125] It is also clear that it does not outlaw the condition of

[124] Stigler, G., J., "The Origin of the Sherman Act" [1985] 14 J. Legal Stud. 4 at p. 4.
[125] Gifford, D., J., & Kudrle, R., T., "European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?" at p. 769.

monopoly; rather, it outlaws the process of monopolisation.[126] It was interestingly said that the Sherman Act contained "a broadly written law intended to attain and protect certain broad and fundamental objectives—the maximum of trade and commerce with a minimum of regulation [...], without unnecessarily infringing on the right of individual persons to engage in commerce".[127] The last part of this argument is important as it shows that even if consumer welfare is of paramount importance; a person's ability to do business without unjustified government intervention is still preserved by the Sherman Act.[128]

2.2. History of EU Competition Law

EU competition law has gone through many changes since its inception. It dates back to 1948 when Western Europe was just about to experience drastic changes. From the end of WWII, political ideas started developing on the creation of European cooperation between nations. This led to a series of negotiations and subsequently to the formation of European institutions, each of them being assigned with a particular role. Unfortunately, those established European institutions lacked "the authority or political will to ensure that the cooperation itself develops into any kind of supranational integration".[129] The post-war devastation and the economic and political instability in Western Europe required more concrete integration between participating nations. This situation led politicians and participating countries to seek other measures that would create an environment beyond mere unilateral cooperation.

In order to achieve such an environment, the leading post-war nations had to undertake various steps for creating a new and stronger Europe.[130] Following the gruesome

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[126] Bork, R., H., *The Antitrust Paradox: A Policy at War with Itself* at p.57.
[127] Haddock, G., B., "The Sherman Act and Big Business" [1952] 1 A.B.A. Antitrust Section 17 at p.20.
[128] The text of the Sherman Act could be read as being 'bigness neutral' while its interpretation and further enforcement could be regarded as targeting exclusively large firms. On this matter, it was argued that such a vision of the Sherman Act and its enforcement comes from those stakeholders who are prone to assumptions "contending that the injection of competitive values into regulatory proceedings is a form of uninformed, bureaucratic meddling apparently motivated either by ignorance or antibusiness attitude"-- Kauper, T., E., "The Challenge of Competition" [1972-1973] 28 Bus. Law. 169 at p. 172.
[129] Goyder, D., G., Goyder, J., Albors-Llorens, A., *Goyder's EC Competition Law* (5th edition, OUP, Oxford: 2009) at p.24.
[130] On 16 April 1948, the establishment of the Organisation for European Economic Co-operation (OEEC) was their first step which heavily contributed to the liberalisation of trade in Europe.

experience of WWII, the leading nations acknowledged the necessity to create a unified supranational power in order to permit a recovery from the economic and social devastation caused by the war.[131]

The reasons behind the creation of the EU had a considerable effect on the way EU competition law was drafted and, subsequently, interpreted. So far, it becomes clear that the EU was created for both economic and political reasons with an aim of having an integrated society which, in turn, had repercussions on the way EU competition law was enforced. It can already be contrasted with US antitrust law and its reasons behind the Sherman Act.

2.2.1. European Coal and Steel Community

The post-war devastation and the economic and political instability in Western Europe required more concrete integration between participating nations. This situation led politicians and participating countries to seek other measures that would create an environment beyond mere unilateral cooperation. In order to achieve such an environment, the leading post-war nations had to undertake various steps for creating stronger Europe.[132]

The very first institution, established on 16 April 1948, was the Organisation for European Economic Co-operation (OEEC). It originated from the combinations of the Marshall Plan[133] and the Conference of Sixteen.[134] Therefore, the aim of OEEC was to bring Europe to economic rehabilitation by capital investments and other necessary tools that would help Europe to recover and remained "a permanent conference of Sovereign states without any supranational powers".[135]

The next important step toward supranational integration of Western Europe was the establishment of the Council of Europe.[136] The initial plan was to create a European

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[131] In 1950, Western Europe and the US instructed Robert Schuman to address the rapid increase of the steel crisis, which led to the possibility of steel market becoming subject to cartelisation.
[132] On 16 April 1948, the establishment of the Organisation for European Economic Co-operation (OEEC) was their first step.
[133] The Marshall Plan was named after its creator and active advocate, George Catlett Marshall, the US Secretary of State at a time. The Marshall Plan aimed at restoration of Europe by the post-war European Aid Programme.
[134] Conference for European Economic Co-operation.
[135] D.G. Goyder, J. Goyder, A. Albors-Llorens *"Goyder's EC Competition Law"* at p.25.
[136] Founded by the French foreign minister Georges Bidault and the Belgian foreign minister Paul-Henri Spaak.

legislative Assembly which would be provided with some sovereign powers.[137] However, British delegation opposed to such a significant transfer of power to the Assembly; therefore, ensuring that it would get only a consultative role. The post-war Europe acknowledged the necessity to create a unified supranational power which would, in turn, ensure that participating nations would work together on the restoration of the post-war economic and social devastation.

In 1950 Robert Schuman was instructed by the British and the US delegates to create a plan for reintegrating Federal Germany in to the Western Europe. The problem that was predominant at that time was the rapid increase of the steel crisis, which led to the possibility of steel market becoming subject to cartelisation. Clearly, due to the poor economic situation in Western Europe, such an outcome could not have been allowed.

As the society was still experiencing post-war losses, it was agreed that a careful approach was required as "it was too much to expect State to consent to massive transfers of sovereignty, which would have injured national sensitivities only a few years after the end of the war".[138] For such reasons, the proposal to create a common market for steel, coal and iron within Western Europe had transpired. [139] According to this plan, the common market would erase all quotas, trade and customs duties barriers; therefore, creating an integrated economic and trade environment for the participating nations. This plan raised much scepticism among stakeholders, appraising it as "wishful thinking".[140]

The steel, coal and iron industries were seen as the most common interest between France and Germany and the pooling of these industries together would create a strong unification of the European Federation.[141] Therefore, on 18 April 1951, the Treaty Constituting the European Coal and Steel Community (the Treaty of Paris) was signed, thereby, creating the European Coal and Steel Community (ECSC) which introduced a new system that "has

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[137] Agreed at the Congress of Europe in The Hague (May 1948).
[138] Pascal Fontaine "The Schuman Declaration: 9 May 1950", p. 5.
[139] *Ibid.*
[140] Vernon Raymond "Schuman Plan—Sovereign Powers of the European Coal and Steel Community" 47 Am. J. Int'l L. 183 (1953), at p. 183.
[141] See Robert Schuman's proposal of 9th May 1950.

brought prices down through competition and the consequent rationalisation of industry".[142]

The Treaty of Paris moved certain decisions from the member states to the new institution. For the states therefore it was the case that "they have given up to a new entity, capable of making decisions with which the states themselves might not agree, most of their powers to control the future course of events".[143] The Treaty's objectives included contribution to economic expansion, development of employment and improvement of the participating nations' standard of living.[144] It was not clear what actual powers the states had to give up; however, the most important related to prohibitions on the governments erecting import and export duties, qualitative restrictions on the movement of coal and steel, states' charges, or engaging in any other restrictive practices that would divide the common market or exploit the consumer.[145] The prohibition to creation of restrictive practices that would lead to the division of the common market and exploitation of the consumers is the direct reference to the protection of competition within the common market. Furthermore, the Treaty imposed a positive obligation on the signatories to ensure that they establish, maintain and observe normal conditions of competition.[146] It was the High Authority[147] that was charged with ensuring that the objectives of the Treaty were fully satisfied,[148] granting an authorisation if the provisions of the Treaty were violated.[149] The Treaty provided the High Authority with enforcement powers under Articles 65 and 66 of the Treaty.

Article 66(7) of the Treaty empowered the High Authority to address situations in which public or private enterprises held a dominant position which prevented effective competition within the common market. Where an abuse of a dominant position took

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[142] Shenstone, M., "Schuman Plan—A Leap into the Unknown" [1951-1952] 7 Int'l J. 116 at p. 120.
[143] Raymond, V., "Schuman Plan—Sovereign Powers of the European Coal and Steel Community" [1953] 47 Am. J. Int'l L. 183 at p. 189.
[144] Article 2 of the Treaty Constituting the European Coal and Steel Community 1951.
[145] *Ibid.* Article 4.
[146] *Ibid.* Article 5.
[147] The High Authority, the executive body of the ECSC, was to consist of nine members only, two from each of the participating countries. They were supposed to be free from their respective government's influences and not to have any kind of interest in steel or coal industries.
[148] In addition to the High Authority, the Treaty also established a Special Council of Ministers, a Court of Justice and the Common Assembly. The Council of Ministers was partly advisory and partly executive body which had a political control over the High Authority. The Court of Justice had a judicial control over the High Authority and the rest of the institutions. The Common Assembly was taking part in general checks of the roles played by the institutions. Overall, each department played an important role in the implementation of the Treaty's provisions.
[149] Article 66(2) of the Treaty Constituting the European Coal and Steel Community 1951.

place, the High Authority had a power to issue recommendations to the parties in order to prevent the abuse. If the recommendations were not followed, then the High Authority had a right to consult any interested governments and impose fines. In this provision, therefore, the first reference in legislation to ‘abuse of dominant position’ appears; later on, this reference took a more defined form.[150] At that stage, the concept of ‘abuse’ was neither defined nor elaborated on; therefore, leaving vagueness as to its actual interpretation. Such an outcome reflected in the fact that they lacked any experience with the concept of abuse;[151] for which reasons they chose the safest path by giving all the powers of control over public or private enterprises to the antitrust authority.

The drafting of the first codified competition provisions of newly created ECSC is the process that should be briefly considered. Articles 65 and 66 of the Treaty were legal provisions that later had an extensive influence on EU competition law and its subsequent legal provisions.[152] As was discussed above, US antitrust law is considerably older and, accordingly, more experienced than EU competition law. For such reasons, it will not be surprising to conclude that US antitrust law ideas had an important influence on the development of ECSC competition provisions.[153] The main question is how much US antitrust law influenced the creation of ECSC which, in turn, led to the creation of current competition provisions. For instance, it was argued that US antitrust law did not have as much influence on ECSC despite the common perception that EU principles of competition law was Americanised after WWII.[154]

As was discussed earlier, the very idea to create unified economic society appeared after WWII in order to decartelise Germany and to eradicate any possibilities for the new war to begin. Pooling industries and tying countries’ economic powers was a priority for European countries and the US. For such reasons, EU competition law project had to be created quickly. Jean Monnet[155] was one of the leading European figures who was involved in the initial stages of the project and who was a supporter of US antitrust law.

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[150] Discussed later in the chapter and the rest of the thesis.
[151] Gerber, D., J., *Law and Competition in the Twentieth Century Europe: Protecting Prometheus* (Oxford University Press, New York: 1998) at p.341.
[152] For the purposes of the current research, it is only the drafting of Article 66 that is going to be discussed.
[153] Gerber, D., J., *Law and Competition in Twentieth Century Europe: Protecting Prometheus* at p. 337.
[154] Giocoli, N., “Competition Versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy” [2009] J.C.L. & E. 747 at p. 764.
[155] Jean Monnet was described as being “the driving force behind the post-war integration movement and the real architect of the common market”-- Pierre-Henri Laurent “Paul-Henri Spaak and the Diplomatic Origins of the Common Market, 1955-1956” [1970] 85(3) Political Science Quarterly 373 at p. 385.

Jean Monnet's ties with France helped him to convince France that if the EEC did not create strong integrative goals for the new supranational society, then German firms would become very powerful against the will of the US.[156] For such purposes, Jean Monnet invited a professor of antitrust law at Harvard and his close friend, Robert Bowie, to draft relevant antitrust provisions on a quick basis. The fact that Bowie was an antitrust scholar in the US, a close friend of Monnet and an employee of the US High Commissioner for Germany office implies that it would be impossible for drafting not to be drawn on US antitrust experience. However, fearing the European's outrage for the US involvement in the drafting, the whole project was conducted in private and then given to European legal drafters to introduce final version which would retain the US antitrust ideas.[157]

2.2.2. European Union

The Treaty and the creation of the ECSC was the first step toward what is currently known as the European Union. While the process was not an easy task, the necessity for creating such a community which would unify the willing nations of Western Europe over the coal and steel markets was not underestimated. The transition from the simple idea in the Schuman Plan to the binding treaty under international law which also made an explicit reference to competition law provisions was extraordinary. Clearly, since the 1950s the system has considerably changed; however, the main principle of close cooperation among participating nations remains the same. Although, the next step on the agenda was how to strengthen the system and to give it a bigger future prospective.

In May 1955, the foreign ministers of the ECSC held a meeting at Messina, Sicily in order to discuss the future expansion of the ECSC. The meeting resulted in Messina Declaration which was heavily influenced by the Benelux Memorandum. The Messina Declaration contained a series of suggestions on the establishment of a European Common Market without internal duties and quantitative restrictions. One of the main objectives set out in the Messina Declaration was "the development of rules assuring the free play of competition within the Common Market, particularly in such a way as to exclude all preferences of a national basis".[158] In this case, the objective of the Messina Declaration

[156] Gerber, D., J., *Law and Competition in Twentieth Century Europe: Protecting Prometheus* at p. 337-338.
[157] See for example Ball, G., W., *The Past had another pattern: Memoirs* 89 (New York: 1982) as referenced in Gerber, D., J., *Law and Competition in Twentieth Century Europe: Protecting Prometheus*.
[158] The Messina Declaration, 3 June 1955, para. (g) at p.2.

was to tie up the development of healthy competition with the necessity to erase economic discrimination based on the national level.

In 1956, after the Messina Declaration[159], the foreign ministers of the Six held a meeting in Brussels, Belgium. The meeting was convened by Paul-Henri Spaak who had a group of senior officials to prepare the ideas contained in the Messina Declaration into a form suitable for treaty provisions. It led to the Spaak Report[160] which is considered to be a document of a great importance as it was comprised of *travaux préparatoires* on which the Treaty of Rome[161] was based. The final conclusion reached at Messina Conference provided that "its [*i.e.* the Treaty's] application necessitates a study of the following questions...*the elaboration of rules to ensure undistorted competition within the Community*, which will in particular exclude any national discrimination".[162]

The Spaak Report provided a detailed description of the objectives of the future European Common Market. The reference to problem of monopoly was explicitly made in the Spaak Report,

> "The problem only remains because there are enterprises which, owing to their size or specialisation or the agreements they have concluded, enjoy a monopoly position. [...] More generally, the Treaty will have to provide means of ensuring that monopoly situations and practices do not stand in the way of the fundamental objectives of the Common Market".[163]

The Spaak Report also expressly provided that "the Commission may only propose the removal of such distortions of competition that create a real and serious threat to the competition relation".[164] It cannot go unnoticed that the Spaak Report mentioned size as a factor in a monopoly status and it was very concise as to competition objectives of the European Common Market. The preservation of the Common Market's objectives was given the paramount consideration where the distortion of competition was regarded as

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[159] In addition, another conference took place in Noordwijk.

[160] The official name of the Spaak Report in French is *Rapport des chefs de délégation aux Ministres des affaires étrangères concernant l'unification de l'Europe dans le domaine économique*.

[161] The EEC Treaty (hereinafter the Treaty of Rome).

[162] As cited it Goyder, D., G., *EEC Competition Law* (OUP, New York: 1988) at p.22.

[163] The Spaak Report as cited in Goyder, J., & Albors-Llorens, A., *Goyder's EC Competition Law* at p.33.

[164] Quitzow, C., M., *State Measures Distorting Free Competition in the EC: A Study of the Need for a New Community Policy Towards Anti-Competitive State Measures in the EMU Perspective* (Kluwer Law International, The Netherlands: 2001) at p.8.

pure obstacle to such objectives. This was the first concrete piece of evidence where a size of a firm was directly linked to a monopoly.

2.2.3. Treaty on the Functioning of the European Union

Article 2 of the Treaty of Rome provided that one of the objectives of the new institution was to achieve "a harmonious development of economic activities".[165] Article 3[166] expanded on the objectives of the Community, providing that the activities of the Community shall include, *inter alia*, "the institution of a system ensuring that competition in the common market is not distorted".[167] It is worth noting that the Treaty of Paris did not have any explicit reference to the protection of competition in its objectives; and it is believed to be due to the gradual development of competition policy within the Common Market. The Treaty of Paris, as discussed above, not only recognised but also stressed the importance of undistorted competition for the fulfilment of the Community's objectives. Article 5 of the Treaty of Rome provides that "Member States shall take all appropriate measures, [...], to ensure the fulfilment of the obligations arising out of this Treaty". This provision is placing an obligation on the Member States to apply all appropriate measures in order to protect competition within the Common Market, which is one of the Community's objectives.

The Treaty of Rome was the first to codify competition provisions.[168] Articles 85 and 86 were the main competition provisions, *i.e.* provisions which include the set of prohibitions the violation of which would subject the parties to punishment. Article 86 was influenced by Article 66 of the Treaty of Paris as both have the same legislative aims behind them. However, it was argued that the final wording of Article 86 allowed the Treaty of Rome to go beyond of so-called limited objectives of Article 66 of the Treaty of Paris.[169] Generally, the comparison between the two is not very important as it will not provide a clearer picture as to the wording and intention of the competition provisions. This comparison is, however, necessary in order to show a gradual development of competition rules on abuse of market power in the EU.

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[165] The further objectives of the Community under Article 2 are "a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it".
[166] Article 3 of the Treaty of Rome is equivalent to Article 3 of the Treaty of Paris.
[167] *Ibid.* Article 3(*f*).
[168] See, Articles 85-94 of the Treaty of Rome.
[169] Goyder, D., G., *EEC Competition Law* at p. 23.

Before proceeding to the text of Article 86, it is necessary to mention that on 1 December 2009 the Treaty of Lisbon entered into force; creating a new treaty arrangement for what is now the EU, in which the foundation treaties are the TFEU, and the Treaty on European Union ('TEU'). The TFEU re-numbered the main competition provisions in the Treaty of Rome. Therefore, Article 86 of the Treaty of Rome,[170] which became Article 82 EC, is now Article 102.

Article 102 TFEU provides, [171]

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States".[172]

Therefore, according to the wording of Article 102 in order for an anticompetitive abuse to take place a firm must be in a dominant position. It was argued that the language of Article 102 "was intended to *regulate* the conduct of dominant firms and to prevent dominant firms from unfairly *using* their power, not merely to prevent them from expanding or protecting their power".[173] And this argument is entirely correct; however, it is important to identify the extent to which the Commission and the courts follow the language of Article 102. The terms 'abuse' and 'dominant position' have been trusted upon to the courts for interpretation; however, it was argued that "both the structure of the Treaty and

[170] The text of what is now Article 101 has remained unchanged since 1958 save for the substitution of 'internal market' for 'common market' in 2009.
[171] Please note that the main wording of Article 102TFEU remained the same apart from the principle of "common market" in Article 82 EC was replaced by the principle of "internal market" in Article 102 TFEU. This did not change the core idea of competition provisions in Article 102 TFEU. See Consolidated version of the Treaty on European Union—Protocol (No.27) on the internal market and competition OJ C115/309.
[172] The text of Article 102 continued: Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
[173] Fox, E., M., "We Protect Competition, You Protect Competitors" [2003] 26(2) World Competition 149 at p. 157.

the continental legal tradition may constrain the potential for growth and development of the operative meanings of these provisions".[174]

2.3. Final Observations

When comparing the language of Section 2 and Article 102, it was argued that Section 2 focuses on an empirical measurement of monopoly power[175] and that while "'monopoly' is a status; the language of Article [102] is a prohibition of an action, of an 'abuse' by a dominant firm".[176] Clearly, both antitrust regimes had different visions on how they preferred their antitrust law to work. The difference between Section 2 and Article 102, as will be seen later in the thesis, does not lie in the way both legal provisions are drafted but rather it lies in the way they are interpreted and applied by antitrust authorities and the courts. And, it is an undeniable fact that politics had played an important role in shaping antitrust law, especially in the EU. In fact it was argued that "it is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws".[177] The EU and the US have different political frameworks leading to differences between their enforcement priorities. In relation to US antitrust law, it was interestingly argued that "antitrust must be understood as the political judgment of a nation whose leaders had always shown a keen awareness of the economic foundations of politics".[178] Antitrust law, therefore, cannot be considered in isolation as there are many external factors which could influence the way antitrust law is being perceived. Whatever is important for a nation at a particular time is going to have repercussions on antitrust law. The influence of politics was even more noticeable in the EU because it, among others, needed competition law to break down national barriers and introduce newly created membership of different countries to market integration. At present, the Commission is politically independent

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[174] Gifford, D., J., & Kudrle, R., T., "European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?" at p. 770.
[175] See Barnett, T., O, & Wellford, H., B. "The DOJ's Single-Firm Conduct Report: Promoting Consumer Welfare Through Clearer Standards for Section 2 of the Sherman Act". Available at: <http://www.justice.gov/atr/dojs-single-firm-conduct-report-promoting-consumer-welfare-through-clearer-standards-section-2#N_12_>.
[176] Duncan, R., Coleman, C., Daniel, H., & Haleen, P. "Litigating Single-Firm Conduct Under the Sherman Act and the EU Treaty: Divergence Without End, or Change We Can Believe In?" [2009] G.C.L.R. 148 at p.149.
[177] Pitofsky, R. "The Political Content of Antitrust" [1978-1979] 127 U. Pa. L. Rev. 1051 at p. 1051.
[178] Hofstadter, R., *The Paranoid Style in American Politics and Other Essays* (John Wiley & Sons, Inc., United States of America: 1964) at p. 205.

executive arm of the EU and it consists of 28 Commissioners, *i.e.* one representative from each member state. Directorate-General for Competition is assigned with a policy to enforce EU competition rules. It becomes very probable that each member state might exert its own interests on the decision making process based on its own political agenda. Along with market integration, therefore, each member state's political views and values must be accommodated into the new EU project. The Commission enjoys a pre-eminent power not only to investigate an anti-competitive conduct but also to prosecute it and issue binding decisions with an up to ten percent fine of a firm's turnover.[179] This makes the Commission very powerful and, according to the Commission, its aim is to ensure that all EU firms have an access to the EU market "including small and medium-sized enterprises (SMEs)".[180] For such reasons, it appears that the Commission's decisional standards tend to protect smaller firms from the rigour of competition law. The evidence of which could be derived from the ease with which the Commission has established the presence of dominance in a number of the leading cases, *i.e.* "the Commission has been more interested in controlling large companies than with curtailing actual monopoly power".[181] The powers of the Commission are strikingly different from the powers of the DOJ and the Federal Trade Commission (FTC)[182] in the US. The DOJ, for instance, prosecutes certain breaches of antitrust law by filling criminal suits or initiating civil actions seeking for a court order to prevent and remedy any violations of US antitrust law. It has no similar authority to issue binding decisions.[183]

Lastly, when comparing the EU with the US,[184] it was argued that the Commission sees some aspects of competition law issues in more political terms than more economically focused US antitrust law.[185]

[179] European Commission, European Union Explained (November 2014), at p. 4. Available at: <http://bookshop.europa.eu/en/bundles/the-eu-explained-cbsciep2OwkgkAAAE.xjhtLxJz/;pgid=Iq1Ekni0.1lSR0OOK4MycO9B000086qpnE8m;sid=o-1c9v_8w4dc_avAfejCUZ3ZpD5aJbKfvZ8>.
[180] European Commission, European Union Explained (November 2014), at p. 4.
[181] Gifford, D., J., & Kudrle, R., T., "European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?" at p.759.
[182] The FTC was created by the Federal Trade Commission Act 1914 and is allowed to bring civil enforcement actions for the violation of antitrust rules.
[183] See, US Department of Justice, Antitrust Enforcement and the Consumer (Washington DC, 20530). Available at: <https://www.justice.gov/atr/antitrust-laws-and-you>.
[184] It was argued that the main difference in the enforcement of Article 102 and Section 2 is in the fact that the US adopted "an ex-ante, judicially enforced, conduct-based, prohibition approach"; while the EU was more keen to embrace "an ex-post, administratively enforced, performance-based, abuse approach". This reflects the reality behind the enforcement of antitrust law in the EU and US, *i.e.* Section 2 is enforced by the

2.4. Conclusion

The study of historical background of US antitrust law and EU competition law gives an invaluable insight to the origination and subsequent development of antitrust law and policy within two jurisdictions. This chapter focused on the relevant parts of US antitrust law and EU competition law history which should provide the reader with a robust background on the main historical and legal events leading to the law on dominance and monopoly. For such reasons, this part of the thesis has dealt with the appearance of the relevant competition laws of the US and the EU, up to the point at which the key texts – Section 2 and Article 102– became operative.

The comparison between the history of two jurisdictions showed that both the US and EU were faced with different threats that led them to pass their respective antitrust legislations. It was shown that US antitrust law was passed in order to tackle the appearance and spread of corporations, and a trust was the worst type of them. The public was very antagonistic toward corporations because it was believed that all corporations were inherently monopolistic. Keeping that in mind, the Sherman Act was adopted to address the spread of a private corporate power; however, it was revealed that Congress did not prohibit monopolies altogether. And, Section 2, therefore, can be seen as being two-sided, *i.e.* it protects consumer welfare and allows commerce. This was explained by the fact that US antitrust law was influenced by the *laissez-faire* economics where firms were allowed to do business without government's intervention. US antitrust law, therefore, has a profound history on the control of private economic power and it provides a good foundation for the further research of this thesis.

EU competition law, on the other hand, was created to serve economic welfare, but also to fulfil a wider political purpose in facilitating European integration after WWII. One key idea behind the Treaty of Paris was to create the ECSC to observe, *inter alia*, normal conditions of competition. At the later stage, the Spaak Report linked a size of a firm with monopoly and, accordingly, anti-competitive conduct. This, however, seemed to be built on a common assumption or prejudice that monopoly power was detrimental for market

courts while Article 102 is enforced by the Commission-- Giocoli, N., "Competition versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy" at p. 763-764.

[185] Baker, D., I., "An Enduring Antitrust Divide Across the Atlantic Over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists" [2009] 5 Eur. Competition J. 145 at p. 193.

development because, unlike the US, the newly created union had yet to have any dealings with private economic power. Following this observation, the influence of US antitrust law experience cannot be ignored here. This led both jurisdictions to share, among others, similar goals behind their respective antitrust interventions, *i.e.* the protection of consumer welfare and promotion of economic efficiency and which will be discussed in the following chapter.

The comparative analysis between the enforcement powers of the Commission and the DOJ revealed that the Commission has more power in the control of dominance than US antitrust authorities. In particular, the power to issue binding decisions provides the Commission with an opportunity to pursue its own policy. This, among others, includes the assurance that SMEs have an access to the EU internal market which, in turn, can reflect on the way bigness and size are treated by the Commission under Article 102.

Therefore, despite different historical events leading to the formation of US antitrust law and EU competition law, it is concluded that both jurisdictions apply the similar pattern on the control of monopoly and dominance, *i.e.* Section 2 and Article 102 both require monopolistic or dominant status and the abuse of that status. This is the most obvious similarity. The actual assessment of dominance or monopoly will depend on the antitrust authorities and the courts and will be affected by the socio-political and economic environment, which is where the divergences between the EU and US begin.

Chapter 3: Economic Principles of Antitrust Law

Antitrust is not economics and for both disciplines to co-exist, antitrust law had to become more flexible in accommodating certain economic principles. US antitrust law had started to include economics into its realm earlier than EU competition law.[186] Economics, in this respect, introduced a notion of efficiency where markets are performing in a way which will benefit the consumers. Economics, furthermore, provided antitrust law with a perfect competition model and a monopoly model. Both are the examples of two extreme market structures which paint a picture of what a market is going to be like under either of the models. Economics plays an inseparable role in the analysis of dominance and monopoly in the EU and US. However, in spite of the influence economics has on antitrust law, both are two distinct disciplines. Economics provides tools for the analysis of the firms' actions along with tools for the assessment of market structure. It leads to the understanding that maximisation of consumer welfare lies at the heart of the market performance and competition law. Ideally, competitors, in such a scenario, are the objects which play the crucial role in the satisfaction of consumer welfare and realisation of other goals of antitrust law. The role economics plays in antitrust law is very straightforward and, as a discipline, it "values competition only as a process for the production of 'efficient' outcomes".[187]

Initially, antitrust law was not prepared to deal with complexity of measuring market power; therefore, the assistance of economics became very important. Given that antitrust has as one of its aims the promotion of economic efficiency, antitrust policy is itself grounded in economics, which provides not only a reference for the policy framework, but also specific analytical tools. For such reasons, economics considerably contributed to "the

[186] In 2005, the Commission shared its preliminary thoughts on the reform on Article 102 (former Article 82) in order to include economics into the assessment of an abusive behaviour under Article 102—see, Neelie Kroes, Preliminary Thoughts on Policy Review of Article 81. Available at: <http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en>.
[187] Fox, E., M., "The Modernisation of Antitrust: A New Equilibrium" [1980-1981] 66 Cornell L. Rev. 1140 at p.1156.

formation and adjudication of antitrust policy from the earliest days" [188] and a strong link between these disciplines cannot be ignored. Therefore, the analysis of the relevant economic principles and approaches is vital to understand the application of antitrust rules to market power.[189]

3.1. The Chicago School vs The Ordoliberal School

Antitrust law encompasses various goals although its actual objectives have always been under much debate.[190] With time, the common agreement gradually led to believe that the promotion of economic efficiency was one of the primary goals of antitrust law. In this case, the economics of industrial organisation wields a heavy influence on the analysis of antitrust rules.

The economics of industrial organisation can be generally defined as "the study of the supply side of the economy, particularly those markets in which business firms are sellers".[191] It is that part of the wider discipline of economics in which we find analysis of competitive structures and strategies, and which therefore provides economic framework relevant to a general discussion of antitrust and the specific tools relevant to its application.[192] The application of economics of industrial organisation to the analysis of antitrust rules has developed gradually. This development process was, however, contentious leading to various opinions on the aims and objectives of antitrust in various markets.

The Ordoliberal School of economic and antitrust theory, founded in the 1930s, insisted that the main legitimate objective of antitrust was the liberalisation of markets from big

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[188] Blair, R., D., & Kaserman, D., L., *Antitrust Economics* (2nd edition, Oxford University Press, New York, Oxford: 2009) at p.3.
[189] Chapter 3 is not going to provide an in-depth analysis of antitrust economics and it is jurisdiction-neutral unless specified otherwise. It will rather provide an overview of the main principles relevant for the purposes of this research.
[190] See Nazzini, R., *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (OUP, New York: 2011).
[191] Schmalensee, R., L., "Industrial Economics: An Overview", Sloan School of Management Massachusetts Institute of Technology (March 7, 1998) at p.1.
[192] Devine, P., J., Lee, N., Jones, R., M., & Tyson, W., J., *An Introduction to Industrial Economics* (4th edition, Routledge, Great Britain: 1993) at p. 8.

business and the protection of market structure.[193] Ordoliberals considered it necessary to place certain restrictions on the conduct of dominant firms or to eliminate private economic power, while at the same time, allowing certain commercial freedom to compete on a market.[194] In order to achieve that, Ordoliberals developed the 'performance-based competition' principle[195] which would identify abusive conduct. The dispersal of market power and the creation of a more supportive environment for small businesses, *i.e.* competitors, could enhance consumer welfare; however, it could also lead to the creation of "a particular market structure as a matter of principle".[196] If this is the case, then there will be no place for powerful and large firms. In the current society, this objective would not be considered as a legitimate aim of antitrust law since it is the protection of consumers that antitrust authorities argue to be of paramount importance.[197]

The reliance of antitrust authorities on two different schools of thought could provide one explanation on the differences in treatment of market power in the EU and US. US antitrust law, for instance, was applying economics as introduced by the Chicago School which argues that antitrust law promotes allocative efficiency with the consumers and firms acting in a rational way. Consumer welfare was at the core of the Chicago School with the premise that antitrust law should not intervene "unless a challenged practice by a particular firm decreased aggregate consumer welfare".[198] In other words, markets have a tendency of self-correcting; therefore, an overly interventionist antitrust and *per se* illegality rules may stifle economic efficiency on the US market. This 'hands off' approach, which is largely based on the concerns of creating the false positive market environment, could be

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[193] See *e.g* Gerber, D., J., *Law and Competition in Twentieth Century Europe: Protecting Prometheus*.
[194] O'Donoghue, R., & Padilla, A., J., *The Law and Economics of Article 82 EC* (Hart Publishing, Oxford and Portland, Oregon: 2006) at p. 9.
[195] *Leistungswettbewerb.*
[196] Jones, A., & Sufrin, B., *EU Competition Law: Text, Cases and Materials* (4th edition, Oxford University Press, New York: 2011) at p.17.
[197] However, note the Commission's aim to ensure that SMEs have an access to the EU market, Chapter 2.
[198] It was further added that consumer welfare paradigm was not a rule of non-intervention; rather, it became words that anchored the conversation of antitrust which became necessary to the antitrust discourse-- Fox, E., M., "What Is Harm To Competition? Exclusionary Practices and Anticompetitive Effect" [2002-2003] 70 Antitrust L.J. 371 at 379.

contrasted with the post-Chicago[199] economics which could be characterised as "counselling a 'light touch'".[200]

EU competition law, on the other hand, was relying on Ordoliberal economics which believes that some behaviour of dominant firms should be controlled thereby denying the existence of a notion that markets may be self-correcting. The focus of EU competition law was to ensure that fairness among competitors was present on a market or, in other words, smaller competitors should not had been put into disadvantageous position by dominant firms. It was argued that the time and, partly, the pressure from the US officials on EU competition law to incorporate economics, had moved competition law focus from goals of fairness toward smaller firms to goals of economic and market efficiency.[201] The focus of EU competition law on the notion of fair competition (rather than free competition) does promise smaller firms more protection on a market although it does not necessarily ensure market efficiency for the benefit of the consumers. This is so because the forces of competition law, in this case, turn toward the smaller firms which might not necessarily guarantee the delivery of satisfactory goods and services to the consumers.[202]

In the 1930s economists began to analyse the extent of anticompetitive harm arising in markets. Joe S. Bain[203] developed the Structure—Conduct—Performance paradigm (SCP) which was used by economists to analyse the operation of various markets. The SCP provides that the structure of a market influences the conduct of buyers and sellers and this conduct, in turn, affects the further performance of a market. The very core idea of the SCP was that by controlling and regulating the structure of a market, antitrust authorities, at the same time, were improving the performance of a market. In such cases, the regulation of a firm's behaviour directly was not necessary as it was the structure of a market that dictated the firm's further behaviour. This led the SCP to become both the "impetus and foundation

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[199] It was argued that the attempts of firms to become dominant (*i.e.* to win the market) and, consequently, to obtain substantial market power could be referred the post-Chicago way of thinking about market power--Giorgio Monti "The Concept of Dominance in Article 82" 2 Eur. Competition J. 31 2006, at p.43.
[200] Rosch, J., T., "I Say Monopoly, You Say Dominance: The Continuing Divide on the Treatment of Dominant Firms, Is It the Economics?" at the International Bar Association, Antitrust Section Conference (Florence, Italy, September 2007), at p. 13. Available at: <https://www.ftc.gov/public-statements/2007/09/i-say-monopoly-you-say-dominance-continuing-divide-treatment-dominant>.
[201] Fox, E., M., "Monopolisation, Abuse of Dominance, and the Indeterminacy of Economics: The US/EU Divide" [2006] Utah L. Rev 725 at p.727.
[202] For more discussion on this point see Chapter 7.
[203] Bain, J., S., *Barriers to New Competition* (Harvard University Press, 1956). See also Mason, E., S., *Economic Concentration and the Monopoly Problem* (Harvard University Press, Cambridge: 1957).

for statistical studies relating conduct or performance variables to structure".[204] 'Statistical studies', in this case, are the accounting rates of a firm's return which are used to calculate profits. Therefore, the DOJ started focusing only on highly concentrated markets. According to Bain, economies of scale[205] were not very important in some markets; many markets were extremely concentrated with high barriers to entry which, in turn, allowed dominant firms to raise anticompetitive prices.[206] This resulted in the appearance of a new antitrust movement which decided that "a large number of small firms would yield lower prices than a relatively small number of larger firms".[207]

In the 1960s, the SCP was strongly criticised by the Chicago School mainly for relying on accounting returns to calculate the monopoly profits, for disregarding the importance of economies of scale in the markets and for using barriers to entry as an indication of monopolistic profits. It was argued, in fact, that Bain used "a possible outcome of barriers, high profit rates, to substitute for the actual barriers".[208] All these arguments led to the common opinion of the proponents of the Chicago School that antitrust regime under the SCP was interventionist and structuralistic.

Despite all the criticism of the SCP, it still remains an important tool in the application of antitrust analysis. According to Hovenkamp, the defenders of Bain's theory may have taken it too far in placing more importance on market structure rather than firms' behaviour; however, "that is a question of balance, not of basic legitimacy".[209]

3.2. Economic Efficiency

The Chicago School argued that economic efficiency was the exclusive objective of antitrust law.[210] Economic efficiency is concerned with the optimal production and

[204] Scherer, F., M., "Structure-Performance Relationships and Antitrust Policy" [1977] 46 Antitrust L.J. 864 at p.864.
[205] "The concepts of economies of scale is in terms of a physical output which is homogenous and measurable"—See, Douglas, E., "Size of Firm and the Structure of Costs in Retailing" at p. 159.
[206] See Bain, J., S., *Industrial Organisation* (2nd edition, Wiley: 1968).
[207] Hovenkamp, H., *Federal Antitrust Policy: The Law of Competition and Its Practice* (3rd edition, Thomson & West, United States: 2005) at p. 61.
[208] Demsetz, H., "Barriers to Entry" [1982] 72 AM. Econ. Rev. 47 at p. 48.
[209] Hovenkamp, H., *Federal Antitrust Policy: The Law of Competition and Its Practice* at p. 46.
[210] Hovenkamp, H., "Antitrust Policy After Chicago" [1985] Univ. Mich. L. R. 213 at p. 226.

distribution and is achieved when society's resources are used and allocated in the most efficient and beneficial way. This leads to the minimisation of waste and economic inefficiency and maximisation of consumer welfare.[211] In antitrust law, consumer welfare is not explicitly defined; rather, the satisfaction of the consumer and the general wealth of a society could be used as an indication of consumer welfare.[212] It has been argued that consumer welfare "refers to the individual benefits derived from the consumption of goods and services and [...] in practice, applied welfare economics uses the notion of consumer surplus to measure consumer welfare".[213]In economics, consumer welfare does not include the general principles of consumer interests "in preventing monopolists from extracting monopoly profits".[214] The consumer welfare principle is "operationalised as aggregate consumer surplus provided a benchmark that was a check against antitrust enforcement [and] that antitrust law would not be invoked unless a particular challenged practice decreased aggregate consumer surplus".[215]

Economic efficiency consists of three types of efficiencies which are vital for the achievement of consumer welfare: allocative efficiency, productive efficiency and dynamic efficiency.[216] Allocative efficiency is said to be achieved when the market price equals the marginal cost[217] of producing a commodity. The definition of allocative efficiency was provided by Vilfredo Pareto[218] that market is efficient[219] where no market player may be made better off without someone else being made worse off. According to Fox, however, antitrust should not be confined to efficiency objectives but instead, if it is feasible, should reflect "in a meaningful way all of its basic goals, including power dispersion, competitive

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[211] See Chapter 2 where it was argued that the protection of consumer welfare takes priority over economic efficiency.
[212] It was argued that consumer welfare should be distinguished from total welfare which is a combination of consumer surplus and producer surplus. In particular, it was argued that Bork in *Antitrust Paradox: A Policy at War with Itself* used the term consumer welfare to refer to total welfare specifically including producers' surplus—see, Kaplow, L., "On the Choice of Welfare Standards in Competition Law", 05/2011, Discussion Paper No. 693, at p. 1, fn. 2.
[213] Glossary of Industrial Organisation Economics and Competition Law, complied by Khemani R. S. and Shapiro D. M. (Organisation for Economic Co-Operation and Development), p. 29.
[214] Fox, E., M., "The Modernisation of Antitrust: A New Equilibrium" at p.1161--It was provided that economics uses the welfare in a more technical way by referring to the maximisation of social welfare which is a resource loss "that is, the use of unnecessary resources to satisfy the diverted demand of individuals who would have been satisfied with a product in the market of the restricted output if that product were sold at cost".
[215] Fox, E., M., "We Protect Competition, You Protect Competitors" at p. 153.
[216] Dynamic efficiency relates to innovations and technological development of a market.
[217] For the definition and discussion of marginal cost, see below.
[218] Pareto, V., *Manuel D'Economie Politique* (1909).
[219] Or, "Pareto optimal".

opportunity, and long-run consumer satisfaction".[220] This might provide the required balance for the law on monopoly as a flexibility of such an approach would ensure that monopoly power is not being automatically labelled unlawful without careful consideration of its effects on competition, in general and on consumer welfare, in particular.

Productive efficiency, meanwhile, is achieved when products are produced at the lowest cost possible which may lead to the promotion of consumer welfare. In the economic context, productive efficiency is "a ratio between the amount of firm's inputs and the amount of its output".[221] According to Bork, the main task of antitrust law is to enhance allocative efficiency without negatively affecting productive efficiency and this process should be "guided by basic economic analysis, otherwise the law acts blindly upon forces it does not understand and produces results it does not intend".[222] Fox, for instance, argued that there are three perspectives on efficiency which are more representative than inclusive.[223] A business autonomy principle, the first perspective on efficiency, provides that any business, irrespective whether it has market power or not, should be allowed to choose its own way of acting on a market because businesses know better what a consumer needs for its demands to be satisfied. This way of treating efficiency is vulnerable[224] because there is no guarantee that such businesses would not put their interests first. In fact, it is more likely that businesses would strive to maximise their own profits as profit maximisation is the primary motivation which drives firms to compete on a market. Therefore, this would place too much freedom on firms with a possibility to jeopardise the goal of the maximisation of consumer welfare in antitrust law. A theory of output limitation is another way of looking at efficiency principle in antitrust economics. According to this theory, if firms are offering the required level of output which consumers are willing to buy at a price compensatory to the firms, then all consumer interests will be satisfied. It was argued that this theory does not have a place in antitrust law as it is "narrow and static".[225] This theory is not without flaws as it carries a very subjective idea by assuming that firms would be able to meet the demands of the consumers without taking into account the needs to produce at lower costs possible. The final perspective on efficiency is the protection of competition process which would invite the desire to

[220] Fox, E., M., "The Modernisation of Antitrust: A New Equilibrium" at p. 1178-1179.
[221] Hovenkamp, H., "Antitrust Policy After Chicago" at p.238.
[222] Bork, R., H., *The Antitrust Paradox: A Policy at War with Itself* at p.91.
[223] Fox, E., M., "The Modernisation of Antitrust: A New Equilibrium" at p. 1170.
[224] *Ibid.* at p. 1170.
[225] *Ibid.* at p. 1173.

compete on the merits with consumer welfare being at the core of the competition process. It was argued that this perspective on efficiency is the most suitable way for antitrust economics.[226] The protection of competition process theory is inclusive and flexible. It manages to take into account all the relevant factors of market performance meanwhile placing consumers at the core of its protection. Moreover, "it is the one accepted economic perspective that harmonises with the dominant non-efficiency values of antitrust".[227]

3.3. Market Power

Antitrust puts different types of anti-competitive behaviour under control via the application of various antitrust legal provisions. A general rule exists that for a firm to be able to restrict competition, it has to have power within a defined market. Market power, in this case, refers to the ability of a firm, *inter alia*, to limit output, raise prices above the competitive level, exclude competitors from the market, stifle innovation and erect barriers to entry for new market entrants.[228] These factors are the natural consequences flowing from the actions of monopolistic firms and unless they exercise such a power "they are unable to affect competition adversely".[229] The common agreement about market power is that a monopolist has an ability to raise prices above the competitive level. However, the ability to charge anti-competitive prices, on its own, should not be a single indication of a firm's market position. The high profits of such a firm could lure new competitors by which they could limit the realm of the power of a monopolist. Therefore, a firm with market power should also be able to erect barriers to entry in order to support its monopolistic market status. It leads to the conclusion that market power exists when a firm raises prices above the competitive level without significant losses to its business.

The determination of market definition is a vital first step in the assessment of market power. Market definition is a tool which is used by competition authorities in order to assess the competitive constraints on the firms in a properly defined relevant market. Its main objective, therefore, is to define both product and geographic markets and to identify

[226] *Ibid.* at p. 1175.
[227] *Ibid.* at p. 1175.
[228] Goyder, J., & Albors-Llorens, A., *Goyder's EC Competition Law* at p.13.
[229] Bishop, S., & Walker, M., *Economics of EC Competition Law: Concepts, Application and Measurement* (4th edition, Sweet & Maxwell, London, Dublin, Hong Kong: 1999), para.1.06, p.4.

those competitors who could affect the firms' behaviour and prevent them "from behaving independently of effective competitive pressure".[230]

The establishment of a relevant market is the first step in the assessment of market power; therefore, it has to be approached with an extreme care. If the relevant market is not defined correctly then the assessment of market power will be flawed. Economics provides an important contribution to the assessment of dominance and monopoly. However, it was argued that, despite the influence of economics, "courts continue to place [primacy] on market definition and market shares in the assessment of market power".[231] This could be explained by the fact that economics is a different discipline and, therefore, the courts would prefer a more theoretical legal analysis with a slight addition of econometric methods to their assessment of market power. A more technical assessment would be reserved to economists; therefore sparing the courts from making economic calculations.

