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**US and EU Antitrust Policy Objectives and the Legal Status of the  
Hardcore Vertical Restrictions: Absolute Territorial Protection and  
Minimum Resale Price Maintenance**

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**LLB (Hons) DPLP**

**Submitted in fulfilment of the requirements of the Degree of Master of  
Laws by Research**

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## ABSTRACT

This thesis is concerned with the identification and analysis of the policy objectives of US antitrust and EU competition law, with particular reference to the hardcore vertical restrictions, absolute territorial protection (ATP) and minimum resale price maintenance (RPM). It does not critique the identified policy objectives as such, but it does critique the underlying economic principles through which they are interpreted to assess whether the US and EU legal positions on the hardcore restrictions are logically justifiable.

As such, two chapters are dedicated to the identification of the objectives of US antitrust policy and EU competition policy, respectively. This is done through analysis of their legal development, and political and historical context. They conclude that the promotion of consumer welfare has become the sole objective of US antitrust policy, but that EU competition policy has retained a multifaceted set of objectives, including the protection of market integration and the promotion of effective competition, as well as the welfare objectives the EU has adopted more recently.

The final chapter assesses whether the US and EU legal positions on the hardcore vertical restrictions are logically justified by the policy objectives of each jurisdiction identified in the previous chapters. It considers the development of the legal positions in detail, and goes on to critique the economic analysis of vertical restraints under which the restrictions have been considered. It concludes that the EU justifies its absolute prohibition of both hardcore restrictions under its multifaceted set of competition policy objectives, but that the US can only logically justify its rule of reason for ATP under the sole objective of consumer welfare, while minimum RPM should have continued to be subject to *per se* illegality. The *Leegin* decision to permit minimum RPM subject to a rule of reason relied on flawed analysis of its economic effects.

## **ACKNOWLEDGEMENTS**

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## **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.

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Donald Mackay

## TABLE OF CONTENTS

<i>Table of Cases</i>	v
<i>Table of Legislation</i>	ix
<i>List of Abbreviations</i>	x
<b>CHAPTER 1. INTRODUCTION</b>	1
<b>1.1. Introductory Remarks</b>	1
<b>1.2. Methodology</b>	2
<b>CHAPTER 2. THE ORIGINS AND OBJECTIVES OF UNITED STATES ANTITRUST LAW</b>	4
<b>2.1. Introduction</b>	4
<b>2.2. The Background to the Sherman Act</b>	5
<b>2.3. Interpretations of the legislative intent of the Sherman Act</b>	6
<b>2.4. The early development of US antitrust case law</b>	14
<b>2.5. The Postwar and Warren Court Period</b>	24
<b>2.6. The Chicago School Revolution</b>	31
<b>2.7. The Post-Chicago School</b>	35
<b>2.8. Conclusions</b>	40
<b>CHAPTER 3. THE ORIGINS AND OBJECTIVES OF EUROPEAN COMPETITION LAW</b>	41
<b>3.1. Introduction</b>	41
<b>3.2. The History of Cartels in Germany</b>	41
<b>3.3. Postwar Reconstruction</b>	46
<b>3.4. Influences on the development of the Community competition rules</b>	50

<b>3.5. The shift to the more economic approach</b>	65
<b>3.6. Conclusions</b>	75
<b>CHAPTER 4. COMPARATIVE LEGALITY OF THE HARDCORE VERTICAL RESTRICTIONS</b>	76
<b>4.1. Introduction</b>	76
<b>4.2. Comparative treatment of Absolute Territorial Protection</b>	77
<b>4.3. Comparative treatment of minimum Resale Price Maintenance</b>	86
<b>4.4. Free Riding and Provision of Services under Vertical Restraints</b>	97
<b>4.5. Antitrust policy on the forms of competition</b>	103
<b>4.6. Justifications of the US and EU hardcore restrictions policies</b>	108
<b>CHAPTER 5. CONCLUSION</b>	112
<b>5.1. Summary</b>	112
<b>APPENDIX</b>	119
<b>BIBLIOGRAPHY</b>	122

## TABLE OF CASES

### Supreme Court of the United States

- Albrecht v Herald Co* 380 US 145 (1968)
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## **ABBREVIATIONS**

ATP	Absolute Territorial Protection
BER	Block Exemption Regulation
EAGCP	Economic Advisory Group on Competition Policy
EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
FTC	Federal Trade Commission
OJ	Official Journal of the European Union
RPM	Resale Price Maintenance
US	United States of America

## CHAPTER 1. INTRODUCTION

‘Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give.’<sup>1</sup>

### 1.1.Introductory Remarks

It feels almost obligatory to open this thesis with the above quotation from Robert Bork’s hugely influential *The Antitrust Paradox*. The sentiment is undoubtedly universally shared by all concerned with the study and application of competition law and policy. Antitrust is at an apex in the interplay between law, policy, and economics; defined as much by legal *dicta* and complex economic analysis as by the fundamental political question of to what extent government and the law should regulate private action. As such, to say that there is a lack of consensus on the given answers to the question Bork posed would be an understatement.

This thesis is concerned not with what those goals should be, but rather how the United States and the European Union have arrived at their present goals. As such, the first and second Chapters are, respectively, critiques of the legal history of US antitrust and EU competition law. Given the breadth of the academic debate in the United States, the first chapter starts by considering the schools of thought on antitrust policy in the abstract before assessing the historical development in Sherman Act case law. Its relatively brief treatment of the historical origins of the Sherman Act contrasts with the more extensive historical analysis of the factors leading to the development of European competition

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<sup>1</sup> R.H. Bork *The Antitrust Paradox* (2<sup>nd</sup> ed. Free Press, New York, 1993) 51

policy discussed in the second chapter. This is because European competition policy has been more shaped by evolution of policy by executive actors in the Commission than by any changes in the largely consistent interpretation of case law on competition law objectives by the Court of Justice. In the United States, changes in antitrust policy objectives are evidenced by shifts in the dynamic interpretation of Sherman Act case law.

The third chapter focuses onto the hardcore restrictions: Absolute Territorial Protection (ATP), the most restrictive vertical *nonprice* restraint, and Minimum Resale Price Maintenance, the most restrictive vertical *price* restraint. The third chapter assesses the two jurisdictions' *legal position* on the hardcore restrictions, concluding whether the positions are logically justified considering their *policy objectives*. It is necessary to draw some distinctions in how these are analysed. The policy objectives identified in the first and second chapters are not critiqued in the third, but the *economic principles* through which they have been interpreted are. The legal positions reached are also critiqued, which ultimately answers the thesis' principal research question – are the present legal positions logically justified under the policy objectives they serve?

## **1.2. Methodology**

This thesis has relied on primary and secondary literary sources, and has not incorporated any empirical research. Primary sources were principally in the form of case law, but also included European Union legislation and Commission publications, and a limited amount of United States legislation. These were obtained from Westlaw International, in the case of US primary sources, and the EU's principal databases, Curia and Eur-Lex. Secondary sources included a mix of historical, economic and legal texts

and journal articles. The journal articles were sourced from a variety of databases, principally Hein Online.

The research objectives have altered significantly from the initial research proposal. That proposal envisaged an inquiry into multi-jurisdictional corporate legal and compliance practice, in the context of a wider range of opposing antitrust issues. It became apparent that providing a meaningful answer to any research question on such a topic would require significant empirical study, and an early decision was taken to refocus the thesis onto a 'black letter law' research model. This subsequently evolved into an analysis of the US and EU legal positions in the context of their economic and historical backgrounds.

The research metric that has survived from the original proposal is logical justification; whether the jurisdictions' legal positions are logically justified under their policy objectives. It became clear that, given the wealth of primary and secondary material available, specific focus was required, and the hardcore vertical restrictions were an obvious choice. While the thesis has no requirement for an originality declaration and does not presume to claim it, it is hoped that this analysis of the hardcore vertical restrictions in the context of their wider historical and economic background provides an interesting perspective on this contentious area of competition law.

## CHAPTER 2. THE ORIGINS AND OBJECTIVES OF UNITED STATES

### ANTITRUST LAW

#### 2.1. Introduction

The United States federal courts have never produced any ‘definitive statement’ of the objectives of US antitrust law.<sup>1</sup> The vigorous academic debate advocating a variety of ‘conflicting perceived goals’<sup>2</sup> is rooted in the interpretation of the Sherman Act, which has changed radically over time. Despite subsequent legislation, §§ 1 and 2 of the Sherman Antitrust Act of 1890 remain the principal statutory provisions under which antitrust cases are determined. It is a vague and expansive statute, and its Congressional intention is a disputed field for advocates of a variety of policy objectives.<sup>3</sup>

This Chapter will begin with an assessment of the political background to drafting the Sherman Act. It will then consider the leading schools of thought on US antitrust policy, and what policy objectives they advocate. It will consider whether the Sherman Act was drafted with specific policy objectives engrained in it, or whether, as Frank Easterbrook suggests,<sup>4</sup> it was deliberately drafted as a dynamic statute which gives the courts a ‘blank check’ to set the policy objectives of US antitrust.

The following section, focusing on the development of US antitrust case law, will begin with discussion of the early cases interpreting the Sherman Act. On that foundation, it will critique the radical changes in antitrust law from the ‘equity objectives’<sup>5</sup> which

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<sup>1</sup> R.H. Bork ‘Legislative Intent and the Policy of the Sherman Act’ (1966) 9 *Journal of Law and Economics* 7

<sup>2</sup> E. Buttieg *Competition Law: Safeguarding the Consumer Interest, A Comparative Analysis of US Antitrust Law and EC Competition Law* (1<sup>st</sup> ed. Kluwer Law International, Alphen aan den Rijn, 2009) 17

<sup>3</sup> H. Hovenkamp *Federal Antitrust Policy: The Law of Competition and its Practice* (3<sup>rd</sup> ed. West, St. Paul, 2005) 49

<sup>4</sup> F.H. Easterbrook ‘Workable Antitrust Policy’ (1986) 84 (8) *Michigan Law Review* 1696, 1702

<sup>5</sup> K.G. Elzinga ‘The Goals of Antitrust: Other than Competition and Efficiency, what else counts?’ (1977) 125 (6) *University of Pennsylvania Law Review* 1191



defined the Warren Court period through to moves towards the exclusive ‘efficiency objective’<sup>6</sup> advocated by the Chicago School. The final part of the chapter will assess the development of ‘Post-Chicago’ economics and antitrust policy, and conclude with how US antitrust has defined its current policy objectives under that economic metric.

## 2.2. The Background to the Sherman Act

Thorelli considers the aftermath of the American Civil War created a set of economic conditions that led to demand for the Sherman Act.<sup>7</sup> The period saw significant industrial expansion and agricultural depression, the latter exacerbated by the corrupt and growing railroad industry. The rural population in the West were critical of the railroads and the Eastern capital and machinery suppliers,<sup>8</sup> and numerous rural and Western states passed laws to regulate railroad rates.<sup>9</sup> State law proved insufficient to regulate the railroads effectively, and so federal legislation became a necessity<sup>10</sup> after the *Wabash* case,<sup>11</sup> which limited the ability of individual states to regulate interstate commerce.

The Sherman Act is named for Republican Senator John Sherman of Ohio. In 1888, he developed a ‘sudden’ interest in antitrust, which William Kolasky attributes to both personal and partisan factors.<sup>12</sup> At the 1888 Republican National Convention, Sherman lost the Presidential nomination to Benjamin Harrison. In the same contest, he had accused another contender, the Governor of Michigan, Russell Alger, of buying votes. In 1889, Alger’s Diamond Match Company was penalised for monopolisation under

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<sup>6</sup> R.H. Bork *The Antitrust Paradox* (2<sup>nd</sup> ed. Free Press, New York, 1993) xi

<sup>7</sup> H.B. Thorelli *The Federal Antitrust Policy: Origination of an American Tradition* (1<sup>st</sup> ed. Allen and Unwin, London, 1954) 160; see generally 54 – 163

<sup>8</sup> *Ibid* 160 – 161

<sup>9</sup> G.J. Stigler ‘The Origin of the Sherman Act’ (1985) 14 (1) *Journal of Legal Studies* 1

<sup>10</sup> Thorelli *American Tradition* 160 – 161

<sup>11</sup> *Wabash, St Louis & Pacific Railway Co v Illinois* 118 US 557 (1886)

<sup>12</sup> W<sup>m</sup>. Kolasky ‘Senator John Sherman and the Origin of Antitrust’ (2009) 24 (1) *Antitrust* 85, 86

Michigan state law in *Richardson v Buehl*,<sup>13</sup> a case Sherman enthusiastically cited while promoting his federal antitrust bill in the Senate. Sherman was also strongly in favour of protective tariffs, which incumbent Democrat President Grover Cleveland had linked to the spread of the anticompetitive ‘trusts’. Sherman’s antitrust bill focused purely on antitrust and made no reference to tariff reform, and was likely an attempt to split the two issues ahead of the 1888 election.

After a false start in the previous session, the Senate debated Sherman’s bill from 25<sup>th</sup> to 27<sup>th</sup> March 1890. Sherman’s response was described as ‘impatient and confused’,<sup>14</sup> and he lost control of the debate to Senator George Hoar of Massachusetts.<sup>15</sup> Against Sherman’s wishes, the bill was sent to the Senate Judiciary Committee, who altered the key provisions entirely. The bill then passed both houses of Congress with near unanimous support (including the reluctant endorsement of Senator Sherman).<sup>16</sup> §§ 1 and 2 of the Sherman Antitrust Act of 1890 have remained in force since. Senator Hoar observed acerbically in his memoirs that

‘In 1890 a bill was passed which was called the Sherman Act, for no other reason that I can think of except that Mr Sherman had nothing to do with framing it whatever.’<sup>17</sup>

### **2.3. Interpretations of the legislative intent of the Sherman Act**

The Congressional intent of the Sherman Act has been a matter of persistent academic debate.<sup>18</sup> Hovenkamp lists a number of the prominent views:<sup>19</sup> that Congress intended

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<sup>13</sup> *Richardson v Buehl* 77 Mich. 632 (1889)

<sup>14</sup> W<sup>m</sup>. Letwin *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1<sup>st</sup> ed. Edinburgh University Press, Edinburgh, 1967) 87

<sup>15</sup> 21 Congressional Record 2455 (1890)

<sup>16</sup> Kolasky ‘Senator John Sherman’ 88

<sup>17</sup> G.F. Hoar *Autobiography of Seventy Years* (1<sup>st</sup> ed. Scribner, New York, 1903) 363

<sup>18</sup> Buttgieg *Consumer Interest* 17; Hovenkamp *Federal Antitrust Policy* 49

<sup>19</sup> Hovenkamp *Federal Antitrust Policy* 49

the Sherman Act to be concerned (1) ‘almost exclusively with allocative efficiency’,<sup>20</sup> the view advocated by the Chicago School;<sup>21</sup> (2) with ensuring justice or fairness;<sup>22</sup> (3) with preventing ‘wealth transfers away from consumers and towards price fixers or monopolists’,<sup>23</sup> and (4) with support for non-consumer small business interest groups.<sup>24</sup>

Additionally, there is the view that Congress intended the Sherman Act to be concerned with preserving the process of competition, the view advocated by Eleanor Fox.<sup>25</sup> Fox defines this concept as a form of efficiency-oriented antitrust thought, though in a manner entirely distinct to that of the Chicago School. Finally, there is Frank Easterbrook’s ‘blank check’ view.<sup>26</sup> He suggests that Congress had no principled intention but instead identified the offending industries and ‘told the judiciary to do something about it. They weren’t sure just what’.<sup>27</sup>

Easterbrook also states, however, that ‘however you slice the legislative history, the dominant theme is the protection of consumers from overchargers’.<sup>28</sup> He attempts to reconcile the ‘blank check’ position and his Chicagoan philosophy with a rationality argument. He states uncontroversially that courts ‘should do their best to have a sensible, consistent program’,<sup>29</sup> but asserts that a ‘common law power’ is only rational when

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<sup>20</sup> Ibid

<sup>21</sup> Bork ‘Legislative Intent’ 8

<sup>22</sup> L. Schwartz ‘“Justice” and other Non-Economic Goals of Antitrust’ (1979) 127 (4) University of Pennsylvania Law Review 1076

<sup>23</sup> Hovenkamp *Federal Antitrust Policy* 49; see R.H. Lande ‘Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged’ (1982) 34 (1) Hastings Law Journal 65

<sup>24</sup> Stigler ‘Origin’ 3

<sup>25</sup> E.M. Fox ‘The Modernization of Antitrust: A New Equilibrium’ (1981) 66 (6) Cornell Law Review 1140, 1169

<sup>26</sup> Easterbrook ‘Workable Antitrust’ 1702

<sup>27</sup> Ibid

<sup>28</sup> Ibid 1703

<sup>29</sup> Ibid

antitrust has a single policy objective.<sup>30</sup> To Easterbrook, any antitrust policy with multiple objectives is an insensible and incoherent policy, an obfuscation which is an abuse of an open Congressional mandate to the federal courts.