The process of identifying the boundaries of a relevant market can be a complicated procedure and antitrust authorities rely on certain economic tools in defining two main components of a relevant market, *i.e.* relevant product market and relevant geographic market.

In the EU,[232] a relevant product market includes all products which consumers regard as being substitutable or interchangeable with one another due to the products' "characteristics, their prices and their intended use".[233] A relevant geographic market includes the area where a firm is involved in the supply and demand of goods and services. For the purposes of geographical market definition, the conditions of competition in this area have to be considerably homogenous.[234]

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[230] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (*hereinafter* The Commission Notice on the Definition of Relevant Market) [1997] OJ C372/5, at para.2.
[231] Vickers, J., "Market Power in Competition Cases" [2006] 2 Eur. Competition J. 3 at p. 7.
[232] The US has a similar definition of relevant market. See, the Department of Justice and the Federal Trade Commission joint merger enforcement guidelines "1992 Horizontal Merger Guidelines" (Revised in 1997). Available at: <http://www.ftc.gov/bc/docs/horizmer.shtm>.
[233] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law at para.7. This definition of relevant product market was introduced in Case 85/76, *Hoffmann-La Roche* v *Commission* [1979] ECR 461.
[234] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law [1997] OJ C372/5, at para.8.

In the US and EU, antitrust authorities seek to identify whether a price change in a product would drive consumers to its potential substitutes. If so, then such products would be considered as being interchangeable with each other. In this case, if substitutes do exist then a price raise will not be profitable. The assessment of market definition could be a difficult task as it is not very easy to decide which products or services are close substitutes, or, in other words, which products or services belong to the same market.

In order to determine what products could be regarded as substitutes, antitrust authorities rely on three main competitive constraints of the firm: demand substitutability, supply substitutability and potential competition.[235] Demand substitution is the most widely used as it is the most efficient tool in the examination of market definition. It constitutes the strongest competitive force on the firm's pricing decision,[236] *i.e.* a price increase will lead to the loss in consumer demand if customers could turn to product substitutes.[237]

The assessment of demand substitution involves an application of the hypothetical economic test of price increase which is used in order to measure the cross-price elasticity of consumer demand. The US antitrust authorities also apply the same hypothetical price increase on "a hypothetical profit maximising firm"[238] in order to see the consumers' response to a price increase. This hypothetical test is known as the Small but Significant Non-transitory Increase in Price (SSNIP) test which includes a hypothetical price increase (5% to 10%) to products in question.[239] If the SSNIP test shows that a small price raise is unprofitable and consumers switch to available substitutes, then other substitutes will be added in to the relevant product market.[240] This process of including the potential product substitutes into the relevant market will continue until the point when the small price

[235] The discussion will only focus on demand substitutability.
[236] Commission Notice on the Definition of Relevant Market, at para.13.
[237] 'Substitutability', in this case, heavily depends on the consumer general preference, taste and other habits that antitrust authorities will take into account when approaching the assessment of demand substitutability.
[238] The Department of Justice and the Federal Trade Commission joint merger enforcement guidelines "1992 Horizontal Merger Guidelines" (*hereinafter* US Horizontal Merger Guidelines), para. 1.11.
[239] The definition of the relevant market and the SNIIP test, in particular, were criticised because "the objection could be made that relevant market boundaries are not *authoritatively defined* within anti-trust proceedings—they are not defined based on a view taken by the respective application method or authority, but it is the *consumers'* point of view being *investigated*. In price tests it is the response of consumers which is investigated and assessed" (emphasis in original)—Silhan, J., "The Concept of Relevant Market: Some Critical Remarks" [2012] ECLR 589 at 591.
[240] Commission Notice on the Definition of Relevant Market, at para.17; US Horizontal Merger Guidelines, para. 1.11.

increase becomes profitable.[241] In the US, antitrust authorities, in considering the consumers' response, take into account various factors, *e.g.* evidence that buyers either turning to the substitutes or considering to do so and evidence that producers are taking into account a possibility of consumers to shift to different products.[242] It should be noted that the US Merger Guidelines suggest only 5% price increase for the purposes of the SSNIP test.[243] However, US antitrust authorities adopted the 10% price increase in practice which was criticised by Robert Pitofsky for being "hard to justify".[244] This, therefore, already indicates a small divergence in the assessment of market power that exists between the US and EU antitrust laws. This, although, does not prevent the US and EU antitrust authorities to rely on the same economic hypothetical test in the assessment of demand substitutability for a product or a group of products.

In the assessment of the relevant geographic market, the US and EU antitrust authorities also apply the SSNIP test. [245] It should be noted that a single firm can be present in the several markets; therefore, the careful delineation of geographic market should be undertaken. In this case, antitrust authorities will consider whether the hypothetical price increase would push consumers to switch to the suppliers of the products in different geographical areas.[246] The result of the test would be the same as with the relevant product market, *i.e.* the set of geographical areas would be added until the relative price increase becomes unprofitable.

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[241] The SSNIP test has a flaw which is known as the cellophane fallacy which is a term originated in the *United States* v *du Pont & Co*. It occurs when 5-10 % hypothetical price increase is added on an already monopolistic price. The SSNIP test does not take into account the fact that a monopolist will be already charging the highest price and raising a price further will lead to an incorrect conclusion as to the existence of market power. Such a situation will take place because the consumer will switch to those products which do not represent substitutes. This will lead to a broad definition of a relevant market and, subsequently, to an incorrect analysis of market power and "that the estimated elasticity of demand and gross margin will be greater than if prices corresponded to a competitive market"-- O'Donoghue, R., & Padilla, A., J., *The Law and Economics of Article 82*, at p. 81.

[242] US Horizontal Merger Guidelines, para. 1.11.

[243] *Ibid.* para.1.11.

[244] Pitofsky, R., "New Definitions of Relevant Market and the Assault on Antitrust" [1990] 90(7) Colum. L. Rev. 1805 at p.1824.

[245] The SSNIP test is argued to be unreliable tool for the analysis because it cannot identify whether the prevailing market price is already a monopoly price. This situation is called the "cellophane fallacy". The term was introduced in the American case *United States* v *EI du Pont de Nemours & Co*. See also, Turner, D., F., "Antitrust Policy and the Cellophane Case" 70 Harv. L. Rev; O'Donoghue, R., & Padilla, A., J., *The Law and Economics of Article 82*, at p. 81; and Commission Notice on the Definition of Relevant Market, at para.19.

[246] Commission Notice on the Definition of Relevant Market, at para.17; US Horizontal Merger Guidelines", para. 1.21.

Therefore, market power is a firm's ability to raise prices above the supply cost without losing its customers to the existing or new competitors.[247] Supply cost is simply a minimum cost a firm would incur when producing its product. No firm would ever be able to retain its market power if a relevant market lacks barriers to entry for new competitors. The early agreement among the economists is that "if economies of scale are such that the minimum efficient scale of operation is large in comparison to the market, then there can be a barrier to entry and, hence, monopoly".[248] The Minimum Efficient Scale (MES) is considered to be the lowest point where a firm can produce in such a way which would minimise its long run average costs. It is being a useful tool in order to assess a market structure as it provides with the clearer picture on the state of a market and its competitors. That said if the MES is calculated as being small relative to the overall size of a market, then it could lead to a conclusion that a market in question has a large number of competitors. This, in turn, leads to the situation where a presence of a larger number of competitors would influence market players to compete fairly in the given circumstances. It was also argued that the proof of dominance does not lie in the definition of a relevant market; rather, "in a full analysis of all the factors which influence the power of a firm".[249]

3.4. Economic Models of Competition

A market is a place where all buyers and sellers are involved in the exchange of goods and services for (typically) money. Competition among market players is very important for a market to be efficient. A market contains various players and their supply and demand relationships determine the market price. Supply and demand are economic factors, which are responsible for the determination of a price. In a perfectly competitive market, as will be discussed below, the price for a unit of production will vary until the point when the quantity demanded by the consumers will be equal to the quantity supplied by the

[247] Baden Fuller, C., W., "Article 86 EEC: Economic Analysis of the Existence of a Dominant Position" [1979] 4(6) European Law Review 423 at p. 428.
[248] *Ibid.* at p. 428.
[249] *Ibid.* at p. 436.

producers, *i.e.* the market will determine the satisfactory price for all market players. If this is the case, then the perfectly competitive market is considered to be in "equilibrium".[250]

A consumer is a rational person who demands a product and is prepared to match the demand with money. Therefore, a consumer plays an inseparable part in the market system as it gives the producers a financial incentive to produce and supply. Consumer demand is a key feature in the discussion of market power. For every consumer there is a highest amount a consumer is willing to pay which is called a "reservation price".[251] Any supplier of a product would be tempted to charge a consumer his reservation price; but instead they will have to consider the relationship between the consumer's willingness to pay his reservation price and the quantity of a product demanded on a market.[252] The reason behind this consideration is that if a price for a particular product drops then people with a lower reservation price will be able to afford it or, similarly, consumers with a high reservation price will be able to buy this product for a lower price. Also, if a firm decides to produce a larger quantity of a product; then, it will have to lower the price in order to include the consumers with lower reservation price into the transaction. Therefore, economics explains that the higher the price, the less the demand for a product because the price has an inverse relationship with the quantity demanded by the consumers. The relationship between the price for a product and its supply is shown by the demand curve.

The elasticity of demand depends on the reaction of the consumer demand toward the price change. The price elasticity of demand reflects how much the quantity demanded changes in response to a change in price. Where demand falls less than proportionately to an increase in price, demand is said to be inelastic. Similarly, a demand is elastic if the price increase causes a big drop in consumer demand. Due to the inverse relationship between the price and the quantity demanded; the price elasticity of demand is necessary in order to explain how changes in one affect the other.

The knowledge of these economic principles is important in order to assess the existence of market power. As was discussed earlier, the first step in the assessment of the existence of market power requires the delineation of a relevant market. The cross price elasticity of

[250] Hovenkamp, H., *Federal Antitrust Policy and the Law of Competition and its Practice* (3rd edition, Thomson/West, United States: 2005) at p.4
[251] Hovenkamp, H., *Federal Antitrust Policy and the Law of Competition and its Practice*, at p.4.
[252] Jones, A., & Sufrin, B., *EU Competition Law: Text, Cases and Materials*, at p.4.

demand is a key economic tool which is important for the purposes of market definition. The cross price elasticity of demand identifies whether the price increase for one product will affect the demand for another product. The purpose of this examination is to identify whether two different products could be considered as substitutes[253] for the purposes of market definition.

A firm is another player of the market system. It is assumed that a firm acts in a rational way with an aim to maximise profits.[254] Profits, in such situations, are regarded to be a difference between total cost incurred on producing a product and the total revenue[255] a firm earns from selling this product.[256] In perfect competition model, for instance, firms do not earn any profits; rather making zero economic profits.[257] In this case, economists use the relationship between costs and revenues in order to measure the profits of a firm.[258]

Another economic tool, used to assess the business relationship between buyers and sellers, is a supply of goods and services model. A supply model indicates how much of production the producers are willing to supply at any particular price. The sellers will consider various factors when deciding on the output;[259] however, the costs of production are the most important determinants. Cost, in a broad sense, is a value of money that has been used in the production of a product. This monetary value is lost as it is no longer available for a further use. There are various ways in analysing and categorising costs, and in the application of antitrust matters may turn on differences between them. For the purposes of industrial economics, the following costs are relevant and important. Total cost (TC) represents the total economic cost used in the production of a product and can be divided into two categories: variable and fixed costs. Variable costs (VC) are "costs that vary with output",[260] for instance, rental of factory. Fixed costs (FC) are the costs which do not change along with the production; rather, they are fixed in relation to the output of

[253] See para. 3.3. above.
[254] Jones, A., & Sufrin, B., *EU Competition Law: Text, Cases and Materials*, at p. 6.
[255] Revenue is considered to be a reinstatement of a price to a firm.
[256] Total cost and total revenue are the main components of profit.
[257] See 3.4.1. below.
[258] It was argued that "there is no difference in principle and no clear distinction in practice between profit and monopoly gain. Profit is legitimate or justified monopoly revenue, and monopoly gain is that which is 'too' large or lasts too long (or which rests on some 'unfair' competitive practice)"-- Knight, F., H., & Papandreou, A., "An Appraisal of Economic Change—Discussion" [1954] 44(2) American Economic Review 63 at p. 65.
[259] For instance, the market structure, the prices of the substitute products, the competitive constraints, the expenses on various inputs and so on.
[260] Posner, R., A., *Antitrust Law* (2nd edition, The University of Chicago Press, Chicago and London: 2001) at p. 11.

production for a certain period of time, for instance, raw materials. Therefore, fixed costs will be incurred even if a firm is not producing any product. The importance of distinguishing between different costs should not be underestimated as when a firm is deciding on the quantity of output to be placed on a market, it will take different costs into account.[261]

As was already discussed, an assumption exists that a firm's only goal is one of profit maximisation. In this case, when a firm deliberates on how much output it requires to produce in order to maximise a profit, it will take the marginal cost into account. Marginal cost (MC) is the cost of producing an extra unit of a product. In some cases, MC of an additional unit of output may depend on how much quantity of output is already being produced by a firm. After a firm identifies its marginal cost on producing an extra unit of output, it is then when a decision could be made whether an extra unit of output should be introduced for the profit maximisation purposes. In this case, a firm would prefer to raise or lower its quantity of output to the point where marginal revenue (MR) [262] equals MC. The idea behind this formula is straightforward, *i.e.* if the production of an extra unit of output brings additional revenue that is higher than expenses incurred in producing it; then, it will be profitable to do so.[263]

A properly functioning market with effective competition could lead to various benefits since it carries an idea that resources for the production of output will not be wasted and firms will produce the exact quantity of output that consumers desire and are willing to pay for. Free and properly functioning market has a potential to function in a way which would bring costs down. In order to achieve such an outcome, a strong interfirm competition becomes of the paramount importance.

3.4.1. Perfect Competition Model

Economists developed an extreme economic model, known as a perfectly competitive market. A market with perfect competition carries an idea of a market that functions efficiently with firms fiercely competing with each other. In a perfectly competitive

[261] Please note that it will depend on whether there is a long run model or a short run model. In the former, a firm will take all costs into account; while, in the latter, a firm will only take into account its marginal costs.
[262] Marginal revenue is the increase in the producer's revenue after an extra unit of production was sold to the customers.
[263] Although, this never guarantees a profit since this approach does not take other costs into account, *e.g.* fixed costs.

market, there is a large (formally an infinite) number of market players where each of them is considered to be price-takers rather than price makers. This is explained by the fact that the economic model of perfect competition presumes that each market player is insignificant to the market as a whole; therefore, each of them takes price as it is without them having any influence on a market price. Furthermore, in a perfectly competitive market, all products are homogenous, producers and consumers have free access to the information and there are no barriers to entry or exit out of the market. If a perfectly competitive market existed, then each producer would make zero profits.[264] If a market allows its players to earn extra profits, then the situation may lead to new competitors into the market to get their own share of the profits. Due to the openness of a perfectly competitive market to new competitors, they will continue to entering the market until it is no longer possible to reap excessive economic profits. Therefore, in a perfectly competitive market the consumers do not pay above costs due to the free access to information and if a competitor attempts to price above the costs then it will be punished by losing its sales.

In addition, in a perfectly competitive market the price has to be equal to both MC and Average Costs (AC), the latter being a cost which is evenly spread over all units already produced. If MC of a next unit of output is higher than AC of existing output, the production of this next unit of output will raise AC. In this case, a producer will have to reduce the supply if it wants to reduce the costs. In a situation where MC of a next unit of production is lower than AC of existing output, the production of a next unit will decrease AC. The producer will have to increase the supply in order to lower the costs of production. This will lead a perfectly competitive market to drive the producers to produce to the point when MC curve intersects with AC curve.

[264] "Zero profit" is an economic profit that is calculated in relation to the opportunity costs. "Opportunity cost" is a cost of a product that was not produced in favour of another product. In such a case, the production of another product should bring enough profit to compensate the business for not producing something else. If the production of another product cannot bring this profit, then the business will be out of a market.

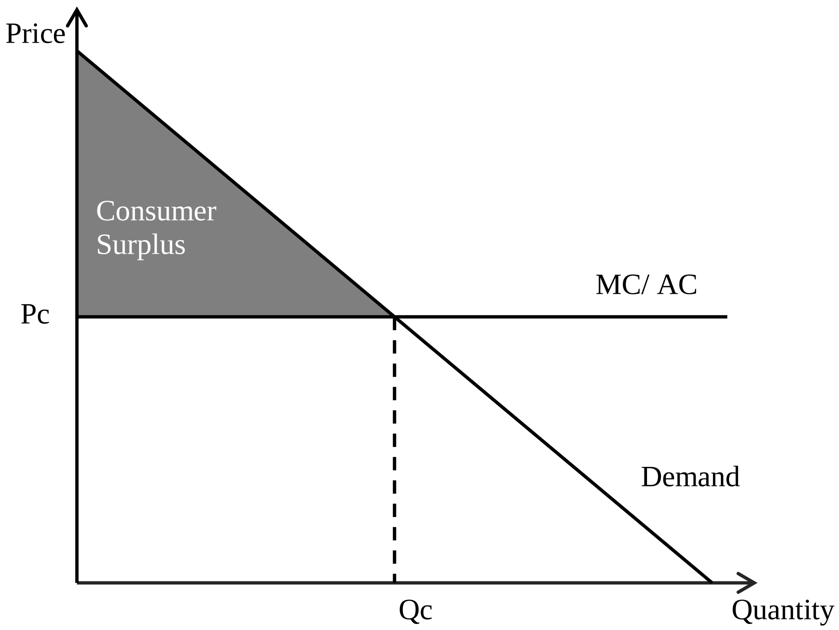

Figure 1: Perfect Competition Model

The demand curve shows how much of the product the customers willing to buy at the different price. As the price falls, demand rises. *Pc* is the perfectly competitive price; while *Qc* is the perfectly competitive quantity of output. *MC* in Figure 1 cuts the demand curve which shows that the marginal costs in this industry equate to the market price. As was already discussed, the marginal cost is assumed to be equal to the average cost; therefore, when *P=MC=AC*, market players' economic profits become zero. The shaded grey triangular area on Figure 1 is a consumer surplus following as the result of a perfectly competitive market. In general terms, consumer surplus[265] is the gain that consumers get when they pay less for products than their reservation price.

The economic model of perfect competition, however, does not and cannot ever exist. This ideal hypothetical market is necessary for the economists and antitrust authorities to measure the reality against this backdrop. The most important feature of a perfectly competitive market is the firms' inability to control prices, in other words, their only

[265] Total surplus consists of consumer surplus and producer surplus. "Surplus" in this case means all the benefits which are higher than costs of the production of the output.

response to market changes would be to increase or decrease their volume of output.[266] Perfect competition is also known as a static model departure from which will signal "a breakdown and invite competition authorities to intervene".[267] It should be noted that antitrust authorities do not openly claim that their primary goal is to achieve perfect competition; however, it cannot be denied that perfect competition model has had a heavy influence on the policy of antitrust law.

3.4.2. Monopoly Model

Monopoly eliminates interfirm rivalry, as pure monopoly involves only one seller on a market. The most detrimental feature of monopoly is the ability of a monopolist to raise the market prices above the competitive level. This ability to raise the prices results from the lack or even absence of competition in the market. The power to raise prices above the competitive level, however, is not absolute. The monopolist will still be constrained by the consumer demand, the function of which is independent of supply structures.

The exercise of monopoly power may give rise to profits, which do not exist in the perfectly competitive market, in which firms have no power to exercise.[268] To protect its monopoly, and by implication its profits, a monopolist may wish to erect barriers to entry. Overall, a monopolist has two options to retain a total control over a monopolistic market: it could launch a price reduction with a purpose to exclude potential competition or to sell at the price below long run marginal cost which would push the actual competitors out of a defined market.[269] All these techniques will lead to a monopolist reducing the competitive constraints it would otherwise face by engaging in exclusionary strategic behaviour. In reality, however, monopoly, in its pure form, is not common because most markets "do not have 'one, and only one seller'".[270]

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[266] Ranlett, J., G., & Curry, R., L., "Economic Principles: The 'Monopoly', 'Oligopoly', and 'Competition' Models" [1967-1968] 1 Antitrust L. & Econ. Rev. 107 at p.129.
[267] Ahlborn, C., "Competition Policy in the New Economy: Is European Competition Law Up to the Challenge?" [2001] ECLR 156 at p. 160.
[268] Del Mar, M., "Concerted Practices and the Presence of Obligations: Joint Action in Competition Law and Social Philosophy" [2011] Law & Phil. 105 at p. 109.
[269] Kyriazis, N., & Gyselen, L., "Article 86 EEC: The Monopoly Power Measurement Issue Revisited" [1986] E.L.R. 134 at p. 134.
[270] Karier, T., *Beyond Competition: The Economics of Mergers and Monopoly Power* (M.E. Sharpe, New York, England: 1993) at p.28.

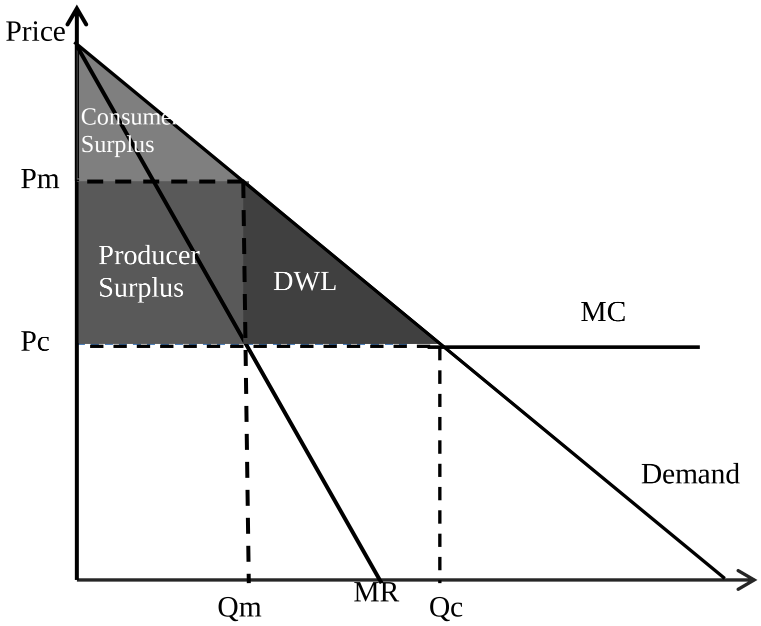

Figure 2: Monopoly Model

Figure 2 shows that the actions of the monopolist lead to inefficiencies and a failure to maximise consumer welfare. It also shows the way the monopolist earns profits, *i.e.* via raising price above the competitive level. *Pc* is the competitive price while *Pm* is the price charged by the monopolist. In the perfect competition model, it was seen that *Pc* was set on the intersection of *MC* curve with the demand curve. In this case, it was assumed that marginal cost equalled the market price; which made a perfectly competitive market viable and efficient. On the other hand, in the monopoly model it becomes obvious that monopoly price is well above the *MC* curve; therefore, the market price is no longer equal to the marginal cost. Therefore, the whole purpose of achieving market efficiency and welfare is lost.

Figure 2 introduces a new curve, the Marginal Revenue (MR) curve. As was discussed earlier, the marginal revenue is extra revenue the producer receives from selling an extra unit of output. In case if a monopolist decides to sell an extra unit of production along with the rest of the produced units, the monopolist will receive extra revenue for supplying the extra product. Assuming the absence of price discrimination, in order to meet demand at an extra unit of production, the monopolist will have to lower its price on all the units produced, including the extra unit of production. The MR curve, in such cases, will always be below the demand curve because the extra revenue received from the supply will be lower than the selling price. Therefore, in order for the expansion of output to be profitable, the monopolist will increase its output only until the point when the MR equals MC. Finally, the fact that the MR of the monopolist is lower than the selling price would lead to higher prices and limited output.

The ability of the monopolist to raise prices above the competitive level is the main feature of monopoly. Since monopoly prices are high above the competitive prices, the monopolist reaps excessive profits, something it will never be able to do in a perfectly competitive market. This will also lead to the restriction of output; therefore, some customers who are willing to pay the competitive price are left without the products. Therefore, when comparing Figure 1 with Figure 2, it appears that a large part of consumer surplus becomes the extra profit of the monopolist, i.e. it is transformed into a producer surplus. According to Figure 2, the dark grey area is the monopolist profit; while, the light grey area is the loss of the consumer surplus. The latter is known as the deadweight welfare loss (DWL) which is a loss of economic efficiency and an indication that the market is not working efficiently. DWL is also known as the social cost of monopoly which is "the difference in social value between a monopolised market and a competitive market".[271]

3.4.3. Perfect Competition vs Monopoly

Perfect competition and monopoly models explain the firms' behaviour when they are operating in either of the market structures. A market could be described as being monopolistic without satisfying all the conditions of the monopoly model. Such a situation could occur when there is a dominant firm acting on a market and being capable of controlling market price and operations of competitors. For this reason, antitrust law is now focusing on the *de facto* monopoly which allows several firms to compete on a market; however, it still has a dominant firm that influences market operations of the competitors. The possible outcome of monopolistic markets could lead to inefficiencies since market prices and costs are not minimised and the monopolist's major concern is the high profits.[272] Typically, monopolies also lead to DWL which is a loss of efficiency.

[271] Hovenkamp, H., *Federal Antitrust Policy: The Law of Competition and Its Practice* , at p. 19.
[272] Ranlett, J., G., & Curry, R., L., "Economic Principles: The 'Monopoly', 'Oligopoly', and 'Competition' Models" [1967-1968] 1 Antitrust L. & Econ. Rev. 107 at p. 140.

Perfect competition, on the other hand, is “an abstraction, and the real world satisfies its conditions only imperfectly”.[273] This explanation is very true since the creation of perfect competition model was required in order to show how firms would perform under certain competitive environment. For instance, the idea that a perfectly competitive market carries homogenous products could be highly improbable. In reality, there will always be some sort of product differentiation;[274] and this makes the existence of a market with homogenous products highly unlikely. The same principle applies to monopolistic markets as any product or service might always have some degree of substitutes available on a market.

A market which features perfect competition is believed to lead to efficiencies; therefore, creating beneficial market environment for the consumers. Such a market could lead to a better productive efficiency where a market utilises all of its resources in the most efficient way. This will lower the costs of production and, therefore, result in lower expenses for producers and, accordingly, lower prices for consumers. If a market player does not produce at the lowest possible cost, it will have to leave the market, as it will sustain losses. The idea of fierce competition in a perfectly competitive market confirms the necessity of strong rivalry among market players. Markets that feature lack or no competition among its market players could lead to productive inefficiency and, therefore, to the welfare loss. The effect flowing from lack of competition is described as X-inefficiency and was discussed by Leibenstein in 1966[275] who concluded that X-inefficiency negatively affects the markets because “neither individuals nor firms work as hard, nor do they search for information as effectively, as they could”.[276] Therefore, if market features perfect competition then fierce rivalry among competitors will motivate them to minimise costs and increase productive efficiency. Perfectly competitive market could also positively affect the dynamic efficiency of a market by encouraging innovation and investments in R&D. This form of economic efficiency is important as it is argued to

[273] Hovenkamp, H., *Federal Antitrust Policy: The Law of Competition and Its* Practice, at p. 39.
[274] *I.e.* innovation could cause product differentiation, especially when a firm spends large amount of finance on Research & Development. In such cases, it can become difficult to treat such products as homogenous.
[275] Leibenstein, H., “Allocative Efficiency vs ‘X-Efficiency’” [1966] 56(3) The American Economic Review 392.
[276] *Ibid.* at p. 407.

be the most important form of efficiency as it “provides the greatest enhancement of social wealth”.[277]

Market efficiency and total economic welfare are clearly very important advantages of a properly functioning market with a strong interfirm rivalry. Since it is argued that perfectly competitive market *per se* does not exist, it seems that current antitrust rules are aimed at driving markets as close as possible to a market with perfect competition. It was argued, however, not every industry can accommodate perfect competition model, *i.e.* new economy industries would be the example of it.[278] The market restructure, in order to create much smaller firms, and attempts to force those firms to price at MC could potentially lead to consumers being worse off.[279] For now, perfect competition and monopoly models *per se* simply represent what they are, *i.e.* hypothetical economic models of market structure.

3.5. Final Observations

Antitrust law had never claimed that its purpose was to protect inefficient small businesses; however, it was a purpose of antitrust law[280] “to expand the range of consumer choice and entrepreneurial opportunity by encouraging the formation of markets […] and protecting participants—particularly small businessmen—against exclusionary practices”.[281] This led to the time when the prevalent view was that a market would be better off if it had a number of smaller producers; therefore, placing a burden on large and powerful firms to disprove that their market success was evidence of actual or potential harm to the market.[282] Despite all existing arguments about the purposes of antitrust law and the parties which are affected by its influence, the underlying point is that consumers’ interests are of a paramount importance, as discussed earlier. Consumers, or the public in general,

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[277] Brodley, J., F., “The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress” as published in First, H., Fox, E., M., and Pitofsky, R., (eds) *Revitalising Antitrust in its Second Century: Essays on Legal, Economic, and Political Policy* (Quorum Books, New York, Westport Connecticut, London: 1991) at p. 99.
[278] See Chapter 7 for a brief discussion of the new market economy with a reference to antitrust case against Google.
[279] Ahlborn, C., “Competition Policy in the New Economy: Is European Competition Law Up to the Challenge?”, at p. 161.
[280] Refer to *United States* v *Aluminium Co of America (Alcoa)* where the Supreme Court held that the purpose of the Sherman Act was to ensure that an industry was divided into small units—see, Chapter 5.
[281] Blake, H., M., & Jones, W., K., “In Defense of Antitrust” [1965] 65 Colum. L. Rev. 377 at p. 384.
[282] Lilienthal, D., E., *Big Business: A New Era* (Harper & Brothers, New York: 1953), at p. 6.

and their assumed dissatisfaction with powerful firms might not mean that they are ready actually to wipe out large firms entirely. It was argued that "in the abstract the public might be more ready to break them up, but when faced with the decision on a company that is well known (and usually well regarded), they are distinctly reluctant".[283] Following this argument, it appears that it is smaller competitors which might have the most interest in the eradication of large private economic power on a given market. It is hard to imagine that a firm which does not monopolise and which fulfils consumers' needs could anger the public by simply because of its market size or bigness. The majority of consumers are normally not interested in the way a firm conducts its business as long as they receive a satisfactory end product. Antitrust law and all the ensuing rules are strictly for market players, *i.e.* the competitors. This is why adequate antitrust rules and their enforcement are needed to control markets, in general and the actions of businesses, in particular.

The danger of having a policy which would protect competitors from the aggressive competition and target powerful firms to make place for their weaker rivals may bring short-term benefits, "but all too often the only longer-term winners are inefficient rivals protected from the rigours of competition".[284] This, however, will depend on a market in question. Small firms will normally operate on a smaller market, while bigger firms will most likely target a global market. Globalisation, on the other hand, has led all markets to become interconnected with one another, therefore leading to the conclusion that actions of the larger firms would have repercussions on even smaller markets. It is argued that this factor should be taken into account when assessing the effects of the large firms' actions. This becomes even more acute because technical progress and innovation have started to play an important role in the furtherance of market development. For such reasons, it is believed that firms would "seek innovations to challenge existing companies in high profit markets and better respond to emerging market demands".[285]

The history of political influence on US antitrust law reached a stage where it was agreed that the goal of antitrust was to protect the competitive process even if it would lead to the reduction of small businesses on a market because the pursuit "of mythic virtues of smallness would themselves be inconsistent with another set of political values:

[283] Best, R., D., "The Antitrust Controversy—A Survey" [1961-1962] 17 Bus. Law. 859 at p. 867.
[284] Kolasky, W., J. "What is competition? A Comparison of US and European Perspectives" [2004] Antitrust Bull 29 at pp.40-41.
[285] Lowe, P., & Held, A., "Modernisation and Beyond: The Role of Competition policy in Driving Economic Growth"[2005] 1 Eur. Competition J. 35 at 36.

maintenance of conditions of equality of opportunity for all businessmen through limitations on the range of private discretion".[286] The principle of equality of opportunity to do business among all competitors should be at the core of the law on monopoly as it would help to strike a necessary balance in which the interests of the general public, small businesses and large firms would all be considered. If the true reasons behind antitrust law are the protection of consumer welfare and not simply weaker competitors, then the prohibition should only be triggered when equally able competitors[287] start utilising their market power against each other to the consumers' detriment. The EU, however, does not seem to be offering equality in this respect by striving to provide SMEs with an access to the EU internal market. And, EU competition law justifies it by the argument that diversity[288] on a market provides consumers with a choice.[289] One of the common arguments advanced by businesses which are being affected by excessive, in their opinion, government's intervention provides that a government is attempting to take on a role which decides whether a large or small firm should be involved in a particular market activity, while, in reality, "the only appropriate judge is the consumer".[290] It could be rephrased by saying that it is rather the consumer reaction to the firms' market performance which could determine whether a market is being efficient or not.

Chapter 2 showed that US antitrust law was more experienced in tackling the spread of bigness and size in the past. Neither the Supreme Court nor antitrust authorities, however, had proved that large firms *per se* adversely affected consumer welfare. Meanwhile, no proof had ever been provided to show that small businesses would necessarily enhance

[286] Pitofsky, R. "The Political Content of Antitrust", at p. 1059.
[287] This should not be confused with EU competition law's 'as efficient competitor' test which is used for the assessment of a firm's conduct and not its dominance. This test includes a hypothetical competitor who is as efficient as a dominant firm under the investigation. The idea behind this test is to identify whether behaviour of a dominant firm is capable to exclude an equally efficient competitors. If this is the case, then the dominant firm is likely to be pricing below costs. If, however, an equally efficient competitor is capable to compete then the Commission will unlikely to interfere—see, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" 2009/C 45/02, paras. 24-27.
[288] In fact, it was argued that bigness also creates diversity in size of business, *i.e.* "diversity of size and of function, so that what is small becomes bigger, so that what is big in turn creates many little businesses, which in turn compete with and stimulate and discipline what is big" in Lilienthal, D., E., *Big Business: A New Era*, at p. 36.
[289] In *Microsoft*, for instance, the GC concluded that Microsoft's actions led to the increasing number of consumers to be "locked into a homogenous Windows solution at the level of work group server operating systems"; therefore, robbing them of their right of choice. See, *Microsoft Corporation* v *Commission*, para. 650.
[290] Dirlam, J., B., & Kahn, A., E., *Fair Competition: The Law and Economics of Antitrust Policy* (Cornell University Press, Ithaca, New York: 1954), at p.11. It was further argued that antitrust law had become a protective roof for small firms from "deserved competitive extinction; *i.e.* present interpretations confuse the preservation of competition with the preservation of competitors".

consumer welfare either. And, it was argued that "for some operations […] size is neutral or perhaps even a disadvantage".[291] The reason behind this argument lies in the economies of scale where the "economic system is simply a huge selection mechanism for picking the most efficient methods, and this includes the proper size, for doing a particular task at a particular time and place".[292] As was mentioned in Chapter 1, it is difficult to identify whether bigness or size would benefit or harm consumer welfare unless an individual study of an industry has been conducted.[293] Irrespective of this, size and bigness should not be prejudiced simply because they give a firm with an opportunity to abuse or monopolise, [294] especially when no concrete evidence exists that smaller businesses would necessarily fulfil the objectives of antitrust law.

It was also argued that "the dynamics of economic growth will keep markets adequately competitive as long as government restrictions do not choke off individual initiative or prevent entry into different lines of business".[295] This, however, will lead to powerful firms acquiring more control over a market, thereby, endangering other firms' chance to compete. This is so because "competition is an evolutionary process [and] evolution requires the extinction of some species as well as the survival of others".[296]And, US antitrust law seems to fully recognise it by promoting free competition on a US market. The EU, on the other hand, is different. Such a scenario will not be acceptable for EU competition law since it prefers fair competition which explains why the Commission is believed to favour smaller market players. And this approach of the Commission aligns with the opinion of Louis Brandeis who believed that "competition consists in trying to do things better than someone else […] it is not competition to resort to methods of the prize ring, and simply 'knock the other man out'".[297] The US's position can be contrasted with the EU as according to the DOJ "when one firm's vigorous competition and lower prices take sales from its less efficient competitors—that is competition working properly".[298] And, this statement represents the US' vision of what is good for the US market and its consumers, *i.e.* free competition.

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[291] Adelman, M., A., "Small Business—A Matter of Definition" [1960] 16 Section of Antitrust Law, Proceedings at the Spring Meeting, Washington D. C., April 7 & 8, pp. 18-32, at p. 23.
[292] *Ibid.* at p. 24.
[293] However, see Chapter 7 for the discussion of the general benefits of large firms.
[294] See *United States v United States Steel Corp*. in Chapter 5.
[295] Blake, H., M., & Jones, W., K., "In Defense of Antitrust", at p. 379.
[296] Bork, R., H., & Bowman, Jr., W., S., "The Goals of Antitrust: A Dialogue on Policy. The Crisis in Antitrust", at p. 375.
[297] Brandeis, L., D., *The Curse of Bigness,* at p. 115.
[298] US Department of Justice, Antitrust Enforcement and the Consumer (Washington, DC 20530), para. 2.

3.6. Conclusion

The primary aim of this chapter was to explain why monopolies are considered to be harmful for the primary aims of antitrust from the economic perspective. It was revealed that economics does not provide antitrust authorities with an answer as to whether a firm is violating antitrust rules. It rather creates a set of economic tools which are used by antitrust authorities to assess the degree of anti-competitive behaviour by dominant firms. The decision as to whether violation of antitrust rules is taking place on a market is completely up to antitrust law.

Economics of industrial organisation had become an important part in the antitrust analysis of, among others, market power. It assisted in shaping aims and objective of antitrust law from an economic perspective and it had led to a common agreement that promotion of economic efficiency was one of the objectives of antitrust law along with the protection of consumer welfare. It was submitted that "antitrust policy enunciates a distinct economic objective—a blending of efficiency and consumer welfare—to be achieved by a particular social instrumentality—interfirm rivalry".[299] Firms, in this respect, are primary partakers which have a potential to either promote or stifle economic efficiency and consumer welfare. A market, in this respect, is a playground where firms and consumers meet in order to exchange goods in return for financial rewards. This lies at the core of any market existence and operation.

Economic models of market structure appear to be a significant part of the analysis which describes the level of interfirm rivalry within a defined market. These economic models are examples of two extreme markets; whereby, each model provides examples of different effects on consumer welfare. They create two strikingly different market conditions, whereas, each contains individual scenario of either consumer harm or benefit. It became clear that there is never going to be a market where market conditions are perfect; similarly, with the development of antitrust law, pure monopoly, as depicted in one of the models, is also unlikely to exist. It is possible that these models provide an option for a third scenario where monopoly and competition might get on while preserving the main objectives of antitrust law and respecting the firms' right of freedom to contract.

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[299] Brodley, J., F., "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress" at p.97.

Despite the fact that the EU and US had been influenced by different economic schools of thought, both antitrust jurisdictions apply similar economic tools for the definition of monopoly and dominance. The distinction between two jurisdictions, therefore, does not subsist in the tools they apply, but rather in the final results on their definition of market power. It was argued, however, that differences between the EU and US "are not always explained by the sound economics of one jurisdiction and the unsound economics of the other, but often by equally credible assumptions regarding the best route to robust markets".[300] This provides that despite the application of similar, if not identical, economic tools for the assessment of market power, both jurisdictions devise their own strategy on tackling monopolies. And such strategies are heavily influenced by the different economic schools of thought.

It transpired that the Chicago School believed in economic efficiency as being the exclusive objective of antitrust law. It supported the self-correcting market tendency for the consumer benefit. The Ordoliberal School, in contrast, was a supporter of an idea that the legitimate aim of antitrust law was to liberalise markets from monopolies which would require greater government's intervention and control. The US applies the Chicago School, while the EU predominantly follows the Ordoliberal approach to antitrust law. Therefore, at this stage of the research, it could be preliminary concluded that the EU's alleged interventionist approach to dominance is derived from the Ordoliberal School. Along this line of thinking, it could also be concluded that the US applies more self-correcting techniques and less antagonistic approach to firms with monopoly power.

It was also revealed that the disparity between the EU and US is reflected in the approach two jurisdictions take toward market performance among competitors. It was argued that the US prefers free competition while the EU leans in favour of fair competition. This distinction is reflected on the way smaller competitors are treated, *i.e.* the interventionist approach to dominance may be explained by the Commission striving to keep market open for SMEs which access may be endangered by the presence of a dominant firm. The US, on the other hand, holds a more relaxed approach by accepting aggressive competition and weak competitors as a result of it. This distinction is very important.

[300] Fox, E., M., "Monopolisation, Abuse of Dominance, and the Indeterminacy of Economics: The US/EU Divide", at p. 729.

Chapter 4: Monopoly and Dominance in a Nutshell

This chapter is focusing on the main (non-economic) tools applied to the assessment of monopoly and dominance in the US and EU. The two concepts, although being subject to similar rules, are not identical.

As discussed in the previous chapters, EU and US antitrust law have two main legal provisions which deal with the concepts of monopoly and dominance. Section 2 condemns monopolisation or an attempt to monopolise by firms, while Article 102 prohibits an abuse of a dominant position. In terms of terminology, even though both concepts are sometimes used interchangeably, precision requires that the term 'monopoly' be applied in US antitrust law and 'dominance' in EU competition law.[301]

This chapter is going to focus on the concepts of a dominant position and monopoly and their main constituent parts. It will be seen that, on a general scale, both jurisdictions have the same underlying principle of what dominant position and monopoly represent. It will also be seen that the US and the EU apply almost identical tests when assessing the existence of monopoly and dominant position. However, as will be discussed, this is where the similarities in approaches end and differences in the results follow.

4.1. US Antitrust Law: Monopoly

A market which features monopoly[302] as its predominant market force is only rarely considered as being a good market.[303] If a firm possesses monopoly power, then it can be predicted that it will limit output and increase prices.[304] Consumers, in this scenario, will

[301] See Chapter 1.
[302] The discussion here is about all monopolies which are not natural monopolies or monopolies created by the States.
[303] Refer to Chapter 3 for a discussion of why monopoly is considered to be detrimental for markets.
[304] Fox, E., M., "Monopoly and Competition: Tilting the Law Towards a More Competitive Economy" [1980] 37 Wash. & Lee L. Rev. 49 at p. 57.

face scarce influx of goods and services with prices going up. Furthermore, markets in general will be affected as competition will be suppressed due to the lack or absence of competitive process. For these reasons, unlawful monopoly is not desirable and antitrust authorities need to ensure that markets are either free from monopolies or monopolies are under a tight control by the government. Neither option is entirely possible as both would require certain laws and resources to eradicate monopolies in their entirety. Meanwhile, overly interventionist governmental policies would go against the principle of market freedom where firms are allowed to compete freely without extensive governmental intervention. The middle ground is for antitrust authorities and courts to act when a firm is monopolising in order to prevent either the gaining of monopoly or strengthening of already existing monopolistic position. One of the concerns is that when monopoly is not unlawful then antitrust authorities should not act because "an antimonopoly law not predicated on bad acts will chill lawful competition by leading firms; and that dislocation costs and efficiency loss that may attend relief against monopoly are likely to outweigh the benefits of dissipation".[305]

The protection and enhancement of consumer welfare is of paramount importance in antitrust law and, as was argued,[306] the maximisation of consumer welfare is now considered to be the main aim of the Sherman Act.[307] A market with a small number of competitors and a powerful monopolist directly affects consumers as the choice in goods and services could considerably diminish, and income could transfer from the consumer to the monopolist. From this perspective, it could already be seen that Section 2 is very straightforward in what it protects, or rather, forbids. However, Section 2, as is the case with Article 102,[308] does not offer any interpretation of illegal and harmful monopoly which is outlawed by antitrust authorities.[309] This task is left to the courts.

In the application of Section 2, the court requires the plaintiff to prove two main elements of the monopolisation claim as set out in *Grinnell* case.[310] It was held that Section 2 contains two main elements,

[305] *Ibid.* at p. 57.
[306] See Chapter 3.
[307] Bork, R., H., "Legislative Intent and the Policy of the Sherman Act", at p.10.
[308] See para. 4.2. below.
[309] Refer to Chapter 2 for the brief discussion on the language of Section 2 of the Sherman Act.
[310] *United States* v *Grinnell Corp.*, 384 US 563 (1966).

> "(1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident".[311]

As was briefly discussed in the previous chapter, a firm should possess market power in order to satisfy the first limb of Section 2. And, market power, for the purposes of antitrust law analysis, could only exist in the relevant market.[312] According to *du Pont, "*when a product is controlled by one interest, without substitutes available in the market, there is monopoly power".[313] And, it was argued that "monopoly power is the power to vary one's price within a substantial margin—a choice of profitable alternatives—and, correspondingly, the power to exclude competitors entirely or to a substantial extent when it is desired to do so".[314] For these reasons, the court must first identify whether a monopolist possessed enough market power to have monopolised a relevant market and, if yes, to further identify if that the said monopolist was engaging in monopolistic behaviour contrary to Section 2.[315]

4.1.1. Market Shares

Market shares will be able to show a firm's size on the relevant market especially after comparison with its closest competitors is conducted. And antitrust law considers market shares to be the most important and accurate assessment of monopoly power.

In the US, antitrust authorities and the courts calculate market shares based on a firm's number of units produced or its revenue. The importance of market shares in the assessment of market power in monopolisation cases started in *Alcoa*[316] where the court was computing Alcoa's market share in aluminium market. In this case, the court famously held that market shares over ninety percent are enough to constitute a monopoly; however, "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-

[311] *United States* v *Grinnell Corp*., at p. 570-571.
[312] The discussion of the definition of relevant market see Chapter 3.
[313] *United States* v *E. I. du Pont de Nemours & Co*., at p.394.
[314] Turner, D., F., "Antitrust Policy and The Cellophane Fallacy" 70 Harv. L. Rev. 281 (1956-1957) at p.288.
[315] Sullivan, E., T., Hovenkamp, H., & Shelanski, H., A., *Antitrust Law, Policy and Procedure: Cases, Materials, Problems* (6th edition, Lexis Nexis, US: 2009), at p. 580: comment on *Alcoa* case.
[316] *United States* v *Aluminum Co. Of America at al. (Alcoa)*.

three percent is not".[317] In *American Tobacco*,[318] the court held that when a firm held over two-thirds of the domestic field of cigarettes, it could amount to a substantial monopoly in the relevant market.[319] In *du Pont*, the court said that the defendants produced almost seventy-five percent of the cellophane sold in the US.[320] This market share was enough to find the existence of monopoly power. In *Grinnell*,[321] it was found that the appellant[322] had control over the three firms with over eighty-seven percent of the accredited central station service business and it was a high enough number to constitute monopoly power.[323] In *Eastman Kodak*,[324] the court found that Kodak had almost hundred percent of control over the parts market and eighty to ninety-five percent of the service market in Kodak complex business machines.[325]

Therefore, the cases above show that if a firm is in possession of over ninety percent of market shares in a relevant market, the court will, almost automatically, infer the existence of monopoly power.[326] The numbers the court put as thresholds for the assessment of monopoly power stem from the numbers the judges in the Supreme Court had in front of them, as this is an established practice when it comes to judicial decisions. Furthermore, as was provided in Chapter 1, for the purposes of this research seventy percent market share is considered to be the threshold below which the Supreme Court will doubt the existence of monopoly power.[327] The market shares, however, are criticised for being "imperfect surrogates of market power",[328] meaning that the overall number cannot provide the best picture for measuring monopoly power.

Finding monopoly power, however, is not the end in the application of Section 2 as this is only the first step in the antitrust procedure. In fact, the existence of monopoly power, on

[317] *United States* v *Aluminum Co. Of America at al. (Alcoa)*, at p. 424 .
[318] *American Tobacco Co* v *United States*, 328 US 781 (1946).
[319] *Ibid.* at p.797.
[320] *United States* v *E. I. du Pont de Nemours & Co*., at p.379.
[321] *United States* v *Grinnell Corp. Et. Al.*, 384 US. 563 (1966).
[322] In this case, "the appellants" mean Grinnell as both the Government and Grinnell appealed to the Supreme Court against the District Court judgment. Although, the District Court held in favour of the Government, the United States appealed as it believed that the relief was inadequate; while, the defendants appealed on the merits, on the relief and on the grounds that during proceedings the District Court denied them a fair trial.
[323] *United States* v *Grinnell Corp. Et. Al.*, at p.571.
[324] *Eastman Kodak Co.* v *Image Technical Services, INC., et. al.*, 504 US 451 (1992).
[325] *Ibid.* at p.481.
[326] More discussion of the application of market shares is in Chapter 5.
[327] See Chapter 5.
[328] Hovenkamp, H., *Federal Antitrust Policy: The Law of Competition and Its Practice*, at p.273-274.

its own, should not be treated as a violation of Section 2. The recent case, *Trinko*[329] is an authority for this proposition. It was held that,

> "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices […] is what attracts 'business acumen' in the first place […], the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*".[330]

The Supreme Court in *Trinko* did not only make a mere possession of monopoly legal but also welcome monopoly power as the evidence of the free-market system. This reflects US antitrust law's approach to a free competition and self-correcting markets.[331] It recognises that a firm has a right to enjoy the fruits of its labour and Section 2 does not outlaw success and prosperity as long as there is no illegality behind monopoly.

The position in *Trinko* is supported by the Supreme Court's[332] preference of a high market share threshold for the establishment of monopoly, *i.e.* seventy percent and above. The DOJ stated that it was "not aware […] of any court that has found that a defendant possessed monopoly power when its market share was less than fifty percent".[333] Although, it was argued that higher thresholds "shield the unilateral conduct of a larger proportion of firms, sometimes even ones with significant degrees of market power […] because they are based on the characteristics of firms rather than their conduct".[334] This is a very valid observation; however, it can also be argued that lower thresholds will lead to more firms becoming subjects to Section 2, because again, a percentage of a market does not provide any information on a firm's behaviour. And in this situation, it is important to decide which policy US antitrust law wishes to pursue. At the time of writing, US antitrust law is very clear on its policy objectives, *i.e.*, with the influence of the Chicago School,[335] it recognises the self-correcting markets, vigorous competition, monopoly prices, free competition and

[329] *Verizon Communications Inc.* v *Law Offices of Curtis V. Trinko LLP*, 540 US 398 (2004).
[330] *Ibid.* at p.407.
[331] See Chapter 3.
[332] With reference to *United States* v *Aluminum Co. Of America at al. (Alcoa)*.
[333] US Department of Justice "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act" (2008), at p.22.
[334] Tor, A., "Unilateral, Anticompetitive Acquisitions of Dominance or Monopoly Power" 76 Antitrust L. J. 847 [2009-2010], at p. 854.
[335] Refer to Chapter 3.

business growth to a monopoly size. Therefore, in order to uphold its policy objectives, US antitrust law allows firms to acquire up to seventy percent of a market as long as there is no illegality behind their monopolies.[336]

It was also argued that "market share, after all, is a historical, or backwards-looking measure. […] but the issue of market power is dynamic".[337] The argument that market power is dynamic should not be underestimated as evolution of new economy markets and high tech industries are the best examples of such a dynamic. In technology markets, arguably, the most successful firms are those which have the highest market share.[338] This fact is not a matter of coincidence because the success is not linked to market shares; rather, the more successful a firm is the more market share it eventually acquires. This, in turn, gives it an opportunity to invest more into, for instance, technology markets which are highly dependent on innovation and investments. However, market shares on their own, in special circumstances, could not be the only indicators of the existence of market power. Economists, for instance, argue that "inferences of power from share alone can be misleading" as regard should also be made to market demand and supply elasticity.[339]

According to the DOJ, if a firm manages to maintain its market shares for a significant period of time and "market conditions (for example, barriers to entry) are such that the firm's market share is unlikely to be eroded in the near future",[340] the DOJ will presume that the firm in question holds market power. If a market share is not high but antitrust authorities or courts want to look into a firm's market status further, they will take into account the existence of other factors which they label as barriers to entry.

4.1.2. Barriers to Entry

The definition of barriers to entry in antitrust law is not readily available. They could be described as any artificial barriers erected by a firm in order to make it difficult for new market players to enter a relevant market.[341] Various economists and lawyers rely on actual

[336] See Chapter 5.
[337] Hay, G., A., "Market Power in Antitrust" 18 Cornell Law Forum Faculty ed. 2 [1991-1992], at p.4.
[338] See, for instance, Google in Chapter 7.
[339] Landes, W., M., & Posner, R., A., "Market Power in Antitrust Cases", at p. 947. The reference was made to the Lerner Index which was actively promoted by the authors as being the best tool in measuring market power.
[340] US Department of Justice "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act", at p. 23.
[341] Bork, R., H., *The Antitrust Paradox: A Policy At War With Itself*, at p.310.

examples; rather than on a legal or economic definition. For the purposes of antitrust law, barriers to entry could be seen as factors which provide a firm with an opportunity to reap monopolistic profits whilst preventing new or potential competitors to enter the same market.

The attempts to provide a useful definition of barriers to entry for the purposes of antitrust law vary.[342] In academic literature on the definition of barriers to entry, it is important to highlight two influential definitions of barriers to entry: Bain was the first economist who defined barriers to entry as "'the extent to which, in the long run, established firms can elevate their selling prices above the minimal average costs production and distribution' without 'inducing potential entrants to enter the industry'".[343] This definition of barriers to entry focuses on the incumbent firm's ability to earn high profits and economies of scale is "a qualifying barrier to entry".[344] It was argued that Bain's definition was flawed because it "builds the consequences of the definition into the definition itself".[345]Another definition of barriers to entry was later introduced by Stigler where he defined barriers to entry as "cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry".[346] According to Stigler's definition of barriers to entry, both the new entrants and an incumbent firm have to face economies of scale; therefore, both face the same costs. For such reasons, under Stigler's definition of barriers to entry, economies of scale are not considered to be a qualifying barrier to entry. It was argued that the choice between these two definitions is probably more valuable in practice than in theory.[347] In theory, barriers to entry can be defined to be "socially undesirable limitations of entry, which are attributable to the protection of resource owners already in the industry".[348] In practice, a barrier to entry is "literally anything that prevents an entrant that is at least as efficient as incumbent firms

[342] See, for example, the following definitions of barriers to entry: Ferguson, J., M., *Advertising and Competition: Theory, Measurement and Fact* (MA, Ballinger: Cambridge: 1974) and Fisher, F., M., "Diagnosing Monopoly" 19(2) [1979] Quarterly Review of Economics and Business 7.
[343] Hovenkamp, H., *Federal Antitrust Policy: The Law of Competition and Its Practice*, at p. 39, citing J. Bain "Industrial Organisation" (1968) at p. 252.
[344] *Ibid*, at p. 40.
[345] McAfee, R., P., Mialon, H., M., & Williams, M., A., "When are Sunk Costs Barriers to Entry? Entry Barriers in Economic and Antitrust Analysis", AEA Papers and Proceedings, May 2004, at p. 462.
[346] Stigler, G., J., "Barriers to Entry, Economies of Scale, and Firm Size" in Stigler, G., J., *The Organisation of Industry* (The University of Chicago Press, US:1968), at p.67.
[347] Schmalensee, R., "Ease or Entry: Has the Concept Been Applied Too Readily?" 56 Antitrust L. J. 41 (1987) at p. 43. *E.g.*, when it comes to finding evidence in antitrust case.
[348] Weizsacker von, C., C., "A Welfare Analysis of Barriers to Entry", The Bell Journal of Economics, Vol. 11, No. 2 (Autumn, 1980) 399-420, at p. 400.

from entering the market"[349]. Despite certain inconsistencies in the definition of barriers to entry, in antitrust law, a greater reliance is placed on Bain's definition of barriers to entry.[350]

As of to date, there are no single guidelines or notices published by the US antitrust authorities which speak about the concept of barriers to entry in respect to monopolisation offence.[351] The Supreme Court has never provided a comprehensive analysis of those barriers to entry which the court would consider as being capable of creating obstacles for new entrants.[352] The absence of a definition can lead to confusion where all privileges and advantages a firm has over its competitors can be seen as a barrier. It was interestingly argued that "moment by moment the big company can outbid, outspend, or outlose the small one; and from a series of such momentary advantages it derives an advantage in attaining its large aggregate results".[353] Clearly, any competitor is aware of it. The intimidation and fear of being prevented to do business can be a good deterrent for a potential entrant. Power and success are regarded to constitute a barrier since "the large company is in a position to hurt without being hurt".[354]

The more superior market player, of course, will always hold and control a facility which its smaller competitor might need in order to enter a market. This is an unfortunate reality of any market. For these reasons, it is not surprising that such a market player will be in a more privileged position than its smaller competitors. However, it is argued that not every resource or facility in the hands of a powerful firm should be taken as a barrier as some privileges are the result of the business acumen and successful investment. The reality can be different though and all the difficulties lie in an ambiguity which lurks in the concept, and "it is this ambiguity that causes the trouble".[355] There is no clear distinction between barriers and other factors which brings an uncertainty to the assessment of monopoly power.

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[349] Bishop, S., & Walker, M., *The Economics of EC Competition Law: Concepts, Application and Measurement*, (2nd edition, Sweet & Maxwell, London: 2002), at p. 62.
[350] Hovenkamp, H., *Federal Antitrust Policy: The Law of Competition and Its Practice*, at p. 40.
[351] Except for "Horizontal Merger Guidelines" by US Department of Justice and the Federal Trade Commission, August 19, 2010.
[352] Lazaroff, D., E., "Entry Barriers and Contemporary Antitrust Litigation" 7 U. C. Davis Bus. L. J. 1 (2006-2007), at p.6.
[353] Edwards, C., D., "Conglomerate Bigness as a Source of Power", in Business Concentration and Price Policy 331 (1955), at p. 335.
[354] Edwards, C., D., "Conglomerate Bigness as a Source of Power", at p. 335.
[355] Bork, R., H., *The Antitrust Paradox: A Policy At War With Itself*, at p.310.

US antitrust law does not seem to place too much reliance on a firm's privileges and advantages over rivals; however, there are some cases which applied them in the context of barriers to entry. The Supreme Court's first brief mentioning of barriers to entry was in *American Tobacco*, when the court held that "by the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade".[356] In this case, the Supreme Court did not go into depth on barriers to entry allegedly present in the case; however, the fact that the court considered the essential elements for the manufacture of tobacco products as being a barrier to entry could not go unnoticed. Furthermore, it was argued that the Supreme Court suggested that barriers to entry in question "were created by anticompetitive conduct, rather than some cost or condition faced by potential entrants".[357] The anticompetitive conduct, in this case, involved American tobacco placing the control over the essential elements of the production of tobacco in the hands of independent corporations which, in turn, were acting as barriers to entry. In *Eastman Kodak*, it was held that the most common examples of barriers to entry could include "patents or other legal licenses, control of essential or superior resources, entrenched buyer preferences, high capital entry costs and economies of scale".[358] All these factors, in aggregate, identify a firm's bigness and *Eastman Kodak* used them to define barriers under Section 2. It should be noted that the Supreme Court in *American Tobacco* stressed that barriers would be illegal if they were created by the anticompetitive conduct. This is a very important point because the presence of illegality can help to distinguish between factors which strengthen monopoly position and factors which are the result of business acumen. This will be further discussed in Chapter 5 in the context of a case study.

Chapter 1 of this thesis listed the possession of IPRs as one of the most likely examples of a firm's bigness and *Eastman Kodak* is the source for such conclusion. Any firm which possesses an IP over its product, facility, knowledge or resource, will have a legal right to prevent others from using it.[359] This is the most plausible explanation of why antitrust law considers IPRs as potential barriers between a powerful firm and its potential or actual competitors. Obviously, antitrust law should be able to distinguish between natural

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[356] *US* v *American Tobacco Co.*, 221 US 106 (1911), at p. 183.
[357] Lazaroff, D., E., "Entry Barriers and Contemporary Antitrust Litigation", at p. 7.
[358] *Image technical Services, Inc*. v *Eastman Kodak Co.*, 125 F.3d 1195 (9^{th} Cir. 1997), at p.1208.
[359] In this case, antitrust law imposes certain conditions which are outwith the scope of the current research.

barriers[360] and artificial barriers the aim of which is simply to suppress competition.[361] The need for artificial barriers to entry is explained by the fact that a monopolist needs to protect a market it is monopolising. There are situations when some leading firms “may have the *power* to raise prices to noncompetitive level, but where, because entry is unrestricted, they cannot afford to *exercise* it”.[362] The reason behind their inability to exercise it stems from the fact that when a monopolist starts earning high profits, the market will be swamped by new entrants being attracted by such profits. Therefore, having IP protection over a product, a firm raises its chances to both prevent and eliminate competition on a relevant market. And, the more IPRs a firm has, the more advantageous its position on a relevant market is.

It was already provided that US antitrust law places more importance on market shares in the assessment of a monopoly power under Section 2. There is a general concern that market shares are not very reliable as the main tool in the assessment of market power. This concern lies in the fact that market shares, as already mentioned, are calculated based on economic data which, as argued, might not deliver a very accurate result. This, of course, might undermine the entire Section 2 analysis. It was argued that the reliance on barriers to entry is more justified because “barriers, if present, are relatively easy to identify, albeit difficult to quantify”. [363] It is very difficult not to agree with this argument since, as discussed above, any facility or privilege in the hands of an alleged monopolist can be seen as a barrier.

Therefore, US antitrust law does not place much importance on other factors or barriers to entry. However, the case study in Chapter 5 is going to provide a more detailed analysis on the way the Supreme Court approaches all firm’s advantages and privileges in the assessment of monopoly power.

[360] Natural barriers are those which result from successful business practices and efficiencies.
[361] Bork, R., H., *The Antitrust Paradox: A Policy At War With Itself*, at p. 311.
[362] Mueller, C., E., “The New Antitrust: A Structural Approach” 12 Vill. L. Rev. 764 (1967), at p. 793.
[363] Disner, E., G., “Barrier Analysis in Antitrust Law” 58 Cornell L. Rev. 862 (1972-1973), at p.870.

4.2. EU Competition Law: Dominance

Article 102 protects competitors' opportunities from "distortions of competition which are somehow connected or associated with the market power or dominant position enjoyed by a rival".[364] The assessment of a dominant position is the first step in the application of Article 102 to a particular antitrust case (it will not be if prima facie the conduct complained of could not be considered to be abusive). The Economic Advisory Group on Competition Policy (EAGCP) Report argued, for example, that "an effects-based approach needs to put less weight on a separate verification of dominance. […] If an effects-based approach yields a consistent and verifiable account of significant competitive harm, that in itself is evidence of dominance".[365] The effects-based approached is a new (more economic) approach toward antitrust violations.[366] It encourages the Commission to consider the effects of antitrust violation; rather, than judging simply from its form. The EAGCP continued to argue that "the case law tradition of having separate assessments of dominance and of abusiveness of behaviour simplifies procedures, but this simplification involves a loss of precision in the implementation of the legal norm".[367]The EAGCP was particularly concerned with the fact that the EC Treaty[368] did not require a separate assessment of dominance and abuse; therefore, the argument revolved around the fact of following the EC Treaty procedure. The fact that the EC Treaty does not provide for this separate assessment does not mean that such an approach necessarily lacks legal precision. On the contrary, the need for antitrust authorities and courts to deal with the existence of dominance and its abuse separately provides a clearer picture in the future assessment. This is so because any actions of a dominant or monopolistic firm might potentially seem to be anticompetitive due to the firm's market superiority. The actions of such firms, unless there is a straightforward violation of antitrust law, can be condemned because such firms affect the market dynamics, and consumers and competitors on a greater scale than its smaller rivals. Such an approach, therefore, may lead to successful firms whose dominance or monopoly is not in itself illegal to fall within the prohibition of Article 102 or Section 2 because the ability of such firms to harm competition and competitors can become the focal point of the analysis. Therefore, it is important to have a clear separation in the

[364] Eilmansberger, T., "Dominance—The Lost Child? How Effects-Based Rules Could and Should Change Dominance Analysis" 2 Eur. Competition J. 15 2006, at p.19.
[365] Report by the EAGCP "An economic approach to Article 82", July 2005, p.14.
[366] See Chapter 3.
[367] Report by the EAGCP "An economic approach to Article 82", at p.14.
[368] In its Report, the EAGCP referred to the then-Article 82 EC Treaty which is now-Article 102 TFEU.

assessment of dominance and monopoly and abuse and monopolisation. The former determines the firm's market status the assessment of which starts with its market shares. The latter relates to the firm's market behaviour and the impact of that behaviour Article 102 prohibits the abuse of a dominant position by a firm within the internal market. In order for a firm to be in a dominant position, it has to possess market power. Market power is said to take place when the firm is able "to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded".[369] In other words, if the firm has power to influence market price, then such an influence is regarded as market power. For current antitrust purposes, the evidence of a mere possession of dominance is not enough. The difficulty is that many firms possess some sort of market power; however, this does not necessarily mean that they automatically fall under Article 102 prohibition. The law requires a higher threshold than the mere existence of market power. For such reasons, what becomes paramount is "not whether market power is present, but whether it is important".[370]

The classic legal definition of a dominant position was first provided in *United Brands (UBC)*[371] where the Court of Justice of the European Union (CJEU) defined dominance as a position of economic strength which allows a firm to behave independently on a relevant market.[372] It was argued that the notion of independence was "the special feature of dominance",[373] which could be broadly defined. The Commission, for instance, defines 'independence' as the competitive constraint exerted on a firm in which case "dominance entails that these competitive constraints are not sufficiently effective […] that the undertaking's decisions are largely insensitive to the actions and reactions of competitors, customers and, ultimately, consumers".[374] Such a generalised interpretation of the notion of independence[375] is problematic since it can lead to an uncertainty as to what degree of independence the Commission needs to have in order to establish the presence of a dominant position. In such situations, the firms could experience difficulties to conduct a

[369] Landes, W., M., & Posner, R., A., "Market Power in Antitrust Cases", at p. 937.
[370] Schmalensee, R., "Another Look At Market Power" 95 Harv. L. Rev. 1789 1981-1982, at p. 1790.
[371] *United Brands* v *Commission*.
[372] This definition will be discussed in more detail in Chapter 6--*United Brands* v *Commission*, para. 65.
[373] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005, para. 23. Available at: < http://ec.europa.eu/competition/antitrust/art82/index.html>.
[374] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, para.10.
[375] In *Atlantic Container*, the GC held that a firm with market shares above fifty percent "is capable of enjoying such independence"-- T-191/98, *Atlantic Container Line Ab* v *Commission* [2003] ECR II-3275, at para. 932.

self-assessed analysis of whether their behaviour is independent of their competitors, customers and consumers. It is undeniable that the more powerful a firm is the more aware of its power it will be. This makes multinational corporations become first candidates to satisfy the notion of independence in the assessment of dominance. The notion of independence also relates to the ability of a dominant firm to raise prices above the competitive level.[376] This could be argued as a very strong indication of the existence of a dominant position. As a matter of practice, a dominant firm will continue to raise its prices above the competitive level until "the constraints imposed on the firm by its competitors are binding".[377] However, with a lack of information on the required degree of independence, firms with less power than corporations may also be targeted. The Commission, unfortunately, was not very successful in clarifying legal definition of dominance; it rather reinstated of what was already provided by the courts. Although it was argued that in the Discussion Paper, the Commission attempted to tacitly move away from the classic definition of dominance and, instead, introduced economic language by equating substantial market power with dominance.[378] It is submitted that the introduction of more economic language into antitrust law did not change the gist of the classic legal definition of dominance; it simply adjusted this definition to a more economic thinking.

This classic definition of dominance led to various comments as to whether it provides an adequate explanation of a dominant position. It was argued that the last part of the definition of dominance[379] was not entirely accurate since any firm (even a dominant one) will have to take into account the productive capacity of its competitors and product preferences of its consumers.[380] It was further argued that "product differentiation in the market, the presence of barriers to entry and expansion on the part of rivals, and differences in productive efficiency"[381] could ease the firm's ability to determine prices on a market.

[376] *I.e.*, to act to an appreciable extent independently of its competitors.
[377] Azevedo de, J., P., & Walker, M., "Market Dominance: measurement problems and mistakes" [2003] ECLR 640 at 641.
[378] Monti, G., "The Concept of Dominance in Article 82", at p. 32.
[379] "Power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"--*United Brands* v *Commission*, para. 65.
[380] Faull, J., & Nikpay, A., *The EC Law of Competition* (2nd edition, Oxford University Press, New York: 2007), at p. 59.
[381] *Ibid.*

It is commonly agreed that dominance can be defined via direct and indirect ways. The direct way would be applying econometric methods in order to find out whether a firm is charging prices above costs. For instance, Landes and Posner[382] argued that the Lerner index would provide a precise economic definition of substantial market power. The Lerner index measures "the proportional deviation of price at the firm's profit-maximising output from the firm's marginal cost at that output".[383] The application of the Lerner index was criticised by various academics and economists for not being an accurate method in dealings with market power and dominance.[384] The indirect way of measuring market power is conducted via considering market shares of a dominant firm and its competitors; barriers to entry or expansion; and countervailing power of buyers. The latter approach to the finding of dominance is rooted in EU competition law; therefore, it is regarded as a more favourable approach.

It should be noted, however, that in order for a firm to be able to distort effective competition, it must hold market power over a certain period of time. [385] There is no set limit of time which would be indicative of the existence of dominance but according to the Commission, two years of market power would normally be enough to infer the existence of a dominant position.[386]

In the assessment of a dominant position, the Commission takes market shares and other factors into account; therefore, having a broad scale of discretion in the analysis of a firm's status under Article 102. In *CMB* it was held that "a dominant position may be the outcome of a number of factors which, considered separately, would not necessarily be determinative".[387] This reflects the exact approach of the Commission in its assessment of dominance[388] *albeit* it was argued that no single factor could necessarily be decisive.[389]

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[382] Landes, W., M., & Posner, R., A., "Market Power in Antitrust Cases".
[383] *Ibid.* at p. 939.
[384] See *e.g.* Schmalensee, R., "Another Look at Market Power"; and Comments "Landes and Posner on Market Power: Four Responses" 95 Harv. L. Rev. 1787 1981-1982.
[385] *Hoffmann-La Roche & Co AG* v *Commission*, para. 41.
[386] The Commission considers that it will depend on a market and product in question; however, two years of market power would normally be enough to infer the existence of dominant position-- Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings.
[387] Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others* v *Commission* [1996] ECR II-1439 para. 76.
[388] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, at para. 15.

Like US antitrust law, the EU also prefers market shares as the most accurate tool for the assessment of dominance. Unlike US antitrust law, however, the EU sets out an entirely different threshold below which dominance is unlikely to be found.

4.2.1. Market Shares

When Article 102 is being applied to the abuse of a dominant position, the extra weight is placed on the market shares[390] of a firm in order to find out the whether a firm is in fact dominant. It was argued that the Commission prefers market shares over other factors in its assessment of a dominant position.[391] However, as Chapter 6 will show, other factors also play an important role in the Commission's analysis. The Commission, to be more precise, regards market shares as a first factor which aids in revealing a firm's market status.[392] As a general rule, if a firm's market share is below forty percent in a relevant market then dominance is not likely.[393] However, the Commission still reserves the right to investigate a firm further even if its market shares are below forty percent. That is, the Commission can feel obliged to intervene if the existent competitors do not exert enough competitive constraints on a firm with less than forty percent market share.[394] It is very unsettled because it keeps firms unaware of the boundaries of its market status in EU competition law. The only reassurance that firms do receive is that the Commission will not reach the final conclusion without taking all other factors into account.[395]

The standard procedure in finding dominance involves "first defining a relevant market in which to compute the defendant's market share, next computing that share, and then deciding whether it is large enough to support an inference of the required degree of market power".[396] This approach was criticised for focusing too much on the market definition rather than on the important question of market power.[397] The Commission calculates market shares based on the sales of a firm's relevant products in the relevant

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389 Temple-Lang, J., "Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law" 3 Fordham Int'l L. F. 1979-1980 at p. 4.
390 Consider: *Hoffmann-La Roche & Co AG* v *Commission*, para. 41; *AKZO v Commission*, para. 60; *Hilti v Commission*, para. 91; Case T-83/91, *Tetra Pak v Commission* [1994] ECR II-755 para. 109; *Compagnie Maratime Belge Transports*, para. 76.
391 Faull, J., & Nikpay, A., *Faull & Nikpay: The EC Law of Competition*, at p.320.
392 Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, para. 13.
393 *Ibid.* para. 14.
394 *Ibid.*
395 *Ibid.* para. 15.
396 Landes, W., M., & Posner, R., A., "Market Power in Antitrust Cases", at p. 938.
397 Schmalensee, R., "Another Look at Market Power", at p.1798.

area.[398] The high expectations the Commission and the courts place on market shares are, of course, not without criticism. It was argued that the classic market shares approach to the finding of dominance carries the assessment when products are either 'in' or 'out' of the relevant market.[399] This practice leads to the presumption that if products are in the same relevant market, then they are automatically considered to be substitutes. The reality, however, is different. Many products are imperfect substitutes for one another and substitutability is "a matter of degree, and it is artificial to force categorisation".[400] The established practice of categorising products based on their various features might not provide a good basis for measuring market shares within that relevant market. In other words, when relevant market is being defined the fact that substitutability among products varies should be taken into account.

In *Roche*, it was held that "very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position".[401] In *AKZO*, the CJEU held that according to *Roche* decision "the very large market shares" would constitute fifty per cent of the relevant market and "are in themselves […] evidence of the existence of a dominant position".[402] In *Hilti*, the GC confirmed the Commission's finding of a dominant position holding that a market share of between seventy to eighty percent in the relevant market "is a clear indication of the existence of a dominant position".[403] In *Tetra Pak*, it was held that a firm which held nearly ninety percent of the relevant markets was in a dominant position for the purposes of Article 102.[404] And, the GC in *Microsoft* concluded that "Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market".[405]

The Commission and the courts will also take into account market shares of a firm's competitors in order to see how the relevant market is divided among them. [406] In *Roche*,

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[398] Commission Notice on the Definition of the Relevant Market, at para. 53.
[399] Vickers, J., "Market Power in Competition Cases", at p.8.
[400] *Ibid.*
[401]*Hoffmann-La Roche & Co AG* v *Commission*, para. 41.
[402]*AKZO Chemie BV* v *Commission*, para. 60.
[403]*Hilti AG* v *Commission*, para. 92. Confirmed by the CJEU, Case C-53/92 P, *Hilti AG* v *Commission* [1994] ECR I-667.
[404]*Tetra Pak International* v *Commission*, paras. 121-122. In fact, the General Court added that the market power in one market was so strong that there was no longer any need to establish the existence of dominance in other markets, para. 119.
[405]*Microsoft* v *Commission*, para. 664.
[406]*Hoffmann-La Roche & Co AG* v *Commission*, para. 48; *United Brands* v *Commission*, para. 111; *NV Nederlandsche Banden-Industrie Michelin* v *Commission*. See also *Michelin II* [Michelin [2001] OJ L143/1],

for instance, it was conceded that Roche's market shares were forty seven per cent; while, the market shares of its competitors were twenty seven per cent, eighteen per cent, seven per cent, and one per cent. It was concluded, therefore, that "Roche's share, which is equal to the aggregate of the shares of its two next largest competitors, proves that it is entirely free to decide what attitude to adopt when confronted by competition".[407]

Irrespective of the case law and the presumption of dominance at fifty percent, the Commission provided that forty per cent market shares could be regarded as an implied threshold below which dominance was unlikely to be inferred[408] and this number is chosen to be a threshold for the purposes of this research. It should be noted, however, that unlike in Article 101 cases, this implied market share threshold is not a 'safe harbour'[409] which would protect the firms from the application of Article 102 if their market shares are below forty per cent. The creation of a safe harbour for the application of Article 102 could lead to Type II errors, *i.e.* leading to under-enforcement in the sense that a firm could still be dominant in the economic sense while holding "below the threshold" market shares.[410] Type I error, which is also known as a false positive, occurs when a competition authority decides that a pro-competitive behaviour is, in fact, contrary to Article 102; thereby, prohibiting it altogether. In such cases, the law becomes over-inclusive.[411] Type II error, or a false negative, has the opposite effect, *i.e.* when the competition authority concludes that an abuse is not contrary to Article 102 thus permitting it. Therefore, the law is under-inclusive.[412] The argument that the Commission holds an interventionist approach to dominant firms can be supported by another argument that the Commission is trying to avoid Type I errors in its enforcement of Article 102. The Discussion Paper[413] received several comments from various stakeholders urging the Commission to introduce a 'safe

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where Michelin's market shares were calculated to be over fifty per cent in contrast with the significantly smaller market shares of its competitors.

[407] *Hoffmann-La Roche & Co AG* v *Commission*, para. 51.

[408] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, para. 14.

[409] In the application of Article 101 TFEU, the various new block exemptions exist which contain market share thresholds. For instance, Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L142/1 applies only to those vertical agreements where a firm's market shares are below thirty per cent.

[410] Monti, M., "The Concept of Dominance in Article 82", at p. 47.

[411] Whish, R., & Bailey, D., *Competition Law* (8th edition, Oxford University Press, United Kingdom: 2015), at p. 203.

[412] *Ibid.*

[413] DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses: Public Consultation. Brussels, December 2005.

harbour'; [414] however, the Commission chose not to. Instead, as argued earlier, the Commission stopped at forty percent threshold above which an economic analysis of dominance will be required. The American Chamber of Commerce to the European Union (AmCham EU), for instance, argued that market shares of forty to fifty percent or below could not be a good indication of dominance, suggesting that seventy five percent would be a better indication.[415] This proposition can be explained by the fact that, as provided earlier, US antitrust law prefers higher thresholds in the assessment of market power. More interestingly, it was further added that "market shares can be a good indicator of *economic strength* […], in addition, there needs to be a separate finding (and not simply a presumption) based on economic analysis and the specific market circumstances of each case, that this strength is such that it allows an undertaking to act independently".[416] The Commission's decision not to follow the US approach to monopoly signals a different approach to firms with economic power as the Commission leaves open the possibility that, in some cases, even below forty percent is enough to find the existence of a dominant position.[417]

This strategy has granted the Commission with enough flexibility to apply Article 102 to firms which market shares are at or below of the threshold. [418] With this scenario, the Commission's strategy can be interpreted as following an over-enforcement approach in order to exert more control over the competitive process on the internal market.

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[414] "Such a safe harbour could provide additional legal certainty for undertakings close to the threshold. It should also be considered that in the market power assessment—for monopolisation offences under Section 2 of the Sherman Act […]—the threshold for possible market power […] is fixed an 75%, and that below 75%, authorities and judges are mostly extremely reluctant to apply Section 2"-- Ashurst on DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses, at p. 11; "The *Discussion Paper* retains too much discretion for enforcers and creates a real risk of deterring pro-competitive conduct by firms with market power. […] There is inevitably a tension between the need for business certainty from bright line rules and the conduct of a case-by-case analysis based on economic analysis. Hence it is important to establish clear guidelines with decent safe harbours for dominance and potential abuses rather than presumptions"--comments on the DG-Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses by the Competition Law Forum's Article 82 Review Group, at p. 3. Available at: <http://ec.europa.eu/competition/antitrust/art82/contributions.html>.

[415] Comments on the DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses by American Chamber of Commerce to the European Union, April 4th 2006, para.13.

[416] *Ibid.* para.13 (emphasis in original).

[417] However, adding that it "will not come to a final conclusion as to whether or not a case should be pursued without examining all the factors which may be sufficient to constrain the behaviour of the undertaking"-- DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, para. 15.

[418] *British Airways* v *Commission*, para. 212.

Therefore, EU competition law measures a firm's size at forty percent or below which is significantly lower than in US antitrust law. The Commission recognises the said fact and, unlike US antitrust authorities, it places more importance on other factors in a firm's possession in order to justify the finding of a dominant position under Article 102.

4.2.2. Barriers to Entry

The concept of barriers to entry is difficult to define; however, this factor does not minimise their importance for the Commission and the courts. As in US antitrust law, there is still an uncertainty as to what barriers to entry actually are. It was argued that analysis of barriers to entry is "the single most misunderstood topic in the analysis of competition and monopoly".[419]

The Commission defines barriers to entry as "legal barriers, such as tariffs and quotas, or [...] advantages specifically enjoyed by the dominant undertakings, such as economies of scale and scope, privileged access to essential inputs or natural resources, important technologies or an essential distribution and sales network".[420] These examples are, in effect, factors which, in the context of this research, constitute a firm's bigness. These factors, or advantages, make a firm superior over its rivals. These factors, in combination with a certain number of market shares, make a firm dominant under Article 102. The Commission labels them as barriers to entry because technological, financial and commercial superiority may act as a barrier for potential market entrants.

Despite the ambiguity surrounding the definition of barriers to entry, this concept is very important in the analysis of a dominant position. If this practice remains and the Commission and the courts continue to include all privileges and advantages into the assessment, then a firm may be wrongly found to possess market power and its behaviour may be constrained by competition law.[421] Such a result will be against Article 102 which original purpose is to prohibit anti-competitive behaviour of dominant firms.

The economic analysis of barriers to entry seems to recognise the importance to distinguish between factors which result from a firm's efficiency and superiority and those which

[419] Fisher, F., M., "Diagnosing Monopoly" [1997] 27 J. Reprints Antitrust L. & Econ. 669 at p. 687.
[420] Guidance on its Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, para. 17.
[421] Jones, A., & Sufrin, B., *EC Competition Law: Text, Cases and Materials,* at p. 87.

result from incumbency or first-mover advantages.[422] Despite the fact that EU competition law claims to have only the consumer welfare at the heart of EU competition law policy, as was provided in Chapter 3, consumers, markets and firms are all interconnected. If a firm gets punished for its success, it may have a deterrent effect on other firms and which, in turn, will affect consumers. For such reasons, the Commission and the courts should take an extreme care when taking privileges and advantages as an additional evidence of the existence of a dominant position. It is argued that there is a general consensus that "entry barriers result from asymmetry between an incumbent firm and a potential entrant and where the incumbent acts on the asymmetry".[423] Therefore, a firm's competitor (or a new entrant) should believe that its entry is being deterred by the dominant firm, *i.e.* it is not just a mere threat but an actual possibility.[424]

As will be seen in Chapter 6, the EU courts offer the Commission their full support in the application of advantages and privileges into the assessment of dominance. In *UBC*,[425] for instance, the CJEU did not provide a list of barriers which it took into account when assessing UBC's dominant position. However, the CJEU did hold that "large capital investments required for the creation and running of banana plantations"[426] were the examples of barriers which were creating obstacles for new competitors.[427] The CJEU concluded that "the cumulative effect of all the advantages enjoyed by UBC thus ensures that it has a dominant position on the relevant market".[428]

In *Roche*, the CJEU concluded that "the technological lead of an undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competition […] represent in themselves technical and commercial advantages and […] it is the consequence of the existence of obstacles preventing new competitors from having access to the market".[429] Based on the information above, the CJEU concluded that "Roche's shares of each of the relevant market, complemented by those factors which in

[422] Harbord, D., & Hoehn, T., "Barriers to Entry and Exit in European Competition Policy" International Review of Law and Economics (1994) 14, 411-435, at p. 423.
[423] Turnbull, S., A., "Barriers to Entry, Article 86 and the Abuse of a Dominant Position: An Economic Critique of European Community Competition Law" [1996] ECLR 96 at p. 96.
[424] *Ibid.*—It was further argued that if the dominant firm "commits itself to considerable sunk costs in R & D or advertising it may succeed in deterring entry. Raising rivals' costs is an important part of this analysis".
[425] *United Brands* v *Commission*.
[426] *Ibid.* at para. 122.
[427] A more detailed discussion of factors taken into account by the CJEU in the *United Brands* v *Commission* case will be provided in Chapter 6.
[428] *United Brands* v *Commission*, at para. 129.
[429] *Hoffmann-La Roche & Co AG* v *Commission*, para. 48.

conjunction with the market shares make it possible to show that there may be a dominant position".[430]

Chapter 6 will provide an in-depth discussion of the *UBC* and *Roche* cases along with other important cases relevant for the current research. For now, what becomes clear is that the relevance of a firm's bigness should not be underestimated. Both the Commission and the EU courts are criticised for adopting a wide definition of dominance with a narrow definition of entry barriers, "often focusing on mere costs of entry rather than economic barriers".[431] At this stage, therefore, it can be preliminary concluded that a firm's bigness is considered by the Commission as being a barrier to entry and it definitely plays a vital role in the finding of a dominant position.

4.3. Final Observations

The main legal provisions of both jurisdictions have distinctly different wordings on the laws of monopoly. However, neither provision outlaws monopoly power or dominance without anticompetitive action on the part of the monopoly holder.[432] It should also be noted that none of the legal provisions provide the definition of monopoly or dominance leaving it to antitrust authorities or the courts to deal with. This leads to an earlier argument that EU and US antitrust authorities and the courts are left with too much freedom of legal interpretation; which could influence both sides, in negative and positive ways. This responsibility, in combination with other factors discussed throughout this research paper, has led to differences in the definition of monopoly and dominance in the EU and US, despite the application of similar economic and non-economic tools. It was argued, for instance, unlike the US definition of monopoly power, the EU's general definition of dominance is "less rooted in price theory analysis".[433] The evidence of this is drawn from the classic definition of dominance as introduced in *Hoffman La-Roche*[434] and

[430] Case 85/76, *Hoffmann-La Roche & Co AG* v *Commission* [1979] ECR 461, para. 49.
[431] Turnbull, S., A., "Barriers to Entry, Article 86 and the Abuse of a Dominant Position: An Economic Critique of European Community Competition Law", at p. 97.
[432] Please note that Article 102 contains a non-exhaustive list of anticompetitive behaviour while Section 2 does not.
[433] Hawk, B., E. "The American (anti-trust) Revolution: Lessons for the EEC?" [1988] E.C.L.R. 53 at p.83.
[434] *Hoffmann-La Roche* v *Commission*.

expanded on in *UBC*.[435] The notion of 'independence' seems to include a vast variety of economic and non-economic factors[436] which could identify the existence of a dominant position. Alternatively, as it was submitted that "the proof of dominance lies not in the definition of the 'relevant market' but, rather, in a full analysis of all the factors which influence the power of a firm".[437] In the US, on the other hand, the definition of monopoly power entails the ability of a monopoly holder to control prices or exclude competition as discussed by the Supreme Court in the *du Pont* case.[438] Such a straightforward definition of monopoly power directs to a more economic analysis based on pricing decisions of a monopolist. Such differences could be attributed to the political and policy preferences of each jurisdiction, one result of which is that the EU takes a more interventionist approach than the US.

As was argued in Chapter 3, the protection of consumer welfare and the promotion of economic efficiencies are the main goals of antitrust law both in the EU and US. This provides that any decision behind the enforcement policy of the antitrust authorities should focus on these aims. In the EU, the Commission is sceptical about dominant firms being able to deliver market efficiencies, especially when the said firm is a quasi-monopolist.[439] According to the Commission, "exclusionary conduct which maintains, creates or strengthen a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains".[440] The Commission even sets out a list of cumulative requirements which a dominant firm needs to satisfy in order to show that its dominance leads to market efficiencies.[441] Irrespective of the Commission's acceptance of a certain level of dominance, the Commission is also of an opinion that quasi-monopoly

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[435] *United Brands* v *Commission*; See Chapters 4 & 6.
[436] The non-economic factors or, also known as indicators of dominance, would normally include patents, various investment capacities, R&D, advertising and all those factors which the Commission and the courts take into account when assessing the power of a firm
[437] Baden-Fuller, C., W., "Article 86 EEC: Economic Analysis of the Existence of a Dominant Position", at p. 436.
[438] *United States* vs *du Pont & Co.,* Refer to Chapter 5.
[439] Or, in other words, almost a monopolist.
[440] Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, at para. 30.
[441] For example, "the efficiencies have been, or are likely to be, realised as a result of the conduct […] technical improvements in the quality of goods, or a reduction in the cost of production or distribution. The conduct is indispensable to the realisation of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies. The likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare […] The conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition"—*Ibid.* at para. 30.

achieved via abusive practices can never rely on the efficiency justification.[442] This slightly resembles the position in US antitrust law where the Supreme Court believes that Section 2 applies only to those monopolists which growth is not natural or normal.[443] This similarity between the EU and US is insignificant in a sense that, as argued earlier, monopoly status in the US is different from a monopoly status in the EU. The reason why the Commission prefers a lower threshold for dominance can be explained by the fact that EU competition law is hesitating[444] between 'false positives' or 'false negatives'. The fact that the Commission considers that quasi-monopolist can never claim efficiency as a justification for its behaviour supports an argument that EU competition law is leaning toward false positives.[445] It appears to be a safe strategy to become over-inclusive and prohibit behaviour of a dominant firm disregarding any potential positive contribution to consumer welfare. This thesis does not suggest that size and bigness of a dominant firm lead only to efficiencies, especially when they provide a firm with an opportunity to abuse. Meanwhile, no evidence exists that dominance is always harmful and EU competition law itself recognises it by not prohibiting dominance *per se*.[446] The Commission, therefore, appears to have a secure position by covering all firms with market shares at or above forty percent, rather than allowing monopolists to claim that their actions lead to efficiencies.