Robert Bork differs with Easterbrook on the congressional intention of the Sherman Act, but ultimately reaches a similar view on present antitrust objectives. While Hovenkamp characterises the Chicago School as advocating that ‘Economic Efficiency...should be the exclusive goal of the antitrust laws’,<sup>31</sup> Bork describes it somewhat differently, stating that

‘My conclusion, drawn from the evidence in the Congressional Record, is that Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare... This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output.’<sup>32</sup>

Bork argues that Senator Sherman’s position in the Senate debate showed ‘exclusive concern for consumer welfare’,<sup>33</sup> citing sections of his remarks in the debates on his Bill which refer to injuries to and prices being raised for the consumer public.<sup>34</sup> He also suggests that Sherman identified the phrase ‘restraint of trade’<sup>35</sup> with the more modern concept of restriction of output,<sup>36</sup> which Bork considers a key part of the ‘consumer welfare’ goal.

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<sup>30</sup> Ibid

<sup>31</sup> Hovenkamp *Federal Antitrust Policy* 62

<sup>32</sup> Bork ‘Legislative Intent’ 7; see also Bork *Paradox* 57

<sup>33</sup> Bork *Paradox* 62

<sup>34</sup> Bork ‘Legislative Intent’ 16; 21 Congressional Record 2457 and 2569 (1890)

<sup>35</sup> §§ 1 and 2 Sherman Antitrust Act of 1890 15 U.S.C. §§ 1 – 7

<sup>36</sup> 21 Congressional Record 2462 (1890)

While the phrase ‘restraint of trade’ makes it into the Sherman Act, Bork is less than convincing that Sherman’s wish for a consumer-oriented (if not necessarily a consumer welfare) law made it into the final Act after he lost control of its passage to Senator Hoar and the Judiciary Committee.<sup>37</sup> Bork states

‘Sherman’s original bill, which was the one debated and which was clearly carried forward into the redraft that became law, declared illegal two classes of “arrangements, contracts, trusts, or combinations”: (1) those “made with a view, or which tend, to *prevent full and free competition*”; and (2) those “designed, or which tend, to *advance the cost to the consumer*” of articles of commerce (Emphasis added).’<sup>38</sup>

EU competition law practitioners would immediately recognise an archaic phrasing of ‘object or effect’, a key part of the construction of the EU equivalent of § 1 of the Sherman Act.<sup>39</sup> Bork’s assertion that the draft clauses in the Sherman’s bill were ‘clearly carried forward’ does not stand up to scrutiny – the language in § 1 of the Sherman Act, as enacted, is fundamentally different.

It is true that Senator Hoar maintained ‘that the principal objective of the new bill was the same as that which had prevailed ever since the introduction of the original Sherman bill.’<sup>40</sup> Ultimately, the complete substitution by the Judiciary Committee of Senator Sherman’s draft undermines the argument that it wholly retained his intention for the bill

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<sup>37</sup> 21 Congressional Record 2455 (1890)

<sup>38</sup> Bork *Paradox* 61 – 62

<sup>39</sup> Article 101 of the Treaty on the Functioning of the European Union

<sup>40</sup> Thorelli *American Tradition* 200

to have an exclusive objective of consumer welfare. The changes add credence to the view that Congress intended a more multivalued approach.<sup>41</sup>

Since Chicago's ascendancy under the Reagan Administration in the 1980s, its influence has been such that many of its most prominent academic critics have accepted its metrics of efficiency and consumer welfare, if not its conclusions. Eleanor Fox sought to reinterpret the concept of efficiency by, as she saw it, returning it to its part in the 'traditional notion of competition as process.'<sup>42</sup> Robert Lande's alternative was that Congress intended the Sherman Act to be interpreted along the lines of 'economic objectives, but primarily objectives of a distributive rather than of an efficiency nature.'<sup>43</sup>

Fox challenges the Chicago view that efficiency can be the sole goal of antitrust law, preferring a multivalued approach.<sup>44</sup> She refers in particular to Senator Sherman's warning about the effect in 'the popular mind' of 'the concentration of capital into vast combinations'.<sup>45</sup> Her definition of efficiency is a

'conception [that] does not presume to define desired, efficient outcomes. It does not focus on consumer surplus, marginal cost, or welfare loss. It centres, rather, on an environment that is conducive to vigorous rivalry and in turn (it is assumed), to efficiency and progressiveness.'<sup>46</sup>

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<sup>41</sup> Fox 'Equilibrium' 1142

<sup>42</sup> Ibid 1169

<sup>43</sup> Lande 'Wealth Transfers' 68

<sup>44</sup> Fox 'Equilibrium' 1146

<sup>45</sup> 21 Congressional Record 2460 (1890)

<sup>46</sup> Fox 'Equilibrium' 1169

Fox also places significant emphasis on ‘preserving lower barriers to entry’ to ensure unestablished competitors can enter and bring ‘a vital source of new spirit and new progressiveness’.<sup>47</sup> In these passages she shows a distinct interpretation of the legislative intent of the Sherman Act which is at odds with the Chicago School, who deny the existence of unintended barriers to entry,<sup>48</sup> i.e. those not directly attributable to predatory conduct or government intervention.

Lande’s position is that, while Congress was in favour of efficiency, its intentions for the enactment of the Sherman Act were more distributive in nature. He relies on a section of Senator Sherman’s remarks, on which he notes

‘As Senator Sherman pointed out in qualifications of his praise for efficiency, “It is sometimes said of these combinations that they reduce prices to the consumer by better methods of production, but all experience shows that *this saving of cost goes to the pockets of the producer.*”’<sup>49</sup>

On this basis, Lande advocates that the Sherman Act is intended to create a right to a ‘consumers’ surplus’, i.e. the right to purchase products or services at a competitive price rather than a monopolised price.<sup>50</sup> Like the Chicago School,<sup>51</sup> he is critical of the cornucopia of social values offered by non-economic goals of antitrust and notes the disputes between their advocates on how they should relate to economic goals of

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<sup>47</sup> Ibid

<sup>48</sup> Bork *Paradox* 310 – 311

<sup>49</sup> Lande ‘Wealth Transfers’ 91, quoting from 21 Congressional Record 2460 (1890)

<sup>50</sup> Lande ‘Wealth Transfers’ 70. Lande defines consumer surplus as ‘the difference between the maximum amount that a consumer would pay and the price that he or she actually pays’ – see more expansive definitions in E. Mansfield *Microeconomics: Theory and Applications* (4<sup>th</sup> ed. Norton, New York, 1982) 15 and G.J. Stigler *The Theory of Price* (3<sup>rd</sup> ed. Collier-Macmillan, New York, 1966) 78 – 81

<sup>51</sup> Easterbrook ‘Workable Antitrust’ 1700

antitrust.<sup>52</sup> But he reserves more criticism for the Chicago School, stating that Bork ‘incorrectly restricts the definition of [consumer welfare] to economic efficiency’.<sup>53</sup>

Lande’s proposition of distributive intent is challenged strongly by Easterbrook who makes the case that the Sherman Act was intended purely to protect consumers. Lande does not dispute this, but Easterbrook considers that an approach based solely on efficiency is the only ‘legal’ way to achieve this. Easterbrook states

‘Goals based on something other than efficiency...really call on judges to redistribute income. How much consumers should contribute to small grocers is a political choice. Judges have no metric, and we ought not attribute to Congress a decision to grant judges a political power that lacks any semblance of “legal” criteria.’<sup>54</sup>

In a jurisdiction which constitutionally guarantees separation of powers, the argument that there was no Congressional intent to mandate the judiciary with political power rather than legal power is a compelling one. Easterbrook makes an arguable case for efficiency alone as the most credible objective for a purely legal arbitration of antitrust disputes.<sup>55</sup> It has put the onus on Chicago’s detractors to show that they can successfully create a coherent and legal (rather than political) program for antitrust decision-making by the federal courts.

Some academics, however, have rejected the premise that political values should be excluded entirely from the antitrust laws. During Chicago’s ascendancy in the late 1970s, Robert Pitofsky stated that the ‘general American governmental preference for a

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<sup>52</sup> Lande ‘Wealth Transfers’ 69

<sup>53</sup> Ibid 87

<sup>54</sup> Easterbrook ‘Workable Antitrust’ 1703 – 1704

<sup>55</sup> Ibid 1703



system of checks and balances'<sup>56</sup> supported his view that resistance to concentrations of economic power is a legitimate (but political) use of the antitrust statutes. He cites 'a fear that excessive concentration of economic power will breed antidemocratic political pressures',<sup>57</sup> and 'economic conditions conducive to totalitarianism'.<sup>58</sup> Thus, he supports antitrust intervention as a less drastic check on the free market, on the basis that an unfettered free market would inevitably create overwhelming societal pressure for 'direct regulation or Marxist solutions'.<sup>59</sup> This is built on by Louis Schwartz who notes

'American imposition of antitrust measures upon conquered Germany and Japan after World War II...the dominant motivation was political: a desire to create alternative centres of power that could not readily be marshalled behind authoritarian regimes.'<sup>60</sup>

But while Pitofsky rejects the inclusion of small business welfare in antitrust enforcement,<sup>61</sup> Schwartz contends that a running theme of subsequent legislation (not all, it should be said, directly related to antitrust) cannot be ignored, stating

'A judge or administrator who wishes to be responsive to the will of Congress can hardly fail to catch the drift of these legislative enactments. Collectively, they portray a view of the public interest that must pervade the interpretation of the antitrust laws, whether or not one approves of all these "preferences" for small business.'<sup>62</sup>

However, significant weight cannot be given to Schwartz's position on subsequent legislation. Hovenkamp has cautioned against the view, considering that, while other

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<sup>56</sup> R. Pitofsky 'The Political Content of Antitrust' (1979) 127 (4) *University of Pennsylvania Law Review* 1051, 1054

<sup>57</sup> *Ibid* 1051

<sup>58</sup> *Ibid* 1052

<sup>59</sup> *Ibid* 1057; see also Thorelli *American Tradition* 180 and Senator Sherman at 21 *Congressional Record* 2460 (1890)

<sup>60</sup> Schwartz 'Non-Economic Goals' 1077 – 1078

<sup>61</sup> Pitofsky 'Political Content' 1058

<sup>62</sup> Schwartz 'Non-Economic Goals' 1077

Acts may be relevant, they are not directly applicable to antitrust cases considered solely under §§ 1 and 2 of the Sherman Act.<sup>63</sup>

#### **2.4. The early development of US antitrust case law**

Over time, Sherman Act case law has articulated a changing set of antitrust policy objectives. Much of the case law reflects the prevailing view of its time. This section will critique the early development from 1890 until the beginning of the Warren Court period, when the character of antitrust case law changed significantly.

Western United States railroad cases were, appropriately, among the early Sherman Act cases to reach the Supreme Court.<sup>64</sup> *United States v Trans-Missouri Freight Association*<sup>65</sup> came to the Supreme Court on appeal from the 8<sup>th</sup> Circuit.<sup>66</sup> The US Attorney General had ordered the dissolution of the defendant, an association of railroad companies created ‘for the purpose of maintaining reasonable rates to be received by each company executing the agreements’,<sup>67</sup> i.e. price fixing. The 8<sup>th</sup> Circuit had affirmed the trial court’s judgment in favour of the defendant, setting out a reasonableness test based on balancing ‘contracts made for a lawful purpose which were not unreasonably injurious to the public welfare’.<sup>68</sup>

The Supreme Court overturned the 8<sup>th</sup> Circuit’s decision by a narrow five to four majority. Justice Peckham gave the majority opinion and Justice White led the dissent.

Bork characterises the distinction between the two approaches, stating that ‘Peckham

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<sup>63</sup> Hovenkamp *Federal Antitrust Policy* 51

<sup>64</sup> See Thorelli *American Tradition* 160 – 161

<sup>65</sup> *United States v Trans-Missouri Freight Association* 166 US 290 (1897)

<sup>66</sup> *United States v Trans-Missouri Freight Association* 58 Fed. 58 (8<sup>th</sup> Circuit, 1893)

<sup>67</sup> *Trans-Missouri* 166 US at 310

<sup>68</sup> *Trans-Missouri* (8<sup>th</sup> Circuit) 73

proposed to judge the legality of the restraint by its character, White by its degree<sup>69</sup>.

Peckham's opinion rejects the reasonable rates argument, finding it contradictory and entirely counter to the aim of maintaining competition. He states

‘The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise... Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.’<sup>70</sup>

Peckham's opinion was the first Sherman Act decision to create a rule of *per se* illegality, for horizontal price fixing.<sup>71</sup> Bork, firmly in favour of *per se* illegality in this context, states ‘Justice Peckham led a narrow majority that chose consumer welfare as the law's guiding policy’.<sup>72</sup> His conclusion that *Trans-Missouri* displays a consumer welfare objective is contradicted by Fox, who states

‘In the early years, the Supreme Court applied the Sherman Act...in a manner that reflected the multivalued legislative history and the desire to protect competition for the benefit of all – consumers, entrepreneurs, and “the public good.”’<sup>73</sup>

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<sup>69</sup> Bork *Paradox* 22

<sup>70</sup> *Trans-Missouri* 166 US at 339

<sup>71</sup> Bork *Paradox* 23

<sup>72</sup> *Ibid* 22

<sup>73</sup> Fox ‘Equilibrium’

One passage of Justice Peckham's opinion is at odds with Bork's claim that he interpreted the Sherman Act as exclusively concerned with consumer welfare.<sup>74</sup> Justice Peckham states his concern that

‘In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class, and the absorption of control over one commodity by an all-powerful combination of capital.’<sup>75</sup>

Bork dismisses it as ‘a slip rather than a deliberate policy statement’,<sup>76</sup> but that is somewhat undermined by the fact that Peckham is careful to draw a distinction between damage to ‘small dealers and worthy men’ done by technological progress – ‘these are misfortunes which seem to be the necessary accompaniment of all great industrial changes’<sup>77</sup> – and damage done by purposive anti-competitive conduct – ‘It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market’.<sup>78</sup> It lends credence to Fox's view that the Sherman Act intended to

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<sup>74</sup> Bork *Paradox* 24 – 25

<sup>75</sup> *Trans-Missouri* 166 US at 323

<sup>76</sup> Bork *Paradox* 25

<sup>77</sup> *Trans-Missouri* 166 US at 323

<sup>78</sup> *Ibid*

protect businesses as well as consumers,<sup>79</sup> although Bork is largely correct that the policy objective of ‘small-business welfare’ was not given ‘operative weight’<sup>80</sup> until the *Chicago Board of Trade* case.<sup>81</sup>

The following year saw two further significant Sherman Act decisions, which deal with the crucial subject of which contracts can be declared legal even if they restrain trade to some extent. The facts of *United States v Joint Traffic Association*<sup>82</sup> were analogous to *Trans-Missouri*. The principal decision merely follows *Trans-Missouri* without much further analysis, with the Court splitting 5 to 4 on the same lines.<sup>83</sup> However, it provides one significant point of clarity in Justice Peckham’s response to an extensive submission by counsel for the defendant. Counsel had submitted ‘a formidable list’ of common business contracts that would allegedly be declared illegal by the statutory construction *Trans-Missouri* placed on the Sherman Act.<sup>84</sup>

The list included pay bargaining agreements, incorporation, partnerships, wholesalers purchasing from several producers, distribution agreements, non-compete agreements, mergers and acquisitions, and restrictions attached to the sale of heritable property.<sup>85</sup> Peckham rejects the defendant’s submission thus

‘To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain

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<sup>79</sup> Fox ‘Equilibrium’

<sup>80</sup> Bork *Paradox* 17

<sup>81</sup> *Board of Trade of City of Chicago v United States* 246 US 231 (1918)

<sup>82</sup> *United States v Joint Traffic Association* 171 US 505 (1898)

<sup>83</sup> *Ibid* 577

<sup>84</sup> *Ibid* 567

<sup>85</sup> *Ibid*

trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court.’<sup>86</sup>

Bork claims that Justice Peckham’s *Joint Traffic* opinion ‘made [his] pro-consumer orientation clearer’<sup>87</sup> than it had been in *Trans-Missouri* as

‘each example involves both the agreed elimination of actual or potential rivalry and the integration of the parties’ productive economic activities or facilities. The rate agreements declared illegal per se in *Trans-Missouri* and *Joint Traffic* involved only the first of these elements. Thus, Peckham seemed to be saving from the per se rule any agreement with the capacity for creating efficiency.’<sup>88</sup>

This passage is evidence that Justice Peckham considered consumer welfare to be an objective of antitrust policy. However, it should not be considered as supporting Bork’s contention that consumer welfare is the intended exclusive goal of US antitrust policy.<sup>89</sup> *Joint Traffic* does not contradict *Trans-Missouri*, it affirms it in full.<sup>90</sup> Insofar as *Trans-Missouri* stands for the protection of ‘small dealers and worthy men’,<sup>91</sup> so too does *Joint Traffic*.