The US, on the other hand, had moved away from an overly interventionist approach which resulted in a certain level of acceptance of monopoly. One of the influential explanations of such a move was advanced by Kovacic. It was argued that Chicago/Harvard double helix[447] assumed, among others, that "overinclusive applications of antitrust law to control dominant firm conduct pose greater hazards to economic

[442] The nature of the objective justification under Article 102 was interestingly discussed in Loewenthal, P-J., "The Defence of 'Objective Justification' in the Application of Article 82 EC" [2005] 28(4) W. Comp. 455.
[443] *United States* v *Aluminium Co of America (Alcoa)* in Chapter 5.
[444] The Commission, in fact, says that "the purpose of competition law is to maximise consumer welfare. […] [I]n working to maximise consumer welfare, we need be as concerned by Type II errors (under-enforcement) as by Type I errors (over-enforcement)" Lowe, P., "Remarks on Unilateral Conduct", Speech at Session on International Enforcement Perspectives, Federal Trade Commission and Antitrust Division Hearings on Section 2 of the Sherman Act (Washington DC, 11 September, 2006) at p.5. Available at: <http://ec.europa.eu/competition/speeches/text/sp2006_019_en.pdf>.
[445] On the other hand, it was argued that EU competition law, by moving away from form-based analysis, has already recognised the danger of false-positives by conducting a more comprehensive and economic evaluation of dominant firms' behaviour in order to avoid chilling effects on competition law-- Lugard, P., "Chilling Effects of Antitrust Law: Better Safe Than Sorry?", 2008 Fordham Comp. L. Inst 000 (B. Hawk ed. 2009), Chapter 18, at p. 438.
[446] See *NV Nederlandsche Banden-Industrie Michelin* v *Commission (Michelin I)* in Chapter 6.
[447] A principle in antitrust law which consists of hybrid of ideas derived from both the Chicago and Harvard Schools of thought.

performance than underinclusive applications".[448] Under these circumstances, the efforts of monopolists to exercise their market power would not be borne by the competitors, suppliers and customers.[449] The recognition of potential benefits of monopoly or, rather, its neutrality could be the example of the US moving away from focusing on false negatives. It is preferable to permit conduct which has anticompetitive effects because competitive market forces would naturally destroy monopoly, while "Type 2 errors become entrenched in the law".[450]Therefore, the fast moving development of technology, globalisation and innovation, *i.e.* all factors which are pushing antitrust law toward adjustment to the new economic and market realities, could be seen as a contributing factor to the maximisation of consumer welfare. For such reasons, the under-enforcement of antitrust law, while relying on market forces, could be the possible solution to include globalisation and new market realities until a right balance in the law on monopoly is found. Furthermore, when comparing the EU and US approaches to dominance and monopoly, the practice in the EU has shown that "'dominance' in Europe has often led to various kinds of quasi-regulatory control, severely constraining a firm's pursuit of profit in a way that contrasts with American practice".[451] This is because the Commission is trying to avoid Type II errors.

As was discussed earlier, the time factor is very important for dominance and monopoly to be detrimental. In fact, the economists remind the EU courts that dominance "is a concept related to time [*i.e.*] dominance is a position of power over time".[452] The Commission does not deny the application of time to this matter by providing that a firm which can profitably increase prices above the competitive level for a significant period of time could be regarded as dominant for the purposes of Article 102.[453] This position is similar to the US where monopoly might only trigger the application of Section 2 if it was sustained for a considerable amount of time.[454] Only in those situations, dominance and monopoly might

[448] Kovacic, W., E., "The Intellectual DNA of Modern US Competition Law for Dominant Form Conduct: The Chicago/Harvard Double Helix" [2007] Colum. Bus. L. Rev. 1 at p. 72.
[449] *Ibid.* at p. 72.
[450] Lugard, P., "Chilling Effects of Antitrust Law: Better Safe Than Sorry?", at p. 443. The author was citing Easterbrook., "The Limits of Antitrust" 63(1) Tex. L. Rev. 1, 1-40, (Aug. 2004).
[451] Gifford, D., J., & Kudrle, R., T., "European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?", at p. 739.
[452] Baden-Fuller, C., W., "Article 86 EEC: Economic Analysis of the Existence of a Dominant Position", at p. 424.
[453] The Commission would consider two years of market power to be enough to infer dominance, although providing that it will always depend on a product and market in question--Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, para. 11.
[454] Refer to Chapter 5.

have detrimental effects on a market, *i.e.* if a monopolist manages to keep his market foreclosed from new entrants for a prolonged period of time.

4.4 Conclusion

This chapter aimed to introduce the main tools used in the assessment of dominance and monopoly in the EU and US. Despite being rather brief, this chapter was used to create a foundation for the case study in Chapters 5 and 6.

It was revealed that both the EU and US apply the same tools in the establishment of dominance and monopoly, respectively. Furthermore, it was revealed that both jurisdictions are influenced by economics which, arguably, leads to a more coherent and accurate analysis of economic power.

The EU and US apply market shares as the foremost indication of dominance and monopoly and, despite the arguments that market share is not a good enough tool to measure a firm's status, both jurisdictions continue to place importance on market shares. This is where the similarities between the EU and US end. It was discussed that US antitrust law requires seventy percent and above to trigger the presumption of monopoly and that it is very unlikely that a firm would be found to be a monopolist with market shares below fifty percent. EU competition law, on the other hand, keeps its market share threshold at a much lower rate by presuming the existence of a dominant position at or above forty percent. The Commission, however, has explicitly provided that it reserves a right to investigate a firm even with market shares being below forty percent. Such a disparity between two jurisdictions is intriguing.

In addition, EU competition law is also very clear that it will take other factors into account in case if a firm's market shares are low. The Commission labels such factors as barriers to entry and defines them very broadly; the official definition contained all factors which a firm might use against its competitors, leading to a preliminary conclusion that any privilege and advantage a firm had over its competitor would be taken against it during investigation, decision making and, possibly, a court hearing.[455] It was argued that such an approach would lead to firms getting punished for a success and have a potential deterrence effect on other firms. This, in turn, might negatively affect consumer welfare.

US antitrust law also lists 'barriers to entry' as another factor it can take into account in the assessment of monopoly power but there is no official definition of barriers in US antitrust law. Two of the Supreme Court's cases did provide a discussion, *albeit* a brief one, of the possible factors which would be considered as a barrier under Section 2. None of the cases were very detailed;[456] however, the possession of IPRs and access to capital were highlighted by *Eastman Kodak.* Nonetheless, US antitrust law does not place as much reliance on a firm's advantages and privileges as EU competition law. It was argued that this could be explained by the fact that, with the presence of a high market share threshold, the presumption of monopoly occurs with no doubt; therefore, the need to turn to additional factors becomes unnecessary.

The view of this research is that the Commission holds an interventionist approach toward dominant firms and this chapter supports this argument by demonstrating that the Commission is trying to avoid Type II errors by keeping flexibility in its assessment of dominance. This flexibility applies to both low market share threshold and all factors used to find dominance under Article 102 which allows the Commission to investigate any firm without being restrained by, for instance, a safe harbour or a narrow definition of barriers. US antitrust law, on the other hand, promotes free competition and self-correcting markets which is supported by the Supreme Court in *Trinko*. It recognises the importance to allow firms to enjoy fruits of their labour as long as there is no illegality behind their business actions, which explains the presence of a higher market share threshold for the finding of monopoly.

In EU competition law, the legal definition of dominance, as it is portrayed by the courts, might not be entirely consistent with the practice developed by antitrust authorities when approaching dominance. It has been thirty five years since the courts introduced this definition which has been cited and applied in every case law on the abuse of a dominant position.[457] Since then, however, the time changed as antitrust law and its challenges have

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[455] The approach of the EU courts to privileges and advantages of a firm will be considered in Chapter 6.
[456] However, see Chapter 5.
[457] See Chapter 6.

been developing since *UBC* and R*oche.* The possible danger, therefore, is that the classic legal definition of dominance may not be able to keep up with the development of markets and globalisation. On the contrary, it might even create obstacles to the effective finding of a dominant position.

Therefore, at this stage of the research, it can be preliminarily concluded that US antitrust law not only permits size but it also actively encourages it via high market share thresholds and the recognition that mere monopoly and monopoly prices are important examples of the free competition. Additionally, it does not have many concerns with firms' bigness via placing almost no importance on firm's various advantages and privileges as long as there is no illegality or anti-competitive intent behind those factors. This, however, will be discussed in more details in Chapter 5. In relation to the Commission, it can be preliminarily concluded that its interventionist approach leads it to distrust large firms in a dominant position. Chapter 6 will consider this point further.

Chapter 5: The Application of Section 2 to Monopoly: The US Case Study

The previous chapter provided a brief discussion of the main tools used in the assessment of a dominant position and monopoly in the EU and US where it was revealed that the EU and US apply almost identical economic tools to assess dominance and monopoly. The next step would be to see how the Supreme Court in the US has been dealing with the establishment of monopoly power in practice.[458]

This chapter includes a number of the Supreme Court's cases under Section 2 which were selected based on the number of market shares, *i.e.* above seventy percent threshold. In addition, the selected cases were chosen due to their importance in shaping the law on monopoly and their relevance for the current research. Unlike EU competition law,[459] US antitrust law has several important rulings which have a direct discussion of the applicability of a firm's size to the analysis of monopoly under Section 2. The analysis of those cases will be provided in this chapter.

In order to identify whether US antitrust law places any importance on other factors to support the finding of monopoly, the selected cases will be assessed to highlight the discussion, if any, on the Supreme Court's application of commercial and technological advantages to a firm under consideration. This approach will test if bigness is part of the analysis on the establishment of monopoly.

This chapter will attempt to determine whether there is an antagonistic approach to the firms' size and bigness under Section 2.

[458] This means that only relevant to the topic of a research cases will be discussed and certain overlap with the part on US antitrust law from Chapter 4 will occur.
[459] See Chapter 1.

5.1. Background

As was shown in Chapter 2, monopoly used to be defined as “an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.”[460] The understanding of the original[461] definition of monopoly is very important in order to grasp the reasons behind the Supreme Court’s judgements in the earlier cases on Section 2. It will be seen that that initially the Supreme Court’s position toward monopoly was very straightforward as it only focused on the original aims of the Sherman Act. With the introduction of economics into antitrust law, the Supreme Court’s interpretation and application of Section 2 has changed over time,[462] as will be shown by a study of the selected leading cases.

It was argued that antitrust law partially rests on a principle that “economic control must be exercised either by a freely competitive market or by a public agency, and never by private parties”.[463] This argument is no doubt directed at those firms which economic power dictates the way markets operate; thereby, influencing prices and, possibly, stifling competition. Economics is important for the assessment of monopoly and various economic reasons are normally cited in order to explain the harm ensuing from monopoly power and monopolisation.[464] In relation to the former, the Supreme Court held that monopoly was also forbidden “based upon the belief that great industrial consolidations *[were]* inherently undesirable, regardless of their economic results”.[465] This reflects the common belief that firms with monopoly power bring no benefits whatsoever and it also ties up with a highly influential opinion of Louis Brandeis,[466] discussed in Chapter 1.

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[460] Coke, E., *The Third Part of the Institutes of the Laws of England* (1680, Reel position: Wing/958:12), p. 181, cap. 85.

[461] *I.e.*, before the US courts had further developed the definition of monopoly in their subsequent cases under Section 2.

[462] The way the US government had dealt with the development of Section 2 and bigness, see Kovacic, W., E. “Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration” [1988-1989] 74 Iowa L. Rev. 1105.

[463] Note, Section 2 of the Sherman Act—Is A Per Se Test Feasible? [1964-1965] 50 Iowa L. Rev. 1196 at p.1214. See also, Arant, D., “Section 2 of the Sherman Act” [1967-1968] 37 Antitrust L.J. 643.

[464] See Chapter 3.

[465] *US* v *Aluminium Co of America et al.*, at p. 428.

[466] Brandeis, L., D., *The Curse of Bigness*.

For the purposes of this research, seventy percent market share was decided to be a threshold below which US antitrust authorities and the Supreme Court would unlikely find the existence of monopoly power.

5.1.1. *Standard Oil* [467]

Standard Oil was the first US case under Section 2 which became a foundation for further cases on the control of the behaviour of firms with monopoly power. It this case, Standard Oil was a monopolist involved in an aggressive monopolisation on a relevant market. The importance of this case lies in the fact that the Supreme Court, due to the absence of economic analysis, provides a clear discussion of the original aims behind the adoption of the Sherman Act. The clear understanding of such aims should not be underestimated because they can contribute to the study of whether there is an interventionist approach to firms with monopoly power.

Standard Oil[468] involved a business in the refinement of crude oil. John D. Rockefeller and William Rockefeller, along with several companies, established a corporation under the name Standard Oil Company of Ohio (Standard) which received the business of the partnerships. All the Standard's owners became the stockholders. By 1872, Standard had acquired a substantial number of oil refineries in Cleveland, Ohio by employing strong-arm tactics, such as forcing its competitors "either to become members of the combination or [*to be*] driven out of business".[469]

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[467] *Standard Oil Co. of New Jersey v. United States* .

[468] Key Supreme Court's cases citing *Standard Oil*: *U.S.* v. *Terminal R.R. Ass'n of St. Louis,* 32 S. Ct. 507, 510+, U.S. Mo. (1912); *U.S.* v. *Union Pac. R. Co.*, 33 S. Ct. 162, 163+, U.S. Utah, (1913); *D.R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 35 S. Ct. 398, 401, U.S. Ga., (1915); *U.S.* v. *U.S. Steel Corp.*, 40 S. Ct. 293, 299+, U.S.N.J., (1920); *U.S.* v. *Reading Co.*, 40 S. Ct. 425, 427+, U.S. Pa., (1920); *U.S.* v. *Lehigh Valley R. Co.*, 41 S. Ct. 104, 109+, U.S.N.Y., (1920); *U.S.* v. *Socony-Vacuum Oil Co.*, 60 S. Ct. 811, 839+, U.S. Wis., (1940); *Apex Hosiery Co.* v. *Leader.*, 60 S. Ct. 982, 990+, U.S. Pa., (1940); *U.S.* v. *Crescent Amusement Co.*, 65 S. Ct. 254, 260, U.S. Tenn., (1944); *Associated Press* v. *U.S.*, 65 S. Ct. 1416, 1421+, U.S.N.Y., (1945); *U.S.* v. *U.S. Gypsum Co.*, 68 S. Ct. 525, 544, U.S. Dist. Col., (1948); *U.S.* v. *Columbia Steel Co.*, 68 S. Ct. 1107, 1122+, U.S. Del., (1948); *Lorain Journal Co.* v. *U.S.*, 72 S. Ct. 181, 186, U.S. Ohio, (1951); *U.S.* v. *E. I. du Pont de Nemours Co.*, 76 S. Ct. 994, 1002+, U.S. Del., (1956); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 81 S. Ct. 356, 367, U.S. Ill., (1961); *Eastern R. R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 81 S. Ct. 523, 529+, U.S. Pa., (1961); *U.S.* v. *Grinnell Corp.*, 86 S. Ct. 1698, 1708, U.S.R.I., (1966); *U.S.* v. *Topco Associates, Inc.*, 92 S. Ct. 1126, 1133+, U.S. Ill., (1972); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 97 S. Ct. 2549, 2557, U.S. Cal., (1977); *National Soc. of Professional Engineers* v. *U.S.*, 98 S. Ct. 1355, 1363+, U.S. Dist, Col., (1978); *U.S.* v. *U.S. Gypsum Co.*, 98 S. Ct. 2864, 2874, U.S. Pa., (1978); *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S. Ct. 2731, 2737+, U.S. Ill., (1984); *NYNEX Corp.* v. *Disco, Inc.*, 119 S. Ct. 493, 497+, U.S.N.Y., (1998).

[469] *Standard Oil Co. of New Jersey v. United States* 221 U.S. 1 (1910), 221 U.S. 32-33.

According to the Supreme Court, the main idea behind the adoption of the Sherman Act and Section 2[470] was to control "the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organisations, […], and that combinations known as trusts were being exerted to oppress individuals and injure the public generally".[471] The poor economic environment and the sudden spread of powerful businesses had created a pressure to control the behaviour of corporations which inevitably led to the passage of the Sherman Act. In other words, the Supreme Court's decision as to the interpretation of the Sherman Act "was based, not on the authority of previous cases on the statute, but on a practically *de novo* consideration of the Act in light of its intent and of general legal principles".[472]

It should be remembered that *Standard Oil* is a 1911 case; therefore, the Court's discussion of monopoly is highly tied up with the obsolete English common law principles 'forestalling, regrating and engrossing.'[473] The Court also held that "the words 'to monopolise' and 'monopolise' as used in the section, reach every act bringing about the prohibited results".[474]

Despite the fact that this research does not discuss monopolisation,[475] it is still important to highlight the Supreme Court's definition of monopolisation under Section 2,

> "The freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented […] In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract".[476]

It should be noted that the Supreme Court did not make a distinction between monopoly and monopolisation which could lead to the confusion that the terms were synonymous.

[470] Refer to Chapter 2.
[471] *Standard Oil Co. of New Jersey v. United States,* at p.50.
[472] Raymond, R. L. "The Standard Oil and Tobacco Cases" 25 Harv. L. Rev. 31 [1911-1912], p. 36.
[473] For more information refer to Chapter 2.
[474] *Standard Oil Co. of New Jersey v. United States,* at p. 61.
[475] Or, an abuse of a dominant position under Article 102.
[476] *Standard Oil Co. of New Jersey v. United States,* at p. 62.

This could be explained by simple use of language or, by implication, that the Supreme Court did in fact consider both terms as being interchangeable. The Supreme Court seemed to believe that if an individual was given an opportunity to contract with no obstacles, then monopoly would not survive on such a market. In other words, the Supreme Court advocated that monopoly power was inherently illegal. Breyer interpreted the Supreme Court's opinion by arguing that, "a monopoly achieved through luck or business skill won't last long. The 'centrifugal and centripetal' forces of the market place will, before long, destroy it".[477] The reason why the Supreme Court saw monopoly as being illegal could be explained by the fact that the Sherman Act was adopted owing to Standard Oil's monopolisation and, more importantly, the illegality behind the formation of the trust.

The Supreme Court's opinion that monopoly was inherently illegal[478] liberated it from defining monopoly and, instead, the Supreme Court focused on monopolisation.[479] It was with the development of US antitrust law when it became settled that monopoly was a position of a firm on a market and it did not imply "anything about the lawfulness of the monopoly possessed."[480] Therefore, a firm could be a monopolist without unlawfully monopolising a market. At that stage, the Supreme Court missed an opportunity to recognise that which could be justified by the fact that Standard Oil gained and secured its monopoly via predatory price discrimination[481] every time its competitors tried to enter the oil refining market.[482] It was argued that the offence of monopolisation is the most equivocal as "it might be taken to forbid mere possession of monopoly power, and hence to outlaw a market situation rather than a course of conduct."[483] This stems from the fact that Section 2 does not speak about monopoly power as an offence and this omission, although

[477] Breyer, S., G., "The problem of the honest monopolist" [1975] 44 Antitrust L.J. 194 at p.195.
[478] It should be noted that Standard Oil gained its monopoly via a combination.
[479] The Supreme Court held that Standard Oil had expressed "an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive other from the field, and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view"-- *Standard Oil Co. of New Jersey v. United States*, at p. 76.
[480] Congressional Research Report Service, Report RL33708, *The Distinction Between Monopoly and Monopolisation in Antitrust Law*, Janice E. Rubin, Antitrust Law Division 9,October 2003, 2006), at p. 1.
[481] "Predatory pricing" is an exclusionary anticompetitive practice where a monopolist is charging prices below costs in order to drive its competitors out of a market. The only purpose, in such cases, is the ability to be charging monopolistic prices once all competitors are excluded from the relevant market. See, Hovenkamp, H., *Federal Antitrust Policy: the law of competition and its practice*, at pp. 339-370; Bork, R., H., *The Antitrust Paradox: a policy at war with itself*, at pp. 144-159; McGee, J., S., "Predatory price cutting: the Standard Oil (N.J.) case" [1958] 1 Journal of Law and Economics 137.
[482] McGee, J., S., "Predatory price cutting: the Standard Oil (N.J.) case", at p. 138.
[483] Dirlam, J., B., & Kahn, A., E., "Fair Competition: the law and economics of antitrust policy", at p. 28.

deliberate,[484] in the language of Section 2 can be the reason for the initial attempts to punish the mere possession of monopoly. It is at the later stage of the development of antitrust law when it becomes clear that “the prohibitions of the Sherman Act are directed at business conduct from which anticompetitive consequences have already resulted or are clearly intended”.[485] These anticompetitive consequences would detrimentally affect competition which places much attention on “the nature of the option actually open to the buyer”.[486]

The Supreme Court also stated[487] that in order to ascertain whether a violation of Section 2 was committed the appropriate criteria lies in the rule of reason.[488] In other words, according to the Supreme Court “in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied”.[489] It has been argued that the rule of reason has become very important in the application of law to monopolists because the principle of the rule of reason focuses on the ways a firm operates on a market.[490] Further argument was provided that rule of reason “places a heavy responsibility upon the members of the judiciary who find few guidelines and many pitfalls in applying the law fairly to the involved operations of large corporations”.[491]

When the first trusts started to appear in the US market, Louis Brandeis was very critical of the belief that they would provide efficiency to the general public and the argument that trusts were the products of natural monopolies, concluding that “without the aid of criminal rebating, of bribery and corruption, the Standard Oil would never have acquired the vast wealth and power which enabled it to destroy its small competitors by price-cutting and similar practices”.[492] Criminal rebating, bribery and corruption were not used by the

[484] As was argued earlier, Section 2 is open to interpretation; thereby, giving the courts more discretion in handling unlawful monopolies. For more information, see Chapter 2.
[485] Edwards, C., D., “Public Policy and Business Size” [1951] 24(4) The Journal of Business of the University of Chicago 280 at p. 282.
[486]Clark, J., M., “Toward a concept of workable competition” [1940] XXX(2) American Economic Review 241 at p. 243.
[487]*Standard Oil Co. of New Jersey v. United States* 221 U.S. 1 (1910), 221 U.S. 62.
[488] “Rule of reason” doctrine connotes that only those acts will be declared to anticompetitive and illegal under the Sherman Act if their aim is to restrain competition. See, Blair, R., D., & Sokol, D., D., “The Rule of Reason and the Goals of Antitrust: an economic approach” [2012]78 Antitrust L. J. 471.
[489]*Standard Oil Co. of New Jersey v. United States* 221 U.S. 1 (1910), 221 U.S. 66.
[490] Adelman, M., A., “Business Size and Public Policy” [1951] 24(4) The Journal of Business of the University of Chicago 269 at p. 273.
[491] Best, R., D., “The Antitrust Controversy—A Survey”, at p. 861.
[492] Brandeis, L., D., *The Curse of Bigness*, at p 105.

Supreme Court as the evidence of Standard Oil's anticompetitive behaviour; however, the antagonistic approach toward Standard Oil and the way it was doing its business could not be ignored. It was submitted that the perspective of Louis Brandeis "toward large corporate size exerted a powerful influence on future deconcentration cycles".[493] Undoubtedly, Louis Brandeis was a very severe critic of powerful corporations dominating the US market and he "found the Sherman Act deficient in that it tolerated large aggregations of capital so long as they did not achieve monopoly power".[494]

Standard Oil is often known as the abuse theory case,[495] with the Supreme Court making the illegality of monopolisation the centre of the deliberations. It was argued that the decision in *Standard Oil* retarded "the advance of economic concentration"[496] because the Supreme Court did not place any focus on the furtherance of economic development in the oil refinery market. Such an outcome is understandable as the Sherman Act was still in its infancy; therefore, the Supreme Court interpreted it as closely to its objectives as possible. For such reasons, the judgment in *Standard Oil* is "a landmark in the development of antitrust law […] it created a legend".[497]

The judgment in *Standard Oil* did not contain any reference to market shares or other factors; and there was no economic analysis of the assessment of monopoly. In fact, Standard Oil's size and bigness were obvious even without the discussion of market shares and other factors. The Supreme Court seemed to assess Standard Oil's monopoly via the large scale of the firm's predatory pricing and the damage it caused to the oil refinery market. It was argued that the Supreme Court "framed doctrine about size that rested upon monopolistic combination, bad intent, and predatory practices, in order that size gained by efficiency would not be hampered".[498] The fact that size and overall bigness of a firm may also be gained via efficiency is an important point and the following cases will recognise it.

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[493] Kovacic, W., E. "Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration", at p.1131.

[494] Handler, M. "Introductory—The Brandeis Conception of the Relationship of Small Business to Antitrust" [1960] 16 Section of Antitrust Law, Proceedings at the Spring Meeting, Washington DC, April 7 & 8, 00. 13-17.

[495]Joilet, R., *Monopolisation and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power* (Faculte de Droit, Liege, MartinusNijhoff, La Haye: 1970) at p. 42.

[496] The Notes, "The Industrial Reorganisation Act: An Antitrust Proposal to Restructure the American Economy" [1973] 73(3) Columbia Law Review 635 at p. 636.

[497] McGee, J., S., "Predatory Price Cutting: The Standard Oil (N.J.) Case", at p.137.

[498] Bork, R., H., *The Antitrust Paradox: a policy at war with itself*, at p. 165.

5.1.2. *US Steel Corporation*[499]

US Steel was the first case where the Supreme Court had deliberated, among others, on the *per se* illegality of a firm's size under Section 2. This case[500] was against the Steel Corporation (Steel), a holding firm, and its operating firms on the grounds of illegality and monopoly in violation of the Sherman Act. According to the Supreme Court, the government contended that the size of the corporation in question had resulted from a combination of powerful and able competitors which eventually substantially dominated a market.[501] Steel, denying the government's accusation, argued that its superiority was due to the market's demand to introduce integration; therefore, the corporation was formed with an aim being "salvage, not monopoly".[502] In other words, the steel industry required a new flow of investments, innovations to boost the production and minimise the waste. Furthermore, Steel argued that the government's contention was based on "the size and asserted dominance of the corporation—alleged power for evil, not the exertion of the power in evil".[503]

The Supreme Court did not provide an explanation on how it measured Steel's size;[504] rather, relying on a fact that Steel was a conglomerate with a greater size and productive power than any of its competitors.[505] Furthermore, there was not any direct reference to Steel's individual market shares; however, it was submitted that Steel (along with other 180 firms forming a merger) controlled almost ninety percent of the market.[506] The Supreme Court did not apply any economic reasoning in this case which shows that all economic assumptions were still in their infancy. It could not be ignored, however, that unlike in *Standard Oil* case, the Supreme Court in *US Steel* delivered a more constructive

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499 *United States v United States Steel Corp*.

500 Key Supreme Court's cases citing *U.S. Steel:* Industrial Ass'n of San Francisco *v.* U.S., 45 S. Ct. 403, 408, U.S. Cal., (1925); *U.S.* v. *International Harvester Co.,* 45 S. Ct. 748, 754+, U.S. Minn., (1927); *U.S* v. *Swift & Co.,* 52 S. Ct. 460, 463, U.S. Dist. Col., (1932); *U.S.* v. *Elgin, J. & E. Ry. Co.,* 56 S. Ct. 841, 844+, U.S. Ill., (1936); *U.S.* v. *Socony-Vacuum Oil Co.,* 60 S. Ct. 811, 846, U.S. Wis., (1940); *Apex Hosiery Co.* v. *Leader.,* 60 S. Ct. 982, 994+, U.S. Pa., (1940); *U.S.* v. *Line Material Co.,* 68 S. Ct. 550, 559, U.S. Wis., (1948); *U.S.* v. *Griffith*., 68 S. Ct. 941, 946, U.S. Okla., (1948); *U.S.* v. *Columbia Steel Co.,* 68 S. Ct. 1107, 1113+, U.S. Del., (1948); *Standard Oil Co. of California* v. *United States.,* 69 S. Ct. 1051, 1064, U.S. cal., (1949); *U.S.* v. *Oregon State Medical Soc.,* 72 S. Ct. 690, 696, U.S. Or., (1952); *U.S.* v. *E. I. du Pont de Nemours & Co.,* 81 S. Ct. 1243, 1269, U.S. Ill., (1961).

501 *United States v United States Steel Corp,* at pp. 442-443.

502 *Ibid.* at p. 443.

503 *Ibid.* at p. 447.

504 *I.e.,* there was no direct reference that market shares were used as an evidence of Steel's size; however, the only conclusion which could be made was that market shares were indeed used to assess Steel's size.

505 The Supreme Courts held that Steel was "greater in size and productive capacity than any of its competitors, equal or nearly equal to them all"-- *United States v United States Steel Corp.,* at p. 445.

506 Hovenkamp, H., *Federal Antitrust Policy: The Law of Competition and its Practice*, at p. 292.

opinion by focusing on Steel's size and productive capacity. Therefore, it can be concluded that Steel's size was almost ninety percent market shares and its bigness was further evidenced by its greater productive power over its rivals; therefore, Steel could potentially be considered a monopolist under Section 2. The Supreme Court, however, denied that Steel had achieved monopoly power by holding that "the corporation did not achieve monopoly, […] and it is against monopoly that the statute is directed, not against an expectation of it, but against its realisation, and it is certain that it was not realised".[507] It introduced a different angle to the perception of monopoly power, *i.e.* all factors in the case pointed at Steel holding a monopoly power; however, "its power over prices was not and is not commensurate with its power to produce".[508]

Therefore, the Supreme Court held that,

> "The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offence, or the existence of unexerted power an offence. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that is possible".[509]

It was argued that this paragraph was "one of the most often quoted and one of the most misinterpreted principles of antitrust law"[510] and it was so liberally interpreted "as to nullify the effectiveness of the Sherman Act in dealing with close-knit combinations".[511] Despite this argument, it was submitted that the Supreme Court provided a legal view on the definition of monopoly[512] which delivered a very clear message, *i.e.* a size *per se* was not covered by Section 2 because the law required an act of monopolisation. It has been argued that "neither mere size nor the virtual absence of competition is illegal or prohibited in itself".[513] This is further supported by the Congressional Research Report where it is argued that "absent a finding by a court of 'guilty behaviour,' therefore, there can be no

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[507] *United States v United States Steel Corp.*, at p. 444.
[508] *Ibid.* at p. 445.
[509] *Ibid.* at pp. 451-452.
[510] Joilet, R., *Monopolisation and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power*, at p. 43.
[511] Harbeson, R., W., "A New Phase of the Antitrust Law" [1946-1947] 45 Mich. L. Rev. 977 at p. 986.
[512] *Ibid.* at p.978.
[513] Kinter, E., W., *An Antitrust Primer* (The Macmillan Company & Collier-Macmillan Canada, United States of America: 1964) at p.99.

automatic finding of 'monopolisation' based merely on a finding of monopoly power: a finding of '*monopoly power*' does *not*, by itself, *necessarily equate to a finding of the monopolisation* prohibited by […] section 2 of the Sherman Act".[514] The situation might be different if, like in *Standard Oil*, a firm gained monopoly via anticompetitive means.[515] In this scenario, the size and bigness will indicate the existence of a monopolist on the relevant market.

Another important point highlighted by the Supreme Court relates to one of the government's contentions, *i.e.* "the power is 'unlawful regardless of purpose' […] it seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest, and illegal, because there is potency in it for mischief".[516] The Supreme Court continued "the fallacy it conveys is manifest".[517] This is another clear message from the Supreme Court, *i.e.* the fact that monopoly power provides a firm with an opportunity to violate antitrust law does not make such power automatically illegal under Section 2.

Posner criticised the Supreme Court's decision in *US Steel* arguing that it failed to recognise firm's monopolistic behaviour by relying on the fact that Steel's market shares considerably declined after the corporation was formed.[518]According to Posner, when monopoly attracts new entrants, the monopolist would either do nothing or would reduce its output; however, in both cases, the market shares of the monopolist would decline.[519] After considering the Supreme Court's ruling, it is difficult to judge why the Supreme Court did not take economics into account. It is possible that due to the considerable infancy of US antitrust law, the Supreme Court might not have been equipped to include economics into its legal interpretation of the Sherman Act. The US antitrust policy is following the general presumption, it is argued, that no party "is qualified to judge what is good for the economy."[520] This will, however, change.

[514] Congressional Research Report Service, Report RL33708, *The Distinction Between Monopoly and Monopolisation in Antitrust Law*, Janice E. Rubin, Antitrust Law Division, at p. 3 (emphasis in original).
[515] This will later be known as an abuse theory. See below.
[516] *United States v United States Steel Corp.*, at p. 450.
[517] *Ibid.*
[518] Posner, R., A., *Economic Analysis of Law* (5th edition, A Division of Aspen Publishers, Inc& A Wolters Kluwer Company, United States of America: 1998) at p. 315.
[519] *Ibid.*
[520]Heflebower, R., B., "Economics of Size" [1951] 24(4) The Journal of Business of the University of Chicago 253 at p. 253.

The distinction between the mere size of a firm and its actions should be very clear in order to avoid the suppression of the economic and technological progress. It was pointed out, among other things, that if a society desires healthy economic growth, then healthy growth of businesses should not be prevented.[521] This point is very important for this thesis, especially in the context of EU competition law. It is well recognised that with power comes certain responsibilities and antitrust law should be objective in order to reflect that point. The objectivity here, however, could be blinded by the fear of an uncontrollable spread of powerful businesses. This could become even more acute for smaller competitors[522] which have to face, in addition to its competitors' high market shares, aggressive advertising campaigns, the ownership of IPRs and other factors which, according to this thesis, signify the firm's bigness. It was argued that "when bigness reaches the point at which it impairs the vigour of competition, it also reaches the point at which it is recognised as a problem in a competitive public policy."[523] The impairment of competition, in this scenario, is a deciding factor in the assessment of the effects of the firm's market behaviour. Lastly, if the firm "means concentration"[524] then it will be regarded as harmful *per se* due to its intent behind its monopoly power.

According to Louis Brandeis, "it may be true that as a legal proposition mere size is not a crime, but mere size may become an industrial and social menace, because it frequently creates […] conditions of such gross inequality, as to imperil the welfare of the employees and of the industry."[525] It should not be ignored that this argument took place in the thirties, *i.e.* at the time of the largest stock market collapse in the history of the US and the Great Depression. The society was weakened leading to the businesses not abiding the rules. The times have changed and with the adequate economically driven antitrust rules, mere size can be controlled to ensure it does not become an industrial and social menace.

5.1.3. *Swift & Co*[526]

Swift was a case which continued and, to a certain extent, clarified the position of Section 2 toward size and its relevance to the finding of unlawful monopoly.

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521 Adelman, M., A., "Business Size and Public Policy", at p. 274.
522 See Chapter 7.
523 Edwards, C., D., "Public Policy and Business Size", at p. 286.
524 Heflebower, R., B., "Economics of Size", at p.254.
525 Brandeis, L., D., *The Curse of Bigness,* at p. 107.
526 *United States* v *Swift & Co*.

In 1920, the government filed a bill under the Sherman Act asking for the dissolution of the combination of several leading meat packers.[527] The main concern of the government was that the combination, by concert of action, were suppressing competition in the purchase of livestock and in the sale of dressed meat,[528] and were successful in leveraging their monopoly into the other parts of trade. This is another example of a case[529] where a combination of several firms could cause concerns that a size could become a tool for monopolisation.

All firms involved in the combination had various advantages[530] over their rivals "through their ownership of refrigerator cars and branch houses, as well as other facilities, they were in a position to distribute 'substitute foods and other unrelated commodities' with substantially no increase of overhead".[531] According to the Supreme Court "their low overhead and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals".[532] This is the first case, in the context of this research, where the Supreme Court took into account, albeit briefly, the advantages of a firm over its competitors.[533] There was no mentioning of the combination's market shares; rather, the Supreme Court described its size as being gigantic. It is also important to stress that the combination's facilities and low overhead signify its bigness which will allow it to supress its competitors.

The Supreme Court held that[534] "mere size […] is not an offence against the Sherman Act unless magnified to the point at which it amounts to a monopoly […], but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have

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[527]Swift & Co., Armour & Co., Wilson & Co., the Morris Packing Company and the Cudahy Packing Company (the combination).
[528]*United States* v *Swift & Co.*, at p.110.
[529] Key Supreme Court's cases citing *Swift*: *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 56 S. Ct. 546, 552, U.S. Pa., (1936); *Chrysler Corp.* v. *U.S.*, 62 S. Ct. 1146, 1150+, U.S Ind., (1942); *American Tobacco Co.* v. *U.S.*, 66 S. Ct. 1125, 1133, U.S. Ky., (1946); *U.S.* v. *Paramount Pictures.*, 68 S. Ct. 915, 937, U.S.N.Y., (1948); *U.S.* v. *Griffith*, 68 S. Ct. 941, 946, U.S. Okla., (1948); *Ford Motor Co.* v. *U.S.*, 69 S. Ct. 93, 102, U.S. Ind., (1948); *U.S. Gypsum Co.* v. *National Gypsum Co.*, 77 S. Ct. 490, 494, U.S. Dist. Col., (1957); *Brown Shoe Co.* v. *U.S.*, 82 S. Ct. 1502, U.S. Mo., (1962); *Los Angeles Meat and Provision Drivers Union, Local 626* v. *U.S.*, 83 S. Ct. 162, 167, U.S. Cal., (1962); *U.S.* v. *United Shoe Machinery Corp.*, 88 S. Ct. 1469, 1499+, U.S. Mass., (1968); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 88 S. Ct. 2224, 2233, U. S. Ps., (1968).
[530] The Supreme Court had no discussion of Swift's market share.
[531] *United States* v *Swift & Co.*, at p.110.
[532] *Ibid.* at p. 116.
[533] However, note the brief discussion of the elements used by the Supreme Court in *Eastman Kodak Co.* v *Image Technical Services, INC., et. al.*, Chapter 4, para. 4.1.1
[534] The Supreme Court cited *United States v United States Steel Corp.* and *United States* v *International Harvester Co.*, 274 US 693 (1927) for the above proposition.

been utilised in the past".[535] The fact that the combination was involved in an anti-competitive behaviour, abusing its size and privileged position, in the past could not be ignored and factored into the Supreme Court's holding. It still remains clear that mere size does not amount to monopoly power under Section 2 as long as it can be shown that a firm or a combination have never been involved in the anti-competitive practices in the past and there is no illegality behind its size.

The judgment in *Swift* was very well summed up by Levi who argued that "the restrictions were imposed presumably to prevent the abuse of size otherwise lawful, and a significant abuse would have been low prices [*and*] size, efficiency, fear of past aggression, and the diffusion of responsibility which comes with size, are the predominant themes of the opinion".[536] Despite not being a long and complicated case, the Supreme Court's judgment in *Swift* has left an important imprint on the *per se* illegality of size under Section 2.

5.1.4. *Alcoa*[537]

In 1938, the trial against Aluminium Co of America (Alcoa) started on the grounds of Alcoa illegally monopolising the virgin aluminium ingot market. The government demanded that Alcoa be dissolved but lost and later appealed to the Supreme Court which, under s 229 of the USCA,[538] referred the case back to the United States Court of Appeals for the Second Circuit.[539]

Alcoa was a corporation which was established to undertake the production and sale of ingot aluminium and, later on, fabricate the metal into finished articles. Alcoa was assigned with a patent which allowed it to manufacture pure aluminium; therefore, holding a legal monopoly over the production. This led Alcoa to having both "a monopoly of the

[535]*United States* v *Swift & Co.,* at p. 116.
[536]Levi, E., H., "A Two Level Anti-Monopoly Law" [1952-1953] 47 Nw. U. L. Rev. 576 at p. 577.
[537]*United States* v *Aluminium Co of America (Alcoa)* 148 F.2d 416 (2nd Cir. 1945)—on certification from the Supreme Court.
[538] The Code of the Laws of the United States of America.
[539] Key Supreme Court's cases citing *Alcoa*: *American Tobacco Co.* v. *U.S.*, 66 S. Ct. 1125, 1128+, U.S. Ky., (1946); *U.S.* v. *Line Material Co.,* 68 S. Ct. 550, 559+, U.S. Wis., (1948); *U.S.* v. *Griffith.,* 68 S. Ct. 941, 944+, U.S. Okla., (1948); *U.S.* v. *Paramount Pictures*, 68 S. Ct. 915, 937+, U.S.N.Y., (1948); *U.S.* v. *Columbia Steel Co.,* 68 S. Ct. 1107, 1113+, U.S. Del., (1948); *U.S.* v. *E. I. du Pont de Nemours Co.,* 76 S. Ct. 994, 999+, U.S. Del., (1956); *Brown Shoe Co.* v. *U.S.,* 82 S. Ct. 1502, 1519, U.S. Mo., (1962); *U.S.* v. *Aluminum Co. of America.,* 84 S. Ct. 1283, 1287, U.S.N.Y., (1964); *U.S.* v. *Grinnell Corp.,* 86 S. Ct. 1698, 1704+, U.S.R.I., (1966); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 105 S. Ct. 2847, 2857+, U.S. Colo., (1958); *Atlantic Richfield Co.* v. *USA Petroleum Co.,* 110 S. Ct. 1884, 1903, U.S. Cal., (1990); *Eastman Kodak Co.* v. *Image Technical Services, Inc.,* 112 S. Ct. 2072, 2090+, U.S. Cal., (1992); *Pacific Bell Telephone Co.* v. *Linkline Communications, Inc.*, 129 S. Ct. 1109, 1120+, U.S., (2009).

manufacture of ‘virgin’ aluminium ingot” and “the monopoly of a process which eliminated all competition”.[540]

The government put forward an argument that throughout their entire existence Alcoa remained the only producer of virgin ingot in the United States and it was enough to infer a possession of unlawful monopoly.[541] Alcoa, on the contrary, argued that being the single producer of virgin ingot did not make it an unlawful monopolist as Alcoa was facing competition from imported virgin ingot (secondary ingot). Even if competitive constraints from secondary ingot were not enough, then Alcoa argued that it did not keep its monopoly via anticompetitive means; rather, it was a natural growth which was not prohibited by the Sherman Act.[542]

The calculation of market shares in the relevant market (virgin ingot aluminium market) was one of the most distinguished parts of the judgment: The delineation of the relevant market and the separation of the production of the ingot aluminium from other stages of its development were carefully approached by the court, where it was found that Alcoa had nearly ninety percent of all virgin aluminium available in the US in 1912.[543] The calculation of ninety percent market share included all production by Alcoa without adding secondary ingot into calculation.

Following this, it was famously held that,

> “That percentage is enough to constitute monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not”.[544]

It is very interesting to see how specific the Supreme Court is in its separation of market share thresholds. It becomes clear that ninety percent market share is enough to become subject to Section 2 or, in other words, it will signal the presence of a possibly unlawful monopolist on a relevant market; meanwhile, thirty three percent market share is not

[540] *United States* v *Aluminium Co of America (Alcoa)*, at p. 422.
[541] *Ibid.* at p. 423.
[542] *Ibid.*
[543] *Ibid.*
[544] *Ibid.* at p. 424.

enough to trigger the application of Section 2.[545] This, as will be seen in the next chapter, reflects an entirely different approach from EU competition law. Despite rather generous approach to market share thresholds, the Supreme Court was criticised because "the illegality *per se* of size is difficult because the automaticity of the percentage is illusory [*as*] the percentage test by itself requires an evaluation of market conditions".[546] Nevertheless, the Supreme Court's application of market shares to Alcoa represents a more economic approach than any of the cases discussed earlier in this chapter. It was argued that it is possible that the basis for the court's attitude is "the old idea that monopoly and competition are mutually exclusive and that markets must therefore be either purely monopolistic or purely competitive, whereas it is now recognised that monopoly is a matter of degree and that actually the vast majority of all markets involve both monopolistic and competitive elements mixed in varying degrees".[547]

Furthermore, the Supreme Court did not consider any other factors apart from Alcoa's market shares and its behaviour, *i.e.* the entire analysis was carried out by relying on Alcoa's size and its market behaviour as a leading producer of ingot aluminium. The Supreme Court, however, continued that "the origin of a monopoly may be critical in determining its legality".[548] This reflects Brandeis' criticism mentioned above that trusts were not "natural monopolies"[549] but rather the examples of criminal behaviour of the large firms. Therefore, according to the Supreme Court,

> "Size does not determine guilt; that there must be some 'exclusion' of competitors; that the growth must be something else than 'natural' or 'normal'; that there must be a 'wrongful intent,' or some other specific intent; or that some 'unduly' coercive means must be used".[550]

There is another affirmation that Section 2 does not consider a size to be an indication of unlawful monopoly.[551] Instead, the courts require an act of exclusion or a wrongful intent. The court opined that a firm may also become a monopolist "by force of accident" and

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[545]Winerman, M., & Kovacic, W., E.," Learned Hand, *Alcoa*, and the Reluctant Application of the Sherman Act" [2013] 79(1) Antitrust Law Journal 295 at pp.335-336.
[546]Levi, E., H., "A Two Level Anti-Monopoly Law", at p. 572.
[547]Harbeson, R., W., "A New Phase of the Antitrust Law", at p. 985.
[548]*United States* v *Aluminium Co of America (Alcoa),* at p. 429.
[549]See., Brandeis, L., D., *The Curse of Bigness*.
[550]*United States* v *Aluminium Co of America (Alcoa),* at p. 429.
[551] Adams, W., "The Aluminium Case: Legal Victory-Economic Defeat" [1970-1971] 2 J. Reprints Antitrust L. & Econ. 325 at p. 329.

since monopolising is a crime, making such a firm a subject to Section 2 would be against Congress' intent.[552] If this is the case, then such a firm is believed not to be having a wrongful intent to eliminate competition. Citing the *U.S. Steel* case,[553] the Supreme Court said that "the successful competitor, having been urged to compete, must not be turned upon when he wins".[554]The Supreme Court, however, did consider Alcoa's conduct to be illegal by arguing that it was doubling and redoubling its capacity before other competitors, while grabbing any new chance that opened to it to face all the new entrants.[555] It was argued that by this reasoning, the court turned an actively competitive firm into an illegal monopolist under Section 2 disregarding the possibility that Alcoa's behaviour "deemed desirable by efficiency-based economics".[556] Despite this criticism of the court's ruling on Alcoa's market behaviour, the court's attempt to clarify the dilemma on whether a mere possession of monopoly contravenes Section 2 is a welcome step towards the recognition that some powerful businesses retain a right to be competitively active.

Finally, before turning to Alcoa's monopolisation, the Supreme Court concluded[557] that "Alcoa's size was 'magnified' to make it a 'monopoly'; indeed, it has never been anything else; and its size, not only offered it an 'opportunity to abuse,' but it 'utilised' its size for 'abuse'".[558]Unlike the situation in *US Steel* case, this case can be distinguished because Alcoa was found to use its size to create a monopoly which in turn was used to monopolise the relevant market. The Supreme Court drew a clear distinction between the time when Alcoa was still in possession of lawful monopoly and when it started to apply unlawful practices in order to strengthen its monopolistic position.[559] The Supreme Court specifically pointed out on the facts that Alcoa (in order to strengthen its monopolistic position and, therefore, by default retain its size) was embracing any market opportunity it had to face a new competitor "with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel".[560] In other words, Alcoa, unlike US Steel, triggered the second requirement of Section 2, *i.e.* the act of monopolisation. The Supreme Court did not explicitly say that Alcoa's reasons

[552] *United States* v *Aluminium Co of America (Alcoa),* at p.430.
[553] *United States* v *US Steel Corporation*.
[554] *United States* v *Aluminium Co of America (Alcoa),* at p.430.
[555] *Ibid.* at p. 431.
[556] Cudahy, R., D., Hon., & Devlin, A., "Anticompetitive Effect" [2010-2011] 95 Minn. L. Rev. 59 at p. 70.
[557] Relying on *United States* v *Swift & Co*.
[558] *United States* v *Aluminium Co of America (Alcoa),* at p. 430.
[559] *Ibid.* at pp. 430-431.
[560] *United States* v *Aluminium Co of America (Alcoa),* at p. 431.

behind such behaviour were to uphold its size; however, it seemed that the Supreme Court did believe that it was the expected result from Alcoa's market behaviour.[561]

It was argued that the decision in *Alcoa* led to government's burden of proof to diminish when dealing with Section 2 liabilities.[562]*Alcoa*'s decision did not manage to avoid being called a bad law though[563] due to the general consensus that Alcoa, in fact, did not commit any economic wrongdoing.[564] It was finally argued that the decision in *Alcoa* lost its viability to remain a strong precedent on Section 2 monopoly and monopolisation and became "nothing more than historic interest".[565]

It was also said, quoting Professor Levy,[566] that the Supreme Court in *Alcoa* might "have passed from the abuse theory to a recognition that size and power are themselves the abuse. […] as a result of an increased awareness of the monopoly problem […] we appear to have a new interpretation of the Act closer probably to its original intention".[567] It can be seen that the decision in *Alcoa* raised various debates as to the adequacy of the judgment in relation to both the possession of monopoly and the abuse theory under the Sherman Act. The decision in *Alcoa* has created, nevertheless, the theory of the illegality of monopoly without abuse[568] or, in other words, *per se* illegality of monopoly versus the abuse theory.

Despite an attempt to introduce *per se* illegality of monopoly, the Supreme Court reaffirmed the already existed position that size *per se* was not a violation of Section 2 and recognised that having a monopolist on a relevant market does not necessarily entail that the monopolist is unlawfully monopolising a market. Alcoa, however, did not fall within the definition of a possible 'lawful' monopolist. The Supreme Court agreed that the supplier of an important product (or raw material) will have a large market share, but, once

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561 The opinion of Judge L. Hand was criticised on the grounds that he "was truer to his own longstanding view of the Sherman Act's purposes than he was to the theory on which the case was litigated"-- Winerman, M., & Kovacic, W., E., "Learned Hand, *Alcoa*, and the Reluctant Application of the Sherman Act", at p. 305.
562Kovacic, E., W., "Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration", at pp 1117-1118.
563 Bork, R., H., *The Antitrust Paradox: A Policy at War with Itself*, at p. 165.
564Lopatka, J., E., & Godek, P., E., "Another Look at Alcoa: Raising Rivals' Costs Does Not Improve the View" [1996] 26 J. Reprints Antitrust L. & Econ. 619 at p. 621.
565 Noble, R., A., "'No Fault' Monopolisation: Requiem or Rebirth for Alcoa" [1981-1982] 17 New Eng. L. Rev. 777 at p. 779.
566Professor of Law, University of Chicago Law School; formerly Special Assistant to the Attorney General and First Assistant in the Antitrust Division.
567 Ackerson, A., C., "Sherman Act and 'Bigness' in Business" [1948-1949] 24 LA. B. Bull. 139 at p. 140. See also: Levi, E., H., "The Antitrust Laws and Monopoly" [1946-1947] 14 U. Chi. L. Rev. 153 at pp. 174-176.
568Levi, E., H., "A Two Level Anti-Monopoly Law", at p.576.

said supplier starts expanding its output in order to maintain its market share, Section 2 can be deemed to be violated.[569] It should not be ignored that the facts in *Alcoa* are very straightforward, *i.e.* the Supreme Court had a firm which was almost a *de facto* monopolist. Alcoa's market position in terms of percentage of market control spoke for itself. Therefore, it is not surprising that the Supreme Court's decision in *Alcoa* is known as a decision which introduced the *per se* illegality of monopoly principle into the application of Section 2.

In 1965, it was argued that the post-*Alcoa* cases in the US showed the tendency where it was impossible for a defendant to be convicted of illegal monopolisation "without proof of both monopoly power and legally or economically abusive conduct in the acquisition or maintenance of that power".[570] This indicates that the abuse theory became more acute in the monopolisation analysis which could be due to the fact that not all monopoly cases involved an almost *de facto* monopolist. If the courts and antitrust authorities were relying only on the high percentage of market control then smaller firms would avoid any antitrust responsibility. At the time *Alcoa* case was decided, US antitrust law was still not sure about the position smaller firms were holding under Section 2. The Supreme Court provided that the common assumption of one of the purposes of the Sherman Act "was to perpetuate and preserve, for its own sake and in spite of possible costs, an organisation of industry in small units which can effectively compete with each other".[571] In other words, Section 2 was indeed granting certain protection to smaller firms[572] from the actions of the monopolists.[573] This part of the Supreme Court's opinion in *Alcoa* was heavily criticised because "it is a position which is questionable as a description of congressional intent, dubious as social policy, and impossible as antitrust doctrine [...] there was [...] no clear

[569]Lopatka, J., E., & Godek, P., E., "Another Look at Alcoa: Raising Rivals' Costs Does Not Improve the View", at p. 623.
[570] The Notes, "Section 2 of the Sherman Act—Is a Per Se Test Feasible?" [1964-1965] 50 Iowa L. Rev. 1196 at pp. 1207-1208.
[571] *United States* v *Aluminium Co of America (Alcoa),* at p. 429. The Supreme Court in *Brown Shoe* had confirmed that point by providing that "it is competition, not competitors, which the Act protects. But we cannot fail to recognise Congress' desire to promote competition through the protection of viable, small, locally owned businesses"—See, *Brown Shoe Co* v *United States* 370 US 294 (1962) 344.
[572] At times, smaller firms can be equaled with inefficient firms.
[573] Please note, that that position would be eventually abandoned by the antitrust authorities and the courts at a later stage of the development of antitrust law. See Chapter 7.

indication that antitrust should create shelters for the inefficient".[574] This point will be discussed further in Chapter 7 of this thesis.

5.1.5 *United Shoe*[575]

United Shoe is the first case in this thesis[576] which, in addition to relying on market shares, considered other factors which contributed to United Shoe Machinery Corporation's (United Shoe) monopoly of the production of all essential machinery used in the major processes of shoemaking. The market itself did have a few number of manufactures involved in shoemaking but they were not posing severe competitive constraints on United Shoe.

In the complaint lodged by the Government, the argument was that the relevant market consisted of all shoe machinery industry including various sub-markets.[577] The District Court agreed concluding that for the purposes of the antitrust rules, the relevant market is to be defined as a shoe machinery market. As for the market shares, the District Court found that United Shoe supplied seventy five to ninety five percent of the market; however, to be more precise, the District Court concluded that it would be more accurate to say that United Shoe supplied about eighty five percent of the American shoe machinery market.[578] United Shoe was a very progressive corporation involved in the manufacture of various types of machines which would cover every major process in shoemaking. Furthermore, it was involved in the research with patent protection attributable to the ideas of its own employees.

The District Court had to decide whether United Shoe violated Section 2[579] relying on the opinion of the earlier decisions from the Supreme Court.[580] In particular, the District Court

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[574] Bork, R., H., & Bowman, Jr., W., S., "The Goals of Antitrust: A Dialogue on Policy. The Crisis in Antitrust", at p. 369. The criticism continued that "the statutory language of all the major antitrust laws after the Sherman Act explicitly requires the preservation of *competition*. That places an enormous burden of persuasion upon those who purport to find in the legislative history a direction to value small business above competition" (emphasis in original)—at pp. 369-370.

[575] *United Shoe Machinery Corporation* v *United States*. Key Supreme Court's cases citing *United Shoe*: *U.S.* v. *E. I. du Pont de Nemours & Co.*, 76 S. Ct. 994, 999+, U.S. Del., (1956); *U.S.* v. *United Shoe Machinery Corp.*, 88 S. Ct. 1496, 1498, U.S. Mass., (1968); *Illinois Brick Co.* v. *Illinois*, 97 S. Ct. 2061, 2078, U.S. Ill., (1977).

[576] Among those cases which were selected for the purposes of this research.

[577] *United States* v *United Shoe Machinery Corp*., at p. 302.

[578] *Ibid.* at p. 307.

[579] The analysis of the District Court's opinion is not going to focus on the act of monopolisation. The focus is purely on the District Court's assessment of United Shoe's market power.

heavily relied on the doctrine from the *Alcoa* case that a mere possession of monopoly power did not automatically violate Section 2 if the monopoly was achieved by the superior skill, superior product or foresight.[581] The District Court found that in order to be able to compete with United Shoe, its competitors had to be very well prepared as United Shoe was holding a strong market position.

It became undisputable that United Shoe was a corporation of a considerable size by holding eighty five percent of the market. This, however, was not enough for the District Court which decided to assess United Shoe's market position even further and considered all other factors which strengthened the corporation's monopoly.

According to the District Court,

> "The three principal sources of United's power have been the original constitution of the company, the superiority of United's products and services, and the leasing system. […] But United's control does not rest solely on its original constitution, its ability, its research, or its economies of scale. There are other barriers to competition, and these barriers were erected by United's own business policies".[582]

It should be noted from the outset that the District Court considered United Shoe's privileges as barriers to competition[583] which resulted from the corporation's own business policies. The District Court took it further and provided that United Shoe had a network of long-term leases which were created to strengthen the corporation's power and eliminate its competitors;[584] it offered a long line of machine types whilst its competitors offered a short line which provided United Shoe with a power to discriminate;[585] "being by far the largest company in the field, with by far the largest resources in dollars, in patents, in facilities, and in knowledge, United has marked capacity to attract offers of inventions, inventors' services, and shoe machinery businesses".[586] The District Court was very

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[580]*E.g.*, *Standard Oil Co. of New Jersey v. United States*; *United States* v *Aluminium Co of America (Alcoa*; *United States* v *Griffith* 334 US 100, 68 S. Ct. 941.
[581]*United States* v *United Shoe Machinery Corp*., at pp. 341-342.
[582]*Ibid.* at p. 344.
[583] See Chapter 4.
[584] *United States* v *United Shoe Machinery Corp*., at pp. 343
[585] *Ibid.*
[586] *Ibid.* at pp. 343-344.

specific in defining United Shoe's bigness by relying on other factors which put a firm into a privilege position. The District Court then continued that the practices United Shoe was involved in did not result from "the consequences of ability, natural forces, or law" rather,

> "They are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense, they are *unnatural barriers*; they unnecessarily exclude actual or potential competition; they restrict a free market".[587]

This paragraph of the District Court's judgment implies the anti-competitive intent behind United Shoe's business strategy, *i.e.* the restriction of competition. It follows that if privileges are the result of business skill and acumen then a firm should not be condemned. In any other case, there is a possibility that such advantages over rivals will be held against a firm under consideration. The challenge of distinguishing between 'good' and 'bad' privileges, however, remains.

United Shoe attempted to defend its superiority over its rivals by arguing that some monopoly power was necessary in order to develop shoe machinery market and "achieve maximum economies of production and distribution".[588] The District Court rejected it and held that "the law does not allow an enterprise that maintains a control of a market through practices not economically inevitable, to justify that control because of its supposed social advantage […] it is for the Congress, not for private parties, to determine whether a monopoly, not compelled by circumstances, is advantageous".[589]

The summary of the Court's position towards the main elements of Section 2 was summarised in *Grinell*[590] where the Court held that Section 2 contains two elements: "(1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident".[591] This summary provides that monopoly power has to be either wilfully acquired or maintained unless it results from a successful business strategy. In other words, the element of wilfulness is an important

[587] *Ibid.* at pp. 344-345.
[588] *Ibid.* at p. 345.
[589] *Ibid.*
[590] *United States* v *Grinell Corp. et. al.*.
[591] *Ibid.* at pp. 570-571.

part of the unlawful monopoly under Section 2. It was argued that there is little or no agreement about the meaning of wilfulness with judicial decisions agreeing that 'wilfulness' could stretch from "mere aggressive operation of the monopoly firm to illegal use of monopoly power".[592]

5.1.6. *Du Pont*[593]

Du Pont is an important US case which deals with the definition of a relevant market and which, as provided earlier, gives a good example of how a firm's monopoly may depend on the way a relevant market is delineated.

Du Pont was a leading firm in the field of synthetics and manufacture of plain cellophane with patent protection in the US. Government charged du Pont with monopolisation or attempt to monopolise under Section 2. During the period in question, du Pont manufactured almost seventy five percent of cellophane and this number constituted less than twenty percent of all "flexible packaging material" sales in the US.[594] The main concern of the government was the fact that the relevant market was the cellophane market in which case du Pont's seventy five percent of the cellophane production granted it with significant market power. Du Pont, on the other hand, argued that the relevant market consisted of all flexible packaging material where du Pont's market position was only twenty percent.

According to the Supreme Court,[595] "monopoly power is the power to control prices or exclude competition"[596] and the Supreme Court had, therefore, to determine whether du Pont held monopoly over cellophane, *i.e.* whether du Pont had any control over the cellophane's price in competition with other flexible packaging materials.[597] In this situation, the determination of the relevant market should involve a careful analysis.

[592] Fox, E., M., "Monopoly and Competition: Tilting the Law Towards a More Competitive Economy", at p. 53.
[593] *United States* v *du Pont & Co.*
[594] *Ibid.* at p. 380.
[595] Key Supreme Court's cases citing *du Pont: International Boxing Club of N.Y., Inc.* v. *U.S.*, 79 S. Ct. 245, 250+, U.S.N.Y., (1959); *Brown Shoe Co.* v. *U.S.*, 82 S. Ct. 1502, 1548, U.S. Mo., (1962); *U.S.* v. *Continental Can Co.*, 84 S. Ct. 1738, 1743+, U.S.N.Y., 1964); *U.S.* v. *Grinnell Corp.*, 86 S. Ct. 1698, 1704+, U.S.R.I., (1966); *Eastman Kodak Co.* v. *Image Technical Services, Inc.*, 112 S. Ct. 2072, 2081+, U.S. Cal., (1992).
[596] *United States* v *du Pont & Co.*, at p. 392.
[597] *Ibid.* at p. 394.

The Supreme Court held that "when a product is controlled by one interest, without substitutes available in the market, there is monopoly power".[598] The Supreme Court concluded that "in considering what is the relevant market for determining the control of price and competition, […] commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolisation of which may be illegal".[599] While conducting a more technical analysis of cellophane, the Supreme Court compared it with all other flexible packaging commodities and concluded that "cellophane combines the desirable elements of transparency, strength and cheapness more definitely than any of the others".[600] The Supreme Court, therefore, concluded that "cellophane's interchangeability with other materials […] suffices to make it a part of this flexible packaging material market".[601]

Du Pont is an important case in the battle between market power and wide definition of the relevant market.[602] As was already briefly mentioned,[603] the narrower the market the higher the monopoly power of a firm is, *ceteris paribus*. Neither antitrust authorities nor the courts actually admit this inclination in dealing with market definition,[604] therefore, there is no evidence on this matter; however, the case law sets a good example of such a gradually developed tendency. It was argued that market definition was the most litigated issue in the field;[605] thereby, making it an important part of the market power analysis.

The Supreme Court provided an interesting insight on the interpretation of the Sherman Act, citing *Standard Oil*[606] as an authority for the proposition that the Sherman Act was passed due to the fears of the fast accumulations of power in the hands of individuals and corporate wealth.[607] More interestingly, the Supreme Court provided that with all the concerns over the rapid shift of power towards private individuals, mergers, larger

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[598] *Ibid.* at p. 395.
[599] *Ibid.* at p. 396.
[600] *Ibid.* at p. 398. It could be seen that the same approach to the definition of the relevant market was taken in *United Brands* v *Commission* where the CJEU took all the characteristics of bananas into account therefore ending up with a very narrow definition of the relevant market.
[601] *United States* v *du Pont & Co.,* at p. 400.
[602] For the detailed analysis of du Pont's market position see: Stocking, G., W., & Mueller, W., F., "The Cellophane Case and the New Competition" [1955] 45(1) The American Economic Review 29.
[603] See Chapter 4.
[604] For the general discussion of market definition in the US see Pitofsky, R. "New Definitions of Relevant Market and the Assault on Antitrust" [1991-1992] 21 J. Reprints Antitrust L. & Econ. 863 and Kate, ten, A., & Niels, G. "The Relevant Market: A Concept Still in Search of a Definition" [2009] 5 J. Comp. L. & Econ. 297.
[605] Kaplow, L. "Why (Ever) Define Markets?" [2010-2011] 124 Harv. L. Rev. 437 at p. 439.
[606] *Standard Oil Co. of New Jersey v. United States*.
[607] *United States* v *du Pont & Co.,* at p. 386.

aggregations of private capital and various industries having only a few production organisations, “a considerable size is often essential for efficient operation in research, manufacture and distribution”.[608] The Supreme Court could not have been any clearer on this point; for the research, manufacture and distribution to be efficient, a firm should be of a considerable size. This will be further discussed in Chapter 7. Or, as was interestingly provided by Robert Bork, “any firm that has grown to large size without the employment of predatory practices has demonstrated its superior efficiency […] that it is better at pleasing consumers than its rivals are”.[609]

The Supreme Court’s judgment shows the importance of the careful delineation of the relevant market. The majority of the judges did agree with the fact that despite du Pont’s market position in the cellophane market, there was a great level of interchangeability of du Pont’s cellophane with other flexible wrapping packages. It was argued that after the Supreme Court’s decision in *du Pont*, “we are therefore left with a definition of market which is necessarily broad and which encompasses a refinement of cost-price relationship in applicable situations which defy standardisation”.[610]

The decision of the Supreme Court in *du Pont* highlights the core of the tension between the assessment of market power and market definition. At the time the decision in *du Pont*, the Supreme Courts’ perception that size was a *per se* violation of Section 2 had considerably changed. It was rather an unlawful monopoly or an illegality behind the firm’s size which had materialised to pose bigger problems for competition on US markets. It was argued that a firm’s bigness is a relative term and “it must be considered in the context of the relevant product and geographic market to which a particular fact situation relates”.[611] The Supreme Court did not mention any other factors which, for the purposes of this research, represent a firm’s bigness. Therefore, du Pont’s seventy five percent market share was the most important factor, in addition to the fact that du Pont was indeed in control over the majority of the cellophane market. However, once the trial court and the Supreme Court decided that the cellophane was part of the flexible packaging market, du Pont’s market power became negligible. Had the Supreme Court narrowed the relevant market to the cellophane market, du Pont’s monopoly power would have been exaggerated.

[608] *Ibid.*
[609] Statement of Robert H. Bork [1979] 48 Antitrust L.J. 891 at p.894.
[610] (1957) “Anti-Trust Law: The Impact of the Cellophane Case on the Concept of Market”, Indiana Law Journal: Vol. 32: Iss. 3, Article 4. Available at: < http://www.repository.law.indiana.edu/ilj/vol32/iss3/4>.
[611] Hibner, D., T., Jr., “Bigness and Pricing Problems” [1971-1972] 41 Antitrust L.J. 61 at p. 64.

Therefore, a firm's bigness and size directly depend on the way a relevant market is delineated.

The government tried to argue before the District Court that "once power to control prices has been established, it is immaterial how that power may be used".[612] In other words, the government insisted that the mere existence of market power is enough to trigger the violation of Section 2. *Alcoa* was heavily referenced in *du Pont* and "the government was consciously pushing the *Alcoa* doctrine to its furthermost limits".[613] However, it was argued that "the mainstream of anti-trust doctrine has never condemned the mere economic fact of monopoly".[614] By the time *du Pont* was decided, it had already become an established law in the US.

Du Pont has shown the transition in applying more economic analysis to the assessment of market power although it was argued that "economics can be useful in reaching some decisions, but it should not be determinative in making legal decisions".[615]

The application of antitrust rules to monopolies has shown the separation between two different scenarios where "a court could either say that the proper market includes all of the producers, and twenty-five per cent of the market is not a monopoly, or that the firm is a monopoly, but not an illegal one within the meaning of the act".[616] In this case, the illegality of monopoly power is determined through the assessment of the acts of the firm in question. In other words, whether a monopolist is using its power to control prices and exclude competition or, as Robert Bork said "the existence of power is best shown by the fact that it has been exercised".[617]

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[612] District Court Brief, at p. 40 as referenced in Dirlam, J., B., & Stelzer, I., M., "The Cellophane Labyrinth" [1955-1956] 1 Antitrust Bull. 633 at p.637.
[613] Dirlam, J., B., & Stelzer, I., M., "The Cellophane Labyrinth", at p.637.
[614] *Ibid.*
[615] *Ibid.* at p.649.
[616] Turner, D., "Antitrust Policy and The Cellophane Case", at p. 282.
[617] Statement of Robert H. Bork, at p. 892.

5.2. Final Observations

The above case study revealed a gradual development of Section 2 where there were attempts to make size *per se* illegal under Section 2 which later, with the application of a more economic analysis, were discarded by the Supreme Court. *United Steel*[618] and *International Harvester*[619] further clarified the law in that mere size was not an offence under the Sherman Act which, by implication, welcomed the abuse theory into the application of Section 2. However, it was argued that it did not eradicate all the problems and inconsistencies affiliated with size as certain acts "which might otherwise constitute abuses in the presence of great size or percentage of control might appear more innocuous without size or a high percentage".[620] This also relates to a firm's bigness because only a firm of a large size will have access to various advantages and privileges. The Supreme Court's authority in *United Steel* and *International Harvester*, as argued, indicated that "bigness may carry with it penalties in the form of restrictions on the activities in which it may engage".[621] This argument is true; however, neither of those cases actually prohibited bigness and size *per se*, rather making it clear that firms of a large size which are in a privileged position will carry certain responsibilities to ensure they do not monopolise.

The assessment of the firm's monopoly power is not an easy task especially when intertwined with the initial confusion as to the importance of the size to the monopolisation offence. Economics played an undeniable role in reaching the more or less unified conclusion that size *per se* is not an offence unless used in order to restrain competition or establish a control over a relevant product or geographical market. The term monopoly, on its own, does not provide any information on whether the relevant market is monopolised which is what Section 2 clearly forbids. The transition of lawful monopoly into unlawful takes place when market power is being used anti-competitively when, for instance, a firm is involved in a predatory pricing and until the action or intent is proved, monopoly should

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[618] *United States v United States Steel Corp*. Key Supreme Court's cases citing *United Steel: U.S.* v. *International Harvester Co.,* 47 S. Ct. 748, 754+, U.S. Minn., (1927); *U.S.* v. *Swift & Co.,* 52 S. Ct. 460, 463, U.S. Dist. Col, (1932); *Apex Hosiery Co.* v. *Leader.,* 69 S. Ct. 982, 994+, U.S. Pa., (1940); *U.S.* v. *Line Material Co.,* 68 S. Ct. 550, 559, U.S. Wis., (1948); *U.S.* v. *Griffith,* 68 S. Ct. 941, 946, U.S. Okla., (1948); *U.S.* v. *Columbia Steel Co.,* 68 S. Ct. 1107, 1113+, U.S. Del., (1948); *U.S.* v. *Oregon State Medical Soc.,* 72 S. Ct. 690, 696, U.S. Or., (1952).
[619] *U. S.* v. *International Harvester Co.* Key Supreme Court's cases citing *International Harvester: U.S.* v. *Swift & Co.,* 52 S. Ct. 460, 463+, U.S. Dist. Col., (1932); *American Tobacco Co.* v. *U.S.,* 66 S. Ct. 1125, 1139, U.S. Ky., (1946); *U.S.* v. *Columbia Steel Co.,* 68 S. CT. 1107, 1129, U.S. Del., (1948).
[620] Levi, E., H., "The Antitrust Laws and Monopoly", at p. 160.
[621] Fuller, F., E., "Problems Ahead For 'Big Business'" [1953] 2 A.B.A. Antitrust Section 60 at p. 64.

not be prohibited. US antitrust law seems to be clear on this point, but the general perception exists though that in the majority of cases on monopoly, "if the court has a mind to do so, it can find abuses"[622] and this equally applies to the EU courts. This can be explained by the fact that a powerful and large firm which possesses and uses its advantages and privileges can be suspected in anti-competitive behaviour just because it runs business better and on a greater scale than its rivals. A firm which has, for instance, access to capital will be able to offer better quality products via aggressive and innovative advertising to the detriment of its weaker rivals' business. Depending from which perspective to look, such practices can constitute an abuse of a monopoly power. Furthermore, privileged position opens many doors and, moreover, it can grant its holder with an opportunity to dictate the rules which, in some situations, can also amount to an abuse of the power. However, it all depends on how a firm uses its advantages over its competitors and it is very difficult to identify when such a position leads to an unlawful monopoly. This was clearly highlighted by the Supreme Court in *United Shoe*.

Alcoa could undoubtedly be regarded as the most important and relevant decision which attempted to introduce the *per se* illegality of monopoly.[623] The decision in *Alcoa* was reinforced by the Supreme Court in *American Tobacco*[624] where the Supreme Court applied *Alcoa* to conclude that the petitioners had conspired to establish and maintain monopoly power.[625] In *American Tobacco*, [626] the Supreme Court had to deal with the combination of firms[627] accused of violation of Section 1 and 2 of the Sherman Act, where it was found that they were accountable for eighty percent of the total domestic cigarette production within the US.[628] The combination was named 'The Big Three' and their comparative size provided them with an increased power to dominate all stages of the tobacco industry.[629]

[622]Levi, E., H., "The Antitrust Laws and Monopoly", at p. 158.
[623] For the information on the development of the term 'monopoly' see: Kerr, T., S., "Changing Concepts of Monopoly as Interpreted by Judicial Decisions" [1934-1938] 8 Am. L. Sch. Rev. 436.
[624]*American Tobacco Co.* v *United States* 328 US 781 (1946).
[625]*Ibid.* at p. 814.
[626]For more information on *American Tobacco* v *United States,* see: Murchison, W., C., "Significance of the American Tobacco Company Case" [1947-1948] 26 N. C. L. Rev. 139.
[627]The American Tobacco Company, Liggett & Myers Tobacco Company and R. J. Reynolds Tobacco Company.
[628]*American Tobacco Co.* v *United States*, at p. 796.
[629]*Ibid*.

The Supreme Court then reiterated its proposition in *Swift* case that when size was used as a tool for an abuse in the past then it should not be ignored.[630]

The case study has also revealed that if a firm's market power is of ninety percent or more, then it automatically leads to the conclusion that such a monopoly is unlawful and, therefore, contrary to Section 2. It was argued that if the percentage of control is not as high as in *Alcoa*, then the evidence of the specific intent to monopolise might become important for the Section 2 analysis.[631] This is strikingly different from the position in EU competition law where intent plays no role in the assessment of a firm's conduct under Article 102 and the Commission places more weight on other factors in order to strengthen the finding of a dominant position.[632]

The term monopoly, on its own, as used in law "is not a tool of analysis but a standard of evaluation".[633] It becomes a standard which is applied by antitrust authorities and the courts in order to identify whether the relevant market is being anticompetitive to the detriment of public policy, in general, and consumers, in particular. Economic tools are now an inseparable part of such an evaluation. It was also argued that the antithesis of the concept of monopoly in law is free competition while in economics it is pure competition and "restriction of competition is the legal content of monopoly; control of the market is its economic substance […] these realities are by no means equivalent".[634] The importance of knowing the distinction between two different concepts of monopoly lies in the fact that monopoly in economic sense offers more technical approach towards the application of Section 2 to monopolies where a firm is utilising its size and power in order to control the market. Pure competition is therefore distorted as it requires a homogenous market with various numbers of buyers and sellers where there are no entry barriers and no control over the relevant market whatsoever.[635]

Abuse theory, on the contrary, requires an act which would point at the firm's anticompetitive behaviour. It was argued, however, that *Alcoa* did not end the usage of abuse theory, *albeit* changing it, "by setting an upper limit for monopoly power, or by

[630]*Ibid.* citing *United States* v *Swift & Co.* p. 116. See also above.
[631]Levi, E., H., "The Antitrust Laws and Monopoly", at p. 175.
[632] See Chapter 6.
[633]Mason, E., S., "Monopoly in Law and Economics" [1937] 47(1) The Yale Law Journal 34 at p. 34.
[634]*Ibid.* at p. 36.
[635] As was discussed in Chapter 3, pure competition (which could also be called 'perfect competition') does not exist as this ideal market situation is unlikely to be ever achieved.

making it necessary to recognise that, contrary to implications of *Alcoa*, in some areas monopoly power is lawful as long as it is properly used [*and*] where there is size, there may be restrictions on its use".[636] The last part of this argument resembles the position in the EU[637] where the CJEU agreed[638] that dominance *per se* is not a violation of Article 102; rather, it provides its holder with a special responsibility not to utilise it in an anticompetitive way.

As argued earlier, the boundaries of a relevant market play an important role in the determination of a firm's monopoly as evidenced in *du Pont* case where the Supreme Court established a very broad market definition leading to the general concerns that all future cases would be affected by the Supreme Court's definition of the relevant market.[639] In addition, it was interestingly argued that "a law which uneasily permits great relative size and bigness, but with a lack of assurance as to where monopoly power is to be found moves naturally to a restriction on the use of permitted power".[640] It is impossible not to agree with this argument because if US antitrust law allows firms to grow in size and acquire bigness on a relevant market, then it should ensure it has an adequate set of rules which distinguish between lawful and unlawful monopoly. At this stage of the research, US antitrust law seems to find the required balance which condemns an unlawful monopoly but permits firms to acquire market size and bigness as long as it is for efficient purposes only with the Supreme Court making it clear in 1927 that "the fact the competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination".[641]

It has become clear that US antitrust law made a great step away from condemning monopoly *per se* to recognising that monopoly is not always illegal. Such a move away from the common prejudice toward bigness would have been welcomed by Lilienthal who once stated that "the doctrine that Bigness is an evil, in and of itself, and against the

[636]Levi, E., H., "A Two Level Anti-Monopoly Law", at p. 570.
[637]Discussed in Chapter 6.
[638] *NV Nederlandsche Banden-Industrie Michelin* v *Commission (Michelin I)* in Chapter 6.
[639] Kintner, E., W., *An Antitrust Primer: A Guide to Antitrust and Trade Regulation Laws for Businessmen* (The Macmillan Company & Collier-Macmillan Limited, New York & London: 1964) at p. 102. However, in *International Boxing Club* v *United States* 358 US 242 (1959), the Supreme Court applied the same test which resulted in a narrow definition of the relevant market.
[640]Levi, E., H., "A Two Level Anti-Monopoly Law", at pp. 573-574.
[641] *U. S.* v. *International Harvester Co.,* at 709.

Sherman Act even though there are no specific acts against competition, is a thoroughly unsound development of our governmental policy toward Bigness; it is a policy that cripples our country".[642] However, the future of big business on a US market highly rests on Congress, the courts and administrative agencies[643] as it is in their power to decide how bigness would be treated by antitrust law.

Lastly, as a matter of brief comparison,[644] mergers are well known to be literally associated with size, *i.e.* when several firms merge to create a single business entity, their market predominance becomes undeniable. This leads to smaller competitors fearing the domination of a market by such newly created entity. The response of US antitrust law is clear in this respect that "antitrust analysis focuses on the specific competitive harms that may be associated with a particular merger, not on its size in the abstract […] The key for our review is whether the merger will harm consumers, not the sheer size of the corporate entities involved".[645] The importance in mentioning mergers lies in the fact that bigness of a concentration is not a concern for antitrust authorities, *i.e.* bigness does not seem to pose a danger on its own if it lacks anti-competitive harm.

5.3. Conclusion

The US case study paints a clear picture on the development of Section 2 toward monopoly power. Initially, it had all started with Congress' aims and objectives behind the Sherman Act which were strictly followed by the Supreme Court. Then, the Supreme Court was challenged to identify whether a size *per se* was enough to find the violation of Section 2 where the case study revealed that size *per se* was not a violation of Section 2 as the act of monopolisation or attempted monopolisation was required by the law. The Supreme Court's deliberations on the application of size to the assessment of monopoly power under Section 2 had led it to distinguish between lawful and unlawful monopoly and to recognise

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642 Lilienthal, D., E., *Big Business: A New Era,* at p. 34.
643 Fuller, F., E., "Problems Ahead For 'Big Business'", at p. 76.
644 Current research is not attempting to include the discussion of mergers into current analysis. However, it appears to be important to briefly mention the approach antitrust authorities take toward size when dealing with new mergers.
645 Statement of Joel I. Klein, Assistant Attorney General Antitrust Division US Department before the Committee on the Judiciary United States Senate. Concerning Mergers and Corporate Consolidation. (Washington, DC, June 16, 1998) at pp. 3-4.

that size could be achieved via business skill and acumen. In such situation, size would only represent a firm's market success, unless it had already utilised its size for an abuse in the past. If it were the case, then the Supreme Court was clear that such size would contribute to the finding of an unlawful monopoly under Section 2.

Meanwhile, the US case study did not reveal the Supreme Court's reliance on other factors which, in this research, define a firm's bigness. *United Shoe*, among the selected cases, was the only example where the District Court had some discussion of privileges and advantages United Shoe had over its rivals. However, the District Court was very clear that all the advantages derived from a well-structured business policy which was aimed at the restriction of competition meaning those advantages were not natural consequences of a successful business strategy and that there was an undeniable illegality behind their adoption and application. Therefore, the case study revealed that US antitrust law has a relative disregard of other factors in a firm's possession. This could be explained by the fact that Section 2 demands very high market share to be present before it can be triggered and if a firm has over seventy percent market share then the presence of various privileges and advantages over competitors will not matter as its monopoly position will be highly likely.

Furthermore, it was revealed that, initially, the Supreme Court held an antagonistic approach to powerful firms, however soon recognising the importance to focus on economic harm and economic contributions of powerful businesses in order to avoid passivity on a market.[646] It is unclear whether a firm's size and bigness could be quantified with respect to success or efficiency, what is clear, however, is that they could significantly attribute to market development via influx of more job opportunities, investments and technology development. In addition, the development of US antitrust law has witnessed a shift in the burden of proof placed on plaintiffs who are required to show the proof of wilfulness on the part of the monopolist. That new tendency was welcomed by the

[646] Statement of Federal Trade Commission Chairman William E. Kovacic "Modern US Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act" pp. 3-4. Chairman Kovacic also discussed the evolution of individual conduct under the "double helix" in the DNA of antitrust doctrine. According to the Chairman, the reason why the US had changed its perspective toward the behaviour of big business was due to the influence of both the Chicago School and the Harvard School where the thoughts of both schools were put together for the development of law under Section 2. Available at: <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmtkovacic.pdf>.

monopolists as the spotlight had shifted from their monopoly status.[647] The fact that the US courts started to demand the plaintiffs to prove the presence of wilfulness on the part of the monopolist also signifies the recognition that *per se* monopoly was no longer enough to establish the violation of Section 2.

US antitrust law, following the case law on monopoly, has witnessed a slow transition from more to less interventionist approach from antitrust authorities. Such a transition also had a reflection on the way the US courts started to perceive monopoly and its effects on a US market. It could be seen that during *Alcoa* period,[648] cases on Section 2 still required a presence of certain anticompetitive acts. It was argued, however, that the courts still "defined the concept of wrongful behaviour so broadly that a wide range of conduct sufficed to create liability for dominant firms".[649] The broad interpretation of anticompetitive behaviour would lead to monopolists falling within the realm of Section 2 even if their business actions do not have any anticompetitive effects. This could be explained by the fact that a monopolist would already satisfy the first limb of Section 2, *i.e.* the presence of monopoly power.

Therefore, it is concluded that US antitrust law, due to its rich history on the development of Section 2, does not consider size and bigness as being *per se* illegal under Section 2. There might be exceptions to this rule in the future; however, US antitrust law policy does not object to firms' growing on a market and competing aggressively as long as their actions do not supress competition.

[647] Fox, E., M., "Monopoly and Competition: Tilting the Law Towards a More Competitive Economy", at p. 54.
[648] This period includes such important cases as *United States* v *Aluminium Co of Am*., 148 F.2d 416 (2nd Cir. 1945); *Am. Tobacco Co.* v *United States*, 328 US 781 (1946); *United States* v *Griffith*, 334 US 100 (1948).
[649] Kovacic, W., E., "The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix", at p. 17.

Chapter 6: The Application of Article 102 to Dominance: The EU Case Study

The analysis of US case law has revealed that attempts were made to include a size of a firm into the assessment of monopoly power under the Sherman Act. 'Bigness', on the other hand, did not play a significant role in the assessment of monopoly power. The next step which is required for the purposes of the current analysis is to study the major EU case law on dominance. The assessment of dominance, as has already been discussed, can be a very intricate process and it is filled with ambiguities and uncertainties: There is no "clear demarcation between the application of these concepts and their outer boundaries";[650] therefore, giving an impression that being dominant can be a crime in EU competition law. The purpose of this chapter, therefore, is to analyse how the courts and the Commission apply the well-known set of rules on the assessment of dominance in practice.

This chapter contains a number of EU cases which were selected based on the number of market shares of a firm under consideration.[651] Despite the fact that market share is the starting point in the analysis of market power, the selected cases are going to also discuss other factors the courts take into account in establishing dominance. It is hoped that the case study clarifies whether the EU holds an antagonistic approach to large firms, especially in situations where market shares are below seventy percent.[652] In order to support the finding of dominance under seventy percent market share threshold, the Commission and the courts rely on other factors which, for the purposes of this research, constitute firm's bigness in antitrust law. It will be seen that the said factors are nothing more than all commercial, financial and technical advantages a firm has due to its market position. It will also be seen that none of the selected cases had illegality behind the formation of their businesses unlike, for instance, *Standard Oil* case. Therefore, the case study aims to identify how EU competition law decides a firm's dominance based on low

[650]Al-Dabbah, M., M, "Conduct, Dominance and Abuse in 'Market Relationship': Analysis of Some Conceptual Issues under Article 82 EC" [2000] E.C.L.R. 45 at p. 45.

[651] The firm in *Europemballage Corp & Continental Can Co Inc* v *Commission*, however, has a very high market shares but it is featured in this research due to being the very first competition law cases where Article 102 was applied and the only EU case where the CJEU did not agree with the Commission Decision.

[652] See Chapter 1, where it was provided that, for the purposes of this research, the EU case law is going to be selected based on market shares between forty (or below) and seventy percent.

market shares and other factors many successful businesses have owing to their business decisions.

6.1. Background

The years of applying Article 102 have proved that the EU courts insist that evidence of the existence of a dominant position should first be provided.[653] As was already discussed, Article 102 cannot be triggered if a firm is not in a dominant position. Errors in subjecting non-dominant firms to Article 102 are possible and, if this is a case, EU competition law can simply become a tool for weaker firms to use in order to supress its stronger competitors.

The EU holds a position that damage to the competitive process would lead to consumer harm and "the best way to protect consumers as well as incentives for producers is to rely on open markets unimpeded by private firm obstruction".[654] The principle that competitors should be competing on the merits only is an important part of the Commission's thinking when applying competition law to dominant firms. Consumer welfare, as was discussed, is of paramount importance and the following cases have the protection of consumer welfare at the core of the courts' judgments.

There are various arguments on the way the EU treats dominant firms, for instance, that "the European antitrust authorities are prepared to accept 'dominance'; but draw the line at conduct which can cause economic harm if that dominance is abused […] economic harm does not arise simply because of dominance, nor should dominance be proscribed".[655] This argument is a succinct summary of the way Article 102 is described by the Commission and the EU courts, but whether it reflects a reality is a completely different issue. The most important tool in the assessment of dominance is very well set, *i.e.* market shares in a relevant market whilst the second tool, on the other hand, is a non-exhaustive list of various factors which are used by the Commission to strengthen the finding of a dominant position.

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[653] Neven, D., Nuttall, R., & Seabright, P., *Merger in Daylight: The Economics and Politics of European Merger Control* (CEPR, 1993) at p. 18.
[654] Fox, E., M., "We Protect Competition, You Protect Competitors", at p. 155.
[655] Duncan, R., Coleman, C., Daniel, H., & Haleen, P., "Litigating Single-Firm Conduct under the Sherman Act and the EU Treaty: Divergence Without End, or Change We Can Believe In?", at p. 149.

In both instances, flexibility is featured in their application to a firm under investigation which makes the assessment of dominance vague and the case study below is aimed at addressing the flexibility in the analysis of a dominant position.

6.1.1 *Continental Can*[656]

Continental Can is the first EU case on the application of Article 102 to the abuse of dominant position.[657] The case concerns the Commission decision (Continental Can Decision)[658] against Continental Can Company Inc. (Continental) of New York (USA), a firm producing different types of metal containers for food packaging. The Commission found that Continental abused its dominant position which it held through its subsidiary Schmalbach-Lubeca-Werke AG of Brunswick (SLW) in a market for light metal containers for meat, meat products, fish and crustacean as well as in a market for metal closures for glass jars. The Commission further argued that Continental abused its dominant position by acquiring about eighty per cent of market shares[659] (through its subsidiary Europemballage) of Thomassen & Drijver-Verblifa N.V. (TDV).

Continental appealed,[660] arguing that the Commission's findings of a dominant position were purely based on theoretical evidence. The only concrete evidence supplied by the Commission, as argued by the defendants, was based on Continental's market share which does not "suffice to prove the existence of a dominant position, since it gives no indication of the effective margin of action available to the undertaking".[661] This highlights two main important issues: First, due to being the first case on the assessment of dominance, Continental had thought that eighty percent market share did not provide concrete evidence

[656] 72/21/CEE: Commission Decision of 9 December 1971 relating to a proceeding under Article 86 of the EEC Treaty (IV/26 811—Continental Can Company) OJ 1972, L7 (*hereinafter* Continental Can Decision); Case 6/72, *Europemballage Corp & Continental Can Co Inc* v *Commission*. Related cases: *Europemballage Corp and Continental Can Inc* v *Commission of the European Communities* (6/72 R) (No. 1) [1972] ECR 157; *Europemballage Corp and Continental Can Inc* v *Commission of the European Communities* (6/72 R) (No. 2) [1975] ECR 495.