The second decision is the 6<sup>th</sup> Circuit decision in *United States v Addyston Pipe & Steel Co*,<sup>92</sup> described by Bork as ‘one of the greatest, if not the greatest, antitrust opinions in

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<sup>86</sup> Ibid 568

<sup>87</sup> Bork *Paradox* 23

<sup>88</sup> Ibid

<sup>89</sup> Ibid xi

<sup>90</sup> *Joint Traffic* 171 US at 559 – 560

<sup>91</sup> *Trans-Missouri* 166 US at 323

<sup>92</sup> *United States v Addyston Pipe & Steel Co* 85 Fed. 271 (6<sup>th</sup> Circuit, 1898)

the history of the law'.<sup>93</sup> It is certainly the most significant Sherman Act decision from the lower courts. The judgment does not just dutifully follow *Trans-Missouri*, as one might expect of a subordinate court, but contributed an articulate and highly significant opinion on the interpretation of the Sherman Act. That is down to the character of the 6<sup>th</sup> Circuit judge, William Howard Taft, who wrote the opinion.

Taft is largely remembered as an inept one-term President of the United States who struggled in the shadow of his charismatic predecessor Theodore Roosevelt. However, he does remain the only man to have served as both President and Chief Justice of the United States. His judicial accomplishments significantly eclipsed his political ones, with Justice Frankfurter observing it was 'difficult for me to understand why a man who is so good a Chief Justice...could have been so bad as President'.<sup>94</sup>

Taft, therefore, holds the dubious distinction of being far more revered by antitrust lawyers than by the general public, but that should not detract from the deeply principled and detailed opinion in *Addyston Pipe*. It is far clearer than *Joint Traffic* in articulating a 'workable formula for judging restraints'.<sup>95</sup> Taft uses the example of a business partnership to develop his 'ancillary restraint' concept, stating

'When two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the

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<sup>93</sup> Bork *Paradox* 26

<sup>94</sup> B. Schwartz *A History of the Supreme Court* (1<sup>st</sup> ed. Oxford University Press, Oxford, 1993) 213

<sup>95</sup> Bork *Paradox* 26

members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged.’<sup>96</sup>

Taft goes further and provided one of the earliest significant treatments of vertical restraints. He cited *Chicago, St Louis & New Orleans Railroad Co v Pullman Southern Car Co*,<sup>97</sup> which concerned an agreement under which the railroad company granted a sleeping-car company the exclusive right to provide sleeper services on the railroad. Taft considered that the restraint on competition was ancillary to the purpose of providing a financially viable sleeping car service on the railroad,<sup>98</sup> and would therefore be legal under his ancillary restraint test.

Taft is vociferous in his support of Justice Peckham’s majority opinions in *Trans-Missouri* and *Joint Traffic*. He describes operating Justice White’s proposed process of determining whether a restraint of trade is reasonable as to ‘set sail on a sea of doubt’.<sup>99</sup>

Bork concludes that

‘Taft’s argument would validate all vertical arrangements. In a vertical case there is always economic integration between the parties...so the main condition of the ancillarity test is satisfied’.<sup>100</sup>

However, to a certain extent, this is an assertion. Bork does not properly deal with the question of whether vertical economic integration can ever cause a primary rather than an ancillary restraint on trade.

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<sup>96</sup> *Addyston Pipe* (6<sup>th</sup> Circuit) 280

<sup>97</sup> *Chicago, St Louis & New Orleans Railroad Co v Pullman Southern Car Co* 139 US 79 (1891)

<sup>98</sup> *Addyston Pipe* (6<sup>th</sup> Circuit) 287

<sup>99</sup> *Ibid* 284

<sup>100</sup> *Bork Paradox* 29



The Chicago School's contented interpretation of the early Sherman Act case law ends abruptly with the *Dr Miles* case in 1911.<sup>101</sup> The case concerned a medicine manufacturer who placed minimum resale price maintenance (RPM) obligations on its distributors. Justice Hughes equated the agreement imposed by the upstream manufacturer to a horizontal cartel agreed between the downstream distributors, and declared minimum RPM to be *per se* illegal.<sup>102</sup> It would be nearly a century before that *per se* illegality was reversed.<sup>103</sup>

The other major cases of 1911 were *Standard Oil*<sup>104</sup> and *American Tobacco*,<sup>105</sup> monopolisation cases on broadly similar points. Justice White's majority opinions in both demonstrated a conversion from his position in *Trans-Missouri* and *Joint Traffic*. He adopted a three-part rule of reason which included scope for *per se* illegality rules,<sup>106</sup> which Bork summarises thus

'White's rule of reason, then, may be phrased as a three-part test: (1) "inherent nature" or the *per se* concept; (2) "inherent effect" or market power; and (3) "evident purpose" or specific intent. The rule of reason was thus not composed of any particular substantive rules but was entirely a mode of analysis, a system for directing investigation and decision.'<sup>107</sup>

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<sup>101</sup> *Dr Miles Medical Co v John D Park & Sons Co* 220 US 373 (1911)

<sup>102</sup> *Ibid* 407 – 408

<sup>103</sup> *Leegin Creative Leather Products v PSKS* 551 US 877 (2007)

<sup>104</sup> *Standard Oil Company of New Jersey v United States* 221 US 1 (1911)

<sup>105</sup> *United States v American Tobacco Co* 221 US 106 (1911)

<sup>106</sup> *Bork Paradox* 34

<sup>107</sup> *Ibid* 37

However, Bork criticises Justice White's failure to distinguish the 'rule of reason' he stated in *Standard Oil* from the different concept he applied the same term of art to in *Trans-Missouri*.<sup>108</sup> The confusion this caused led to Congress passing further antitrust legislation in 1914.<sup>109</sup> Despite this, Bork does claim that Justice White intended in *Standard Oil* to articulate consumer welfare as the sole objective of antitrust policy.<sup>110</sup> He claims that the points White makes against monopolies can be understood as facets of restriction of output,<sup>111</sup> deconstructing the passage of *Standard Oil* where White states 'The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) The power which it engendered of enabling a limitation on production; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale.'<sup>112</sup>

Lande challenges this view, emphasising that *Standard Oil* was one of several cases that recognised 'the legislators feared not only the economic consequences of monopoly power, but potential social disruptions as well'.<sup>113</sup> This is confirmed by Justice White's analysis of the Sherman Act debates, where he concluded the main concern was 'the vast accumulation of wealth in the hands of corporations and individuals'.<sup>114</sup>

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<sup>108</sup> Ibid 34

<sup>109</sup> Clayton Antitrust Act of 1914 15 U.S.C. §§ 12 – 27 and Federal Trade Commission Act of 1914 15 U.S.C. §§ 41 – 58

<sup>110</sup> Bork *Paradox* 35 – 36

<sup>111</sup> Ibid 35

<sup>112</sup> *Standard Oil* 221 US at 52

<sup>113</sup> Lande 'Wealth Transfers' 99

<sup>114</sup> *Standard Oil* 221 US at 51

In 1913, President Taft lost re-election to Woodrow Wilson, who moved immediately to reform antitrust law by passing the Clayton Act and the Federal Trade Commission Act. In 1918, Justice Louis Brandeis, a Wilson nominee to the Supreme Court, delivered an opinion that showed a clear shift in the prevailing objectives of antitrust law away from the pro-consumer, efficiency objectives espoused in *Trans-Missouri*, *Addyston* and *Standard Oil*.

*Chicago Board of Trade v United States* concerned the internal regulations of the Chicago grain market, the largest in the world at the time.<sup>115</sup> The Board had limited its members' trading time to only part of each day. The District Court had held the trade restriction to be illegal *per se*.<sup>116</sup>

Reversing the decision of the District Court, Brandeis adopted a rule of reason that bears no relation to the one in *Standard Oil*. Indeed, his judgment is short and makes no reference to precedent at all. Bork describes the ruling as 'more like White's 1897 *Trans-Missouri* dissent than any other prior case'.<sup>117</sup> It advocates a subjective approach, stating 'the court must ordinarily consider the facts peculiar to the business to which the restraint is applied'<sup>118</sup> and several other factors. Brandeis concludes that the 'evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law'<sup>119</sup> – an implicit failure to follow the majority opinion in *Trans-Missouri* without explanation.

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<sup>115</sup> *Chicago Board of Trade* 246 US at 235

<sup>116</sup> *Ibid* 238

<sup>117</sup> Bork *Paradox* 41

<sup>118</sup> *Chicago Board of Trade* 246 US at 238

<sup>119</sup> *Ibid* 239

Bork describes Brandeis' opinion as the first to give 'operative weight' to 'small business welfare'.<sup>120</sup> This is evident from several of Brandeis' points on the Chicago grain market, stating it 'was disadvantageous to all concerned, but particularly so to country dealers and farmers',<sup>121</sup> and that it 'enabled country dealers to do business on a smaller margin'.<sup>122</sup>

The looming twin spectres of the Great Depression and the Second World War that soon followed left a lasting economic legacy. The former led to a significant rise in government economic intervention to maintain wages and prices.<sup>123</sup> The Supreme Court had a mixed approach to New Deal interventionism, ruling the National Industrial Recovery Act of 1933 was unconstitutional in *Schechter Poultry v United States*,<sup>124</sup> but allowing significant scope for price controls and other significant economic regulation in *Nebbia v New York*.<sup>125</sup> The latter led to fear that excessive concentrations of economic power caused significant vulnerability to the rise of totalitarianism.<sup>126</sup> It was a key factor in the genesis of European competition law,<sup>127</sup> and its legacy produced a radical change in antitrust case law in the postwar period.

## 2.5. The Postwar and Warren Court Period

The conclusion of World War II left the United States in an exceedingly strong global position. American infrastructure and heavy industry had survived largely unscathed while the European powers' industrial areas were in ruins. Exports, production, and

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<sup>120</sup> Bork *Paradox* 17

<sup>121</sup> *Chicago Board of Trade* 246 US at 240

<sup>122</sup> *Ibid*

<sup>123</sup> A.J. Meese 'Competition Policy and the Great Depression: Lessons Learned and a New Way Forward' (2013) 23 (2) *Cornell Journal of Law and Public Policy* 255, 260

<sup>124</sup> *Schechter Poultry v United States* 295 US 495 (1935)

<sup>125</sup> *Nebbia v New York* 291 US 502 (1934)

<sup>126</sup> Pitofsky 'Political Content' 1051 – 1052

<sup>127</sup> Schwartz 'Non-Economic Goals' 1077 – 1078

employment all boomed.<sup>128</sup> Kauper states ‘It was easy to ignore concerns over efficiency and to adopt policies focused on protecting and rewarding small enterprises. This highly interventionist antitrust policy was a luxury we could afford.’<sup>129</sup>

Concern regarding industrial concentration and significant latitude for low-risk economic interventionism led to a period where the focus of antitrust moved away from cartels and onto monopolisation. The 2<sup>nd</sup> Circuit *Alcoa* ruling by Judge Learned Hand set the tone in 1945.<sup>130</sup> The United States government brought an action under both §§ 1 and 2 of the Sherman Act against two major aluminum producers. Learned Hand equates monopolies to horizontal price-fixing cartels, stating

‘It would be absurd to condemn such contracts [price-fixing agreements] unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies.’<sup>131</sup>

Bork rejects Hand’s contention on the basis that monopolies provide an efficiency defence that cannot be applied to a cartel.<sup>132</sup> Eleanor Fox confirms that the facts of *Alcoa* would not meet the test for an illegal monopoly based purely on restriction of output,<sup>133</sup> though she states that ‘output theory provides a basis for challenging monopoly of a sort that virtually never exists’.<sup>134</sup>

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<sup>128</sup> T.E. Kauper ‘Influence of Conservative Economic Analysis on the Development of the Law of Antitrust’ in R. Pitofsky (editor) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (1<sup>st</sup> ed. Oxford University Press, Oxford, 2009) 40, 43

<sup>129</sup> *Ibid*

<sup>130</sup> *United States v Aluminum Co of America* 148 F.2d 416 (2<sup>nd</sup> Circuit, 1945)

<sup>131</sup> *Ibid* 428

<sup>132</sup> Bork *Paradox* 166

<sup>133</sup> Fox ‘Equilibrium’ 1163

<sup>134</sup> *Ibid* 1165

Hand articulated the prevailing view of scepticism towards industrial concentrations, clearly allowing for non-economic considerations to be given operative weight in antitrust policy

‘We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are *inherently undesirable, regardless of their economic results*. In the debates in Congress Senator Sherman himself... showed that among the purposes of Congress in 1890 was a desire to *put an end to great aggregations of capital* because of the helplessness of the individual before them... Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, *for its own sake and in spite of possible cost*, an organization of industry in small units which can effectively compete with each other.’<sup>135</sup> [Emphasis added]

*Alcoa* led the way for the antitrust policy followed by the Supreme Court under Chief Justice Earl Warren from 1953 to 1969. Kauper states that

‘Today, antitrust doctrine formulated by the Supreme Court in those days seems a kind of historical curiosity, an anachronism. To those of us involved with antitrust forty years ago, however, those decisions were the reality of antitrust. We had to deal with them every day, often in giving advice to disbelieving clients.’<sup>136</sup>

Learned Hand’s opinion on the defendant’s submissions provide a stark indication of why the business community were sceptical of the Warren Court’s antitrust policy. He states their actions

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<sup>135</sup> *Alcoa* (2<sup>nd</sup> Circuit) 428 – 429

<sup>136</sup> Kauper ‘Conservative Economic Analysis’ in Pitofsky *Overshot the Mark* 40, 42 – 43

‘stimulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked...It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.’<sup>137</sup>

It is evident that any businessman who places value on innovation would find the above passage inexplicable. It would not only be Thomas Kauper’s clients, but businesses all over the United States, who would have reacted with disbelief to their lawyers’ explanations of Warren Court era antitrust policy.

The 1950 Celler-Kefauver amendments to the Clayton Act,<sup>138</sup> brought by Congressman Emanuel Celler because of the concern that industrial concentrations in Germany had led to the rise of Hitler,<sup>139</sup> strengthened the Clayton Act’s section on merger control. The Justice Department’s antitrust actions refocused away from monopolization and onto merger control as the principal means of challenging industrial concentration. The peaks of the Warren Court’s merger interventionism were *Brown Shoe*<sup>140</sup> in 1961 and *Von’s Grocery* in 1966.<sup>141</sup> Admittedly both concerned mergers of large companies, but hardly leading to a concentration which would come to dominate the market. The combined market share of the concentration declared illegal in *Von’s Grocery* was under ten

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<sup>137</sup> *Alcoa* (2<sup>nd</sup> Circuit) 430 – 431

<sup>138</sup> Celler-Kefauver Antimerger Act of 1950 15 U.S.C. §§ 18, 21

<sup>139</sup> 95 Congressional Record 11486 (1949), see also Fox ‘Equilibrium’ 1151

<sup>140</sup> *United States v Brown Shoe Co* 370 US 294 (1961)

<sup>141</sup> *United States v Von’s Grocery Co* 384 US 270 (1966)

percent.<sup>142</sup> The Court's antitrust policy prioritised protecting the process of competition over consumer welfare. Chief Justice Warren stated in *Brown Shoe* that

'some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favour of decentralization.'<sup>143</sup>

Criticism of *Brown Shoe* from the Chicago School was fierce. Bork accuses Chief Justice Warren of ignoring the criteria of § 7 of the Clayton Act (as amended) and using *Brown Shoe* 'to convert the statute to a virulently anticompetitive regulation'.<sup>144</sup> He states that 'rational law...must draw the line between mergers that create wealth and those that decrease it'.<sup>145</sup> Bork implies that the Supreme Court's antitrust policy gave an unacceptable level of discretion to an activist Justice Department.<sup>146</sup> This is indicated by his reference to Justice Potter Stewart's dissent in *Von's Grocery*, who stated 'The sole consistency that I can find is that in litigation under § 7, the Government always wins'.<sup>147</sup>

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<sup>142</sup> Kauper 'Conservative Economic Analysis' in Pitofsky *Overshot the Mark* 40, 43

<sup>143</sup> *Brown Shoe* 370 US at 344

<sup>144</sup> *Bork Paradox* 198

<sup>145</sup> *Ibid* 200

<sup>146</sup> *Ibid*

<sup>147</sup> *Von's Grocery* 384 US at 299



Justice Stewart had previously found himself in the minority with Justice John Harlan in the 1963 *Philadelphia National Bank* case.<sup>148</sup> Harlan and Stewart objected to the increasingly stretched scope of § 7 of the Clayton Act.<sup>149</sup> However, it is also a case of note because it provides an excellent example of the Warren Court's rejection of economic evidence, in the context of its problematic approach to definition of the relevant market.