[657] Key cases citing *Continental Can*: T-24/05, *Alliance One International Inc* v *European Commission* [2011] 4 CMLR 9; T-177/04 *EasyJet Airline Co Ltd* v *Commission of the European Communities* [2006] ECR II-1931; T-210/01, *General Electric Co* v *Commission of the European Communities* [2005] ECR II-5575.

[658] Continental Can Decision.

[659] Despite the fact that Continental's market share is above seventy percent threshold, this case was selected for a number of reasons. First, it is the first EU case where (now) Article 102 was applied. Second, it is the only case where the (now) CJEU overturned the Commission Decision. Last, it provides a good explanation on the way a relevant market should be delineated. All these points will be discussed.

[660] *Europemballage Corp & Continental Can Co Inc* v *Commission*.

[661] *Ibid.* at p.225.

of a dominant position, and, second, the heavy reliance of the Commission on market shares dated back to 1971.

The way *Continental Can* is structured is similar to *Standard Oil* as, in both cases, the courts deal with the application of antitrust law on the control of market power for the first time. Unlike other EU cases, *Continental Can* did not have any discussion of other factors apart from a brief mentioning of market shares and, like *Standard Oil,* it had a brief discussion of the main antitrust legal provisions. This case, however, remains important because it gives an insight of the first steps in the development of law on the assessment of market power.

The CJEU made it clear that a link of causality between dominance and abuse should be present for the correct application of Article 102, which Continental denied.[662] The court's response was that "the condition imposed by [Article 102] is to be interpreted whereby in order to come within the prohibition a dominant position must have been abused".[663] This is the first statement made by the CJEU confirming that for Article 102 to be triggered there must be an abuse of a dominant position. The CJEU then continued that "abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one".[664] The link of causality, in the CJEU's opinion, does exist between the dominant position and abuse "regardless of the means and procedure by which it is achieved".[665]

In assessing the existence of dominance, the Commission saw Continental strengthening its market power through the acquisition of the majority of holding in a competing firm.[666] The Commission, in particular, argued that following a careful investigation, it based its decision on "the vary high market share already held by SLW in metal containers, on the weak competitive position of the competitors remaining in the market, on the economic weakness of most of the consumers in relation to that of the new unit and on the numerous

[662] In particular, the applicants also argued that based on the definition of dominant position and the link of causality, the abuse must occur on the same market as is allegedly dominated: *Ibid.* at pp. 225-226.
[663] *Ibid.* at p. 245, para.26.
[664] *Ibid.*
[665] *Ibid.* at p. 245, para. 27.
[666] The CJEU held that dominant firms could undermine the very core aims of Article 102 "by an alteration to the supply structure which seriously endangers the consumers freedom of action in the market" on the condition that all competition is eliminated—*Ibid.* at p. 246, para. 29

legal and factual links between Continental and potential competitors".[667] This is the first example when the Commission considered Continental's superiority over its competitors, weakness of the consumers and other connections between Continental and its rivals as an additional evidence of market power. Korah, for instance, argued that the Commission defined the concept of dominance "in much the same terms as would an economist […] it focused on the discretionary power of the monopolist to set its prices and make other market decisions without being tightly constrained by competitive pressures".[668]

As was discussed in Chapter 4, the definition of a relevant market is the first step in the assessment of market power. The importance of *Continental Can* lies in the fact that the CJEU disagreed with the Commission's delineation of the relevant market, in particular, the CJEU pointed out that the Commission considered several separate markets for light metal containers, namely a market for light containers for meat products, a market for light containers for canned seafood and a market for metal closures for the food packing industry. The Commission failed, according to the CJEU, to explain how these three markets differ from a market for light metal containers, *i.e.* a larger market. For such reasons, the CJEU held that "to be regarded as constituting a distinct market, the products in question must be individualised, not only by the mere fact that they are used for packing mere products, but by particular characteristics of production which make them specially suitable for this purpose".[669] The CJEU, therefore, required products to be individualised in order to be able to distinguish them from a more generic market. As was discussed in Chapter 4, the boundaries of a relevant market have effects on the definition of dominance because the narrower the market the more dominant a firm becomes. The Commission prefers a narrow definition of a relevant market as evidenced in the *Continental* case. This can also be applied to a firm's size (*i.e.* market shares) and bigness (*i.e.* other factors) because in a narrow relevant market a firm's size and bigness will be exaggerated. The opinion of the CJEU does not show whether the court preferred a narrow or wide definition of the relevant market. It does show, however, that the Commission has to be very thorough in its analysis of dominance. Furthermore, despite the fact that the Commission used the weak competitors as one of the factors it considered in addition to Continental's market shares, it did not measure the competitive force of other rivals in those markets.

[667] *Ibid.* at p. 247, para. 30.
[668] Korah, V., *An Introductory Guide to EC Competition Law and Practice* (9th edition, Hart Publishing, North America: 2007) at p. 105.
[669] *Europemballage Corp & Continental Can Co Inc.* v *Commission*, at p. 248, para. 33.

The CJEU was not entirely satisfied with that fact and concluded that the Commission decision should be annulled.[670]

This case is interesting for the reasons that the CJEU did not agree with the Commission which, at the time of writing, has not happened in any of other EU high-profile cases. *Continental Can* was the first firm to be subjected to the abuse of dominance test under Article 102. Keeping this fact in mind, it is not surprising that Continental tried to argue that dominance and abuse have to exist in the same market for Article 102 to apply. At a later stage of the development of law on dominance, it will become clear that Article 102 will also be violated when firm's anticompetitive actions go beyond its primary market.[671] The CJEU, in *Continental*, made a very important point, *i.e.* "the provision 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(b) of the TFEU]"[672] which provides for "the establishing of the competition rules necessary for the functioning of the internal market". This shows that the CJEU, from the very first judicial interpretation of Article 102, held that dominance test has to be assessed in a way which would be in conformity with the main goals of the TFEU. In other words, the functioning of the internal market should not be fettered by the abuse of a dominant position.

6.1.2. *United Brands*[673]

United Brands was the most famous EU case which significantly shaped EU competition law on dominance. United Brands Company (UBC) was a US corporation and the largest producer of bananas in the world market accounting for almost thirty five per cent of world exports.[674] On 19 March 1975, the Commission initiated proceedings against UBC on the grounds of alleged abuse of a dominant position (Chiquita Decision).

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[670] *Ibid.* at p. 249, para. 37.
[671] See *e.g.* Cases 6 and 7/73, *Instituto Chemioterapico Italiano Spa and Commercial Solvents Corp* v *Commission* [1974] ECR 223.
[672] *Europemballage Corp & Continental Can Co Inc*. v *Commission*, at p. 248, para. 26.
[673] Commission Decision of 17 December 1975 relating to a proceeding under Article 86 of the EEC Treaty (IV/26699—Chiquita) (76/353/EEC) (*hereinafter*, Chiquita Decision), para. 2, at No L 95/11; *United Brands* v *Commission*. Related case: *United Brands Co* v *Commission of the European Communities* (27/76) [1978] ECR 207—AGO.
[674] *United Brands* v *Commission*, at p. 210.

The Commission defined dominance as,

> "The power to behave independently without taking into account, to any substantial extent, their competitors, purchasers and suppliers. Such is the case where undertaking's market share, either in itself or when combined with its knowhow, access to raw materials, capital or other major advantage such as trademark ownership, enables it to determine the prices or to control the production or distribution of a significant part of the relevant goods. It is not necessary for the undertaking to have total dominance such as would deprive all other market participants of their commercial freedom, as long as it is strong enough in general terms to devise its own strategy as it wishes, even if there are differences in the extent to which it dominates individual submarkets".[675]

The Commission's interpretation of dominance provides that for a firm to fall within the first part of Article 102 prohibition,[676] its market power should not be absolute; rather, it should be 'strong enough in general terms' to satisfy the first requirement of Article 102. The Commission definition of dominance appears to be unclear, for instance, by using UBC's ability to devise its own strategy as one of the factors. Technically, any firm has an ability to devise its own strategy and usually, this is how it is done. Whether its strategy is going to be successful does not entirely depend on the firm in question; it will always depend on the competitive constraints which are in place on a particular market. If there are no competitive constraints and the firm can do whatever it wishes, then it seems like such dominant position is going to be absolute, although it was argued that any firm, including a dominant one, is always going to be constrained, to a different extent, by competitors. The very presence of competitors on a market is going to affect firm's demand curve since "all firms, including those that are held to be dominant, will increase prices to the point at which further price increases would be unprofitable".[677] That part of the Commission decision dated back to 1975 and, even at that stage, it was obvious that the Commission preferred a wide definition of dominance. By not requiring absolute dominance and by reserving a right to use any advantage of a firm to support the existence

[675] Chiquita Decision, para. 2.
[676] *I.e.* the existence of dominant position.
[677] Geradin, D., Hofer, O., Louis, F., Petit, N., and Walker, M., "The Concept of Dominance" GCLC Research Papers on Article 82 EC, July 2005, at p.7.

of dominance, the Commission creates an environment where any firm of a considerable size has a potential to be investigated. Therefore, this part of the decision supports an earlier preliminary conclusion that the Commission prefers to keep its options open and have enough freedom to interfere when it deems to be right. Furthermore, the Commission had explicitly included UBC's advantages and privileges into a definition of dominance which supports an earlier argument that, in EU competition law, bigness can play a decisive role in the finding of a dominant position.

Furthermore, the Commission concluded that UBC's marketing policy was concentrating on the sale of bananas under the Chiquita brand[678]. UBC, in particular, was involved in an extensive advertising campaign of the Chiquita brand and in the development of the production, ripening facilities and carriage and sale of Chiquita bananas which the Commission considered to be UBC's advantage over its competitors who had to adjust to a new marketing policy. This led UBC, according to the Commission, to be able to make their advertising and marketing campaigns much more effective. The Commission, therefore, concluded that UBC, being the only firm in the banana market with such advantages, "is in a position thereby to obstruct the effective competition of its existing competitors to a substantial degree; potential competitors wishing to establish themselves in the banana market must overcome the barriers to entry […] UBC therefore enjoys a degree of overall independence in its behaviour on the market […] UBC must, therefore, be considered to be in a dominant position".[679] Therefore, as mentioned earlier, based on the factors the Commission took into account, UBC's bigness could not be denied.

The last sentence of the Commission decision on the existence of a dominant position can simply be summed up to the point that UBC enjoyed "a degree of overall independence in its behaviour".[680] Independence should not be the only criterion in the assessment of a dominant position as independence has various degrees. If independence is linked with the requirement that dominance should not be absolute then it leads to one conclusion, *i.e.* some degree of independence accompanied by some degree of dominance is enough to satisfy the first part of Article 102. If this is the case, then the test, as perceived by the Commission, is very loose.

[678] UBC set up a requirement that only high quality bananas of uniform size and colour could bear the Chiquita brand sign. It was very strict with distributors/ripeners as to which bananas could be sold under this brand. The rest of the UBC bananas were sold without the brand sticker.
[679] Chiquita Decision, para.2.
[680] *Ibid.* para.2.

The CJEU defined dominance as,

> "A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".[681]

This definition of dominant position, since the judgment, has become the most cited definition of dominance[682] which both the Commission and the courts apply in Article 102 cases. A dominant firm is a business entity which is so powerful (in economic terms) that it could act considerably independently[683] from any competitive forces on a relevant market.[684] It was argued that the EU concept of dominance "includes (though is not exhausted by) the idea that a firm can profitably increase its price without losing its

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[681] *United Brands* v *Commission,* at para.65.

[682] Key cases citing *United Brands* v *Commission:* C-457/10 P, *AstraZeneca AB* v *European Commission* [2013] 4 CMLR 7; C-89/11 P, *E.ON Energies AG* v *European Commission* [2013] 4 CMLR 3; T-336/07, *Telefonica SA* v *European Commission* [2012] 5 CMLR 20; C-109/10 P, *Solvay SA* v *European Commission* [2011] ECR I-10329;T-348/08, *Aragonesas Industrias y Energia SAU* v *European Commission* [2011] ECR II-7583; T-57/01, *Solvay SA* v *European Commission* [2009] ECR II-4621; C-202/07 P, *France Telecom SA* v *Commission of the European Communities* [2009] ECR I-2369; C-159/08 P, *Scippacercola* v *Commission of the European Communities* [2009] ECR I-46; T-168/01, *GlaxoSmithKline Services Unlimited* v *Commission of the European Communities* [2006] ECR II-2969; T-279/02, *Degussa Ag* v *Commission of the European Communities* [2006] ECR II-897; T-210/01, *General Electric Co* v *Commission of the European Communities* [2005] ECR II-5575; T-48/00, *Corus UK Ltd* v *Commission of the European Communities* [2004] ECR II-2325; T-219/99, *British Airways Plc* v *Commission of the European Communities* [2003] ECR II-5917; T-191/98, *Atlantic Container Line AB* v *Commission of the European Communities* [2003] ECR II-3275; T-41/96, *Bayer AG* v *Commission of the European Communities* [2000] ECR II-3383; T-228/97, *Irish Sugar Plc* v *Commission of the European Communities* [1999] ECR II-2669; T-102/96, *Gencor Ltd* v *Commission of the European Communities* [1999] ECR II-753; C-7/97, *Oscar Bronner GmbH & Co KG* v *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791; T-504/93, *Tierce Ladbroke SA* v *Commission of the European Communities* [1997] ECR II-923; C-333/94 P, *Tetra Pak International SA* v *Commission of the European Communities* [1996] ECR I-5951; T-24/93, *Compagnie Maratime Belge Transports SA* v *Commission of the European Communities* [1996] ECR II-1201; C-241/91 P, *Radio Telefis Eireann* v *Commission of the European Communities* [1995] ECR I-743; C-130/93 P, *BPB Industries Plc* v *Commission of the European Communities* [1995] ECR I-865; T-83/91, *Tetra Pak International SA* v *Commission of the European Communities* [1994] ECR II-755; C-53/92 P, *Hilti AG* v *Commission of the European Communities* [1994] ECR I-667; T-65/89, *BPB Industries Plc* v *Commission of the European Communities* [1993] ECR II-389; T-30/89, *Hilti AG* v *Commission of the European Communities* [1991] ECR II-1439; T-69/89, *Radio Telefis Eireann* v *Commission of the European Communities* [1991] ECR II-485; C-62/86, *AKZO Chemie BV* v *Commission of the European Communities* [1991] ECR I-3359; C-85/76 F, *Hoffmann-La Roche & Co AG* v *Commission of the European Communities* [1979] ECR 461;

[683] See Chapter 4 for the discussion of 'independence' in *United Brands* v *Commission* case.

[684] The assessment of the CJEU of the relevant market was criticised for failing to take into account the importance of the time dimension. It was argued that the CJEU did not grasp the fact that in winter bananas had no substitutes, while in summer other fruits could be good substitutes for bananas; therefore, concluding that the CJEU did not provide an accurate definition of the relevant market. See, Baden-Fuller, C., W., "Article 86 EEC: Economic Analysis of the Existence of a Dominant Position", at p. 426.

customers. It does not, however, imply that the firm actually does increase its price".[685] This supports the proposition that *the ability* of a firm to raise prices above the competitive level lies at the core of the definition of dominance while the actual action (*i.e.* whether a firm actually raised prices to the detriment of the consumers, competition or competitors) will fall under the assessment of the abuse of dominant position.

The boundaries of a relevant market play an important role in the assessment of dominance and UBC's structure played an important role in the establishment of its dominant position. The CJEU gave a careful consideration to the fact that UBC was vertically integrated to a high degree,[686] *i.e.* UBC was involved in every stage of production, ripening, handling and price setting of its bananas at every level. The fact that UBC was involved in an extensive research on the improving the productivity of its plantations was used by the CJEU as an example of UBC's privileged market position since UBC's competitors could not keep up with the research and development. The CJEU, for the reasons above, concluded that UBC "attained a privileged position by making Chiquita the premier banana brand name on the relevant market with the result that the distributor cannot afford not to offer it to the consumer".[687] These facts show the primary position of UBC as a leading banana supplier in the EU market and become the evidence of UBC's superiority over its rivals.

When it came to market shares, UBC held nearly forty five per cent[688] of the banana market and that number did not lead to an automatic conclusion that UBC was dominant;[689] the CJEU considered it necessary to assess the strength and number of UBC's competitors.[690] This shows, without any direct reference, that even for the CJEU forty five percent was not a high enough number to infer that UBC controlled the market.[691] In fact, the case study showed that the CJEU paid more attention to other factors in UBC's profile, rather than its market shares. This leads to only one conclusion that, technically, the Commission and the CJEU had to turn to every possible advantage UBC had over its competitors in order to prove the existence of a dominant position. In a narrowly defined

[685] Neven, D., Nuttall, R., & Seabright, P., *Merger in Daylight: The Economics and Politics of European Merger Control*, at p. 18.
[686] *United Brands* v *Commission,* para. 70
[687] *Ibid.* para. 93.
[688] *Ibid.* para. 108.
[689] *Ibid.* para. 110.
[690] *Ibid.*
[691] For the discussion of the application of Article 102 to dominant firms involved in an excessive pricing and, therefore, in a control of a market see Pozdnakova, A., "Excessive Pricing and the Prohibition of the Abuse of a Dominant Position" [2010] 33(1) W. Comp. 121.

relevant market (*i.e.* banana market), UBC was, without any doubt, large; it was vertically integrated in almost every level of production; had access to capital and research; involved in advertising; possessed a strong brand name; and had the largest market share amongst its competitors. This conforms with the CJEU holding that "an undertaking does not have to have eliminated all opportunity for competition in order to be in a dominant position".[692] This confirms the Commission's assertion that for the purposes of Article 102 prohibition, dominance does not have to be absolute. At this stage, therefore, it becomes clear that tools for finding dominance appear to be broad and flexible and with the slight adjustment of the law to the facts, a firm like UBC with only forty five percent market share is found to be dominant with the help of other factors which put UBC into a superior position over its competitors.

Despite the fact that UBC did not prevent its competitors from using the same methods of production and distribution, the CJEU has found that UBC's competitors would "come up against almost insuperable practical and financial obstacles"[693] and it was concluded that that factor was "another factor peculiar to a dominant position".[694] The CJEU is entirely correct on the point that smaller competitors will face large obstacles before, if ever, they reach the level of UBC. This reflects a different angle of the aims of EU competition law, *i.e.* the protection of smaller and weaker competitors reaffirming that the argument in Chapter 3 that SMEs are protected from the aggressive competition of large firms in spite of the Commission's assertions that EU competition law is only concerned with the promotion of economic efficiency and protection of consumer welfare. If the protection of smaller competitors is also included into the aims of EU competition law then this practice can be equalled to punishing larger firms for their success irrespective of any efficiency considerations.[695]

UBC's bigness on the banana market was also evidenced by the fact that it had become a standard setting firm. Since it had more financial and physical capabilities to invest more in the production of bananas, competing with UBC became practically impossible.

[692] *United Brands* v *Commission*, para. 113.
[693] *Ibid.* para. 123.
[694] *Ibid.* para. 124.
[695] Note an argument in Chapter 4 that the Commission does not believe that a dominant firm can cite an "efficiency justification" in order to justify its market behaviour.

However, most of the obstacles[696] UBC's competitors would have faced were derived from the considerable investment and business skills and acumen. The study of *UBC* did not show any evidence that there was an illegality behind the formation of the corporation which, once again, supports the proposition that its success was indeed achieved through its business decisions. There was no direct evidence that the Commission and the CJEU were protecting UBC's competitors; however, it was difficult not to assume that UBC was punished for being a superior market player before it got even larger or, before UBC became an absolute monopolist. As it was interestingly pointed out that "punishing dominant firms for their success, and handicapping them to protect their rivals, may have some appeal and may even produce short-term gains, but all too often the only longer-term winners are inefficient rivals protected from the rigours of competition".[697]

6.1.3. *Hoffmann-La Roche*[698]

The case[699] reached the CJEU on the application lodged by Hoffmann-La Roche (Roche) against the Commission decision[700] (Vitamins Decision) dated 9 June 1976.[701] The

[696] *E.g.* large capital investments for the creation and running banana plantations, the ability to increase the sources of supply in case of banana diseases and weather conditions, the ability to set up delivery and distribution of bananas which are regarded as highly perishable type of goods, costly advertising campaign and commercial networks and so on.
[697] Kolasky, W., J., "What is Competition? A Comparison of US and European Perspectives", at p. 41.
[698] Commission Decision of 9 June 1976 relating to the proceeding under Article 86 of the Treaty establishing the European Economic Community (IV/29.020—Vitamins) 76/642/EEC (*hereinafter*, Vitamins Decision)—[1976] OJ L223/27; *Hoffmann-La Roche & Co AG.* v *Commission*. Related case: *F Hoffmann-La Roche & Co AG* v *Commission of the European Communities* (85/76) [1979] ECR 461-- AGO.
[699] *Hoffmann-La Roche & Co AG*. v *Commission*.
[700] Vitamins Decision.
[701] Key cases citing *Hoffmann-La Roche* v *Commission*: C-109/10 P, *Solvay SA* v *European Commission* [2011] ECR I-10329; T-321/05, *AstraZeneca AB* v *European Commission* [2010] ECR II-2805; C-202/07 P, *France telecom SA* v *Commission of the European Communities* [2009] ECR I-2369; T-53/03, *BPB Plc* v *Commission of the European Communities* [2008] ECR II-1333; T-271/03, *Deutsche Telekom Ag* v *Commission of the European Communities* [2008] ECR II-3601; T-125/03, *Akzo Nobel Chemicals Ltd* v *Commission of the European Communities* [2007] ECR II-3523; T-170/06, *Alrosa Co Ltd* v *Commission of the European Communities* [2007] ECR II-2601; C-95/04 P, *British Airways Plc* v *Commission of the European Communities* [2007] ECR I-2331; T-15/02, *BASF AG* v *Commission of the European Communities* [2006] ECR II-497; T-120/01, *General Electric Co* v *Commission of the European Communities* [2005] ECR II-5575; T-201/04 R2, *Microsoft Corp* v *Commission of the European Communities* [2005] 4 CMLR 5; T-219/99, *British Airways Plc* v *Commission of the European Communities* [2003] II-5917; T-191/98, *Atlantic Container Line AB* v *Commission of the European Communities* [2003] ECR II-3275; T-395/94, *Atlantic Container Line AB* v *Commission of the European Communities* [2002] ECR II-875; T-62/98, *Volkswagen AG* v *Commission of the European Communities* [2000] ECR II-2707; C-395/96 P, *Compagnie Maritime Belge Transports SA* v *Commission of the European Communities* [2000] ECR I-1365; T-25/95, *Cimenteries CBR SA* v *Commission of the European Communities* [2000] ECR II-491; T-228/97, *Irish Sugar Plc* v *Commission of the European Communities* [1999] ECR II-2669; T-102/96, *Gencor Ltd* v *Commission of the European Communities* [1999] ECR II-753; C-333/94 P, *Tetra Pak International SA* v *Commission of the European Communities* [1996] ECR I-5951; C-241/91 P, *Radio Telefis Eireann* v *Commission of the European Communities* [1995] ECR I-743; C-53/92 P, *Hilti AG* v *Commission of the European Communities* [1994] ECR I-667; T-65/89, *BPB Indistries Plc* v *Commission of the European Communities* [1993] ECR I-

Vitamins Decision is concerned with several agreements concluded by Roche with various firms all being involved in the production and sale of vitamins[702] within the internal market. The vitamins were primarily used for therapeutic use (twenty five per cent), food (fifteen per cent) and animal feed (sixty per cent). According to the Commission's findings, each of the vitamins had a very specific metabolic function and, for such reasons, they were not interchangeable with other groups.[703] In order to be able to supply such a large market, the pharmaceutical firms should possess a large capacity for the investment and distribution networks. Roche, among those pharmaceutical firms, was the world's largest vitamin manufacturer.[704] The Commission reached that conclusion based on Roche's approximate market share for the various groups of vitamins—Vitamin A (forty per cent),[705] Vitamin B1 (fifty per cent),[706] Vitamin B2 (eighty six per cent),[707] Vitamin B6 (ninety five per cent),[708] Vitamin C (sixty eight per cent),[709] Vitamin E (seventy per cent),[710] Biotin H (ninety five per cent)[711] and Pantothenic acid (sixty four per cent). The Commission found that each vitamin constituted a separate relevant market as each vitamin had a special feature and were not substantially interchangeable with other vitamins.[712] The Commission argued that Roche enjoyed "a complete freedom of action in the relevant markets enabling it to impede effective competition within the common market that it has a dominant position in such markets".[713] The existence of dominance, in particular, was derived from Roche's market shares which ranged from forty seven to ninety five per cent. Furthermore, the Commission also took into account the fact that Roche was the world's largest producer of all vitamins and that it was more technologically and commercially advanced than its competitors. In such cases, the Commission continued, the entry to the relevant markets by new competitors would not significantly affect Roche's position as

1307; T-10/92 R, *Cimenteries CBR SA* v *Commission of the European Communities* [1992] ECR II-1571; C-62/86, *AKZO Chemie BV* v *Commission of the European Communities* [1991] ECR I-3359;

[702] The said vitamins are a group of synthetic substances —A, B1, B2, B6, B12, C, D, E, K, PP, pantothenic acid (B3), biotin (H) and folic acid (M).

[703] Vitamins Decision, para.2.

[704] *Ibid.* para. 5.

[705] The next largest vitamin A manufacturer accounts for slightly more than half of this percentage.

[706] The rest of the vitamin B market is pretty much controlled by the next largest manufacturer.

[707] The rest of the vitamin B2 market was divided among other manufacturers.

[708] Almost a complete monopoly.

[709] The market share of the next largest manufacturer was less than one-quarter of that of Roche.

[710] The next largest manufacturer of vitamin E had market share less than one-third of that of Roche.

[711] Almost a complete monopoly.

[712] Vitamins Decision, para. 20.—Therefore, the relevant markets for the purposes of the application of Article 102 were the following groups of vitamins: A, B2, B6, C, E, Biotin (H), and pantothenic acid (B3).

[713] *Ibid.* para. 21.

vitamins markets require high technological development and investment.[714] The Commission, therefore, found Roche to be in a dominant position in the number of relevant markets making Roche's power undeniable. Unlike *UBC*, it had higher market shares in several vitamin markets and, like *UBC*, it was more technologically and commercially privileged than its rivals.

Roche appealed against the Commission decision citing, among others,[715] the infringement of Article 102, arguing that the Commission incorrectly and inaccurately applied and interpreted the concept of dominant position under Article 102; thereby, erroneously concluding that Roche was a dominant firm and that Roche abused the said dominant position. In particular, Roche argued that the Commission based its analysis of the existence of a dominant position solely on Roche's market shares and the structures of the market. Roche criticised the following findings of the Commission: Roche argued that its market shares were not much larger than that of its competitors, Roche disagreed that it produced wider range of vitamins than all its competitors and that it was the world's largest producer of vitamins; that Roche was more technologically advanced than its competitors.[716] Furthermore, Roche argued that when the Commission was assigning market shares it made a mistake in market delimitation, *i.e.* that the Commission did not take into account the fact that the market in vitamins was an expanding market.[717] The Commission argued that "where an undertaking holds large market shares whilst its competitors have appreciably smaller shares and do not offer a range of products which is as large by comparison, this can generally be considered as an indication of a dominant position".[718]

The CJEU confirmed the Commission's market delimitation, concluding that the very purpose of the relevant market is to ensure that "there is a sufficient degree of interchangeability between all the products forming part of the same market".[719] The CJEU

[714] *Ibid.*
[715] Roche also argued that the Commission infringed the general principle relating to the degree of certainty and foreseeability; the Commission denied Roche a fair trial; and the Commission violated Article 15(2) and 18 of the Council Regulation No 17 (EEC): First Regulation Implementing Articles 85 and 86 of the Treaty (Now--Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty).
[716] *Hoffmann-La Roche & Co AG*. v *Commission,* at p. 475.
[717] *Ibid.* at p. 476.
[718] *Ibid.* at p. 479.
[719] *Ibid.* para.28, at p. 516.

concluded that a necessary interchangeability was absent at any rate during the period under consideration.

The CJEU reinstated the *UBC* definition of dominance[720] and continued that,

> "Such a position does not preclude some competition, […], but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment".[721]

Considering that the CJEU reinstated the *UBC* definition of dominance, the second part of the definition is an elaboration; it provides that, generally, competition should not be precluded altogether; rather, a dominant firm should have an appreciable influence on competition and market structure. In other words, it was submitted that "on the one hand, this qualification implicates that [Art.102] is not concerned with the minimal amount of market power that most business entities enjoy. On the other hand, it is clear that not all competition has to be eliminated for an undertaking to be in a dominant position".[722] It is correct that many firms enjoy some level of market power and competition law is not interested in them. Once again, the CJEU preferred to keep the definition of dominance open-ended with only setting certain boundaries for its application under Article 102. At the stage of this interpretation, it is clear that, once again, dominance was interpreted loosely.

The word 'appreciable' was used twice in, both, the *UBC* and *Roche* definitions of dominance. This adds a slightly more coherent approach toward definition of dominance as it aims to reject those cases where the influence on competition is insignificant; however, what remains unclear is the required level of influence on competition by dominant firms.[723]

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720 *Ibid.* para. 38, at p. 520.
721 *Ibid.* para. 39, at p. 520.
722 Van Bael, I., & Bellis, J-F., *Competition Law of the European Community* (3rd edition, CCH Europe, 1994) at p. 79.
723 For the discussion of the existence of a dominant position under Article 102 with a reference to *Hoffmann-La Roche*, see Waelbroeck, D., "Tough Competition" [2006] 5(8) Comp. L.I. 5.

According to the CJEU, a substantial market share is a good evidence of the dominant position; however, it is not a constant factor and it could vary from market to market,[724] *i.e.* it should be assessed on an individual basis. In this case, all seven vitamin markets were given the same market share criteria as the CEJU believed that these markets had enough features in common not to be distinguished. However, the CJEU continued that "very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position".[725]

According to the CJEU,

> "An undertaking which has very large market share and holds it for some time […] is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position".[726]

The fact that large market shares should be held for some time was highlighted by the CJEU. The time factor could serve as an important piece of evidence on the strength of a firm under consideration.[727] The Commission's reliance on market shares was criticised because it was believed that the Commission "should focus more on industry dynamics, including the behaviour of rival firms".[728] This could go back to what the CJEU said in the *Roche* case, *i.e.* market shares could vary from market to market as every market and industry has its own features and characteristics, *e.g.* technological markets are driven by innovation; therefore, their competition is more dynamic and progressive. Market share is a number which, if calculated correctly, can provide a more solid picture of a firm's size and market status; however, a number does not reflect any characteristics and features of a particular industry. This is where market shares become subjects to criticism.

Therefore, following the CJEU judgment high market shares are a good indication of a dominant position. So, in theory, low market shares should automatically signalise *the*

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[724] *Hoffmann-La Roche & Co AG.* v *Commission,* para.40, at p. 520.
[725] *Ibid.* para.41, at p. 521.
[726] *Ibid.* para. 41, at p. 521.
[727] See Chapter 4.
[728] Dethmers, F., & Dodoo, M., "The Abuse of Hoffmann-La Roche: The Meaning of Dominance under EC Competition Law" [2006] ECLR 537 at p.549.

absence of the firm's ability to raise prices above the competitive level. The practice is different: the lower the firm's market shares, the more other factors the Commission and the courts take into account when assessing the existence of a dominant position.[729] The Commission, as already provided, took additional factors[730] into account when assessing Roche's dominance in each market. For the purposes of this research, the discussion is only going to be made in relation to the vitamin A market where Roche held forty seven percent of a market. The CJEU upheld the Commission's finding of dominance[731] by concluding that Roche was the largest among its competitors (based on its market share) and, therefore, had a complete freedom to decide how to respond to the rivals' attacks with its technical lead was caused by several patents, with Roche remaining dominant even after they expired.[732] Frankly, Roche's bigness and power in all vitamin markets is beyond doubt; hence the narrow definition of a relevant market. The CJEU, like in *UBC*, took commercial and technological privileges as an additional piece of evidence in support of finding dominance. Therefore, the CJEU had set a strong precedence where everything a firm possessed could potentially be used against it as long as it had a large number of market shares which, in the vitamin A market and *UBC's* banana market, were between forty and fifty percent.

6.1.4. *Michelin I*[733]

The importance of market shares and other factors in the assessment of dominant position, as highlighted above, is undeniable. It was seen that a market share threshold appeared after the *UBC* and *Roche* rulings, *albeit* an approximate one. Other factors were also used in both cases, thereby, creating a strong precedence that any commercial and technological advantage over rivals would be used in the assessment of a dominant position. Article 102, however, does not prohibit dominance *per se* as it requires an abuse of the said dominance. The next case makes this point clear.

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[729] Van Bael, I., & Bellis, J-F., *Competition Law of the European Community* (3rd edition, CCH Europe, 1994), at p. 82.

[730] Roche was the world's largest vitamin manufacturer (para.5), it was at the head of a multinational group which, in terms of sales, was the world's leading pharmaceuticals producer (para.6), it acquired licences to produce other vitamins and had a leading role in introducing the use of vitamins into the food industry (para.7), despite the expiration of patents, Roche still had a certain technological lead over its rivals (para.8)--Commission Decision of 9 June 1976 relating to the proceeding under Article 86 of the Treaty establishing the European Economic Community (IV/29.020—Vitamins) 76/642/EEC—[1976] OJ L223/27.

[731] "The Commission was right to find that the applicant occupies a dominant position on the market in vitamin A"-- Case 85/76, *Hoffmann-La Roche & Co AG*. v *Commission* [1979] ECR 461, para. 52.

[732] Case 85/76, *Hoffmann-La Roche & Co AG*. v *Commission* [1979] ECR 461, para. 51.

[733] *Nederlandsche Banden-Industrie Michelin* v *Commission*.

In 1977, the Commission received a complaint against NV Nederlandsche Banden Industrie Michelin (Michelin), asking to apply Article 102 prohibition to Michelin's actions as, allegedly, it was abusing its dominant position.[734] One of the reasons of the complaint was Michelin's bonuses and discounts it was granting to certain tyre dealers. The Commission found that Michelin's business practice of this kind was in contravention with Article 102 which amounted to the abuse of a dominant position.[735]

The existence of a dominant position was partly derived from Michelin's fifty seven to sixty five percent market shares in the market for new replacement tyre for lorries, buses and similar vehicles.[736] When dealing with other factors the Commission took into account to reinforce the finding of dominance, the CJEU provided that Michelin had various advantages over its competitors like "investment and research and the special extent of its range of products".[737] Michelin's network of commercial representatives was also highlighted by the CJEU because it gave Michelin a direct access to tyre users and enabled it to strengthen its dominant position.[738] Lastly, before re-affirming the Commission's finding of dominance,[739] the CJEU rejected Michelin's argument that it had experienced

[734] Key cases citing *Michelin I*: C-109/10 P, *Solvay Sa* v *European Commission* [2011] ECR I-10329; T-110/07, *Siemens AG* v *European Commission* [2011] ECR II-477; T-117/07, *Areva SA* v *European Commission* [2011] ECR II-633; T-321/05, *AstraZeneca AB* v *European Commission* [2010] ECR II-2805; C-202/07 P, *France Telecom SA* v *Commission of the European Communities* [2009] ECR I-2369; T-201/04, *Microsoft Corp* v *Commission of the European Communities* [2007] ECR II-3601; T-170/06, *Alrosa Co Ltd* v *Commission of the European Communities* [2007] ECR II-2601; C-95/04 P, *British Airways Plc* v *Commission of the European Communities* [2007] ECR I-2331; T-15/02, *BASF Ag* v *Commission of the European Communities* [2006] ECR II-497; T-65/98, *Van den Bergh Foods Ltd* v *Commission of the European Communities* [2003] ECR II-4653; T-191/98, *Atlantic Container Line AB* v *Commission of the European Communities* [2003] ECR II-4653; C-338/00 P, *Volkswagen Ag* v *Commission of the European Communities* [2003] ECR I-9189; T-184/01 R, *IMS Health Inc*. v *Commission of the European Communities (No.2)* [2001] ECR II-3193; C-395/96 P, *Compagnie Maratime Belge Tranports SA* v *Commission of the European Communities* [2000] ECR I-1365; T-228/97, *Irish Sugar Plc* v *Commission of the European Communities* [1999] ECR II-2669; C-7/97, *Oscar Bronner GmbH & Co KG* v *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791; T-504/93, *Tierce Ladbroke Sa* v *Commission of the European Communities* [1997] ECR II-923; C-333/94 P, *Tetra Pak International Sa* v *Commission of the European Communities* [1996] ECR I-5951; T-24/93, *Compagnie Maratime Belge Transports Sa* v *Commission of the European Communities* [1996] ECR II-1201; C-241/91 P, *Radio Telefis Eireann* v *Commission of the European Communities* [1005] ECR I-743; C-53/92 P, *Hilti Ag* v *Commission of the European Communities* [1994] ECR I-667; C-62/86, *AKZO Chemie BV* v *Commission of the European Communities* [1991] ECR I-3359;

[735] 81/969/EEC: Commission Decision of 7 October 1981 relating to a proceeding under Article 86 of the EEC Treaty (IV.29.491—Bandengroothandel Frieschebrug BV/NV Nederlandsche Banden-Industrie Michelin) (*hereinafter,* Michelin Decision)—[1981] L353/33.

[736] While its main rivals had only four to eight percent market share-- *Nederlandsche Banden-Industrie Michelin (Michelin I)* v *Commission,* para. 33.

[737] *Ibid.* para. 55.

[738] *Ibid.* para. 58.

[739] *Ibid.* para. 60.

temporary losses as being inconsistent with the assessment of a dominant position.[740] The combination of 'above forty percent' market share and 'other advantages' led to the establishment of dominance. It is very difficult to disprove the Commission's and the CJEU's finding of dominance because Michelin did have a considerably, in EU competition law context, high market share. The way the CJEU selects 'other factors' remains a mystery as, once again, any privileges a firm has are held against it. Michelin, in a narrowly defined relevant market, was incontrovertibly large by virtue of its market share and access to investment, research and network of commercial representatives. The fact that Michelin had developed a reputation among its customers was also stressed by the CJEU on several occasions.[741]

In the assessment of dominance, the CJEU relied on the *Hoffman La-Roche* definition of dominance[742] which led to an observation that the CJEU "has further confirmed that the ability to behave independently of competitors and customers will depend on whether competition is 'effective', so that the two concepts can be taken as equivalent".[743]

Michelin I is famous for the next ruling of the CJEU which held that "a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market".[744] It was argued that some commentators opined that "the 'special responsibility' of a dominant firm is an unhelpful and unclear concept that at worst chills competition […] or at best is a trite reminder to dominant firms that they should not break the law".[745] The 'special responsibility' concept could be regarded as a polite reminder to any firm to behave in a way which would respect both competition law rules and all market players. This proposition can also be interpreted as if EU competition law perceives dominant position as *always* being legal unlike US antitrust law and its notion of 'unlawful monopoly'.[746] If this is the case that it can, in fact, disprove this

[740] *Ibid.* para. 59.
[741] For example, when the CJEU said that that those advantages had led Michelin's consumers to develop a strong preference for Michelin tyres; thereby, giving Michelin an immunity to competition—*Ibid.* para. 56.
[742] *Ibid.* para. 30.
[743] Neven, D., Nuttall, R., & Seabright, P., *Merger in Daylight: The Economics and Politics of European Merger Control*, at p. 18.
[744] *Nederlandsche Banden-Industrie Michelin (Michelin I)* v *Commission*, para.57.
[745] Majumdar, A., "Whither Dominance?" [2006] E.C.L.R. 161 at 163.
[746] See Chapter 5.

research's hypothesis that the Commission and the courts have an antagonistic and interventionist approach to dominant firms. However, there is not a single case, available for the purposes of this research, where the Commission or the courts establishes dominance but closes the case due to the absence of any evidence of an abuse. In any case, it was argued that this concept of special responsibility has created a broader and more inclusive standard of illegality by a dominant firm than "anything that has ever been present in antitrust law in the US".[747]

Michelin I, therefore, is an important case where the CJEU provides a considerably detailed description of 'other factors' and makes dominant position generally legal. Michelin's reputation and network of commercial representatives are further examples of what EU competition law considers as firm's privileges over its competitors.

6.1.5. *British Airways*[748]

This case is an example of a flexibility the Commission applies to the assessment of a dominant position in EU competition law. British Airways (BA) was held to be a purchaser in a dominant position on the UK market for air travel agency services.[749] The GC held that due to the fact that the air travel agencies "represent an economic activity for which [...] airlines could not substitute another form of distribution of their tickets, and that they therefore constitute a market for services distinct from the air transport market".[750] BA's dominance was drawn from its 39.7 percent market share in air travel agency services market. The GC concluded that BA's market share constituted a multiple "of the market shares of each of its five main competitors [...] for air travel agency services".[751] This is the only EU competition law case, at the time of the writing, where market shares below forty per cent were accepted as an indication of a dominant position.[752] Therefore, due to such a low number of market share, the GC had to justify the existence of dominance by

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[747] Baker, D., I., "An Enduring Antitrust Divide Across The Atlantic Over Whether to Incarcerate Conspirators And When to Restrain Abusive Monopolists" ,at p. 171.
[748] *British Airways* v *Commission*.
[749] Key cases citing *British Airways* v *Commission:* T-340/03, *France telecom SA* (formerly Wanadoo Interactive SA) v *Commission of the European Communities* [2007] ECR II-107; T-201/01, *General Electric Co* v *Commission of the European Communities* [2005] ECR II-5575; T-201/04 R2, *Microsoft Corp* v *Commission of the European Communities* [2005] 4 CMLR 5.
[750] *British Airways* v *Commission,* para. 100.
[751] For instance, 3.8 percent for American Airlines, 5.5 percent for Virgin, 3.3 percent for Qantas and 5.3 percent for KLM—*Ibid.* para. 211.
[752] British Airways appealed to the CJEU against the GC's ruling in Case C-95/04 P, *British Airways Plc* v *Commission of the European Communities* [2007] ECR I-2331. The CJEU dismissed the appeal and upheld the judgement of the GC.

relying on various factors. The GC supported the Commission's finding of economic strength based on the number of seats BA was offering on all its routes to and from UK airports as that number represented the capacity of BA's tickets being sold by travel agents.[753] In particular, the GC reinforced the finding of BA's economic strength by "the world rank it occupies in terms of international scheduled passenger-kilometres flown, the extent of the range of its transport services and its hub network" and, in comparison with its rivals, BA offered "a wider choice of routes and more frequent flights".[754] For such reasons, according to the GC, BA's dominance was undisputable.[755] Unfortunately, the GC did not go into much detail when including other factors into conclusion; rather, referring to the Commission decision. According to the Commission, BA's dominant position was derived from its market share where "as well as being large in absolute terms, this share is a multiple of that of any other airline".[756] This evidence of dominance was reinforced by the Commission by the substantial proportion of slots BA held in the relevant airports which created the obstacles for new entrants and strengthened BA's market power.[757] The Commission's assessment of BA's market share and other factors reinforcing the finding of dominance is brief. It would be preferable if the Commission distinguished between factors which are the results of the firm's success from those factors which not only arise out of dominance but also which provide a firm with an opportunity to abuse the said dominance. Here, however, the Commission, with the full support from the GC, combined low market shares with other factors in BA's possession in order to establish dominance.