The proposed merger was between the second and third largest banks in the city of Philadelphia.<sup>150</sup> The US Treasury had cleared the proposed merger despite reports that it would have anticompetitive effects in the Philadelphia area. Their reasoning was that 'there will remain an adequate number of alternative sources of banking service in Philadelphia, and in view of the beneficial effects of this consolidation upon international and national competition it was concluded that the over-all effect upon competition would not be unfavourable.'<sup>151</sup>

The defendants' argument was that the purpose of the concentration was not to attempt to monopolize the Philadelphia market, but to achieve sufficient size to compete with the far larger national banks in New York.<sup>152</sup> This would not only increase competition in the market for national loans, but boost economic development in Philadelphia. Pitofsky considered the defendants' position to be of significant weight, and certainly not a unique situation. He notes

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<sup>148</sup> *United States v Philadelphia National Bank* 374 US 321 (1963) 373

<sup>149</sup> *Ibid* 378. Harlan and Stewart's dissenting view was that § 7 of the Clayton Act had been rendered inapplicable to bank mergers by the enactment of the Bank Merger Act of 1960.

<sup>150</sup> *Ibid* 330

<sup>151</sup> *Ibid* 332 – 333

<sup>152</sup> *Ibid* 334

‘The argument in defense of the merger certainly does not appear frivolous...there are bound to be many cases in which a lessening of competition in some narrow market is counterbalanced by increases in competition in a different larger market.’<sup>153</sup>

The Supreme Court dismissed this view, concluding that anticompetitive effects in the relevant market could not be justified by procompetitive effects in another market. The majority saw that argument simply as a potential loophole in § 7.<sup>154</sup> The minority contended the enactment was not applicable,<sup>155</sup> and criticised the majority for undermining the rule of reason, and preventing firms from developing to meet modern economic demands.<sup>156</sup> By the end of the Warren Court period, antitrust policy was perceived to be holding the business community back.

Almost all the Warren Court period antitrust decisions are no longer good law.<sup>157</sup> An antitrust policy which prioritised the protection of small businesses over the costs to the consumer undoubtedly was swept away by the societal changes of the 1970s.<sup>158</sup> As other industrial nations restored their industrial bases, the US lost its postwar dominance in global markets. There was significant public concern about US economic downturn, and a general sense of pessimism from the Carter administration.<sup>159</sup> Kauper concludes that ‘An antitrust policy based on efficiency concerns fit these concerns almost perfectly’.<sup>160</sup>

The time of the Chicago School had come.

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<sup>153</sup> Pitofsky ‘Political Content’ 1072

<sup>154</sup> *Philadelphia National Bank* 370

<sup>155</sup> *Ibid* 378

<sup>156</sup> R.A. Hammond ‘The *Philadelphia National Bank* Doctrine – A Verification’ (1967) 36 *Antitrust Law Journal* 13, 13

<sup>157</sup> Kauper ‘Conservative Economic Analysis’ in Pitofsky *Overshot the Mark* 40, 44

<sup>158</sup> Fox ‘Equilibrium’ 1142 – 1143

<sup>159</sup> Kauper ‘Conservative Economic Analysis’ in Pitofsky *Overshot the Mark* 40, 44

<sup>160</sup> *Ibid*

## 2.6. The Chicago School Revolution

Peter Gerhart cites the six Supreme Court cases from 1975 to 1980 which form the apex of Chicagoan influence, and a seventh where the Supreme Court departs from that consistency in 1982.<sup>161</sup> *Goldfarb v Virginia State Bar* affirmed that horizontal price fixing by professionals setting minimum fee schedules was *per se* illegal.<sup>162</sup> *National Society of Professional Engineers v United States* extended the same to bid rigging.<sup>163</sup> *Catalano v Target Sales* held an agreement between competitors to restrict credit constituted *per se* illegal horizontal price fixing.<sup>164</sup> *Reiter v Sonotone Corporation* redefined the interpretation of § 4 of the Clayton Act,<sup>165</sup> so that antitrust violation damages were quantified in line with consumer welfare principles.<sup>166</sup>

But it was the radical reform of the law relating to vertical restraints where Chicagoan thought has had the greatest significance. *Broadcast Music v Columbia Broadcasting System*<sup>167</sup> has had significant influence on antitrust law relating to intellectual property law, ruling that blanket licensing for music distribution provided efficiency gains that precluded a finding of *per se* illegality. Undoubtedly, however, the most significant of the six cases is *Continental TV v GTE Sylvania*.<sup>168</sup>

*Sylvania* arose from a multi-faceted dispute between a television manufacturer and its San Francisco retail franchisor.<sup>169</sup> It came before the Supreme Court on the question of

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<sup>161</sup> P.M. Gerhart 'The Supreme Court and Antitrust Analysis' (1982) *Supreme Court Review* 319, 319

<sup>162</sup> *Goldfarb v Virginia State Bar* 421 US 773 (1975)

<sup>163</sup> *National Society of Professional Engineers v United States* 435 US 679 (1978)

<sup>164</sup> *Catalano v Target Sales* 446 US 643 (1980)

<sup>165</sup> Clayton Antitrust Act of 1914 15 U.S.C. §§ 12 – 27

<sup>166</sup> *Reiter v Sonotone Corporation* 442 US 330 (1979)

<sup>167</sup> *Broadcast Music v Columbia Broadcasting System* 441 US 1 (1979)

<sup>168</sup> *Continental TV v GTE Sylvania* 433 US 36 (1977)

<sup>169</sup> *Ibid* 38 – 39

whether ‘Sylvania had violated s 1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations’.<sup>170</sup> The Supreme Court noted that the 1963 case of *Arnold Schwinn*,<sup>171</sup> which had ruled that vertical market division was illegal *per se*, had been subject to significant academic criticism,<sup>172</sup> citing in particular prominent Chicagoans Donald Baker and Richard Posner.<sup>173</sup>

The Supreme Court overruled *Schwinn* and replaced *per se* illegality with a rule of reason for vertical territorial restraints.<sup>174</sup> They considered that *Schwinn* had departed from the correct approach for determining the appropriateness of *per se* illegality, the *Northern Pacific* test.<sup>175</sup> The Supreme Court went further and articulated the potential benefits of such restraints, stating

‘Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These “redeeming virtues” are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers.’<sup>176</sup>

Bork described the decision as ‘adopting a mode of reasoning that will prove enormously beneficial if employed throughout antitrust’.<sup>177</sup> He notes correctly that

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<sup>170</sup> Ibid 40

<sup>171</sup> *United States v Arnold, Schwinn and Co* 388 US 365 (1967)

<sup>172</sup> *Sylvania* 433 US at 48 – 49

<sup>173</sup> D.I. Baker ‘Vertical Restraints in Times of Change: From *White* to *Schwinn* to Where?’ (1975) 44 (3) *Antitrust Law Journal* 537; R.A. Posner ‘Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions’ (1975) 75 (2) *Columbia Law Review* 282

<sup>174</sup> *Sylvania* 433 US at 57 – 58

<sup>175</sup> *Northern Pacific Railroad Co v United States* 356 US 1 (1958) 5

<sup>176</sup> *Sylvania* 433 US at 54 – 55

<sup>177</sup> Bork *Paradox* 286

‘Justice Powell for the majority and Justice White in concurrence gave weight to business efficiency in framing their respective rules’.<sup>178</sup>

Since *Sylvania*, the Supreme Court has not handed down a decision which so comprehensively accepts Chicago School doctrine, but the direction of travel it created on the *per se* illegality of vertical restraints has been permanent. The route from *Sylvania* to *Leegin*, which lifted the *per se* illegality of minimum RPM three decades later,<sup>179</sup> is clear and supported by a significant body of academic work.<sup>180</sup>

The Supreme Court departed from Chicagoan analysis in *Arizona v Maricopa County Medical Society*.<sup>181</sup> Gerhart criticised the majority opinion as ‘retrogressive: it champions a wooden, mechanical view of the *per se* rules and fails to recognize the full range of circumstances in which trade restraints may promote competition.’<sup>182</sup> *Maricopa County* suffers from the absence of two Supreme Court justices; Justice Stevens gives a 4-3 majority opinion. The dissenting opinion was given by Justice Powell,<sup>183</sup> who gave the majority opinion in *Sylvania*.<sup>184</sup>

The State of Arizona acted against the defendants for price-fixing – the Society was created to establish a maximum fee schedule to allow for a streamlined relationship between local doctors and the insurance industry.<sup>185</sup> Justice Stevens dismisses without much analysis the Society’s argument that ‘the doctors’ agreement not to charge certain

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<sup>178</sup> Ibid 287

<sup>179</sup> *Leegin* 551 US at 877

<sup>180</sup> S. Marco-Colino *Vertical Agreements and competition law: a comparative study of the EU and US regimes* (1<sup>st</sup> ed. Hart, Oxford, 2010) 83

<sup>181</sup> *Arizona v Maricopa County Medical Society* 457 US 332 (1981)

<sup>182</sup> Gerhart ‘Antitrust Analysis’ 344

<sup>183</sup> *Maricopa County* 457 US at 357

<sup>184</sup> *Sylvania* 433 US at 37

<sup>185</sup> Ibid 339 – 340

insureds more than a fixed price facilitates the successful marketing of an attractive insurance plan'.<sup>186</sup>

Justice Stevens' majority opinion relied on distinguishing *Maricopa County* from *Broadcast Music*.<sup>187</sup> He concludes that 'This case is fundamentally different... Their combination in the form of the foundation does not permit them to sell any different product.'<sup>188</sup> Powell's dissent is critical of Stevens' interpretation of *Broadcast Music*. Powell argues that *Maricopa County* should have followed *Broadcast Music* on the grounds of efficiency, stating

'the two agreements are similar in important respects. Each involved competitors and resulted in cooperative pricing. Each arrangement also was prompted by the need for better service to the consumers. And each arrangement apparently makes possible a new product by reaping otherwise unattainable efficiencies. The Court's effort to distinguish *Broadcast Music* thus is unconvincing.'<sup>189</sup>

The majority acknowledged the defendant's argument that maximum fee schedules promoted efficiency; allowing more accurate risk calculations, reducing costs and thus saving both the industry and consumer significant sums.<sup>190</sup> Justice Powell cites these as clear evidence of consumer benefit.<sup>191</sup> Some academic analysis of the effect of maximum fee schedules has supported Justice Powell's position in *Maricopa County*,<sup>192</sup>

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<sup>186</sup> Ibid 349

<sup>187</sup> *Broadcast Music* 441 US at 1

<sup>188</sup> *Maricopa County* 457 US at 356

<sup>189</sup> Ibid 364 – 365

<sup>190</sup> Ibid 342

<sup>191</sup> Ibid 361

<sup>192</sup> Gerhart 'Antitrust Analysis' 346; F. Easterbrook 'Maximum Price Fixing' (1981) 48 (4) *University of Chicago Law Review* 886, 896 – 898

though others have shown scepticism towards ‘provider-controlled’ fee schedules while supporting those drafted by insurers.<sup>193</sup>

In short, *Maricopa County* represented a deeply problematic and messy drift away from the dominance of the Chicago School. During the 1980s, Eleanor Fox was the Chicagoans’ most notable critic.<sup>194</sup> It would, however, be almost a decade after *Maricopa County* before her prediction that ‘the courts will slay the paper dragon from Chicago’<sup>195</sup> came about.

## 2.7. The Post-Chicago School

Critics of Chicagoan economics began calls for a ‘post-Chicago’ antitrust policy in the 1980s.<sup>196</sup> However, the criticism was not due to a lack of respect. Hovenkamp states that ‘The Chicago School of antitrust analysis is the most coherent and elegant ideology that antitrust has ever experienced. One must admire its simplicity, as well as its confidence in markets and its optimism. Nevertheless, those who found markets to be somewhat messier and Chicago economics less robust, began in the 1980s to call for a “post-Chicago” antitrust policy that would take the best that the Chicago School had to offer as a point of departure, and then develop an antitrust policy that was more sensitive to market imperfections.’<sup>197</sup>

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<sup>193</sup> D.W. Kallstrom ‘Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act’ (1978) 27 (2) Duke Law Journal 645, 678 – 684

<sup>194</sup> E.M. Fox ‘Consumer Beware Chicago’ (1986) 84 (8) Michigan Law Review 1714; E.M. Fox and L.A. Sullivan ‘Antitrust – Retrospective and Prospective: Where are we coming from? Where are we going?’ (1987) 62 (5) New York University Law Review 936

<sup>195</sup> Fox and Sullivan ‘Retrospective and Prospective’ 968

<sup>196</sup> H. Hovenkamp ‘Post-Chicago Economics: A Review and Critique’ (2001) 16 (2) Columbia Business Law Review 257, 258

<sup>197</sup> Ibid

The ‘breakthrough’<sup>198</sup> Supreme Court case for Post-Chicago economics was the controversial 1992 *Kodak* decision.<sup>199</sup> *Kodak* concerned market power in aftermarkets.<sup>200</sup> Kodak had placed serious restrictions on the ability of the respondent Independent Service Organisations (ISOs) to compete in the market for parts and servicing of Kodak equipment, against Kodak itself.<sup>201</sup>

Justice Blackmun’s 6-3 majority opinion relied on *Jefferson Parish*<sup>202</sup> in finding the possibility of separate aftermarkets for parts and services.<sup>203</sup> While Blackmun considered that the existence of the high-technology service industry was evidence enough of it being a potential efficiency for consumers,<sup>204</sup> he considered that the links between the two aftermarkets created by Kodak constituted a tying arrangement. Kodak had refused to sell parts to consumers whose Kodak equipment was serviced by the ISOs.<sup>205</sup>

It was agreed that Kodak lacked market power in the primary photocopier market.

Justice Blackmun rejected their submissions that they did not exercise market power in the aftermarket<sup>206</sup> in consideration of the important post-Chicago concept of imperfect information,<sup>207</sup> stating that

‘Given the potentially high cost of information and the possibility that a seller may be able to price discriminate between knowledgeable and unsophisticated customers, it

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<sup>198</sup> M.S. Royall ‘Symposium: Post-Chicago Economics, Editor’s Note’ (1995) 63 (2) *Antitrust Law Journal* 445, 445

<sup>199</sup> *Eastman Kodak Co v Image Technical Services* 504 US 451 (1992)

<sup>200</sup> *Ibid* 455

<sup>201</sup> *Ibid*

<sup>202</sup> *Jefferson Parish Hospital District No 2 v Hyde* 466 US 2 (1984) 21 – 22

<sup>203</sup> *Kodak* 504 US at 462

<sup>204</sup> *Ibid*

<sup>205</sup> *Ibid* 463

<sup>206</sup> *Ibid* 465 – 466

<sup>207</sup> R.H. Lande ‘Chicago takes it on the chin: Imperfect Information could play a crucial role in the Post-*Kodak* world’ (1993) 62 (1) *Antitrust Law Journal* 193, 193



makes little sense to assume, in the absence of any evidentiary support, that equipment purchasing decisions are based on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the machine.’<sup>208</sup>

Justice Scalia’s dissent is based principally on Chicagoan criticism of the *per se* illegality of tying arrangements.<sup>209</sup> He is sceptical about applying the antitrust laws to aftermarkets, stating

‘The Court today finds in the typical manufacturer’s inherent power over its own brand of equipment – over the sale of distinctive repair parts for that equipment, for example – the sort of “monopoly power” sufficient to bring the sledgehammer of § 2 into play. And, not surprisingly in light of that insight, it readily labels single-brand power over aftermarket products “market power” sufficient to permit an antitrust plaintiff to invoke the *per se* rule against tying. In my opinion, this makes no economic sense.’<sup>210</sup>

Scalia dismisses Blackmun’s argument on ‘information costs’ as a truism.<sup>211</sup> He proposes a distinction between *circumstantial* and *market* power. Scalia concedes aftermarkets can give a manufacturer ‘leverage’, but states it is not ‘attributable to the dominant party’s *market* power in any relevant sense’.<sup>212</sup> While he is of the view that such leverage can cause consumer injury,<sup>213</sup> he cites with approval a dissenting opinion of Richard Posner that states such negative outcomes are ‘a brief perturbation in competitive conditions – not the sort of thing the antitrust laws do or should worry

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<sup>208</sup> *Kodak* 504 US at 475 – 476

<sup>209</sup> *Ibid* 487; see Bork *Paradox* 365 – 381

<sup>210</sup> *Kodak* 504 US at 489

<sup>211</sup> *Ibid* 496 – 497

<sup>212</sup> *Ibid* 498

<sup>213</sup> *Ibid*

about'.<sup>214</sup> In something of a last stand for the Chicago School, Scalia makes a plea to limit antitrust interventions

‘In my view, if the interbrand market is vibrant, it is simply not necessary to enlist § 2’s machinery to police a seller’s intrabrand restraints. In such circumstances, the interbrand market functions as an infinitely more efficient and more precise corrective to such behaviour, rewarding the seller whose intrabrand restraints enhance consumer welfare while punishing the seller whose control of the aftermarkets is viewed unfavourably by interbrand consumers.’<sup>215</sup>

The *Kodak* decision was not followed by a unified school of post-Chicagoan thought. Hovenkamp considers that ‘under post-Chicago antitrust analysis, the market has become a far messier place’.<sup>216</sup> Sullivan notes that post-Chicagoans do not always agree on outcomes.<sup>217</sup> The range in Post-Chicagoan opinion was indicated by the breadth of views in the 1995 Antitrust Law Journal Symposium on Post-Chicago Economics. Borenstein *et al.* are more supportive of antitrust intervention,<sup>218</sup> while Carl Shapiro is more sceptical.<sup>219</sup> Sullivan describes the latter as ‘perhaps a bit nostalgic for Chicago legal certainties’.<sup>220</sup>

Borenstein *et al.* justify their preference for intervention by reference to the imperfect information considerations from *Kodak*. They state that ‘information imperfections tend

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<sup>214</sup> *Parts and Electric Motors v Sterling Electric* 866 F.2d 228 (7<sup>th</sup> Circuit, 1988) 236

<sup>215</sup> *Kodak* 504 US at 503

<sup>216</sup> Hovenkamp ‘Post-Chicago’ 270

<sup>217</sup> L.A. Sullivan ‘Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a less determinate theoretical world’ (1995) 63 (2) Antitrust Law Journal 669, 671

<sup>218</sup> S. Borenstein, J.K. MacKie-Mason and J.S. Netz ‘Antitrust Policy in Aftermarkets’ (1995) 63 (2) Antitrust Law Journal 455

<sup>219</sup> C. Shapiro ‘Aftermarkets and Consumer Welfare: Making Sense of *Kodak*’ (1995) 63 (2) Antitrust Law Journal 483

<sup>220</sup> Sullivan ‘Post-Chicago Economics’ 673

to make perfect, complete contracting infeasible and thus make contract law less useful in aftermarket cases.<sup>221</sup> Carl Shapiro, by contrast, is far more sceptical of the *Kodak* ruling, stating it ‘holds considerable dangers of restraining the behaviour of firms that possess no genuine monopoly power’.<sup>222</sup> A decade after *Kodak*, Hovenkamp expressed concern for the direction post-Chicago antitrust had taken, stating

‘post-Chicago antitrust economics has had only limited success. Perhaps its biggest failure has been the Supreme Court’s *Kodak* decision and its aftermath. When that decision was first handed down it threatened to turn many competitive firms with unique aftermarkets parts or service into “monopolists” for antitrust purposes. In reality, it has not had that effect but it has burdened the courts with much unnecessary and costly litigation. That experiment should be proclaimed a failure and *Kodak* itself overruled.’<sup>223</sup>

Ultimately, the post-Chicago school replaced the consistent but flawed economic assumptions of the Chicagoans with an acceptance of the fact that ‘markets are much more varied and complex than Chicago theorists were willing to admit’.<sup>224</sup> However, the policy objectives of the Chicago School have been entrenched. Shapiro states that

‘If “Post-Chicago Economics” stands for the notion that markets are subject to numerous imperfections, as indeed the Court recognized in *Kodak*, let me be counted in the “Post-Chicago” camp. However, if “Post-Chicago Economics” stands for the notion that courts are capable of fine-tuning firms’ behaviour in competitive markets,

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<sup>221</sup> Borenstein *et al.* ‘Aftermarkets’ 457

<sup>222</sup> Shapiro ‘Making Sense of *Kodak*’ 484

<sup>223</sup> Hovenkamp ‘Post-Chicago’ 336 – 337

<sup>224</sup> *Ibid* 268

or that antitrust should move away from promoting efficiency and consumer welfare, count me out.’<sup>225</sup>

## 2.8. Conclusions

Bork, in the introduction to the 2<sup>nd</sup> edition of *The Antitrust Paradox*, described ‘mingled satisfaction and chagrin that I look over the course of that law since 1978. Satisfaction is justified because antitrust has moved a long way in the direction urged by this book’.<sup>226</sup>

It is clear from post-Chicagoan analysis that, while the flawed economic assumptions of the Chicago School are no longer a part of US antitrust policy, the policy objectives Bork espoused, efficiency and consumer welfare, have been sustained, and continue to be the prevailing objectives of US antitrust to the present day.

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<sup>225</sup> Shapiro ‘Making Sense of *Kodak*’ 484

<sup>226</sup> Bork *Paradox* ix

## **CHAPTER 3. THE ORGINS AND OBJECTIVES OF EUROPEAN COMPETITION LAW**

### **3.1. Introduction**

European Union competition law has deep roots in the continent's turbulent history. It has been a key part of the 'European Project' from its earliest days. It was recognised as a means to prevent the return to the economic conditions which had facilitated the World Wars. This chapter will assess the history of the European economy, with particular reference to the role of cartels in the economic development of Germany. It will then go on to critique the political and economic influences that led to the foundation of the Community and the early development of its competition policy. Finally, it will assess the changes in competition policy objectives made by decisions of the Court of Justice and statements from the Commission, concluding with a statement of the EU's present policy objectives.

### **3.2. The History of Cartels in Germany**

No European state has an 'antitrust tradition' like that found in the US. State-level antitrust laws propagated following the Civil War, and the US had enacted federal antitrust legislation by 1890.<sup>1</sup> By contrast, few European governments of the time had enacted any effective anti-cartel policies, and their attitude to cartels generally ranged from ambivalence to enthusiasm.

While modern European competition law was developed as part of the postwar reforms, the impetus for creating a supranational competition policy is deeply linked to the history of the European powers, particularly Germany. The process of industrialisation

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<sup>1</sup> Sherman Antitrust Act of 1890 15 U.S.C. §§ 1 – 7

in Germany was distinct to that of France and the United Kingdom – it began later in the 19<sup>th</sup> century and was significantly more rapid.<sup>2</sup> This made it far more prone to cartelisation. Germany did not unify as a single state until 1870, which hampered earlier industrialisation. When the Germanic states instituted a customs union in the 1850s, it prompted rapid, disruptive change.<sup>3</sup> The social change concurrent to industrial revolution occurred in Germany in half the time it had taken in Britain.<sup>4</sup> Gerber considers that this had a profound effect on public perception of industrialisation in Germany, stating

‘The intensity and character of German industrialisation made competition seem not only an unreliable means of organising economic life, but a menacing one...giving capitalism, competition and the entire process of economic modernisation a somewhat demonic air.’<sup>5</sup>

This created significant public demand for an organised rather than purely competitive economy.<sup>6</sup> However, industry leaders rapidly created an economy dubbed the ‘Land of the Cartels’,<sup>7</sup> where cartels acquired an unusual permanence.<sup>8</sup> Gerber considers that the ‘dramatically expanded industrial capacity...impelled firms in such industries to share markets with each other rather than compete and risk huge losses’.<sup>9</sup> He also cites as factors a susceptibility of key German industries to cartelisation; an unusually high dependence on banking finance, which led banks to organise cartels between creditors to

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<sup>2</sup> D.J. Gerber *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (2<sup>nd</sup> ed. Oxford University Press, Oxford, 2003) 71

<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid* 71 – 72

<sup>5</sup> *Ibid* 71

<sup>6</sup> *Ibid* 73

<sup>7</sup> *Ibid* 75

<sup>8</sup> *Ibid* 74

<sup>9</sup> *Ibid* 75

minimise the risk of defaults; and the abrupt shift to a protectionist tariff regime by Chancellor Bismarck less than a decade after German unification.<sup>10</sup>

In 1905, an official report cited by Kantzenbach reported 385 cartels with 12,000 members, who dominated the German economy.<sup>11</sup> The German Supreme Court *Saxony Wood Pulp* case in 1893 exacerbated the problem, encouraging rapid growth of cartels. Struggling producers had agreed to sell their products through a single, collective agent.<sup>12</sup> A renegade member defended a breach of contract action, submitting the cartel had violated an 1869 German law guaranteeing ‘the principle of business freedom’. The Supreme Court rejected the argument that the cartel agreement had been invalidated.<sup>13</sup> In analysing the business freedom principle, the Court considered that it incorporated a public interest element, but concluded that cartels were beneficial to the public.<sup>14</sup> Gerber states

‘According to the Court...“if the firms in a particular branch band together to eliminate or control price reductions among themselves, their co-operation can be seen not only as a justified application of the drive to self-preservation, but also – as a general rule – a service to the public, provided that such prices really are continuously so low that economic ruin threatens the firms”...The Court reasoned that by preserving competitors from ruin and maintaining adequate prices cartels helped to prevent the economic “catastrophes...associated with overproduction”. This policy judgment was the cornerstone of cartel ‘legalization’.’<sup>15</sup>

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<sup>10</sup> Ibid

<sup>11</sup> E. Kantzenbach ‘Competition Policy in West Germany: A Comparison with the Antitrust Policy of the United States’ in W.S. Comanor (editor) *Competition Policy in Europe and North America: Economic Issues and Institutions* (1<sup>st</sup> ed. Harwood, London, 1990) 189, 189

<sup>12</sup> Gerber *Prometheus* 91

<sup>13</sup> Ibid

<sup>14</sup> Ibid 91 – 92

<sup>15</sup> Ibid 92

Gerber criticises the judgment for marginalising the notion of consumer fairness, noting that the cartel held a regional monopoly.<sup>16</sup> The Court was apparently naïve about the level at which the cartel would fix prices; they considered that it would make controlled reductions over time, rather than increasing to a monopoly price. Kuenzler and Warlouzet’s view is that public opinion, sceptical of excessive competition, would have assumed that the cartel would maintain reasonable prices, and thus been supportive of the judgment.<sup>17</sup>

At the beginning of the 20<sup>th</sup> century, German public opinion turned against cartels.<sup>18</sup> Proposals for cartel law reform were debated but largely came to nothing.<sup>19</sup> Kaiser Wilhelm was the most significant opponent of reform, fixated on

‘advancing Germany’s economic and military might, and thus he was not inclined to accept threats to its industrial base. The heavy industries that supplied ships and military hardware were heavily cartelised, and the desire to protect them was reason enough for him to oppose cartel legislation.’<sup>20</sup>

Pace describes the Kaiser’s policy as ‘competitive imperialism’.<sup>21</sup> Wilhelm prioritised state-to-state competition with the other major powers over the maintenance of the domestic competitive process. Norr states

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<sup>16</sup> Ibid 93

<sup>17</sup> A. Kuenzler and L. Warlouzet ‘National Traditions of Competition Law: A Belated Europeanization through Convergence?’ in K.K. Patel and H. Schweitzer (editors) *The Historical Foundations of EU Competition Law* (1<sup>st</sup> ed. Oxford University Press, Oxford, 2013) 89, 93

<sup>18</sup> Gerber *Prometheus* 95

<sup>19</sup> Ibid 95 – 102

<sup>20</sup> Ibid 103

<sup>21</sup> L.F. Pace *European Antitrust Law: Prohibitions, Merger Control and Procedures* (1<sup>st</sup> ed. Edward Elgar, Cheltenham, 2007) 5



‘In the context of competition between Nations in the global marketplace, cartels played the role of *industrial organisations to combat foreign competition* and particularly the American trusts. It would have been unthinkable to combat cartels only on German territory.’<sup>22</sup> [Emphasis added]

Following the First World War, the destruction of European industrial capacity and Germany’s postwar liabilities shifted the focus of German cartels.<sup>23</sup> The previous focus of German cartels was restriction of output to maximise profits, which was untenable in economic conditions where demand significantly outstripped supply.<sup>24</sup> Hyperinflation from 1921 to 1923 provided a new impetus for cartels, passing the economic damage onto the consumer.<sup>25</sup> Cartels lost their positive public perception as economic changes led to the opinion that the cartels were causing hyperinflation.<sup>26</sup> Despite weak anti-cartel laws enacted by the Weimar Republic, the number of German cartels significantly increased in the 1920s.<sup>27</sup> From 1933, the emergent Nazi regime turned Weimar anti-cartel legislation to its own purposes. The Economy Minister was given powers to make cartels compulsory,<sup>28</sup> which played a significant role in ‘organising the Third Reich’s war effort’.<sup>29</sup>

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<sup>22</sup> K.W. Norr *Die Leiden des Privatrechts* (1<sup>st</sup> ed. Tübingen, 1994) 29, translation in Pace *European Antitrust* 5

<sup>23</sup> Gerber *Prometheus* 119

<sup>24</sup> *Ibid* 120

<sup>25</sup> *Ibid*

<sup>26</sup> *Ibid* 121

<sup>27</sup> Pace *European Antitrust* 16

<sup>28</sup> *Ibid*

<sup>29</sup> *Ibid*

### 3.3. Postwar Reconstruction

During the final Allied invasion, the Americans brought a group of economists to assess industrial records and speak to captured industrial leaders.<sup>30</sup> Many were strong proponents of antitrust, and were advocates of deconcentration and decartelisation in the American occupation administration after the war.<sup>31</sup> In American politics there was widespread political concern that industrial concentration was a threat to democracy,<sup>32</sup> and great concern among occupation officials at the ease with which the Nazi regime had acquired hegemonic economic power through cartelisation.<sup>33</sup> It provided a strong political impetus to decentralise economic power to prevent the future rise of totalitarianism.<sup>34</sup>

Wells describes the postwar reconstruction of Germany as ‘perhaps the most ambitious social science experiment in world history’,<sup>35</sup> and there was an initial lack of consensus. Evidently, the Treaty of Versailles had failed in its objective to prevent a Second World War, but Wells states

‘Some argued that Versailles failed because it had not crushed German power once and for all. They usually considered Nazism the logical culmination of the German political, economic, and social systems and assumed that the only way to prevent another war was to keep Germany weak and to reorganise its society radically. Others considered Versailles too harsh, crippling Germany’s relatively pacific Weimar

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<sup>30</sup> W.C. Wells *Antitrust and the Formation of the Postwar World* (1<sup>st</sup> ed. Columbia University Press, New York, 2002) 146

<sup>31</sup> *Ibid*

<sup>32</sup> E.M. Fox ‘The Modernization of Antitrust: A New Equilibrium’ 66 (6) *Cornell Law Review* 1140, 1149 – 1150; R. Pitofsky ‘The Political Content of Antitrust’ (1979) 127 (4) *University of Pennsylvania Law Review* 1051, 1052

<sup>33</sup> Gerber *Prometheus* 268

<sup>34</sup> L.B. Schwartz ‘“Justice” and other Non-Economic Goals of Antitrust’ (1979) 127 (4) *University of Pennsylvania Law Review* 1076, 1077 – 1078

<sup>35</sup> Wells *Postwar World* 137

Republic before it was firmly established and thereby opening the way for the Nazis. They generally attributed Nazism to the chaos spawned by the Great War and the Depression and assumed that prosperity and social order were the keys to a lasting peace.’<sup>36</sup>

Proponents of ‘hard peace’ wished to return Germany to an agrarian economy. It was often a view held by advocates of a conciliatory approach to the Soviets, and had the major drawback of being unable to sustain Germany’s population.<sup>37</sup> Proponents of ‘soft peace’ tended to greater suspicion of the Soviets, as ‘a prosperous, stable Germany would form a bulwark against communist expansion.’<sup>38</sup> Ultimately, tensions between the Allied Zones led to the eventual breakdown of relations between the Americans and the Soviets,<sup>39</sup> and ‘soft peace’ quickly became the accepted approach. American foreign policy viewed the Soviet encroachment across Eastern Europe as a greater threat than a resurgent Germany, and concluded a united Western Europe was the best defence against Communism. It is in this context that American support for European integration flourished.<sup>40</sup>

American occupation officials aimed to promote ‘the introduction of laws and regulations safeguarding free competition to guarantee the sustainability of democratic governments in Western Europe.’<sup>41</sup> The longstanding relationship between the US High Commissioner for Germany, Jack McCloy, and Jean Monnet, the architect of the

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<sup>36</sup> Ibid 143 – 144

<sup>37</sup> Ibid 145

<sup>38</sup> Ibid

<sup>39</sup> Ibid 153

<sup>40</sup> B. Leucht ‘Transatlantic policy networks in the creation of the first European anti-trust law: Mediating between American anti-trust and German ordo-liberalism’ in W. Kaiser, B. Leucht and M. Rasmussen (editors) *The History of the European Union: Origins of a trans- and supranational polity 1950 – 1972* (1<sup>st</sup> ed. Routledge, Oxford, 2009) 56, 56