BA tried to contest the finding of dominance by arguing, among others, that a close nexus should exist between separate markets in order to give rise to Article 102 prohibition. BA, especially, was concerned with the fact that it was not dominant in the air transport market, *albeit* it was held to be dominant in the market for air travel agency services. In order to address this argument, the GC relied on the *Commercial Solvents* case where it was held that "it is in fact possible to distinguish the market in raw materials necessary for the manufacture of a product from the market on which the product is sold. An abuse of a

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[753] *British Airways* v *Commission,* para. 192.
[754] *Ibid.* paras. 212-213.
[755] The GC decided that BA's modest size of the market share and its alleged fluctuations, BA's dependence on UK travel agents and the advance of market shares of BA's certain rivals as irrelevant—*Ibid.* paras. 219-224.
[756] Commission Decision of 14 July 1999 relating to the proceedings under Article 82 of the EC Treaty (IV/D-2/34.780—*Virgin/British Airways*) 2000/74 EC (*hereinafter,* Virgin/British Airways Decision)—[2000] OJ L31/1 at para. 91
[757] *Ibid*. The Commission further added that BA's dominance made it to become an obligatory business partner for the travel agencies in the UK—para. 92.

dominant position on the market in raw materials may thus have effects restricting competition in the market on which the derivatives of the raw material are sold […], even if the market for the derivative does not constitute a self-contained market".[758] This part of the decision in *Commercial Solvents* clearly demands the existence of a link between two markets, in which case the abuse of dominance in the upstream market affects competition in the downstream market. If this is the case, then a firm would be leveraging its upstream dominance into the downstream market. The GC interpreted the *Commercial Solvents* part of the decision by holding that "an abuse of a dominant position committed on the dominated product market, but the effect of which are felt in a separate market on which the undertaking concerned does not hold a dominant position may fall within [Article 102] provided that separate market is sufficiently closely connected to the first".[759] This interpretation is very broad because it omits the very core of the *Commercial Solvents* problem, *i.e.* that there was a raw material owned by the dominant firm in the upstream market without which competitors in the downstream market could not operate at all. This raw material was the necessary link between two markets. In the *British Airways* case, however, there is no obvious trace of such a strong link as in *Commercial Solvents*. BA was indeed very successful in its business; however, it was not dominant. The GC pointed out that air travel agents carry a function of a retailor in a way as almost eighty five per cent of BA tickets are sold via their services and that without the agents, BA would incur an absolute loss of business.[760] In this case, BA was purchasing the air travel agency's services; thereby, becoming a dominant purchaser. This leads only to one conclusion that the dominant component in this situation was the air travel agency as BA was in need of its services without which, again, it would lose most of its business. What remains unclear is how does the *Commercial Solvents*' link between two markets rule fit in here? It was argued that one of the important facts about *Commercial Solvents* case was that "the dominant company was the only source of the raw materials in question in the EU and [the CJEU] specifically rejected claims that other nascent technologies in the trial stage were a substitute for Commercial Solvents' raw materials".[761] There was no similar situation in the *British Airways* case. The inconsistencies in the *British Airways* case show that the GC aimed at establishing a link between two separate markets; thereby, finding BA dominant

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[758] *Instituto Chemioterapico Italiano Spa and Commercial Solvents Corp* v *Commission,* para. 22.
[759] *British Airways* v *Commission,* para. 127.
[760] *Ibid.* para. 133.
[761] Subiotto, R., & O'Donoghue, R., "Defining the Scope of the Duty of Dominant Firms to Deal with Existing Customers under Article 82 EC" [2003] ECLR 683 at 684-685.

and expanding the principle of the required link for two separate markets. The readjustment of the *Commercial Solvents* facts to prove the link between two markets, which otherwise are not as strongly connected as in the *Commercial Solvents* case, represents the flexibility used by the Commission and the courts in the application of Article 102. The *Commercial Solvents* judgement, itself, was criticised for being an example when "Article 102 being applied to protect the situation of the 'small' competitor with no consideration whatsoever of consumer welfare".[762]

British Airways is an example of a case where other factors were vital due to the low number of market shares. The flexibility in the assessment of a dominant position,[763] the point mentioned earlier, is evidenced by the decision in the *British Airways* case. Despite the fact that dominance was not found in the primary market, the arguments the GC used to establish the connection between two markets are remarkable in the sense at they show that if the Commission and the courts set their minds to make a firm subject to Article 102, they will do so.

6.1.6. *Hilti*[764]

In this thesis, it was mentioned on several occasions that the size of a firm and its bigness would be exaggerated if a relevant market were narrowly delineated. In other words, a firm's market status will stand out among its rivals and this especially applies to 'other factors' used for the analysis. *Hilti* is the best example of a very narrow, and if not specific, definition of a relevant market in addition to the importance the possession of IPRs have in the establishment of a dominant position.

This case came before the GC on the application from Hilti AG (Hilti)[765] against the Hilti Decision[766] on 22 December 1987.[767] The Commission found that Hilti abused its

[762] Jones, A.,& Sufrin, B., *EU Competition Law: Text, Cases and Materials*,at p. 483.
[763] See Chapter 3.
[764] Commission Decision of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty in Eurofix-Bauco v Hilti (*hereinafter*, Hilti Decision) [1998] OJ L65/19; *Hilti* v *Commission*; C-53/92 P, *Hilti AG* v *Commission of the European Communities* [1994] ECR I-667. Related case C-53/92 P, *Hilti AG* v *Commission of the European* Communities [1994] ECR I-667—AGO.
[765] Key cases citing *Hilti* v *Commission*: T-321/05, *AstraZeneca Ab* v *European Commission* [2010] ECR II-2805; T-57/01, *Solvay SA* v *European Commission* [2009] ECR II-4621; T-201/04, *Microsoft Corp* v *Commission of the European Communities* [2007] ECR II-3601; T-125/03 R, *Akzo Nobel Chemicals Ltd* v *Commission of the European Communities* [2003] ECR II-4771; T-191/98, *Atlantic Container Line AB* v *Commission of the European Communities* [2003] ECR II-3275; T-25/95, *Cimenteries CBR Sa* v *Commission of the European Communities* [2000] ECR II-491; T-228/97, *Irish Sugar Plc* v *Commission of*

dominant position in the market for nail guns and for the nails and cartridges stripes for those guns. Hilti was the largest producer of 'powder-actuated fastening' (PAF) nail guns, nails and cartridges stripes. The complaint was lodged before the Commission by Eurofix claiming that Hilti was pursuing a commercial strategy by refusing to supply independent dealers and distributors of Hilti products; thereby, excluding Eurofix from the market. The Commission found Hilti's behaviour to be an abuse of its dominant position contrary to Article 102.

Hilti argued that the Commission erred in concluding that the relevant market consisted of three markets, namely the markets in nail guns, cartridges strips (and cartridges) and nails. In Hilti's opinion all these three markets should be a part of one (wider) market. The GC responded that "since cartridge strips and nails are specifically manufactured, and purchased by users, for a single brand of gun, it must be concluded that there are three separate markets for Hilti-compatible cartridge strips and nails".[768] This case raised the question of the substitutability of different products in the determination of the relevant market. It was argued that "it is a question of law whether (and to what extent) the substitutability of products is relevant to the determination of the relevant market, but measuring that substitutability in a particular case is a question in respect of which the [CJEU] will be very reluctant to intervene".[769] The substitutability of products analysis is the most important part in this respect; therefore, many cases have a thorough discussion of whether the products of the dominant firm can be substituted with its rivals' products. The Commission is responsible for the economic analysis relevant to the products substitutability and it is up to the parties to argue that the analysis is incorrect. Hilti appealed to the CJEU against the GC's upholding the Commission's findings[770] on the grounds that the GC erred in its economic assessment of the substitutability of the PAF system with other fastening products. The CJEU upheld the GC's judgment without challenging its economic analysis of product substitutability. It was argued that "although [the CJEU] upheld [the GC's] reasoning, this readiness to review the reasoning of [the GC]

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the European Communities [1999] ECR II-2969; T-504/93, *Tierce Ladbroke Sa* v *Commission of the European Communities* [1997] ECR II-923; C-333/94 P, *Tetra Pak International Sa* v *Commission of the European Communities* [1996] ECR I-5951;

[766] Hilti Decision.

[767] *Hilti* v *Commission*.

[768] *Ibid.* para.66.

[769] Downing, R., "Hilti: The Final Nail" [1995] ECLR 53 at 54.

[770] C-53/92 P, *Hilti AG* v *Commission of the European Communities* [1994] ECR I-667.

indicates that [the CJEU] has not entirely abdicated responsibility for economic analysis to [the GC]".[771]

Based on the data and information collected, the Commission established that Hilti held a market share of about seventy to eighty per cent in the relevant market for nails. As was seen from the case-law discussed earlier, this market share is enough to establish dominant position in the relevant market. Normally, when a firm is found to hold seventy per cent of the market shares, neither the Commission nor the courts go into great details about other factors pertinent to dominant position. However, the GC decided to proceed further (in order to reinforce the finding of a dominant position) and held that the fact that Hilti held a patent and copyright[772] over cartridge strips confirms the existence of Hilti's dominant position. The GC continued and held that "it is highly improbable in practice that a non-dominant supplier will act as Hilti did, since effective competition will normally ensure that the adverse consequences of such behaviour outweigh any benefits".[773] It was argued that *Hilti* "turned as a matter of law upon well-settled principles of product substitutability and as a matter of fact upon a factually unconvincing assertion of an objective justification for the applicant's conduct".[774]

These are the main arguments as to why the Commission and the GC considered Hilti to be in a dominant position. The fact that the relevant market consisted of three different markets is an indication of the established practice of a narrow definition of the relevant market. The fact that Hilti's patent and copyright were taken as additional factors in establishing dominance reflects on the long lasting debate on whether IPRs should be used as an indication of a dominant position.[775] The importance of the GC's comparison of Hilti's behaviour with a non-dominant firm tells a lot about the position the GC took in this

[771] Downing, R., "Hilti: The Final Nail", at p. 54.
[772] In the UK only.
[773] *Hilti* v *Commission,* para.93.
[774] Shaw, J., "A Review of Recent Cases on Articles 85 and 86 EC: Issues of Substantive Law" [1995] ELR 66 at 83.
[775] See, for example, Ong, B., "Anti Competitive Refusals to Grant Copyright Licenses: Reflections on the IMS Saga" [2004] E.I.P.R. 505; Ritter, C., "Refusal to Deal and 'Essential Facilities': Does Intellectual Property Require Special Deference Compared to Tangible Property?" [2005] 3 World Competition 281; Stothers, C., "Refusal to Supply as Abuse of Dominant Position: Essential Facilities in the European Union" [2001] E.C.L.R. 256; Stothers, C., "The End of Exclusivity? Abuse of Intellectual Property Rights in the EU" [2002] E.I.P.R. 86; Schmidt, H., K., S., "Article82's 'Exceptional Circumstances' That Restrict Intellectual Property Rights" [2002] E.I.P.R. 210; Greaves, R., "The Herchel Smith Lecture 1998: Article 85 of the EC Treaty and Intellectual Property Rights" [1998] E.I.P.R. 379.

case, showing the reliance of the court on the ability of effective competition to remedy the anti-competitive behaviour of a non-dominant firm.

6.1.7. *AKZO*[776]

AKZO UK (AKZO) was an economic entity which produced organic peroxides used in a plastic industry in the UK. The Commission found that AKZO had violated Article 102 by damaging its rival's business and securing its withdrawal from the organic peroxides market.[777]

In *AKZO*,[778] the CJEU confirmed the *Roche's* proposition of high market shares being a good indication of dominant position and held that AKZO was in a dominant position in the organic peroxides market with fifty per cent market shares.[779] It was argued that fifty percent market shares, in an unsegmented industry, would not necessarily lead to dominance, as they may be "too small a share to affect the market price by independent action without immediate loss of market share".[780] The CJEU also took into account the fact that this figure did not decrease or fluctuate for many years.[781] The market shares in *AKZO* were not extremely high; however, as it was argued that "in general, the more serious the abuse, the lower the required market share threshold".[782] In other words, if the

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776 *AKZO Chemie BV* v *Commission of the European Communities*.
777 The Commission Decision of 14 December 1985 relating to a proceeding under Article 86 of the EEC Treaty (*ECS/AKZO*) (*hereinafter,* AKZO Decision) [1985] OJ L374/1.
778 *AKZO Chemie BV* v *Commission of the European Communities*.
779 Key cases citing *AKZO Chemie BV* v *Commission of the European Communities*: C-109/10 P, *Solvay Sa* v *European Commission* [2011] ECR I-10329; T-110/07, *Siemens AV* v *European Commission* [2011] ECR II-477; T-321/05, *AstraZeneca Ab* v *European Commission* [2010] ECR II-2805; C-202/07 P, *France Telecom Sa* v *Commission of the European Communities* [2009] ECR I-2369; T-271/03, *Deutsche Telekom AG* v *Commission of the European Communities* [2008] ECR II-477; C-552/03 P, *Unilever Bestfoods (Ireland) Ltd* v *Commission of the European Communities* [2006] ECR I-9091; T-330/01, *Akzo Nobel NV* v *Commission of the European Communities* [2006] ECR II-3389; T-15/02, *BASF AG* v *Commission of the European Communities* [2006] ECR II-497; T-219/99, *British Airways Plc* v *Commission of the European Communities* [2003] ECR II-5917; T-191/98, *Atlantic Container Line Ab* v *Commission of the European Communities* [2003] ECR II-3275; T-228/97, *Irish Sugar plc* v *Commission of the European Communities* [1999] ECR II-2969; C-7/97, *Oscar Bronner GmbH & Co KG* v *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791; T-504/93, *Tierce Ladbroke International SA* v *Commission of the European Communities* [1996] ECR I-5951; C-310/93 P, *BPB Industries Plc* v *Commission of the European Communities* [1995] ECR I-743; C-241/91 P, *Radio Telefis Eireann* v *Commission of the European Communities* [1995] ECR I-743; T-83/91, *Tetra Pak International Sa* v *Commission of the European Communities* [1994] ECR II-755; C-53/92 P, *Hilti AG* v *Commission of the European Communities* [1994] ECR I-667;
780 Rapp, R., T., "Predatory Pricing and Entry Deterring Strategies: The Economics of AKZO" [1986] E.C.L.R. 233 at 237.
781 *AKZO Chemie BV* v *Commission of the European Communities*, para. 59.
782 Duncan, R., Coleman, C., Daniel., H & Haleen, P., "Litigating Single-Firm Conduct under the Sherman Act and the EU Treaty: Divergence Without End, or Change We Can Believe in?", at p. 151.

Commission decides that an abuse is of a very serious nature, then it would try to ensure that the first limb of Article 102 (dominance) is satisfied.

In addition to market shares, the Commission relied on other various factors in support of its finding of a dominant position[783] and the CJEU accepted those factors as being relevant in the assessment of AKZO's dominant position. According to the CJEU, AKZO offered a wider range of products than its rivals; it was a world leader in the peroxides market; and AKZO had "the most highly developed marketing organization, both commercially and technically, and wider knowledge than that of their competitors with regard to safety and toxicology".[784] Therefore, for the purposes of Article 102, these factors, direct to the conclusion that AKZO was indeed a large firm. The combination of AKZO's size of fifty percent market shares and its market status of a large firm led to AKZO being found to be in a dominant position by both the Commission and the CJEU. It was also argued that *AKZO* created a principle of the presumption of dominance in cases when a firm has market shares of fifty percent or more.[785]

Therefore, fifty percent market share, which is a negligible number in US antitrust law, together with AKZO's various advantages over its competitors ensured that the first limb of Article 102 was satisfied. The need to find and prove the existence of dominance was even more important due to the evidence of AKZO being involved in a predatory pricing which was a serious violation of Article 102. Furthermore, as argued earlier, the flexibility in the definition of a dominant position allowed the Commission to declare AKZO dominant. For such reasons, *AKZO* becomes an example when the seriousness of the abuse leads to the necessity to establish dominance. What needs to be ensured is to avoid an adoption of a system of pre-emptive attacks on large firms with a size of above forty percent in order to eradicate any future violations of Article 102 and, possibly, to control an unrestrained growth of businesses in the EU internal market.

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[783] AKZO Decision, para. 69.
[784] *AKZO Chemie BV* v *Commission of the European Communities*, paras. 58-61.
[785] Whish, R., & Bailey, D., *Competition Law* (8th edition, Oxford University Press, United Kingdom: 2015) at p. 193.

6.2. Final Observations

From the cases discussed, it follows that the EU perceives dominance as an intangible property which could be used by its owner in a way which would go against the very core of the TFEU. The classic definition of dominance was crafted to fit in the image of the said property; however, disregarding the fact that, in reality, dominance varies. This is why this thesis believes that the definition of dominance is flexible, thereby, permitting the Commission and the courts to adjust the notion of dominance to an individual case for a tighter control of firms with economic power. The law which is in Article 102 cannot be amended, and it "remains permanently relevant and the best and indeed only direct statement of the law".[786] Indeed, the text of Article 102 covers all the necessary aspects relevant to find an abuse of a dominant position; however, leaving to the Commission and the courts to define dominance.

The case study has revealed that despite the fact that the law is very clear on the primary tools used in the assessment of dominance, the way such tools are applied appears to be worrisome: The application of low market share threshold and a non-exhaustive list of privileges and advantages lead to a conclusion that EU competition law does, in fact, hold an antagonistic approach to firms in a dominant position. It was argued that the definition of a dominant position "does not take place within a consistent framework and therefore the approach provides no benchmark against which competing claims can be assessed".[787] It should be kept in mind that this argument comes from the economists who always pro-economic analysis of competition law. Yet, this argument reflects the uninformative nature of the definition of dominance.

The antagonistic approach to dominance might have a deterrent effect which carries both positive and negative impact. The former is obvious, firms will take a considerable care not to violate EU competition in a fear of sanctions. The latter is reflected in the Commission's enforcement strategy itself stifling competition in the internal market by preventing firms from making lawful business decisions in a fear of falling under Article 102 prohibition.

[786] Phelan, D., R., "The Dynamic Unprohibited Nature of Dominance" [2013] E.C.L.R. 337 at 337.
[787] Bishop, S., & Walker, M., *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell, Great Britain: 1999) at p. 105.

This will lead to consumers being deprived of new products, services, innovation and technological progress. In other words, competition will be stalled.

Meanwhile, the CJEU in *UBC* did provide that,

> "The fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it".[788]

It is very important that the CJEU recognised the fact that any firm should be allowed to protect its commercial and financial interests. The burden is on the Commission to prove that the actual purpose of the firm's actions is more than protection of its business interests; and there is a very fine line between the two. In *UBC*, the CJEU continued that "even if the possibility of a counter-attack is acceptable that attack must still be *proportionate* to the threat taking into account *the economic strength* of the undertakings confronting each other".[789] In this case, the burden is placed on a dominant firm to ensure that it knows its competitors and, therefore, plays accordingly. In other words, when competitors protect their market interests, there has to be equality in this game. However, this approach does not solve a problem or, in other words, does not tell either dominant or non-dominant firms how to abide the rules and avoid disproportionate commercial attacks on each other. It is unlikely that a dominant firm is going to assess the economic strength of its business opponent and, even if it is, almost any decision of a dominant firm could outweigh the decisions of a non-dominant firm. Therefore, although the CJEU's approach is welcomed, it does not provide guidance on how a firm should use its dominant position. Furthermore, the case study did not reveal any discussion on the point that any firm was allowed to protect its commercial interests. Despite the CJEU's holding above, the firm's bigness is only seen as being another weapon against its competitors. For instance, the study of *UBC* had revealed that advertising campaign was one of the factors contributing to UBC's bigness on a banana market. Successful advertising is one of the ways to respond to

[788] *United Brands* v *Commission*, para. 189.
[789] *Ibid.* para. 189 (emphasis added).

competitors' attacks and it is unfortunate that the CJEU did not take that into account. Despite the fact that advertising campaign was only briefly mentioned by the CJEU, the very presence of it in the 'advantages over competitors' list signifies the flexibility in the assessment of dominance.[790]

There is no argument that the law on Article 102 is wrong; there is an argument, however, that the law does not offer much certainty and clarity on the application of the first limb of Article 102. The constant expansion of the rules and freedom the Commission enjoys in the application of the law on dominance signals a worrisome situation when successful firms might be punished for being pro-active and more successful on a relevant market. As it was argued that "the antitrust laws should intervene only when one combatant employs methods that would deny victory to the most efficient firm or create barricades to entry by equally or more efficient new entrants"[791] and this point will be discussed further in Chapter 7. This statement applies to abuses of dominant position and, although both are assessed separately, they are clearly linked with each other.

As for the terminology which was provided in Chapter 1, the EU case study has revealed that the word 'size' was mentioned *albeit* differently from the way it is used in US antitrust law. In *Continental Can*, the CJEU mentioned the size of a firm in the context of structural measures where the CJEU submitted that "structural measure may influence market conditions, it is increases the size and the economic power of the undertaking".[792] In *UBC*, the CJEU used the size of a firm in the context of the appropriate sanctions, *i.e.* the gravity and duration of an infringement and the size of a firm would be taken into account when setting out a fine for the violation of competition law rules.[793] In *Michelin I*, the CJEU held that the gravity of an infringement would depend on a large number of factors which "may include in particular the size and economic strength of the undertaking, which may be indicated by the total turnover of the undertaking and the proportion of that turnover accounted for by the goods in respect of which the infringement was committed".[794] In

[790] Unless, advertising campaign is illegal; however, there was no mentioning of the illegality of UBC's campaign.
[791] Kolasky, W., J., "What is Competition? A Comparison of US and European Perspectives", at p. 36.
[792] *Europemballage Corp & Continental Can Co Inc*. v *Commission*, para. 21.
[793] *United Brands* v *Commission*, para. 289. This was also applied and followed in Case 322/81, *Nederlandsche Banden-Industrie Michelin (Michelin I)* v *Commission* [1983] ECR 3461 at para. 111; Joined Cases C-40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Suiker Unie and Others* v *Commission* [1975] ECR 1663 at para. 612; T-228/97, *Irish Sugar Plc* v *Commission of the European Communities* [1999] ECR II-2669 para. 243.
[794] *Nederlandsche Banden-Industrie Michelin (Michelin I)* v *Commission*, para. 111.

British Airways, the Commission maintained that in order to find BA's dominant position, it took into account various factors including "the size of BA, the range of its air transport services and its network".[795] The Commission then focused on market share of BA and its closest competitors.[796]

Economists, at the meantime, want the EU courts to remember that dominance "is a concept related to time [*i.e.*] dominance is a position of power over time".[797] The Commission does not deny the application of time to this matter by providing that a firm which can profitably increase prices above the competitive level for a significant period of time could be regarded as dominant for the purposes of Article 102.[798] This position is similar to the US where monopoly might only trigger the application of Section 2 if it was sustained for a considerable amount of time.[799] Only in those situations, dominance and monopoly might have detrimental effects on a market, *i.e.* if a monopolist manages to keep his market foreclosed from new entrants for a long period of time.

6.3. Conclusion

The EU case study has significantly clarified the ambiguity in relation to whether a firm's size and bigness play any role in the assessment of a dominant position. It was revealed that, for the purposes of Article 102, a firm's size is measured by a market share threshold of forty percent and above which is enough for the Commission to assume that dominance exists. All technological and commercial advantages a firm has over its competitors are factors which point at the firm's bigness on a relevant market. Or, in other words, such a firm is large which provides it with an opportunity to suppress its competitors. From the evidence gathered in Chapter 6, it is impossible to identify whether firms' first attract the Commission's attention due to the suspected involvement in anti-competitive practices; or, whether, they first attract the Commission's attention by being dominant in a relevant

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[795] *British Airways Plc* v *Commission of the European Communities*, para. 187.
[796] Virgin/British Airways Decision, para. 88.
[797] Baden-Fuller, C., W., "Article 86 EEC: Economic Analysis of the Existence of a Dominant Position", at p. 424.
[798] The Commission would consider two years of market power to be enough to infer dominance, although providing that it will always depend on a product and market in question--Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, para. 11.
[799] Refer to Chapter 5.

market. In either case, however, it becomes clear the firm's size and bigness play a major role in the assessment of dominance. It is also impossible to identify whether, as provided at the beginning of this chapter, the Commission and the EU courts are willing to accept dominance as long as it is not being abused. However, the only conclusion which can be made is that a firm with market share below thirty nine percent and which has negligible advantages over its competitors is most likely to be accepted by the Commission and the EU courts. Or, in other words, such a firm is not dominant. There is no evidence, at the time of writing, if the Commission has ever dropped an investigation due to a firm not holding a dominant position. This is not surprising due to the low market share threshold and other factors, *i.e.* any firm which operates on a multinational level will be caught by Article 102. There is also no evidence of cases when, despite the existence of dominance, the Commission ends an investigation because it does not find an abuse. This, however, is only possible if the Commission has acted following a complaint. In any other case, with the Commission's power to open an own-initiative investigation, there is a high probability that a firm may be targeted due to its dominant position.

At this stage, it was also revealed that the Commission together with the EU courts hold an interventionist approach to firms in a dominant position. This conclusion was reached by the apparent flexibility in the way dominance is being assessed. The current formula for the assessment of dominance does not accommodate the possibility that if a firm's bigness was achieved via legal means, then this fact should be taken into account and should not be held against such a firm. It is undisputable that all firms discussed in this chapter were involved in violations of antitrust rules; however, not every dominant firm is an abuser and the current interventionist approach will lead to a paranoid environment where dominant firms would abstain from making sensible business decisions in order to protect themselves from the application of EU competition rules. This, in turn, can set off a chain reaction that will lead firms to being afraid to grow on a market and, more importantly, to develop their products or services.

Lastly, the ruling in *Michelin I* has revealed an interesting point: It transpired that dominance *per se* is not illegal; rather, a firm has a special responsibility not to abuse its dominant position. This resembles the position in US antitrust law where a monopoly *per se* is not unlawful unless there is an illegality or a wrongful intent. This is however, where the similarities end. In US antitrust law, a firm with market shares below seventy percent is perceived as a potential legal monopolist and, frankly, a firm of such size is indisputably large. In other words, the monopolistic position of such firms is beyond any doubts. Under EU competition law, there seems to be no distinction between lawful and unlawful dominance, *i.e.* dominance either exists and it might be caught by Article 102 or it simply does not. Despite the special responsibility principle in *Michelin I*, the cases in Chapter 6 did not provide any evidence to the contrary.

Chapter 7: The Case Against Google

This is the penultimate chapter of this thesis which sums up the previous arguments and provides the final comparative analysis on the relevance of bigness and size in the assessment of dominance and monopoly.

Previous chapters have focused on the role bigness and size play in EU competition law and US antitrust law. Both elements, as defined in Chapter 1, constitute dominance and monopoly for the purposes of Article 102 and Section 2. Market shares and a firm's privileged position take a central role in EU competition law; whilst, US antitrust law does not include bigness into the assessment of the monopoly power.

It has been repeated on many occasions that monopoly provides a firm with an opportunity to take a superior position on a relevant market which, if misused, will lead to consumer detriment. For such reasons, monopoly has a bad reputation. This research believes that monopoly and dominance *per se* should not be condemned as no evidence has been put forward to prove that dominance and monopoly are always detrimental to consumer welfare and economic efficiencies. In the modern days, bigness and size become representatives of a firm's prosperity and not necessarily of an anti-competitive behaviour. Despite the fact that it was made clear in Chapter 1 that this research was neither pro- nor anti-bigness, this chapter does offer some discussion on the potential benefits of having large firms in a market. It was provided earlier that it was difficult to decide whether bigness and size would benefit a market unless a separate study of each industry was carried out.[800] Therefore, this part of the chapter is rather neutral; however, it will be linked with the current proceedings against Google.

The important part about the case against Google, which contributed to the decision to include it into this thesis, lies in the fact that the same corporation was investigated in the EU and US on the same facts, *albeit* with a different end results. Since this chapter has a comparative angle, the proceedings against Google are hoped to reflect further the

[800] See Chapter 1.

disparity between the system behind the application of Article 102 and Section 2 to firms with market power.

7.1. Bigness and Size Revisited

As was defined in Chapter 1, bigness and size are the important elements of dominance. It was concluded that in EU competition law, size and bigness matter in the assessment of a dominant position, whilst in US antitrust law, size remains the focal indication of monopoly and market power. Bigness, on the other hand, does not play a considerable role in the establishment of monopoly *albeit* not in the cases selected for the purposes of this research.[801] More importantly, it was revealed[802] that US antitrust law distinguishes between legal and illegal monopoly where the latter is being a subject of prohibition under Section 2. EU competition law, on the other hand, does not differentiate between legal and illegal dominance; therefore, all dominant firms are potential subjects to Article 102.[803]

EU competition law and US antitrust law both have different bases for dominance and monopoly. The Commission, for instance, sees dominance as "physical facilities-based monopolies originally derived from public franchise […], while the US authorities have been largely ignoring these old-fashioned monopolists and focused instead on new-idea created monopolies (Microsoft, Google, etc)".[804]

Despite the difficulty in defining bigness,[805] this research concluded that, in the context of antitrust law, bigness is all privileges and advantages a firm has over its rivals. It can also be described as "repositories of power, the biggest centres of nongovernmental power in our society"[806] and, as was evidenced by the case law in Chapters 5 and 6, bigness relates to private economic power which can have a devastating impact on markets, consumers, economics, technological progress, inter-firm rivalry and a society unlike their smaller and less powerful competitors. If such a firm decides to abuse or monopolise, then the

[801] Chapters 1 and 5.
[802] Chapters 4 and 5.
[803] Chapters 4 and 6.
[804] Baker, D., I., "An Enduring Antitrust Divide Across the Atlantic Over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists", at p. 175.
[805] Definition of 'bigness' is in Chapter 1.
[806] Chayes, A., "The Modern Corporation and the Rule of Law" in *The Corporation In Modern Society* edited by Mason, E., S., (Harvard University Press, Cambridge Massachusetts: 1970), at p. 25.

magnitude of the economic and anti-competitive harm will be much higher and more damaging to consumer welfare. This is so because bigness[807] strengthens a firm's market power which, in turn, transforms into economic, political and social power.[808] Such an undesirable level of power has a potential to become an obstacle to the promotion of economic efficiency and protection of consumer welfare which are the core aims of antitrust law.[809] Furthermore, bigness has an adverse reputation because it used to be employed by some private firms[810] to stifle competition leading to bigness and monopoly becoming almost synonyms.[811]

It transpires that bigness and size used to concern US antitrust law in the past,[812] whilst, EU competition law appears to be concerned about bigness and size in the present. [813] Lilienthal provided that the reason why bigness carried a negative meaning was in the fact that it could lead to an increased concentration of economic power as it became "too big to handle".[814] Therefore, Theodore Roosevelt believed that with the passage of the Sherman Act, he found a solution to the big business problem by accepting it "as a part of the modern industrial and social order" and to subject it "to administrative control under full publicity".[815] The idea of having powerful monopolists being publicly tried and their businesses dismantled is still in place nowadays *albeit* under a different façade.[816] In any case, US antitrust authorities have developed a presumption that "what a dominant firm does (if it acts alone and not with competitors) is almost always good for the market […]

[807] The stages of development of big business in the US, see Galambos, L., *The Public Image of Big Business in America, 1880-1940: A Qualitative Study in Social Change*, (The Johns Hopkins University Press, Baltimore & London: United States of America 1975).
[808] Kaysen, C., "The Corporation: How Much Power? What Scope?" in *The Corporation In Modern Society* edited by Mason, E., S., (Harvard University Press, Cambridge Massachusetts: 1970), at p. 99.
[809] Furthermore, it was argued that power can obstruct a notion of 'competition as process' which was "the preferred governor of markets"-- Fox, E., M., "The Modernisation of Antitrust: A New Equilibrium", at p. 1154.
[810] For instance, see *Standard Oil Co. of New Jersey v. United States* in Chapter 5, para. 5.1.1.
[811] It was argued that bigness and monopoly are almost synonymous, therefore, an argument exists that big businesses "*by definition* and quite aside from any specific course of conduct, impair rather than promote competition", see Lilienthal, D., E., *Big Business: A New Era*, at p. 56.
[812] The problem of bigness and the threat of monopoly in the US became so acute that no party knew how and when it could be stopped—see, Hofstadter, R., *The Paranoid Style in American Politics and Other Essays*, at p. 196.
[813] See Chapter 2.
[814] Lilienthal, D., E., *Big Business: A New Era*, at p.137.
[815] Hofstadter, R., *The Paranoid Style in American Politics and Other Essays*, at p. 203.
[816] For instance, the proceedings against Microsoft in the EU and US; and, the recent developments in the case against Google in the EU.

EU law, on the other hand, places a special responsibility on dominant firms, and values contestability of markets by entrants' and mavericks' competition on the merits".[817]

Multinational corporations are the best examples of the modern day dominant firms which include both bigness and size. However, it was argued that "the conception of monopolistic industry as a kind of gigantic, swelling leech on the body of an increasingly deprived and impoverished society has largely disappeared".[818] Such firms, however, remain a potential threat to the very aims of antitrust law because larger and wealthier firms normally have more means at their disposal to engage in anticompetitive practices but "the violation of law lies not in their size and wealth, but in the improper use which has been made thereof".[819]

The application of economics to the assessment of dominance and monopoly had a considerable effect on the evolution of antitrust law: It was argued that "the consciously evolutionary quality of the US antitrust statutes, with their implicit recognition of the need to adjust doctrine over time in light of experience and new learning, gives economists considerable power to influence competition law and policy".[820] It is, partly, due to economics that US antitrust law stopped perceiving monopoly as a menace. The acknowledgment of the importance economics plays in antitrust law along with the development of US antitrust authorities' and courts' understanding of current economic and market realities, had delinked antitrust from its history.[821] Lilienthal, however, is of the opinion that the economic success of the US rests upon big businesses and "size is our greatest single functional asset".[822] Lilienthal considered big corporations as being at the core of market and technological development; therefore, urging both the government and the society to recognise the benefits of big business.

Despite the recognition, at least in US antitrust law, that monopoly *per se* does not violate antitrust law, EU competition law is still circumspect when it comes to dominant firms. The question asked in Chapter 1 remains open, *i.e.* what are the reasons behind the

[817] Fox, E., M., "Monopolisation, Abuse of Dominance, and the Indeterminacy of Economics: The US/EU Divide", at p. 725.
[818] Hofstadter, R., *The Paranoid Style in American Politics and Other Essays*, at p. 212.
[819] Haddock, G., B., "The Sherman Act and Big Business", at p. 21.
[820] Kovacic, W., E., & Shapiro, C., "Antitrust Policy: A Century of Economic and Legal Thinking" [2000] 14:1 Journal of Economic Perspectives 43 at p. 58.
[821] Fox, E., M., "Monopolisation and Abuse of Dominance: Why Europe is Different" [2014] 59(1) The Antitrust Bulletin 129 at p. 132.
[822] Lilienthal, D., E., *Big Business: A New Era*, at p. 33.

Commission's antagonistic approach to firms with economic power? One of the explanations is that the EU was created from several countries with various internal barriers. As a result of this, local and government-owned monopolies were the predominant features of a newly created entity; therefore, "there may be more undertakings with dominant positions that are not the natural result of market dynamics that exist in the US".[823] It is understandable that trade barriers in a newly created internal market had to be demolished in order to fulfil the purpose of European competition law project.[824] The EU Treaty (and all its previous versions) aimed at establishing an economic environment where all firms were allowed to compete on the merits and where the EU internal market was free from power, privilege, or favouritism.[825] It is interesting how 'favouritism' is considered to be one of the features of the EU internal market. The Commission's enforcement priorities reflect the protection of SMEs from the aggressive competition of dominant firms, *i.e.* favouritism is present, at least in EU competition law. Furthermore, historically, the economy of the EU had always been more monopolised than that of the US, therefore, leading to the EU's "competitive self-righting mechanisms [being] less robust".[826] This is why the Commission retains flexibility in its assessment of a dominant position since it appears that the EU internal market is more diverse and complex in comparison with the US market.

As was shown in the previous chapters, US antitrust law's market share thresholds can only be described as generous *albeit* it was argued that in the US there is no fixed market share required for finding monopoly as the percentage of a market share varies with the market in question.[827] When it comes to their application to the alleged monopolist, it was argued that "on economic as well as legal grounds, monopoly power should not be deemed to exist unless the exclusionary conduct contributes to the acquisition or maintenance of not only a power to raise marketwide prices or produce marketwide foreclosure but also a defendant market share of over 50%".[828] This is the evidence that the connection between the status and an anti-competitive action is of paramount importance in US antitrust law.

[823] Kolasky, W., J. "What is Competition? A Comparison of US and European Perspectives", at p. 41.
[824] As discussed in Chapter 2.
[825] Fox, E., M., "Monopolisation and Abuse of Dominance: Why Europe is Different", at p. 132.
[826] Vickers, J., "Competition Law and Economics: A Mid-Atlantic Viewpoint", the Burrell Lecture of the Competition Law Association, given in London on 19 March 2007, [2007] 3 Eur. Competition J. 1 at 6.
[827] Kintner, E., W., *An Antitrust Primer: A Guide to Antitrust and Trade Regulation Laws for Businessmen*, at p. 100. It was further argued that if a firm monopolises and its market shares are around seventy five percent, the chance exists that the Supreme Court will find an unlawful monopoly under Section 2.
[828] Elhauge, E., "Defining Better Monopolisation Standards" [2003-2004] 56 Stan. L. Rev. 253 at p. 336.

Therefore, a monopoly power will be held to be illegal if a firm strengthens its monopolistic position and, subsequently, increases its market shares[829] by illegal and abusive behaviour.

In EU competition law the situation is similar, *i.e.* a possession of a considerably high percentage of market shares will signal the presence of a firm with market power.[830] It was argued that in the EU “a true monopolist is a dominant firm but most dominant firms aren’t monopolists”.[831] This argument is correct; however, it depends on what the Commission perceives as a true monopolist. It should be noted that EU competition law does not require a firm to be a true monopolist; rather, a certain level of dominance would suffice[832] for Article 102 to be triggered. It was discussed in the previous chapters that forty percent market share threshold is not a very high percentage to define dominance, for which reason the Commission and the courts turn to privileges and advantages of a firm to support the existence of a dominant position. The decision of whether a firm is a true monopolist or not will depend, to a certain extent, on the boundaries of a relevant market[833] and, the Commission is required to conduct a separate and independent analysis of a relevant market every time it applies Article 102.[834] This will bring novelty to the assessment of dominance every time the Commission delineates the relevant market. The EU is argued to be less tolerant toward certain conduct because “aggressive acts toward competitors are looked upon with suspicion, and so are any dealings with suppliers and customers that enhance the firm’s competitive position”.[835] The Commission’s distrust of aggressive competition[836] can be contrasted with the position in the US where, as concluded in

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829 In the US, for instance, it was argued that market shares are the most imperfect proxy for the power to raise prices above the competitive level; however, they are an easier and more administrable tests to apply—*Ibid.* at p. 334.

830 In *Astra Zeneca AB*, the GC held that the Commission could not ignore the importance of very large market shares throughout the entire relevant period as the Commission “was entitled to take the view that AZ’s possession of a particularly high market share […] was an entirely relevant indicator of its market power”—Case T-321/05, *Astra Zeneca AB* v *Commission* [2010] ECR II-2805, para. 253.

831 Gifford, D., J., & Kudrle, R., T., “European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?”, at p. 738.

832 The evidence of this proposition could be derived from EU case law on dominance where firms were subjected to Article 102 with, as compared to the practice in the US, not very high marker shares.

833 See Chapter 4.

834 “The Commission must define the relevant market again and make a fresh analysis of the conditions of competition which will not necessarily be based on the same considerations as those underlying the previous finding of a dominant position”, T-125 & 127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, para. 82.

835 Niels, G., & Kate, ten., A. “Introduction: Antitrust in the US and the EU—Converging or Diverging Paths?” [2004] Antitrust Bull 1 at p. 12.

836 However, Neelie Kroes said that “I like aggressive competition—including by dominant companies—and I don’t care if it may hurt competitors—as long as it ultimately benefits consumers”-- Speech at the Fordham

Chapter 3, antitrust authorities and the Supreme Court permit and even encourage firms to compete aggressively. Aggression toward competitors might be the evidence of a vigorous competitive process or aggression might also be the result of a firm's powerful market position which is utilised in order to suppress competition. This thesis believes that aggressive competition *per se* has never been unlawful and should never be automatically considered as being harmful as long as it does not affect consumer welfare. In fact, the first parties which get affected by aggressive competition are smaller (and less powerful) rivals because of "an implicit assumption that any practice that is undertaken by a dominant firm and that is not a 'normal' competitive action has the effect of distorting competition".[837] This explains the Commission's distrust of aggressive actions of a dominant firm[838] due to its veiled concerns over the protection of SMEs.[839] Furthermore, with the current position of the Commission it is very difficult to identify a list of 'normal competitive actions' which will escape the application of Article 102. Moreover, the general concerns that the position of the Commission toward bigness and size may lead to the reduction of incentives to compete continue to flourish because "businesses should not be punished merely because they have, through their hard work, succeeded in capturing a large share of the market".[840] As was already discussed, US antitrust law recognises the importance to separate unlawful conduct from purely successful business tactics[841] but EU competition

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Corporate Law Institute on Policy Review of Article 82, New York, 23rd September 2005. Available at: <http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm>.

[837] Niels, G., & Kate, ten., A. "Introduction: Antitrust in the US and the EU—Converging or Diverging Paths?", at p. 13.

[838] See, for instance, the Commission's opening of a formal proceeding to investigate Gazprom's activities in Central and European gas markets. On September 2012, the Commission opened formal proceedings against the Russian producer and supplier of natural gas as the Commission was concerned with Gazprom being involved in anticompetitive actions on EU market. On April 2015, the Commission sent a Statement of Objections (The preliminary views of the Commission were that Gazprom could be hindering cross-border gas sales; being involved in unfair pricing policy; leveraging Gazprom's market dominance by making the supply of gas to depend on the acquiring of certain infrastructure-related commitments) to Gazprom alleging that some of Gazprom's business behaviour in the EU market constituted an abuse of dominant position. According to the Commission, Gazprom has above fifty or up to a hundred percent market shares in some EU markets and that Gazprom is preventing competition in Central and Eastern European Member States (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia). The Commission said that Gazprom "may have built artificial barriers preventing gas flowing from certain Central Eastern European countries to others, hindering cross-border competition"-- Press Release: Antitrust: Commission Opens Proceedings Against Gazprom (4 September 2012). Available at: <http://europa.eu/rapid/press-release_IP-12-937_en.htm> ; European Commission: Fact Sheet: Commission Sends a Statement of Objections to Gazprom (22 April 2015), MEMO/15/4829. Available at: < http://europa.eu/rapid/press-release_MEMO-15-4829_en.htm>; Press Release: Antitrust: Commission Sends a Statement of Objections to Gazprom for Alleged Abuse of Dominance on Central and Eastern European Gas Supply Markets" (22 April 2015), IP/15/4828. Available at: <http://europa.eu/rapid/press-release_IP-15-4828_en.htm>.

[839] Refer to Chapter 3.

[840] Fingleton, J., & Nikpay, A., "Stimulating Or Chilling Competition" 2008 Fordham Comp. L. inst. 000 (B. Hawk ed. 2009), at p. 391.

[841] Refer to Chapter 5.

law is still slightly unclear on this matter. If this separation does not exist then firms will be punished not for their anticompetitive conduct but for being in a privileged position. It was argued that "the European antitrust authorities are prepared to accept 'dominance'; but draw the line at conduct which can cause economic harm if that dominance is abused".[842] This research agrees with this argument only to a certain extent because, at the time of writing, no evidence is found where dominance was allowed by EU competition law.[843]

It has already been argued[844] that in US antitrust law, mere size is not illegal because "not all monopoly is proscribed".[845] It could be extremely difficult to identify whether a firm is 'too large' for a relevant market because if a relevant market is narrowed down to a very specific product or service then "which is small by ordinary concepts may become a giant".[846] It was suggested that the most plausible way to learn whether a firm was being too large, was to apply the test of experience which could show what happened to a market and competition *after* a firm had gained its size.[847] It was concluded that "upon this pragmatic test of 'works' that our concerns should be concentrated, rather than in abstract and dogmatic condemnation of size as such".[848] The Supreme Court does recognise situations when monopoly was achieved via efficiency, granted by the government or thrust upon a firm.[849] These situations, however, do not lead to an automatic misapplication of Section 2; rather, to a further investigation and examination of factors pertinent to a case.[850] The US has never denied the fact that bigness carries certain benefits with it despite its obvious goal to eradicate unlawful monopolisation. This goal, however, is not antagonistic to big business as "its contribution to the national welfare, both in peace and

842 Duncan, R., Coleman, C., Daniel, H., & Haleen, P. "Litigating Single-Firm Conduct Under the Sherman Act and the EU Treaty: Divergence Without End, or Change We Can Believe In?", at p.149.
843 See Chapter 6.
844 Refer to Chapter 5.
845 Kintner, E., W., *An Antitrust Primer: A Guide to Antitrust and Trade Regulation Laws for Businessmen,* at p. 99.
846 Fuller, F., E., "Problems Ahead For 'Big Business'", at p. 63.
847 Lilienthal, D., E., *Big Business: A New Era,* at p. 163.
848 *Ibid.* at p. 163.
849 The Supreme Court is still being criticised for the lack of knowledge of the purposes behind antitrust law and its enforcement—Haddock, G., B., "The Sherman Act and Big Business", at p. 17.
850 In which case, various factors like barriers to entry or countervailing buyer power become of a crucial importance in the Supreme Court's assessment. It was suggested that the most common types of barriers in competition law are those which were prescribed by law, *i.e.* patent rights or exclusive government licences. See, Baden Fuller, C., W., "Article 86 EEC: Economic Analysis of the Existence of a Dominant Position", at p. 428.

war, is recognised by all […] big business, too, has a tremendous stake in the maintenance of competition".[851]

Bigness and size can have beneficial effects on a market "as size appears to be directly proportional to technical innovation" as "only large firms can afford to spend the money needed in research and development".[852] This argument has a truth behind it, *i.e.* large firms have more resources to invest in the product development or innovation. However, this argument is based on the premise that bigness and size equal wealth; therefore, large firms will be in the possession of more resources simply because they can afford it. On the other hand, it was argued that technological development, innovations and other types of progressiveness "vary in nature and degree with sizes of businesses but none can rightfully claim this progressiveness is imputable solely to enterprise of a given scale".[853] This provides that size on its own could not firmly indicate whether a firm benefits or harms a market. In fact, it was further argued that many economists have conflicting views as to what "is optimum business size or scale in relation to efficiency and economy and the conflict of data regarding the casual relation between business size and actual or potential contribution to the economy".[854]

It was already argued that bigness had become a synonym to monopoly[855] due to the infamous history behind the behaviour of large and powerful firms, at least in the US.[856] Various perceptions exist on the way bigness affects markets and consumers, depending on interests of the stakeholders. A large firm, a small firm, a consumer and antitrust authorities would all have different conceptions of bigness and its effects.[857] It does not actually matter which party's perception is the right one as this is not what antitrust law is eager to achieve. What matters though is to strike a fair balance[858] between large and small

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851 H.R. Rep. No 596, House Committee on the Judiciary on HR. 3736, 80th Cong., 1st Sess. 7 [1947] as quoted in Kauper, T., E., "The Challenge of Competition" [1972-1973] 28 Bus. Law. 169 at p. 169.