<sup>41</sup> Ibid 60

Schuman Declaration, was particularly significant.<sup>42</sup> McCloy's General Counsel, Robert Bowie, was a Harvard antitrust law professor whose work influenced the Declaration and the antitrust provisions in the subsequent European Coal and Steel Community Treaty.<sup>43</sup> Robert Schuman himself, the French Foreign Minister, had discussed the Declaration with the US Ambassador in Paris, David Bruce, and Secretary of State Dean Acheson. Both were supporters of European integration as part of postwar reconstruction.<sup>44</sup> The Declaration was made on 9<sup>th</sup> May 1950, with Schuman proposing 'that Franco-German production of coal and steel be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe... The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.'<sup>45</sup>

The Declaration was a political solution under significant time pressure. Germany remained the most significant coal and steel producer in mainland Europe. The French perceived the postwar fuel shortage to have been exacerbated by the Germans charging higher prices to foreign consumers.<sup>46</sup> A key French goal was securing its steel industry equal access to Ruhr coal as the German producers.<sup>47</sup> The continuing deep suspicion of

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<sup>42</sup> Ibid 59

<sup>43</sup> Ibid

<sup>44</sup> D. Spierenburg and R. Poidevin *The History of the High Authority of the European Coal and Steel Community: Supranationality in Operation* (1<sup>st</sup> ed. Weidenfeld and Nicolson, London, 1994) 26

<sup>45</sup> R. Schuman 'The Schuman Declaration' Paris, 9 May 1950. Retrieved from URL <[europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index\\_en.htm](http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm)> (Accessed 24 October 2016)

<sup>46</sup> Wells *Postwar World* 170

<sup>47</sup> Ibid 171

French intentions among the German public was a barrier to progress.<sup>48</sup> Securing the support of the increasingly autonomous West German government, therefore, was critical to the success of Schuman's plan. However, he correctly suspected that, despite tensions, Chancellor Adenauer would react favourably to his proposal.<sup>49</sup> Adenauer recalls in his memoirs that Schuman wrote to him frankly about the politics underlying the Declaration

'In his personal letter to me Schuman wrote that the purpose of his proposal was not economic, but eminently political. In France there was a fear that once Germany had recovered, she would attack France. He could imagine that the corresponding fears might be present in Germany. Rearmament always showed first in an increased production of coal, iron, and steel. If an organisation such as he was proposing were to be set up, it would enable each country to detect the first signs of rearmament, and would have an extraordinarily calming effect in France...Schuman's plan corresponded entirely with the ideas I had been advocating for a long time concerning the integration of the key industries of Europe. I informed Robert Schuman at once that I accepted his proposal wholeheartedly.'<sup>50</sup>

After the foundation of the European Coal and Steel Community,<sup>51</sup> there were several false starts towards further integration.<sup>52</sup> Proponents of integration concluded the establishment of a Common Market was the best remaining route.<sup>53</sup> The Spaak Report<sup>54</sup>

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<sup>48</sup> K. Adenauer (translated by B. Rhum von Oppen) *Konrad Adenauer: Memoirs 1945-53* (1<sup>st</sup> ed. Weidenfeld and Nicolson, London, 1966) 244

<sup>49</sup> Leucht 'Transatlantic policy networks' in Kaiser *et al. Origins of a trans- and supranational polity* 56, 60

<sup>50</sup> Adenauer *Memoirs* 257

<sup>51</sup> Treaty Establishing the European Coal and Steel Community, Paris, 18 April 1951

<sup>52</sup> Gerber *Prometheus* 342

<sup>53</sup> *Ibid* 343

<sup>54</sup> Information Service, High Authority of the European Community for Coal and Steel 'The Brussels Report on the General Common Market (The Spaak Report)' (Luxembourg, 1956). Retrieved from URL <aei.pitt.edu/995/1/Spaak\_report.pdf> (Accessed 24 October 2016)

was published in 1956 and formed the basis for negotiating the Treaty of Rome which instituted the European Economic Community.<sup>55</sup> The Spaak Report committed to including competition rules in the Treaty of Rome, stating

‘Action against monopolies within the common market will be developed in conformity with the basic rules contained in the treaty. It will be limited to practices affecting interstate commerce which take the form of cartel organizations (ententes) and monopolies using discriminatory practices, dividing markets, limiting production and controlling the market for a particular product.’<sup>56</sup>

The competition rules in the Treaty of Rome, then Articles 85 and 86, remain in force, textually unchanged, as Articles 101 and 102 of the Treaty on the Functioning of the European Union.

### **3.4. Influences on the development of the Community competition rules**

The academic influences on Community competition law begin with the Freiburg School of Economics, also known as Ordoliberalism. Gerber considers it the dominant influence on the foundation of Community competition law, and that its policy objectives ‘suffused the process of European unification’.<sup>57</sup> Ordoliberalism originated in the ‘Freiburg Circles’, underground groups of anti-Nazi intellectuals. Freiburg’s great distance from the major urban centres and its intellectual tradition made it the ideal place for German intellectuals to circulate anti-Nazi ideas in relative safety during the Nazi period.<sup>58</sup>

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<sup>55</sup> Gerber *Prometheus* 343; Treaty Establishing the European Economic Community, Rome, 25 March 1957

<sup>56</sup> ‘The Spaak Report’ (1956) 13

<sup>57</sup> Gerber *Prometheus* 263

<sup>58</sup> *Ibid* 235

Ordoliberal thought focuses on the role and power of the economy within society. The father of Ordoliberalism, Walter Eucken, is linked particularly closely to the concept of the ‘social market economy’ pioneered by Chancellor Adenauer’s government. It accepts certain classical liberal fundamentals such as the links between economic freedom and political freedom, but it differs significantly on the matter of private economic power.<sup>59</sup>

Ordoliberals believed

‘it was not sufficient to protect the individual from the power of government, because governments were not the only threat to individual freedom. Having witnessed the use of private economic power to destroy political and social institutions during the Weimar period, the ordoliberals emphasized the need to protect society from the misuse of such power. This meant that the state had to be strong enough to resist the influence of private power groups. In order for government officials to be in a position to create the structures of the new society, the government of which they were a part would have to be able to protect them against private influences.’<sup>60</sup>

Most Ordoliberals supported the elimination of monopolies,<sup>61</sup> but their conception of economic regulation was to establish structures rather than directing the ‘processes’ of the economy.<sup>62</sup> Ordoliberals tended to consider cartels as aspects of monopolisation, considering that cartel members had the equivalent power to a unilateral monopoly.<sup>63</sup>

Leonard Miksch, a student of Eucken’s, refined an ‘as-if’ standard of conduct for monopolists. Gerber states

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<sup>59</sup> Ibid 240

<sup>60</sup> Ibid

<sup>61</sup> Ibid

<sup>62</sup> Ibid 248

<sup>63</sup> Ibid 251

‘divestiture would not be required, however, in cases of natural monopoly or where the monopoly position was based on a legally protected right (for example, a patent or copyright) or where divestiture would otherwise be impractical or entail economic waste. In such cases competition law was to provide a standard of conduct for such firms. It required that economically powerful firms act *as if* they were subject to competition – that is, as if they did not have such power.’<sup>64</sup>

Eucken defines the objective of Ordoliberalism as ‘complete competition’, namely ‘competition in which no firm in a market has power to coerce conduct by other firms in that market’.<sup>65</sup> Cartels provide members with monopoly power ‘structurally inconsistent with the complete competition standard’.<sup>66</sup> Pinar Akman criticises ‘complete competition’ as equivalent to an unattainable ‘perfect competition standard’.<sup>67</sup> This supports the view that Community competition policy diverged from Ordoliberal objectives when it adopted the workable competition, or effective competition, objective.<sup>68</sup>

While the Ordoliberals had operated underground during the Nazi period, they found themselves in a position of significant influence when Allied Occupation officials turned their mind to the postwar reform of Germany. They were well placed to support the Allies as

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<sup>64</sup> Ibid 252

<sup>65</sup> Ibid 245

<sup>66</sup> Ibid 251

<sup>67</sup> P. Akman ‘Searching for the Long-Lost Soul of Article 82 EC’ (2009) 29 (2) Oxford Journal of Legal Studies 267, 275

<sup>68</sup> Commission of the European Communities *Fifteenth Report on Competition Policy* (Office for Official Publications of the European Communities, Luxembourg, 1986) 11; see J.M. Clark ‘Toward a Concept of Workable Competition’ (1940) 30 (2) American Economic Review 241



‘The US military government sought to develop an economic policy that would both minimize government economic planning and eliminate cartels, and members of the Freiburg School presented a coherent plan for achieving these goals. In addition, they were among the few qualified Germans who were not tainted by ties to Nazism, and thus they met the rigorous US denazification standards. As a result, many members of the group soon assumed leadership positions in German self-government.’<sup>69</sup>

Both Chancellor Adenauer and his Economy Minister Ludwig Erhard had Ordoliberal affiliations. Erhard, a long-time adherent of the Freiburg School, was the architect of the ‘German economic miracle’. In 1948, with the implicit support of US occupation officials, he took the radical step of eliminating rationing and price controls in West Germany. It began a decades-long period of sustained economic growth in Germany.<sup>70</sup> His conception of Ordoliberalism emphasises the importance of the consumer in addition to the standard ordoliberal objective of a structured economy, stating ‘The State must not decide who should be victorious in the market, nor should an industrial organization such as a cartel; it must be consumer alone’.<sup>71</sup>

While Erhard was the key Ordoliberal figure in the domestic politics of West Germany, the Ordoliberals with the greatest impact on the development of competition law at Community level were Walter Hallstein and Hans von der Groeben, who led the West German delegation to the Treaty of Rome negotiations and subsequently became the first German Commissioners,<sup>72</sup> with Von der Groeben the first Competition Commissioner.

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<sup>69</sup> Gerber *Prometheus* 257

<sup>70</sup> Ibid 260

<sup>71</sup> L. Erhard (translated by E.T. Roberts and J.B. Wood) *Prosperity through Competition* (2<sup>nd</sup> ed. Thames and Hudson, London, 1958) 126

<sup>72</sup> Gerber *Prometheus* 263

Gerber considers that their influence held almost sole sway over the drafting of the principal competition rules, stating

‘The structure of the two main competition law provisions of the Rome Treaty (Articles 85 and 86) also closely tracked ordoliberal thought and *bore little resemblance to anything to be found in other European competition laws at the time.*

While the prohibition of cartel agreements had analogues in US antitrust law, the concept of prohibiting abuse of a market-dominating position was an important new development that was *particularly closely associated with ordoliberal and German competition law thought and very different from the discourse of US law.*<sup>73</sup>

[Emphasis added]

The significance of Ordoliberal influence appears to be clear, notwithstanding some outsider viewpoints,<sup>74</sup> but the somewhat hegemonic influence Gerber ascribes to it, to the exclusion of any other European influence,<sup>75</sup> has been criticised.<sup>76</sup> Advocates of a more multi-faceted interpretation respect the influence of Ordoliberalism but consider that Gerber’s view of Ordoliberal transposition from German law to Community law is too simplistic.<sup>77</sup>

Pace and Seidel state that the final text of Article 85 was a compromise between French and German representatives. The Germans wanted the anti-cartel provision to be based

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<sup>73</sup> Ibid 264

<sup>74</sup> Akman ‘Long-Lost Soul’ 271

<sup>75</sup> Gerber *Prometheus* 264

<sup>76</sup> H. Buch-Hansen and A. Wigger ‘Revisiting 50 years of market-making: The neoliberal transformation of European competition policy’ (2010) 17 (1) *Review of International Political Economy* 20, 29

<sup>77</sup> K.K. Patel and H. Schweitzer ‘Introduction’ in K.K. Patel and H. Schweitzer (editors) *The Historical Foundations of EU Competition Law* (1<sup>st</sup> ed. Oxford University Press, Oxford, 2013) 1, 10

on the ‘principle of prohibition without exception’,<sup>78</sup> while the French wished to retain the distinction present in their domestic law between good and bad agreements.<sup>79</sup> They do note, however, that it was Von der Groeben who proposed the compromise construction that remains to this day – a provision prohibiting cartel agreements (85 (1) EEC, now 101 (1) TFEU), and a provision of conditions for declaring the prohibition inapplicable (85 (3) EEC, now 101 (3) TFEU).<sup>80</sup>

The link between Ordoliberalism and the then Article 86 EEC, now Article 102 TFEU, is also unclear, principally because the Freiburg School had a far more developed position on cartels than they did on unilateral monopolies.<sup>81</sup> While Gerber links abuse of dominance to Miksch’s ‘as-if’ standard,<sup>82</sup> Heike Schweitzer notes that Eucken was in favour of the *per se* prohibition of monopolies except where unavoidable.<sup>83</sup>

Following the Treaty of Rome, the development of Community competition policy became tied to the political factors influencing the work of the fledgling Commission. This was of particular significance for the drafting of Regulation 17/62, the principal implementing regulation of the competition rules.<sup>84</sup> In DG IV, the Commission Directorate for Competition, there was a conflict of ideas between Ordoliberalism and

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<sup>78</sup> L.F. Pace and K. Seidel ‘The Drafting and Role of Regulation 17: A Hard-Fought Compromise’ in K.K. Patel and H. Schweitzer (editors) *The Historical Foundations of EU Competition Law* (1<sup>st</sup> ed. Oxford University Press, Oxford, 2013) 54, 63

<sup>79</sup> *Ibid* 62

<sup>80</sup> *Ibid* 63

<sup>81</sup> H. Schweitzer ‘The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC’ in C-D. Ehlermann and M. Marquis (editors) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (1<sup>st</sup> ed. Hart, Oxford, 2008) 119, 133

<sup>82</sup> Gerber *Prometheus* 252, 264

<sup>83</sup> Schweitzer ‘Section 2 Sherman Act and Article 82 EC’ in Ehlermann and Marquis *Competition Law Annual 2007* 119, 133 – 134

<sup>84</sup> Council Regulation (EEC) No 17: First Regulation concerning the application of Article 85 and 86 of the Treaty (1962) OJ P13/204 (21 February 1962)

what Ramirez-Perez and Van de Scheur describe as ‘a ‘Keynesian’ discourse’.<sup>85</sup> The latter, they claim, was characterised by favouring industrial and social policy objectives over pure protection of the process of competition, and greater tolerance than Ordoliberals had to ‘good’ cartels and industrial concentrations.<sup>86</sup> The ‘Keynesian discourse’ reflected the French policy of *planification*, which characterised the French domestic economic policy of significant government intervention, including price controls, up until the 1970s.<sup>87</sup> Von der Groeben considered that the negotiations with the Council to draft Regulation 17/62 were tense, and, and he was unsure at the time whether the Commission’s views would prevail.<sup>88</sup> Relatively broad exemptions to the competition rules for the agricultural<sup>89</sup> and transport<sup>90</sup> sectors highlight a lack of enthusiasm by the Council for a consistent Ordoliberal position.<sup>91</sup>

In 1961, the year before the passage of Regulation 17/62, Von der Groeben wrote in the EEC Bulletin that the developing Commission competition policy ‘must establish on the various markets of the Community a situation in which competition is neither distorted nor perverted’.<sup>92</sup> Prevention of distortion of competition is written into the competition

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<sup>85</sup> S.M. Ramirez-Perez and S. van de Scheur ‘The Evolution of the Law on Articles 85 and 86 EEC [Article 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge’ in K.K. Patel and H. Schweitzer (editors) *The Historical Foundations of EU Competition Law* (1<sup>st</sup> ed. Oxford University Press, Oxford, 2013) 19, 21

<sup>86</sup> *Ibid*

<sup>87</sup> See F. Jenny ‘French Competition Policy in Perspective’ in W.S. Comanor (editor) *Competition Policy in Europe and North America: Economic Issues and Institutions* (1<sup>st</sup> ed. Harwood, London, 1990) 146

<sup>88</sup> H. von der Groeben *The European Community, the Formative Years: The struggle to establish the Common Market and the Political Union (1958-66)* (1<sup>st</sup> ed. Office for Official Publications of the European Communities, Luxembourg, 1987) 108

<sup>89</sup> Council Regulation (EEC) No 26 concerning the application of certain competition rules to the production and commerce of agricultural products (1962) OJ P30/993 (20 April 1962)

<sup>90</sup> Council Regulation (EEC) No 141 concerning the non-application of Council Regulation No 17 to the transport sector (1962) OJ P124/2751 (28 November 1962)

<sup>91</sup> Ramirez-Perez and van de Scheur ‘Keynesian Challenge’ in Patel and Schweitzer *Historical Foundations* 19, 26