852 Peck, R., S., "Is Big Business Big Brother?" [1983-1984] 12 Student Law 22 at p. 45.

853 Oppenheim, S., C., "Small and Big Business: Orientation of Antitrust Points and Counterpoints" [1961] 6 Antitrust Bull. 399 at p. 408.

854 *Ibid.* at p. 409. It was also added that in such cases, size may be advantageous, disadvantageous, or a neutral factor.

855 See *fn.* 803, Lilienthal, D., E., *Big Business: A New Era*, at p.56.

856 See Chapter 5 and, in particular, *Standard Oil Co. of New Jersey v. United States* case.

857 Courts, in this case, are more likely to align with the perception of antitrust authorities on the condition that the law is followed by the latter.

858 However, note the argument that "there is no unison in existing antitrust policy on the relationship of these business sizes to the public interest apart from the generalisation that the paramount goal is to support effective competition"-- Oppenheim, S., C., "Small and Big Business: Orientation of Antitrust Points and Counterpoints", at p. 415.

businesses, [859] large firm's profits and fair share of it for consumers,[860] large firm's actions and effective competition. It was argued,[861] for instance, that the main characteristics of a large firm are "large research laboratories and […] mass production methods" which all provide consumers with "an ever-expanding variety of new products, of constantly increasing quality, and at a lower price".[862] The fact that consumers would be paying lower prices for the products offered by large firms was meant in terms of the buying power of an hour of labour.[863] This view on bigness comes from a stakeholder whose interests lie in the support of a more relaxed attitude toward large firms in the US.[864] This, once again, shows that views on bigness vary in accordance with the interests of various stakeholders.

Google is a classic modern example of a firm which combines it all, *i.e.* size, bigness, power, access to capital, large research centres and, more importantly, a well-known reputation as a leading provider of internet search services around the world. Frankly, it was a matter of time before Google had to face antitrust investigations into its business practices before both the EU and US antitrust authorities.

7.2. The Case against Google

The current proceeding against Google is the most recent example of the way EU competition law deals with dominant firms allegedly abusing the EU internal market. More importantly, the US law opened a proceeding against Google on the same grounds as the EU, *albeit*, with a different end result.

[859] It was argued that small businesses perceive the actions of big business (especially if these are being exercised freely) "as a threat rather than a virtue" in Blake, H., M., & Jones, W., K., "In Defence of Antitrust" [1965] 65 Colum. L. Rev. 377 at pp. 379-380.

[860] In this balancing scenario, a consumer only requires an unrestricted access to goods and services for a non-monopolistic price—see, for instance, Leslie, C., "Antitrust Law as Public Interest Law" [2012] 2:3 UC Irvine Law Review (UC Irvine School of Law Research Paper No. 2013-98), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232452>.

[861] Please note that the following argument came from Chairman of the Board in Standard Oil Company (Indiana) in 1950s.

[862] Wilson, R., E., "Is Big Business Bad?—Fact vs FTC" [1952] 42 Trademark Rep. 469 at p. 471.

[863] Or, in other words, "an hour of work today will purchase more for the working man than at any other time in our history", *Ibid.* at p. 471.

[864] It was argued that "own sense of self-restraint and corporate conscience may be more effective than positive law and antitrust prohibitions"-- Oppenheim, S., C., "Small and Big Business: Orientation of Antitrust Points and Counterpoints", at p. 408.

In November 2010,[865] the EU Commission opened a formal investigation against Google under Article 102.[866] It was the first time the Commission was involved in the investigation of the online search market. The Commission made it clear that its aims were to ensure that online users were provided with a choice; however, concluding that competition law was not an adequate instrument "to impose on Google a specific algorithm or to prevent Google from improving its services if it wishes to do so […] nor can the Commission act in this case as a regulator for all the issues arising in the online world or raised by stakeholders regarding Google".[867] The Commission's acknowledgment of Google's right to choose its own way to run its search algorithm cannot go unnoticed because too much interference, as expressed by some stakeholders, might deter innovation and raise concerns of "government control over access to information and speech".[868]

In February 2014, several attempts were made between Google and the Commission to settle the case with Google offering concessions[869] which were decided not to be enough to remedy the Commission's concerns. Joaquin Almunia said that the objective of the Commission was to ensure that Google's competitors had a chance to compete fairly with Google's own online search services and what the Commission wanted Google to do was to "give rivals a prominent space on Google's search results, in a visual format which attract users".[870] This is a good example of the position in EU competition law where a dominant firm has to ensure that its rivals have an access to a dominant firm's product or service to enable them to compete on a given market. It is true that Google is in a position of being able to cut out all competition due to its dominant market position; therefore, it is undeniable that Google carries a certain level of responsibility to ensure that it does not abuse its dominance. However, it is also true that there are a numerous number of online

865 Press Release: Antitrust: Commission Probes Allegations of Antitrust Violations by Google". Available at: <http://europa.eu/rapid/press-release_IP-10-1624_en.htm>.
866 The Commission argued that Google was involved in four different types of business practices which potentially were against Article 102. In a nutshell, Google was accused of distorting competition in online search market by favouring its own shopping service search results over its competitors' results.
867 Almunia, J., "The Google Antitrust Case: What Is at Stake?", European Commission Press Release. Available at: < http://europa.eu/rapid/press-release_SPEECH-13-768_en.htm>.
868 Foer, A., A., & Vaheesan, S., "*Google*: The Unique case of the Monopolistic Search Engine" [2013] 4(3) Journal of European Competition Law & Practice 199, at p. 199.
869 Joaquin Almunia said that Google's concessions were far-reaching with a potential to achieve a level-playing field in online search and advertising markets. It was also pointed out that no competition authority had ever received such concessions and even though the FTC had investigated the same issues, due to a different market condition, it did not require the same concessions from Google—Press Release: Speech: "Statement on the Google Investigation" (February 5th, 2014). Available at: <http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm>.
870 Press Release: Speech: Joaquin Almunia "Statement on the Google Investigation", (5th February 2015). Available at: < http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm>.

search engines and it is a matter of personal taste which engine to use for online search, *i.e.* it becomes a consumer choice. At this stage, it seems that the Commission's decision is more likely to benefit Google's competitors rather than consumers. This is further evidence of the Commission's enforcement policy to favour smaller competitors[871] by ensuring they are protected from larger and, respectively, more powerful rivals. It was argued that in recent years the Commission was prioritising only those cases where abuse of dominance clearly and undeniably led to the consumer harm; however, in the case against Google, it was less obvious leading to the possibility that the Commission was supporting various competitors against Google.[872]

In April 2015, the Commission sent Statement of Objections (SO) to Google arguing that Google might be abusing its dominant position in contravention to Article 102.[873] Two separate investigations were launched into comparison shopping and the way Google was handling various mobile applications installed into Android operating system.[874] According to the Commission, Google has over ninety per cent market shares in most EEA countries;[875] therefore, making Google almost a monopolist. Google, on its official blog, accepted the fact that it was being the most used search engine; however, adding that "people can now find and access information in numerous different ways—and allegations of harm, for consumers and competitors, have proved to be wide of the mark".[876] Google, therefore, did not deny its dominance on the EU market *albeit* arguing that consumers' choice is not limited to Google search engine only, as internet has various other available options. It was argued that the way the Commission, at this stage, approached market

871 Refer to Chapter 3.
872 Henty, P., "Paranoid About Android? EU Commission Probe Puts Searching Questions to Google" [2015] Ent. L. R. 225 at p. 227.
873 In The New York Times, it was argued that the decision of the Commission could increase a political tensions between the US and the EU—Available at: http://www.nytimes.com/2015/04/16/business/international/european-union-google-antitrust-case.html?_r=0
874 According to the Commission's Press Release on 20 April 2016, the Commission informed Google that the Commission holds a preliminary view that Google is in breach of Article 102 by imposing restrictions on Android device manufacturers and mobile network operators—European Commission/Press Release "Commission Sends Statement of Objections to Google on Android Operating System and Applications", Brussels, (20 April 2016). Available at: < http://europa.eu/rapid/press-release_IP-16-1492_en.htm>.
875 European Commission-Fact Sheet: "Antitrust: Commission Sends Statement of Objections to Google on Comparison Shopping Service" (April 15th, 2015). Available at: <http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm>.
876 "The Search for Harm", April 15, 2015. Available at: <https://googleblog.blogspot.be/2015/04/the-search-for-harm.html>.

definition[877] remained unclear but the Commission seemed to focus on "Google's position as a provider of organic search results".[878] It was concluded that "market definition and market power assessment should account for both sides of the market, which involved identifying the set of buyers and advertisers/sellers to whom a certain competitive concern may relate to as well as their substitutes to Google".[879] Despite Google's ninety percent market shares, the assessment of market power might not be very straightforward. The measurement of market power in a two-sided market[880] might require a very careful analysis as dominance in one side of a market might not necessarily signify dominance in another. The difficulty in the assessment of market power lies in the fact that an application of the classic definition of dominance[881] is not really applicable to Google. This is so due to the fact that Google (and other search engines) allow their end-users to conduct a general search for free, for which reasons, "Google's market power cannot be measured by a departure between the actual price and the competitive price over a sufficiently long period of time".[882] It was argued that market shares and barriers will only be relevant in the assessment of a dominant position if "great care is exercised in examining the quality of the services provided and the costs of switching".[883] The importance lies in the fact that, technically, consumers or end-users do not pay for using Google's general search and, therefore, there are no switching costs at all. The end-users, as noted above, can easily choose which internet search engine to use so it might lead to an assumption that it is their choice to keep using Google's search engine. Their choice might depend on the fact that either Google provides better quality search or the end-users are just unwilling[884] to switch to a different search engine. It was argued that if it is the former, then the lack of switching would be "evidence of competition on the merits [and if] the latter, the question is whether irrational consumer behaviour can be taken into account in the assessment of dominance".[885] Including the behaviour of a consumer[886] into the analysis of a dominant

[877] For the discussion of the definition of the relevant product market in technology sectors see Harbour, P., J., & Koslov, T., I., "Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets" [2009-2010] 76 Antitrust L.J. 769.
[878] Wiethaus, L., "Google's Favouring of Own Service: Comments from an Economic Perspective" [2015] 6(7) Journal of European Competition Law & Practice 506 at p. 506.
[879] *Ibid.* at p. 508.
[880] One side being the web search while another being advertising services.
[881] For a classic definition of dominant position in EU competition law, see Chapter 6.
[882] Nazzini, R., "Google and the (Ever-Stretching) Boundaries of Article 102 TFEU" [2015] 6(5) Journal of European Competition Law & Practice 301 at p.305--The fact that Google charges on the advertising side of the market would only "reflect Google's investment in the quality of its search services so that, overall, Google is not earning supra-competitive profits".
[883] *Ibid.*
[884] Also known as "consumer inertia".
[885] *Ibid.* at p.306.

position would undermine legal certainty[887] especially when competition law does not have any tests for the assessment of the rationality of a consumer.

In June 2011, the FTC[888] also started an official investigation into Google's actions in online markets. In January 2013, the FTC confirmed that Google did, in fact, take aggressive actions to gain advantages over its competitors; however, Google's display of its own content on the internet search results was viewed by the FTC to be "an improvement in the overall quality of Google's search product"[889] and not as an aggressive anti-competitive act to eliminate competition in an online market. For such reasons, the FTC decided not to proceed further because "the FTC's mission is to protect competition, and not individual competitors […] the evidence did not demonstrate that Google's actions in this area stifled competition in violation of US law".[890] Or, in other words, for the FTC to being able to bring a case against Google it had to show "actionable harm", [891] *i.e.* that there was a valid consumer harm on a relevant market and not merely unfavourable competition conditions for Google's competitors. It was argued, *inter alia*, that one of the reasons why Google was not caught by the FTC was due to the First Amendment[892] which makes search results being protected under the free speech principle.[893] Google's reliance on the First Amendment coupled with US antitrust authorities' more relaxed approach

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[886] Default position in competition law is that a consumer is taken as being a rational person—see, Chapter 3.
[887] Nazzini, R., "Google and the (Ever-Stretching) Boundaries of Article 102 TFEU", at p.307.
[888] It should be noted that the FTC had started investigation against Google under Section 5 of the Federal Trade Act 1914. Section 5, in this context, is applicable when the FTC believes that the actions of a firm apply 'unfair method of competition' and the promotion of consumer welfare lies at the heart of the FTC enforcement priorities. Section 5 is also known as a way to fill a gap in those cases where the actions of a firm are anticompetitive but they do not exactly fit into the prohibition under the Sherman Act. There is not going to be any discussion of the application of Section 5 FTCA to antitrust matters; however, the importance and the relevance of the FTC's analysis of Google's market behaviour cannot be avoided. The possibility still exists though that if it was the DOJ which investigated Google under Section 2 then the outcome might have been different. However, it was the FTC which initially investigated Microsoft and the case was only picked up by the DOJ after the FTC's deadlock in 1993. This time, the FTC unanimously agreed on Google's actions not being against consumer welfare, therefore, deciding to end the investigation. At the time of writing, the DOJ have not commented on the FTC's decision not to proceed any further against Google.
[889] Statement of the Federal Trade Commission Regarding Google's Search Practices "In the Matter of Google Inc.", FTC File Number 111-0163 (January 3, 2013), at p.3.
[890] FTC, "Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Market for Devices Like Smart Phones, Games and Tablets, and in Online Search", Press Release. Available at: <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.
[891] Manne, G., A., & Rineheart, W., "The Market Realities that Undermined the FTC's Antitrust Case Against Google" [2013] Harvard Journal of Law & Technology 1 at p. 2.
[892] Google relied on two federal court decisions which held that search results along with the right to choose which results to include in the general search were protected by the First Amendment--*Search King Inc* v *Google Technology Inc* 2003 WL21464568 (W.D.Okla.2003) and *Langdon* v *Google Inc* 474 F.Supp.2d 622 (D.Del. 2007).
[893] Jazrawi, W., & Laporte-Bisquit, C., "Google's Abuse of Dominance" [2015] G.C.L.R. R-51 at p. R-52.

toward monopoly led Google to offering certain changes to a display of its search results and, subsequently, avoiding antitrust liability. Many stakeholders were not satisfied with the FTC's outcome of the investigation against Google[894] arguing that "their problems competing with Google are cognisable antitrust problems rather than the consequences of vigorous competition, shifting consumer demand, and their own business decisions".[895] In other words, their complaints were based on the concerns that Google should have been investigated under Section 2 of the Sherman Act and not under the Section 5 of the FTCA.[896]

Therefore, with the FTC closing the investigation against Google and the Commission issuing SO, keeping in mind that both antitrust authorities had dealt with the same issues, the differences in an approach toward treatment and assessment of market power here could not be ignored.[897] One of the explanations behind such an outcome for Google lies, among others, in the fact that Google has almost ninety percent market share in the EU market in comparison with only sixty-five per cent in the US market. Such a percentage of market shares would even be enough to trigger the presumption of monopoly in the US, let alone in the EU where, as already discussed, market shares above forty per cent are regarded as a likely indication of a dominant position. Therefore, with high market shares being the indication of a firm's size in the assessment of dominance, Google's market position is much stronger in the EU online market than in the US.

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[894] The FTC's decision not to proceed with the case against Google was heavily criticised, with many stakeholders pleading to the DOJ to start its own investigation into Google's actions in the online search market—see, < https://www.washingtonpost.com/business/economy/doj-meets-with-firms-seeking-google-antitrust-probe/2012/12/05/29a34444-3ef6-11e2-bca3-aadc9b7e29c5_story.html>

[895] Manne, G., A., & Rinehart, W., "The Market Realities that Undermined the FTC's Antitrust Case Against Google" [2013] Harvard Journal of Law & Technology 1 at p. 2.

[896] The relationship between the DOJ and the FTC and the Sherman Act and the FTCA is not going to be discussed for the purposes of this research. For the discussion on whether Section 5 (as a standalone legal provision) was a relevant legal provision in the investigation against Google see Litan, R., & Singer, H., "Are Google's Search Results Unfair or Deceptive Under Section 5 of the FTC Act?" (May 8, 2012), available at SSRN: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2054751>.

[897] When it comes to the differences between the EU and US on a court level, it was argued that the CJEU is concerned with the process of competition which requires all firms to compete on the merits. The Supreme Court in the US is mostly concerned with the costs of antitrust intervention leaning toward *per se* illegality and placing a burden on plaintiffs to show how the actions of a firm helps to increase a firm's market power. Furthermore, the plaintiffs would have to show that if an antitrust violation is found then the restrictions on the firm's behaviour should not compromise low prices and stifle incentives to innovate—Fox, E., M., "Monopolisation and Abuse of Dominance: Why Europe is Different" [2014] 59(1) The Antitrust Bulletin 129 at p. 143.

Google plays an important and inseparable role in the new economy market[898] where it holds a primary and very strong position in the technology and innovation industry. This fact is undeniable. When it comes to new economy industries, innovation drives a competitive process there and leading firms could gain large market shares due to the "winner-takes-most" principle.[899] In order to be able to keep their market shares, such firms should be constantly innovating and once they stop, their market shares will be lost to their competitors. The dynamic on such markets is very different; therefore, any firm may lose its market position very quickly. Therefore, by using market share as an indication of dominance in the new economy markets might hamper innovation and stifle competition. It was also argued that the special responsibility principle[900] in EU competition law could have negative repercussions on the new economy because "it prevents companies with high market shares (which nevertheless are under competitive threat and do not have the power to act independently of competitors and customers) to compete vigorously on an equal footing with their rivals".[901] The reason behind this argument lies in the fact that if deriving the presence of dominance purely based on the high market shares is not the correct approach for the new economy markets, then firms which gained their market position due to their innovation and R&D would be unfairly prevented to compete. Furthermore, Google is an undeniably large firm: Its resources and privileges overs its competitors will be taken into account by the Commission since it has become an established practice in the assessment of a dominant position.

[898] New economy markets, as argued, have very peculiar features which require antitrust law to apply a different approach. It was argued that the main characteristics of new economy markets are "very high rates of rapid technological progress, both in terms of creating new products and platforms, and it terms of significantly reducing production costs […], high fixed and sunk costs and low marginal costs of production, because developing a new and innovative product requires large investment […] companies that deal with high fixed costs often need to price significantly above marginal costs in order to earn a competitive return in the long run […] in order for dynamic competition to exist in high-tech industries there a need for a rational expectation of significant market power for a reasonable period of time […] new economy markets tend to be highly concentrated as a result of the high costs that are involved with market entry [and] are the characterised by network effects, also called network externalities or demand-side economies of scale"— Verhaert, J., "The Challenges Involved with the Application of Article 102 TFEU to the New Economy: A Case Study of Google [2014] ECLR 265 at p. 266.

[899] Ahlborn, C., "Competition Policy in the New Economy: Is European Competition Law Up to the Challenge?", at p. 162.

[900] "A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that […] the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market"— *Nederlandsche Banden-Industrie Michelin (Michelin I)* v *Commission*, para.57, as discussed in Chapter 6.

[901] Ahlborn, C., "Competition Policy in the New Economy: Is European Competition Law Up to the Challenge?", at p. 162.

The Commission commented on the differences in approach toward the case against Google by reminding the stakeholders that, in the US web search market, Bing and Yahoo (with the combined market share of around thirty percent) impose competitive constraints on Google while the position in the EU is entirely different. The Commission continued that the EU web search market relies on Google; therefore, "given the resulting commercial significance of Google for specialised search services, the way Google presents its web search results therefore has a much more significant impact on users and on the competitive process in Europe than it does in the USA".[902] Meanwhile, users or consumers would be limited in their choice to look for other specialised search services, which are in competition with Google and which might also contain relevant information.[903] Such a situation is seen by the Commission as being a consumer harm; however, acknowledging that it is the consumers' decision which websites to use for their online search. In addressing the comments about the FTC's decision to close the case against Google, Michael Jennings[904] told Reuters that "we have taken note of the FTC decision, but we do not see that it has any direct implications for our investigation, for our discussion with Google".[905] Therefore, the EU was very straightforward in distinguishing an investigation against Google in the EU and US, making it clear that the Commission has its own (unrelated to the FTC) opinion on Google's alleged abuse of a dominant position.

Clearly, the Commission has different reasons for holding Google as being dominant and, frankly, the Commission has all evidence to prove it. Google does have about ninety percent market share in the EU market; sunk costs in developing algorithm might become barriers to entry; customers' preference of Google's services; and Google brand has actually become a verb which could also lead to network effects with people choosing Google over other search engines and which, in turn, places Google into a privileged and advantageous position over its rivals. For such reasons, Google satisfies both elements of dominance, *i.e.* size and bigness. In other words, Google's powerful and prominent market position cannot be denied; however, it does not necessarily mean that Google unlawfully

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902 Press Release: Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns—Questions and Answers, (25 April, 2013), MEMO/13/383. Available at: <http://europa.eu/rapid/press-release_MEMO-13-383_en.htm>.

903 Press Release: Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns—Questions and Answers, (25 April, 2013), MEMO/13/383. Available at: <http://europa.eu/rapid/press-release_MEMO-13-383_en.htm >.

904 A spokesman for the Commission.

905 "EU says its Google case not affected by US ruling". Available at: <http://uk.reuters.com/article/2013/01/04/google-antitrust-eu-idUKL5E9C450Q20130104>.

exploits its market power in order to suppress competition. As argued earlier, in this case, a link between dominance and its abuse should exist. In the US, for instance, antitrust law requires a link between monopoly power and monopolisation. Article 102, it was argued, does not require such a connection because it "makes the illegal act the 'abuse…of a dominant position,' and thus focuses on whether any dominant market power that already exists was improperly used".[906] It follows that the US recognises the strong connection between monopoly and monopolisation where the unlawful conduct might lead to market power which, in turn, would lead to higher prices to the consumers' detriment. The EU was criticised for having a different perspective on the way dominance should be assessed because "when a firm uses proper conduct to create something sufficiently more valuable than existing market options to enjoy dominant market power, then any high prices it earns are the proper social reward for that creation, and the denial of that reward by E.C. law seems […] unsound".[907] This is a very valid point because with the current interventionist approach,[908] the Commission does not give firms any freedom to grow and it denies firms an opportunity to enjoy the fruits of their labour. This, as argued in Chapter 4, can lead to a consumer detriment because firms' incentives to innovate, produce, invent and compete are hampered by the overly broad and flexible definition of a dominant position. It was argued that "it is relatively easy for a large and successful firm to meet the preconditions for a dominant status [therefore], many or even most, large and successful firms will fall into the category of 'dominant' firms".[909] Such a practice has rooted in the core analysis of Article 102.

In February 2015, US President Barak Obama "warned Europe against making 'commercially driven' decisions to penalise companies like Google and Facebook".[910] The criticism that the EU was pursuing an anti-American protectionist policy was rejected by the Commission[911] which argued that "political pressure had played no part in the decision to accuse Google [as] nationality and successful market domination were not issues for

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906 Elhauge, E., "Defining Better Monopolisation Standards", at p. 331.
907 *Ibid.* at p. 332.
908 See Chapter 6.
909 Gifford, D., J., & Kudrle, R., T., "European Union Competition Law and Policy: How Much Latitude for Convergence with the United States?", at p. 753—It was further added that "they will then be subject to legal obligations tied to notions of fairness and non-discrimination".
910 "Europe Challenges Google, Seeing Violations of its Antitrust Law", The New York Times. Available at: <http://www.nytimes.com/2015/04/16/business/international/european-union-google-antitrust-case.html?_r=0>.
911 The EU Competition Commissioner Margrethe Vestager.

[the Commissioner], only the abuse of market power".[912] This could be tied up with an earlier argument that politics could play an important role in the interpretation of antitrust law.[913] It is unlikely that the Commission is pursuing an anti-American policy. However, the suspicion that it is probably lies in the fact that the US is the birthplace of corporations, for instance, on a global level Apple is, once again, the world's largest firm with a market value of $725bn in the technology hardware and equipment sector.[914] Google is currently on the fourth place, while Microsoft is on the fifth.[915] It should be noted that, according to the ranking, seven out of ten top largest firms have originated in the US. Globalisation has most certainly led bigness to become an indication of global success with a considerable amount of power in the hands of a holder, at least in the US markets. With the world being involved in a trade which could go beyond national borders with firms having its subsidiaries opened in various countries, bigness can sometimes take a form of multinational corporations in respect of which size is measured by various factors like revenues, profits and market value.

The difference between the EU and US in relation to Google adds another piece of evidence on the disparity in the treatment of monopoly and dominance in the EU and US. It cannot go unnoticed that Google does have ninety percent of the EU market and only sixty five percent of the US market. Ninety percent market share would even trigger the presumption of monopoly under US antitrust law so the position of the Commission is understandable. However, the Commission's comment that Google has two competitors with a combined market share of thirty percent places competitive constraints on Google behaviour in the US cannot go unnoticed. This comment gives an assumption that if Google had sixty five percent of the market and two direct competitors then the Commission would not have been concerned. Such a scenario is highly unlikely. The Commission would still have taken the case against Google further because the only difference between Google's market position in the EU and US is that with ninety percent market share the Commission has a stronger case to establish the existence of a dominant position.

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[912] "EU Accuses Google of Hurting Consumers, Competitors in Web Search Case", Reuters. Available at: <http://www.reuters.com/article/2015/04/16/us-google-eu-idUSKBN0N610E20150416#0EmsvDiOhFzmgBiJ.97>.

[913] Refer to Chapter 2.

[914] The data is of 31 March 2015 and provided by Financial Times. Available at: <http://www.ft.com/cms/s/2/1fda5794-169f-11e5-b07f-00144feabdc0.html#axzz3pQAvwaWJ>.

[915] Available at: <http://www.ft.com/cms/s/2/1fda5794-169f-11e5-b07f-00144feabdc0.html#axzz3pQAvwaWJ>.

7.3. Conclusion

This penultimate chapter provided the final comparative analysis on bigness and size in the context of monopoly and dominance. Monopoly and dominance, as was discussed, place a firm into a privileged position and grants it with an opportunity to employ its power to the detriment of consumers and economic efficiency. The history behind the abuse of power and monopolisation has made bigness and monopoly synonyms and this fact explains why bigness is considered to be an undesirable feature of a market.

This picture of bigness and size being associated with monopoly and dominance is, however, a general one in a sense that it will always depend on which party and jurisdiction is discussing it. As was argued throughout this thesis, US antitrust law does not perceive monopoly as being harmful *per se* and this chapter reaffirms those arguments. In addition it provided yet another comparative analysis of the treatment of monopoly and dominance in the US and EU and concluded that US antitrust law accepts dominance as a positive reality of a market performance unless it is proved otherwise. EU competition law, on the other hand, places a special responsibility on dominant firms, thereby, creating a presumption that dominance cannot be trusted. This means that the Commission and the courts are so suspicious of dominant firms that they automatically place restrictions on them even before such firms start engaging in anti-competitive practices. Therefore, in the EU, once a firm starts growing it gets a special responsibility placed on it in addition to its business development and prosperity being used as an additional evidence of dominance.

It becomes of paramount importance to find out why the Commission pursues such a policy by making dominant firm inherently harmful. This chapter concluded that the main reason behind the distrust toward dominance lies in the fact that the EU was created from the number of countries and the eradication of internal barriers was incorporated in the aims behind the creation of the EU project. These internal barriers, as discussed, led to more local monopolies, therefore the EU used to have less natural, union-wide monopolies than the US.

It was also argued in Chapter 3 that the Commission, despite its arguments to the contrary, does protect smaller competitors. This chapter took this argument further and concluded that the Commission does not trust aggressive actions on the part of dominant firms because it is smaller competitors which are mostly affected by the aggressive business practices. This research believes that aggressive competition is healthy competition and if the Commission suppresses lawful competitive actions of dominant firms to protect SMEs then it, by implication, also supresses the firms' incentives to compete. This will result in damage to consumer welfare and economic efficiency.

In spite of the fact that this research is neutral toward dominance and monopoly, it was deemed important to discuss the benefits of having large firms on a market. Bigness and size or dominance and monopoly *per se* should not be labelled harmful and illegal as large firms do have access to large financial resources to invest into R & D and for some industries[916] these qualities are important in order to progress innovation and product development.

It was also highlighted in this chapter that multinational corporations are the prime examples of the modern type of monopolies and Google is one of such corporations. The current proceedings against Google in the EU are the final pieces of evidence which highlight the divergence between the EU and US. The case is still at the stage of SO; therefore, not enough information is available. What is important, or rather interesting, is how Google was investigated on the same facts by both the FTC and the Commission with the former dropping the case as no 'actionable harm' was found to make Google subject to antitrust law. The main difference between the US and EU was in the fact that Google had ninety percent market shares in the EU and only sixty five in the US. The Commission relied on this fact to justify its decision to initiate investigation against Google. This, however, was rejected by this chapter because even if Google had sixty five percent market shares in the EU, the Commission would still have sent the SO. And, it was argued that the Commission's decision will protect Google's competitors rather than its consumers.

The purpose of this chapter, therefore, was to collect certain arguments discussed in the previous chapters, provide a further comparative analysis, highlight the fact that monopoly and dominance *per se* are not inherently detrimental and, finally, to link it with the case against Google in order to reinforce the earlier findings that the Commission of the European Union does hold an antagonistic approach to dominant firms in order to promote consumer welfare, progress economic efficiency and, more interestingly, protect SMEs.

[916] For instance, pharmaceutical and technological industries.

Chapter 8: Conclusion

> "We made no serious attempts to stop monopoly—certainly no intelligent attempt; partly because we lacked knowledge, partly because we lacked desire; for we had a sneaking feeling that perhaps, after all, a private monopoly might be a good thing, and we had no adequate governmental machinery to employ for this purpose"—Louis D. Brandeis.[917]

In this last chapter of the thesis conclusions will be set out which assist in providing answers to the questions posed in Chapter 1.

As was stated in Chapter 1, the famous essay of Louis D. Brandeis on the influence of big business on US markets and industries has inspired this research. In his essay, he argued that bigness could never be beneficial for markets and, therefore, it should be eradicated by sound and strong antitrust system. The essay *Curse of Bigness*[918] was published in 1934 and it still remains a very influential piece of literature, especially for the proponents of the regulation of monopolies. Thus, as mentioned above, the purpose of this research is to assess how much influence a firm's bigness and size has on the assessment of monopoly and dominance in the US and EU. Or, in other words, whether the common prejudice, if not abhorrence, toward large firms with economic power is reflected in the way antitrust rules are being enforced by the two regimes, and in particular by the EU.

In Chapter 1, it was submitted that a firm's dominance and monopoly has two constituent parts: size and bigness. A firm's size is measured by its share of a relevant market. A firm's bigness, meanwhile, is assessed by the non-exhaustive list of 'other factors' in its possession which may include IPRs, access to capital, advertising, economies of scale, R&D, brand reputation, access and ownership of facilities, control of production, and vertical integration. These factors are also considered by antitrust law to pose barriers to entry or expansion, whilst this research groups them as commercial privileges and advantages a firm has over its competitors. Irrespective of the name, 'other factors' do

[917] Brandeis, L., D., *The Curse of Bigness,* at p. 124.
[918] *Ibid.*

demonstrate the firm's commercial and productive capacity and superiority over its rivals. Therefore, the firm which has both size and bigness is considered to be large in the context of this research.

In order for Article 102 and Section 2 to apply, two elements should be present: a dominant position with abuse or a monopoly power with monopolisation, respectively. Dominance and monopoly, as examined in this thesis, are not interchangeable where the former is a term used in EU competition law and the latter is applied in US antitrust law. Both, however, relate to an economic entity which has market power in a relevant market. EU competition law, however, also employs a term 'monopoly' to describe a firm the dominance of which approaches market share of ninety percent or greater. US antitrust law, however, does not use the term 'dominance'; therefore, making dominance an exclusive EU legal concept.

Despite the differences in the terminology, both antitrust regimes apply almost identical tools for the assessment of dominance and monopoly. This, however, only relates to the economic tools which are used for the assessment of market power and which were described in Chapter 3.

As for the legal interpretation and definition of dominance and monopoly, differences exist. Dominance is defined as a position of economic strength which enables a firm to act appreciably independently.[919] Monopoly is a firm's ability to control prices and exclude competition.[920] The striking difference between the two terms lies in the fact that 'monopoly' is defined in a very straightforward way, *i.e.* the monopolist needs to be able to control prices. 'Dominance', on the other hand, is defined in a more vague way which involves the firm's ability to be appreciably independent which, as argued in Chapter 4, invites both flexibility and legal uncertainty into the definition of a dominant position. Such a difference between two definitions may well be intentional.

In order to understand these differences, Chapter 2 focused on the historical events leading to the adoption of the TFEU and Sherman Act: Article 102 and Section 2, respectively. In the US the law developed when the US market was heavily affected by the spread of private monopolies or, as they were known, trusts. The public was so concerned with the

[919] *United Brands v Commission*
[920] *United States* v *E. I. du Pont de Nemours & Co.*

power of trusts on the US market that Congress had to adopt a legislation which would exert control on the behaviour of powerful firms. This led to the adoption of the Sherman Act. It was shown that, despite the common beliefs that trusts were inherently monopolistic, Congress did not prohibit monopoly altogether. This was explained by the fact that US markets were heavily influenced by the *laissez-faire* economics which promoted free competition without unnecessary government intervention. Congress, therefore, attempted to reflect this principle in the rules of the Sherman Act; thereby, requiring the act of monopolisation to be at the heart of Section 2. EU competition law, on the other hand, evolved from an entirely different history. The EU itself was created for political reasons in order to unite countries after World War II. The political situation in Europe required a new powerful entity consisting of various member states connected, *inter alia*, by common business and commercial interests. This led to the adoption of an EU competition law regime targeting, among others, firms which abuse their dominant position. It was demonstrated that the drafting of the main EU competition law provisions (Articles 101 and 102 TFEU) was influenced by the provision of US antitrust law; therefore, a certain level of similarity between the two regimes was unavoidable. Despite this, the text of the EU and US legal provisions is broad and neither provides a definition of dominance and monopoly. It was left to the antitrust authorities and the courts to interpret these terms. Chapter 2 also highlighted the fact that European Commission has authority both to investigate and to issue binding decisions, unlike the US antitrust authorities if the Commission pursues an interventionist approach to dominant firms, then this power allows it to pursue its own policy.

Chapter 3 focused on the economic assessment of market power in the EU and US. It highlighted the main goals behind antitrust intervention: namely, the protection of consumer welfare and the promotion of economic efficiency. It also examined two economic models in order to show both sides of the spectrum, *i.e.* what happens with efficiencies in monopolised markets and in markets which feature perfect competition. Chapter 3 showed that US antitrust law was heavily influenced by the Chicago School of economics which believed in a self-correcting tendency of markets and minimum governmental interference in the affair of businesses. EU competition law, on the other hand, was heavily influenced by the Ordoliberal School of economics which followed the idea that markets should be liberalised from monopolies which, in turn, did not rely on the fact that markets may have a self-correcting tendency. This approach requires a stronger governmental control and intervention into the way markets operate and promotes fair competition among rivals. This, according to the findings of Chapter 3, leads the Commission to hold an interventionist approach to firms in a dominant position. Whereas, the influence of the Chicago School and the view that markets have a self-correcting tendency led US antitrust law to retreat from its initial antagonistic approach to monopoly and allow firms to compete as long as they do not monopolise.

Chapter 4 introduced and highlighted the main tools used by antitrust authorities to determine the existence of dominance and monopoly: market shares and barriers to entry in the relevant market. EU competition law requires lower market share thresholds for the assessment of market power than under US antitrust law. EU competition law uses forty percent and above market shares as an invitation to conduct an economic assessment while US antitrust law, on the other hand, uses seventy percent and above to determine where the presumption of unlawful monopoly takes place. Both regimes consider market shares as the most important indication of dominance and monopoly, despite the criticism considered in Chapter 4 that a market share, among other limitations, does not include the dynamics of the markets and the behaviour of firms under consideration. Irrespective of the criticism, antitrust authorities and the courts take the size of the firms into account in the assessment of dominance and monopoly. However, the divergence in market share thresholds supports the proposition that US antitrust law allows firms to grow in their control of the market up to seventy percent market share which is not insignificant. EU competition law, on the other hand, is different: it was concluded that by keeping the presumption of dominance at fifty percent market shares,[921] and the Commission's ability to investigate a firm at forty percent, EU competition law retains flexibility in the assessment of a dominant position. This will also lead the Commission to avoid Type II errors which, according to the findings set out in Chapter 4, represent an under-inclusive approach to the enforcement of antitrust rules. Therefore, in Chapter 4 it was preliminarily concluded that US antitrust policy not only allows firms to gain up to seventy percent of the market but it also perceives high market shares as an example of healthy competition. The EU competition law enforcers, on the other hand, have an inherent distrust toward dominant firms which is reflected in the lower market share perceptions in the operation of Article 102.

[921] *AKZO Chemie BV* v *Commission of the European Communities.*

Chapter 5 focused on the study of a select number of US cases. It was shown that US antitrust law had several important cases where the Supreme Court held that size *per se* was not a violation of Section 2[922] unless the target of investigation had been magnified to the point when it became an unlawful monopoly. This finding is very important because the principle of unlawful monopoly, as argued in Chapter 5, helps to distinguish between situations where size is gained in an anti-competitively manner from size which is achieved by legitimate business practices. In relation to a firm's bigness, it was demonstrated that the Supreme Court is not concerned with a firm's advantages and privileges *albeit* the District Court in *United Shoe* did use certain privileges held by the firm in order to strengthen a finding of monopoly. However, it was also stressed that the advantages were derived from the well-structured business policy which was aimed at the restriction of competition. It follows that when there is an illegality behind 'other factors', the US courts will use these factors against the alleged monopolist. The rest of the cases analysed in Chapter 5 had no similar references to bigness, leading to the conclusion that bigness of a firm plays no role unless there is an illegality behind their market conduct. The case studies also revealed that the Supreme Court had moved away from holding an antagonistic approach to monopoly and instead started to focus on economic efficiencies large firms may bring into a market. Therefore, Chapter 5 concluded that a firm's size and, occasionally, its bigness become paramount for the assessment of monopoly only if they were achieved illegally. In any other scenario, a size below seventy percent and privileges or advantages held by such a firm, are evidence of a firm's business success and prosperity.

Chapter 6 conducted a similar exercise but in the context of EU competition law where several important cases were examined in order to identify whether size and bigness play any role in the assessment of a dominant position in the EU. The conclusion was that the EU, unlike the US, does not discuss size *per se* when applying Article 102. The Commission's decisions and the courts' ruling revealed that dominance would occur if a firm had significant market shares. Furthermore, as shown in Chapter 4, it was concluded that the size of a firm plays a central role in the finding of a dominant position. The assessment of bigness, unlike the situation in the US, was more interesting because the Commission and the courts include almost all advantages and privileges of a firm in support of a finding of dominance. The list of 'other factors' is non-exhaustive and places

[922] *United States v United States Steel Corp*. and *United States* v *Swift & Co.*

any firm in a dangerous position of becoming automatically dominant under Article 102. Neither the Commission nor the courts have demonstrated consistency in the selection of 'other factors', leading to the conclusion of the thesis that bigness plays a very important role in the assessment of a dominant position. This was explained by the fact that due to a considerably low market share threshold, the Commission and the courts need further evidence to support the findings of dominance and using a firm's superior position as another piece of evidence is the best way to do it. Furthermore, the case studies evidenced the Commission's interventionist approach toward dominant firms and its desire to keep flexibility in the definition of a dominant position. It was concluded that this approach will create an environment where firms will be cautious to grow and develop, fearing that severe sanctions may follow and this may well have a negative effect on consumer welfare and economic efficiency. Lastly, unlike US antitrust law, EU competition law has not developed a difference between lawful and unlawful dominance, and instead it places on dominant firms a special responsibility not to abuse their dominance.[923] This finding is very important for the purposes of the thesis because it leads to the conclusion that if a firm has forty to fifty percent control of the market then it has no chance to argue that its dominant position is legal.

The key findings above support the proposition that the Commission has developed a certain level of distrust toward firms in a dominant position by not considering aggressive competition in a positive manner. The analysis undertaken in Chapter 7 demonstrates that the Commission protects the interests of the SMEs by applying Article 102 rigorously to dominant firms. This contrasts with the approach of US antitrust law which has been shown to be comfortable with aggressive competition. Furthermore, in Chapter 7, the importance of having larger firms on markets as they have more resources and finances to invest was discussed. This especially applies to the new economy markets, with Google as an example of such a firm. Both regimes initiated proceedings against Google on the same grounds albeit with different end results: the FTC deemed it necessary to stop proceedings against Google after no unfair competition had been discovered. The Commission, on the other hand, holds a very strong position toward Google and recently issued a Statement of Objections (SO). The main difference between Google's position in the EU and in the US is that in the former jurisdiction Google holds almost ninety percent of the market while in the latter only sixty five per cent. The Commission relied on this fact in order to deny

[923] *NV Nederlandsche Banden-Industrie Michelin (Michelin I)* v *Commission.*

allegations that it was biased against American firms. In Chapter 7, however, it was argued that even if Google held sixty five percent of the market, the Commission would still have sent the SO. It is without doubt that with low market share thresholds and the acceptance of ‘other factors’ into the determination of dominance, Google would have satisfied the first limb of Article 102, *i.e.* the existence of a dominant position. This leads to the conclusion that Google has become too large for the EU market and the outcome of the case is highly awaited. The analysis in Chapter 7 has provided further evidence of the divergence in the treatment and assessment of dominance and monopoly in the EU and US. Lastly, this chapter has also addressed the final research question, namely, what are the reasons behind the EU’s interventionist approach to firms in a dominant position? The answer lies at the core of the policy behind the formation of the EU: in order to create an internal market, the EU had to demolish national barriers among member states which were saturated with local monopolies. This explains the strive of the Commission to keep the EU market operators in small economic units, in order to avoid monopolies, as it seems to believe that it is the only way to promote economic efficiency and protect consumer welfare.

Therefore, in summation of the key findings, it is submitted that EU competition law is enforced with a certain level of distrust toward firms in a dominant position. This is reflected in its interventionist position in the application of the first limb of Article 102 and, to answer the series of short questions posed in Chapter 1, it follows that: first, a firm’s size and bigness are central to the establishment of dominance in the EU while the US is only concerned with a large size of a firm and has almost complete disregard of the firm’s bigness as long as there is no illegality or wrongful intent. Second, the reasons behind the Commission’s attitude to low market share threshold reflect the Commission’s desire to keep the meaning of dominance as flexible as possible and to avoid Type II errors. Third, a firm’s privileges and advantages play a much bigger role in the EU than in the US. Fourth, this thesis concludes that the Commission does hold an antagonistic and interventionist approach to firms in a dominant position. Lastly, the Commission’s distrust for private economic power lies in its political structure and its desire to protect SMEs in order to maintain diversity among competitors on the EU internal market.

Therefore, the thesis introduces an original position on the assessment of a dominant position and monopoly in the EU and US, respectively. It has been demonstrated that despite the similarities between the two regimes, considerable divergences exist in the way dominance and monopoly are interpreted. The key finding, however, is that the Commission does not have a notion of lawful dominance and this is an omission. The research undertaken does not suggest that the Commission is not correct in its approach to firms in a dominant position; however, the research does confirm that size and bigness should not be assessed in fear that they provide a firm with an opportunity to abuse. A well-balanced system should be created which will value both consumer welfare and the firms' right to win the market and enjoy the fruits of their labour. Moreover, certain markets might require large firms to invest into R& D and engage in advance innovation. Furthermore, a strict and interventionist approach will discourage large firms which, in turn, will have a detrimental effect on consumer welfare and economic efficiencies. Globalisation, new economy markets, diversity of competitive conditions, political situations and economic influence are important features of current market reality and this should be taken into account by antitrust law enforcers. Some industries, such as the pharmaceutical and technological industries, can operate efficiently on the market only with the existence of large firms. Innovation and development of new products, such as a new drug or a mobile phone require significant resources, such as research investment, development facilities and pooling of patents rights. However, at this stage, there can be no conclusion on whether large firms would be more efficient in such markets as this would require a separate study of each industry. For these reasons, the next step forward needs to be the study of individual industries in order to identify whether the presence of large firms would lead to economic efficiencies and consumer welfare.

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