<sup>92</sup> H. von der Groeben ‘Policy on competition in the EEC’ (1961) 7/8 EEC Bulletin 8, translated from ‘Wettbewerbspolitik in der Europäischen Wirtschaftsgemeinschaft’ (1961) 6 *Wirtschaft und Wettbewerb* 373. Retrieved from URL <[http://aei.pitt.edu/32825/1/BULL.SUPP.1961\\_7-8.pdf](http://aei.pitt.edu/32825/1/BULL.SUPP.1961_7-8.pdf)> (Accessed 24 October 2016)

rules,<sup>93</sup> and it is consistent with the central tenet of Ordoliberalism, to prevent interference with the competitive process.<sup>94</sup> While Schweitzer considers that the link between Ordoliberalism and Article 102 is unclear, she does consider that there is a clear link between both competition rules and the goal of market integration.<sup>95</sup> Gerber maintains there is a link between Ordoliberal objectives and the market integration objective. He states

‘The goal of European integration has been developed to counteract distortions of the competitive process associated with the existence of political borders within Europe. Where legal impediments such as intellectual property rights impede competition across borders within the European Union, the abuse provision has been used to assert the unity of the European market. The capacity of a dominant firm to use its market power to prevent competition across borders is seen as a potentially serious distortion of the competitive process, especially because it involves political borders and thus may implicate the enforcement powers of the state. The main point is that this goal derives from and applies the concept of competitive distortion, but here the goal is further defined by the specific context of the process of European integration.’<sup>96</sup>

The emphasis on vertical restraints in early Community competition law enforcement is indicative of the status of market integration as the principal policy objective in the mid-1960s. While horizontal cartels appear as the most obvious form of distortion of competition in a market, the Community identified that vertical agreements could be a

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<sup>93</sup> Article 101 (1) Treaty on the Functioning of the European Union

<sup>94</sup> D.J. Gerber ‘The Future of Article 82: Dissecting the Conflict’ in C-D. Ehlermann and M. Marquis (editors) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (1<sup>st</sup> ed. Hart, Oxford, 2008) 37, 39 – 40

<sup>95</sup> Schweitzer ‘Section 2 Sherman Act and Article 82 EC’ in Ehlermann and Marquis *Competition Law Annual 2007* 119, 137

<sup>96</sup> Gerber ‘Future of Article 82’ in Ehlermann and Marquis *Competition Law Annual 2007* 37, 43

tool for market division. Private agreements maintaining the economic borders the Treaty sought to abolish were unacceptable.<sup>97</sup>

In 1957, the German radio and television manufacturer Grundig appointed Consten as its exclusive distributor and aftermarket service provider in France. Grundig also prohibited all its other purchasers from exporting to France, granting Consten absolute exclusivity in selling Grundig products to the French market.<sup>98</sup> In 1964, the Commission issued a Decision prohibiting the agreement.<sup>99</sup>

The Commission omitted to include any economic impact assessment in determining whether the agreement affected trade between Member States, which indicated the overriding status of the market integration objective.<sup>100</sup> The Decision states that a parallel import ban ‘tends to isolate the national markets and hinder their integration into the Common Market, and consequently is capable of affecting trade between Member States’.<sup>101</sup> They rejected that the ban was indispensable to the agreement, and that its absence would unacceptably compromise Consten’s market position in France.<sup>102</sup> The Decision concludes with a clear statement of the market integration objective, that ‘Absolute territorial protection appears as particularly noxious to the realisation of the Common Market in making more difficult or in preventing the alignment of the market conditions of the products covered by the contract in the Common Market’<sup>103</sup>

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<sup>97</sup> Gerber *Prometheus* 354 – 355

<sup>98</sup> *Grundig Verkaufs-GmbH* (63/566/EEC) (1964) OJ L161/2545 (20 October 1964); (1964) 3 Common Market Law Reports 489, 491

<sup>99</sup> *Ibid* 489

<sup>100</sup> Ramirez-Perez and van de Scheur ‘Keynesian Challenge’ in Patel and Schweitzer *Historical Foundations* 19, 29

<sup>101</sup> *Grundig* Decision (1964) 3 Common Market Law Reports 489, 489

<sup>102</sup> *Ibid* 500

<sup>103</sup> *Ibid* 504

The Court of Justice upheld the Commission decision, and stated their own commitment to the market integration objective thus

‘an agreement between producer and distributor which might tend to *restore the national divisions in trade between Member States* might be such as to *frustrate the most fundamental objections* [sic] *of the Community*. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article 101 (1) is *designed to pursue this aim*, even in the case of agreements between undertakings placed at different levels in the economic process.’<sup>104</sup> [Emphasis added]

The Court rejected that the Commission should have made an economic assessment of the agreement’s effect on trade between Member States, considering that it was clear the conditions of the agreement ‘indisputably’ affected trade.<sup>105</sup> Critically, the Court rejected a need for an economic assessment if the agreement had the object of restricting competition as

‘for the purpose of applying [Article 101 (1) TFEU], there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition. Therefore the absence in the contested decision of any analysis of the effects of the agreement on competition between similar products of different makes does not, of itself, constitute a defect in the decision.’<sup>106</sup>

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<sup>104</sup> C-56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* (‘*Consten and Grundig*’) [1966] ECR 299, 340

<sup>105</sup> *Ibid* 341 – 342

<sup>106</sup> *Ibid* 342

Throughout the rest of the 1960s, the objective of market integration was clear in Court of Justice case law. The Italian challenge to Regulation No 19/65, the first Block Exemption Regulation,<sup>107</sup> failed on the grounds that vertical agreements could distort competition for the purposes of Article 101.<sup>108</sup> The Court emphasised that Article 101 should be read in the context of the Treaty preamble, making particular reference to ‘the elimination of barriers’ considered ‘necessary for bringing about a single market’.<sup>109</sup> *Völk* focused on the question of foreseeability, holding ‘it must be possible to foresee with a sufficient degree of probability...that [an agreement] might hinder the attainment of the objectives of a single market between States’.<sup>110</sup> In *STM*, an early case on agreements with the effect of distorting competition (as opposed to the object of distorting competition, in terms of Article 101), the Court stated

‘it is necessary to consider in particular whether [an agreement] is capable of bringing about a partitioning of the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create.’<sup>111</sup>

During the 1960s the Commission focused its competition law enforcement entirely on Article 101; it did not issue an Article 102 decision until 1971.<sup>112</sup> The initial focus on Article 101 was understandable. Pace references the need for the Commission to ensure private undertakings did not seek to resurrect the barriers they were aiming to eliminate.<sup>113</sup>

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<sup>107</sup> Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices (1965) OJ P36/533 (6 March 1965)

<sup>108</sup> C-32/65 *Italy v Commission* [1966] ECR 389, 396

<sup>109</sup> *Ibid* 405

<sup>110</sup> C-5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295, 302

<sup>111</sup> C-56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 234, 249

<sup>112</sup> *Continental Can Company* (IV/26 811) (1972) OJ L7/25 (8 January 1972); (1972) 11 (2) Common Market Law Reports (Restrictive Practices Supplement) D11

<sup>113</sup> Pace *European Antitrust* 37



Von der Groeben was replaced as Competition Commissioner in 1967 by a Dutchman, Emmanuel Sassen, who did not share his Ordoliberal views.<sup>114</sup> Sassen began to distance DG IV from Ordoliberalism and promoted what Ramirez-Perez and van de Scheur describe as the ‘Keynesian discourse’.<sup>115</sup> His belief was that competition policy should not merely be about the protection of the competitive process, but should incorporate social and industrial policy goals, the latter including a focus on the competitiveness of European companies in the global market.<sup>116</sup>

Ordoliberals, in particular Eucken, have been criticised for not distinguishing between ordoliberal complete competition and neoclassical perfect competition; Akman suggests they are to all intents and purposes the same.<sup>117</sup> The move away from Ordoliberalism led to the increasing influence of the concept of workable competition in Community law (ironically, in the same decade its influence was decimated in the United States). This led to the development of the effective competition objective.

John Maurice Clark coined the term ‘workable competition’ in 1940, and his article ‘Toward a Concept of Workable Competition’<sup>118</sup> had significant influence on the Harvard School of Antitrust.<sup>119</sup> Clark postulated that ‘perfect competition’ had never existed, and served as a poor model of analysis for the comparison of real competitive conditions.<sup>120</sup> The Ordoliberal aim of complete competition or perfect competition was

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<sup>114</sup> Ramirez-Perez and van de Scheur ‘Keynesian Challenge’ in Patel and Schweitzer *Historical Foundations* 19, 30 – 31

<sup>115</sup> Ibid 21

<sup>116</sup> Ibid 32

<sup>117</sup> Akman ‘Long-Lost Soul’ 274 – 275

<sup>118</sup> Clark ‘Workable Competition’

<sup>119</sup> S. Marco-Colino *Vertical Agreements and competition law: a comparative study of the EU and US regimes* (1<sup>st</sup> ed. Hart, Oxford, 2010) 38 – 39

<sup>120</sup> Clark ‘Workable Competition’ 241

thus an unachievable objective which disregarded the political realities that ultimately controlled the Commission. Marco-Colino draws the link between workable competition and the multi-faceted set of objectives that were promoted by Emmanuel Sassen in the early 1970s, stating

‘The concept of workable competition leads to the view that *competition policy is an integral part of the general economic policy strategy*. This implies that it should serve the same goals as other disciplines of economic policy, which in turn favours a multi-goal approach that can include economic and non-economic goals... This theory would serve to justify the multi-goal approach to the regulation of competition followed by early US antitrust and the EU competition policy even to date.’<sup>121</sup>

The effective competition objective became evident in 1970s case law, particularly in the first Commission Decision and ECJ judgment on Article 102, *Continental Can*.<sup>122</sup> The Continental Can Company had acquired a majority shareholding in the Dutch company TDV, which ‘had the effect of practically eliminating competition in... packaging products over a substantial part of the Common Market’.<sup>123</sup> The Commission found the conduct to be an abuse of dominance.<sup>124</sup> The Court of Justice upheld the Decision, stating the complementary purpose of the two competition rules thus

‘[Articles 101 and 102 TFEU] seek to achieve the same aim on different levels, *viz.* the *maintenance of effective competition within the Common Market*. The restraint of competition which is prohibited if it is the result of behaviour falling under [Article 101 TFEU], cannot become permissible by the fact that such behaviour succeeds

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<sup>121</sup> Marco-Colino *Vertical Agreements* 39

<sup>122</sup> *Continental Can* Decision (1972) 11 (2) Common Market Law Reports D11, upheld on appeal in C-6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215

<sup>123</sup> C-6/72 *Continental Can* 220

<sup>124</sup> *Continental Can* Decision (1972) 11 (2) Common Market Law Reports D11

under the influence of a dominant undertaking and results in the merger of the undertakings concerned... Such a diverse legal treatment would make a breach in the entire competition law which could jeopardize the proper functioning of the Common Market.<sup>125</sup> [Emphasis added]

The objective of market integration was not replaced by the objective of effective competition, but became ‘embedded’ in it.<sup>126</sup> The *Metro* case indicated that a multi-faceted set of objectives were being pursued under the umbrella of effective competition.<sup>127</sup> The applicant wholesaler had requested to join SABA’s selective distribution network, but had been rejected.<sup>128</sup> Their application to the Commission to have SABA’s distribution system declared incompatible with Article 101 was unsuccessful.<sup>129</sup> The Court’s affirmation of the Decision demonstrates a concern not only for the competitive process, but also consumer welfare and small-business welfare, stating

‘The powers conferred upon the Commission under [Article 101 (3) TFEU] show that the requirements *for the maintenance of workable competition* may be reconciled with the *safeguarding of objectives of a different nature* and that to this end *certain restrictions on competition are permissible*, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the Common Market... For *specialist wholesalers and retailers the desire to maintain a certain price level*, which corresponds to the desire to preserve, *in the interests of consumers*, the possibility of the continued

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<sup>125</sup> C-6/72 *Continental Can* 244 – 245

<sup>126</sup> Ramirez-Perez and van de Scheur ‘Keynesian Challenge’ in Patel and Schweitzer *Historical Foundations* 19, 22

<sup>127</sup> C-26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875

<sup>128</sup> *Ibid* 1879

<sup>129</sup> *SABA* (IV/847) (1976) OJ L28/19 (3 February 1976)

existence of this channel of distribution... forms one of the objectives which may be pursued without necessarily failing under the prohibition contained in [Article 101 (1) TFEU]<sup>130</sup> [Emphasis added]

There are echoes of Justice Peckham's 'slip'<sup>131</sup> in *Trans-Missouri*, that a 'mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class'.<sup>132</sup> There is the kind of uncomfortable attempt to balance consumer welfare with small business welfare that led to the rise of the Chicago School in the United States, and influenced the eventual move to the 'more economic approach' in the European Union.

The effective competition concept was also applied in the contemporaneous Article 102 case of *United Brands*. The leading case on definition of the relevant market, it defines dominant position as 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market'.<sup>133</sup> In fact, the effective competition approach gave rise to a substantial number of cases, essentially supporting the objectives of workable competition and preventing detriment to a variety of groups, including 'the public interest, individual undertakings and consumers'.<sup>134</sup> The Commission made its clearest statement of the effective competition objective in the 15<sup>th</sup> *Report on Competition Policy*. They state

'Effective competition provides a set of... checks and balances in the market economy system. It preserves the freedom and right of initiative of the individual economic operator and it fosters the spirit of enterprise. It creates an environment within which

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<sup>130</sup> C-26/76 *Metro* 1905

<sup>131</sup> R.H. Bork *The Antitrust Paradox* (2<sup>nd</sup> ed. Free Press, New York, 1993) 25

<sup>132</sup> *United States v Trans-Missouri Freight Association* 166 US 290 (1897) 323

<sup>133</sup> C-27/76 *United Brands and United Brands Continentaal BV v Commission* [1978] ECR 207, 277

<sup>134</sup> *Pace European Antitrust* 38

European industry can grow and develop in the most efficient manner and at the same time take account of social goals. Competition policy should ensure that abusive use of market power by a few does not undermine the rights of the many; it should prevent artificial distortions and enable the market to stimulate European enterprise to innovate and to remain competitive on a global scale.’<sup>135</sup>

### 3.5. The shift to the more economic approach

In the 1990s, EU competition policy moved into a ‘third period’ in which it increased its focus on efficiency and consumer welfare objectives,<sup>136</sup> often referred to as the ‘more economic approach’. The impetus for the more economic approach was sustained criticism of the Commission’s position on vertical restraints, particularly the view that ‘it has taken an overly broad view of the prohibition in [Article 101 (1) TFEU], considering that any restriction on the freedom of action of contracting parties is prohibited by the provision and taking insufficient account of the economic context within which agreements operate.’<sup>137</sup>

In its 1997 Green Paper, the Commission conceded that its policy had been to apply a broad interpretation of Article 101 (1) to vertical restraints, citing a concern for its effect on market integration.<sup>138</sup> They stated that ‘vertical restraints are no longer regarded as *per se* suspicious or *per se* pro-competitive’, and emphasise the ‘importance of market structure in determining the impact of vertical restraints’.<sup>139</sup> Importantly, they also state

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<sup>135</sup> Commission *Fifteenth Report on Competition Policy* 11

<sup>136</sup> Pace *European Antitrust* 39

<sup>137</sup> E. Buttieg *Competition Law: Safeguarding the Consumer Interest – A Comparative Analysis of US Antitrust Law and EC Competition Law* (1<sup>st</sup> ed. Kluwer Law International, Alphen aan den Rijn, 2009) 86

<sup>138</sup> European Commission *Green Paper on Vertical Restraints in EC Competition Policy* (1996) COM (96) 721 Retrieved from URL < [http://ec.europa.eu/competition/antitrust/others/96721en\\_en.pdf](http://ec.europa.eu/competition/antitrust/others/96721en_en.pdf)> (Accessed 25 October 2016) v

<sup>139</sup> *Ibid* iii

vertical agreements have the potential to facilitate market integration and enhance efficiency and consumer welfare, while still recognising their potential to partition the single market.<sup>140</sup> The Commission emphasised its focus on market structures, stating

‘Anti-competitive effects of vertical restraints are likely to be insignificant in competitive markets. Rather their efficiency enhancing effect and benefit to consumers is likely to dominate. Anti-competitive effects are only likely where interbrand competition is weak and there are barriers to entry.’<sup>141</sup>

The 1998 *European Night Services* case, before the General Court, altered the case law on vertical restraints.<sup>142</sup> A joint subsidiary company had been incorporated by several national rail operators to provide sleeper services through the newly built Channel Tunnel. The Commission concluded the agreement engaged Article 101,<sup>143</sup> but allowed it to proceed under the relevant Block Exemption Regulation,<sup>144</sup> subject to significant conditions.<sup>145</sup> In a bid to rid themselves of the restrictions, the applicant applied to the General Court for annulment of the Decision.<sup>146</sup> They submitted that ‘none of the constituent elements of the conduct prohibited by [Article 101 (1) TFEU] is established...since the ENS agreements do not restrict competition’,<sup>147</sup> and that potential benefits outweighed the alleged restrictions on competition.<sup>148</sup>

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<sup>140</sup> Ibid i

<sup>141</sup> Ibid 26

<sup>142</sup> T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services Ltd v Commission* (‘*European Night Services*’) [1998] ECR II-3141

<sup>143</sup> *Night Services* (IV/34.600) (1994) OJ L259/20 (7 October 1994) Paras. 34 – 36

<sup>144</sup> Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (1968) OJ L175/1 (23 July 1968)

<sup>145</sup> *Night Services* Decision (1994) OJ L259/20 Paras. 71 – 84

<sup>146</sup> T-374/94... *European Night Services* Para. 41

<sup>147</sup> Ibid Para. 81

<sup>148</sup> Ibid Para. 106

The Commission Decision had engaged a Block Exemption Regulation, and thus had not considered the agreement under Article 101 (3). The General Court rejected that they were required to balance the pro- and anti-competitive elements of an agreement when considering Article 101 (1),<sup>149</sup> holding that was a test exclusive to Article 101 (3).<sup>150</sup> However, they held that ‘the Commission’s assessment is...based on an analysis of the market which does not correspond to the real situation’,<sup>151</sup> and annulled the decision, finding the Commission had failed to demonstrate the agreement had restricted competition for the purposes of engaging Article 101 (1).<sup>152</sup> It was a major change to the persistent hostility the Community Courts had shown toward vertical agreements.<sup>153</sup>

The Commission’s ‘change of perspective can be perceived’<sup>154</sup> in the revised Block Exemption Regulation for vertical agreements in 1999.<sup>155</sup> The 1999 Regulation replaced a variety of previous regulations on specific categories of vertical agreements,<sup>156</sup> and constituted ‘a single block exemption for these agreements that takes into consideration market power and that broadens considerably the scope of the exemption’.<sup>157</sup> The Regulation was supplemented in 2000 by Commission Guidelines,<sup>158</sup> which confirmed the Green Paper’s position that the Commission views the pro- and anti-competitive

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<sup>149</sup> Ibid Para. 119

<sup>150</sup> Ibid Para. 130

<sup>151</sup> Ibid Para. 147

<sup>152</sup> Ibid Para. 229

<sup>153</sup> Buttgieg *Consumer Interest* 96

<sup>154</sup> Marco-Colino *Vertical Agreements* 60

<sup>155</sup> Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices (1999) OJ L336/21 (29 December 1999)

<sup>156</sup> See Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements (1983) L173/1 (30 June 1983) and Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive purchasing agreements (1983) L173/5 (30 June 1983)

<sup>157</sup> Marco-Colino *Vertical Agreements* 60

<sup>158</sup> Commission Notice: Guidelines on Vertical Restraints (2000) OJ C291/1 (13 October 2000). Revised in 2010 as Commission Guidelines on Vertical Restraints (2010) C130/1 (19 May 2010), which accompanied the updated Block Exemption Regulation, Commission Regulation (EU) No 330/2010 of 20 April 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 L102/1 (23 April 2010)

nature of vertical restraints as being dependent on market structure, and specifically the strength of interbrand competition.<sup>159</sup> The Guidelines stated

‘The protection of competition is the primary objective of EC competition policy, as this enhances consumer welfare and creates an efficient allocation of resources. In applying the EC competition rules, the Commission will adopt an economic approach which is based on the effects of the market; vertical agreements have to be analysed in their legal and economic context.’<sup>160</sup>

This revised competition policy has been described by Hildebrand as ‘more economic and less regulatory’<sup>161</sup> and by Schweitzer as ‘significantly more permissive *vis-à-vis* vertical agreements’.<sup>162</sup> Buttgieg stresses the move from black-listing and white-listing,<sup>163</sup> a legalistic format present in previous Block Exemption Regulations,<sup>164</sup> to economic tests like market power threshold presumptions.<sup>165</sup>

The 2004 Commission Guidelines on Article 101 (3) state that ‘the balancing of anti-competitive and pro-competitive effects is conducted exclusively within the framework laid down by [Article 101 (3)]’.<sup>166</sup> It was borne out of a concern to ensure the continued effectiveness of Article 101 (3) demanded by case law,<sup>167</sup> but the drawback was that it

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<sup>159</sup> 2000 Vertical Restraints Guidelines Para. 6

<sup>160</sup> *Ibid* Para. 7

<sup>161</sup> D. Hildebrand *The Role of Economic Analysis in the EC Competition Rules* (3<sup>rd</sup> ed. Kluwer Law International, Alphen aan den Rijn, 2009) 257

<sup>162</sup> H. Schweitzer ‘The role of consumer welfare in EU competition law’ in J. Drexl and R.M. Hilty (editors) *Technology and Competition: Contributions in Honour of Hanns Ullrich* (1<sup>st</sup> ed. Larcier, Brussels, 2009) 511, 511

<sup>163</sup> Buttgieg *Consumer Interest* 92

<sup>164</sup> Regulation 1983/83 Articles 2 – 3

<sup>165</sup> Regulation 330/2010 Article 3

<sup>166</sup> Commission Guidelines on the application of Article 81 (3) of the Treaty (2004) OJ C101/97 (27 April 2004) Para. 11

<sup>167</sup> T-65/98 *Van der Bergh Foods v Commission* [2003] ECR II-4653 Para. 107; T-112/99 *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission* [2001] ECR II-2459 Para. 74



left significant ambiguity on what economic analysis should be incorporated into ‘object or effect’ determinations under Article 101 (1).

The *GlaxoSmithKline* cases demonstrate this ambiguity. The pharmaceutical multinational submitted the General Court<sup>168</sup> should annul the Commission Decision holding that their distribution network in Spain infringed Article 101.<sup>169</sup> Considering the ‘object or effect’ test in Article 101 (1), the General Court stated

‘In effect, the objective assigned to [Article 101 (1) TFEU]...is to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumers of the products in question...At the hearing, in fact, the Commission emphasised on a number of occasions that it was from that perspective that it had carried out its examination in the present case, initially concluding that the General Sales Conditions clearly restricted the welfare of consumers, then considering whether that restriction would be offset by increased efficiency which would itself benefit consumers.’<sup>170</sup>

Buttgieg notes the General Court’s definition of ‘consumer’ is limited to ‘final consumer’, which is somewhat more restrictive than the usual definition of ‘any user’.<sup>171</sup>

Werden considers that, while consumer welfare is not the test for legality under Article 101 (1), it provides, when considered, economic indicators that there is restriction of competition.<sup>172</sup> Such economic analysis is a standard element of assessing whether an

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<sup>168</sup> T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969

<sup>169</sup> *Glaxo Wellcome* (IV/36.957/FE), *Aseprofar and Fedifar* (IV/36.997/FE), *Spain Pharma* (IV/37.121/F3), *BAI* (IV/37.138/F3) and *EAEPC* (IV/37.380/F3) (2001) OJ L302/1 (17 November 2001)

<sup>170</sup> T-168/01 *GlaxoSmithKline* Para. 118

<sup>171</sup> Buttgieg *Consumer Interest* 68

<sup>172</sup> G.J. Werden ‘Consumer welfare and competition policy’ in J. Drexler, W. Kerber and R. Podszun (editors) *Competition Policy and the Economic Approach: Foundations and Limitations* (1<sup>st</sup> ed. Edward Elgar, Cheltenham, 2011) 11, 29

agreement has the *effect* of restricting competition, but the General Court went further and stated that there should be economic analysis when assessing whether an agreement has the *object* of restricting competition

‘Consequently, the application of [Article 101 (1) TFEU] to the present case cannot depend solely on the fact that the agreement in question is intended to limit parallel trade in medicines or to partition the common market, which leads to the conclusion that it affects trade between Member States, but also requires an analysis designed to determine whether it has as its object or effect the prevention, restriction or distortion of competition on the relevant market, to the detriment of the final consumer.’<sup>173</sup>

The ECJ demonstrated resistance to the more economic approach the General Court had supported. They overturned the General Court judgment, considering that they misinterpreted the textual construction of Article 101 (1)

‘it must be borne in mind that the anti-competitive object and effect of an agreement are not cumulative but alternative conditions for assessing whether such an agreement comes within the scope of the prohibition laid down in [Article 101 (1) TFEU] ...the alternative nature of that condition, indicated by the conjunction ‘or’, leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. Where, however, the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent. It is also apparent

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<sup>173</sup> T-168/01 *GlaxoSmithKline* Para. 119

from the case-law that it is not necessary to examine the effects of an agreement once its anti-competitive object has been established.’<sup>174</sup>

While the Court preferred a more restrictive construction of Article 101 (1), it did not wholly reject an economic approach to it. It appears from its comments on ‘precise purpose’ in the ‘economic context’ to be following the approach in *European Night Services*.<sup>175</sup> The Court may have adopted the view Gregory Werden advocated, that ‘‘consumer welfare’ should not be used as a test and should be used only sparingly as guide because the focus should be on the competitive process itself’.<sup>176</sup>

The application of the consumer welfare objective to Article 102 has also suffered from ambiguity. In 2009, the Commission issued Guidance on their ‘enforcement priorities’.<sup>177</sup> Within the Guidance Notice, the Commission stated

‘The aim of the Commission’s enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.’<sup>178</sup>

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<sup>174</sup> C-501, 513, 515 and 519/06 *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291

<sup>175</sup> T-374/94... *European Night Services* Para. 147

<sup>176</sup> Werden ‘Consumer welfare’ in Drexl *et al. Foundations and Limitations* 11, 29

<sup>177</sup> Commission Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) OJ C45/7 (24 February 2009)

<sup>178</sup> *Ibid* Para. 19

Lovdahl-Gormsen considers that the Discussion Paper<sup>179</sup> that preceded the Guidance hinted at disagreement within the Commission.<sup>180</sup> The Guidance is not a statement of the Commission's interpretation of the law, as Commission Guidelines are.<sup>181</sup> Lovdahl-Gormsen's criticism is that enforcement priorities are, properly defined, a statement of how the Commission will focus resources, and the Guidance is in fact *de facto* substantive guidelines proffering a legal interpretation that ignores aspects of established case law.<sup>182</sup>

The *British Airways* case demonstrated the Court's scepticism of introducing a consumer welfare element to the enforcement of Article 102.<sup>183</sup> The Commission Decision had ruled the financial incentives in British Airways' travel agency commission system infringed Article 102.<sup>184</sup> British Airways submitted to the ECJ that the General Court 'erred in law by disregarding evidence that BA's commissions had no material effect on its competitors',<sup>185</sup> and 'by failing to consider whether there was 'prejudice to consumers' under subparagraph (b)<sup>186</sup> of the second paragraph of [Article 102 TFEU]'.<sup>187</sup> The Court dealt with the first plea by affirming the General Court's position,<sup>188</sup> stating that

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<sup>179</sup> European Commission *DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses* (Brussels, 2005) Retrieved from URL

<<http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>> (Accessed 25 October 2016)

<sup>180</sup> L. Lovdahl-Gormsen 'Why the European Commission's enforcement priorities on article 82 EC should be withdrawn' (2010) 31 (2) *European Competition Law Review* 45, 45

<sup>181</sup> Article 82 Enforcement Priorities Guidance Para. 3

<sup>182</sup> Lovdahl-Gormsen 'Enforcement Priorities' 46

<sup>183</sup> C-95/04 *British Airways v Commission* [2006] ECR I-2969

<sup>184</sup> *Virgin/British Airways* (IV/D2/34.780) (2000) OJ L10/1 (4 February 2000)

<sup>185</sup> C-95/04 *British Airways v Commission* [2006] ECR I-2969, Para. 38

<sup>186</sup> '(b) limiting production, markets or technical development to the prejudice of consumers'

<sup>187</sup> C-95/04 *British Airways* Para. 38

<sup>188</sup> *Ibid* Paras. 101 – 102

‘according to consistent case law, for a practice to constitute an abuse, it is sufficient to demonstrate that there is a risk of it restraining competition, without there being any need to prove that it actually produced that effect.’<sup>189</sup>

In considering ‘consumer prejudice’, the ECJ essentially followed *Continental Can*<sup>190</sup> in holding that Article 82 covered a variety of practices, not only those which cause direct consumer detriment, but also those which undermine effective competition.<sup>191</sup> It did not, however, reject a consumer welfare objective. The General Court had stated that finding an Article 102 infringement

‘does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected.’<sup>192</sup>

Werden suggests that this indicates ‘‘consumer welfare’ is a goal of Article 102’ but ‘effects on ‘consumer welfare’ are *not* the test for legality’.<sup>193</sup> He tends to rely on the assumption that short-term consumer welfare is not a relevant objective, and that effective competition will always enhance long-term consumer welfare. Schweitzer considers that British Airways’ conduct ‘constituted an abuse due to its potential to exclude competitors’, and states the Court’s conceptualisation of competition policy, based on effective and undistorted competition, ‘remains a main source of discontent’. She advocates Treaty revision to refer explicitly to a consumer welfare objective as a

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<sup>189</sup> Ibid Para. 95

<sup>190</sup> C-6/72 *Continental Can* Para. 26

<sup>191</sup> C-95/04 *British Airways* Para. 104

<sup>192</sup> T-219/99 *British Airways v Commission* [2003] ECR II-5917 Para. 264

<sup>193</sup> Werden ‘Consumer welfare’ in Drexl *et al. Foundations and Limitations* 11, 33

replacement of, or (at least), an accompaniment to the current effective competition objectives.<sup>194</sup>

EU competition policy has made an uneasy attempt to reconcile consumer welfare and efficiency objectives with the objectives of effective competition. Lovdahl-Gormsen cites a ‘serious conflict between economic freedom and consumer welfare’. She considers that one must be careful not to equate a greater number of competing undertakings with an increase in consumer welfare.<sup>195</sup> Lovdahl-Gormsen sees the protection of the competitive process as the *means* of achieving an objective, rather than an objective in itself, but states

‘protecting the competitive process can enhance consumer welfare in the long run. However, this is only if the competitive process is protected instrumentally...to achieve consumer welfare...ordoliberalism protects the competitive process to achieve economic freedom.’<sup>196</sup>

More recently, the Court has indicated that it will no longer uphold the competitive process to protect less efficient competitors. In *Danish Post*, they dealt with the effect of unilateral exclusionary conduct, stating

‘not every exclusionary effect is necessarily detrimental to competition...Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to

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<sup>194</sup> Schweitzer ‘Role of consumer welfare’ in Drexl and Hilty *Technology and Competition* 511, 524

<sup>195</sup> L. Lovdahl-Gormsen ‘The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC’ (2007) 3 (2) *European Competition Journal* 329, 330

<sup>196</sup> *Ibid* 335

consumers from the point of view of, among other things, price, choice, quality or innovation.<sup>197</sup>

### 3.6. Conclusions

In contrast to US antitrust policy, the development of European competition policy has been characterised by gradual shifts rather than revolutions in thinking. The current policy objectives have been developed by a differing set of influences. Ordoliberalism was the earliest influence, which focused on the individual freedom to compete and the promotion of undistorted competition. In the context of the European project, it was closely associated with the market integration objective. As the influence of Ordoliberalism was challenged in the Commission by ‘Keynesian discourse’, market integration and freedom to compete became parts of the multi-faceted objectives of promoting effective competition, which also included promoting the wider social and industrial policy objectives of the Community.

Finally, there has been the incorporation of the more economic approach. The additional consumer welfare objectives have not comprehensively replaced the existing objectives derived from earlier influences. However, they have come into conflict with the existing objectives, and their introduction has not been without ambiguity or tension. While they now form part of the set of objectives European competition policy espouses, a comprehensive method for balancing of the several objectives against each other remains to be realised.

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<sup>197</sup> C-209/10 *Post Danmark A/S v Konkurrencerådet* (2012) OJ C151/6 (26 May 2012)

## CHAPTER 4. COMPARATIVE LEGALITY OF THE HARDCORE VERTICAL RESTRICTIONS

### 4.1. Introduction

The schools of thought that operate in antitrust demonstrate little divergence on their treatment of horizontal cartels. Except in limited circumstances manifestly anticompetitive, horizontal market division and price fixing agreements are treated in the US as *per se* illegal and in the EU as having the object of restricting competition. By contrast, the debate over the economic effects and appropriate legal treatment of vertical agreements has been far more controversial. Much of this debate has focused on the treatment of the so-called ‘hardcore restrictions’; respectively, the most comprehensively restrictive vertical nonprice restraint, absolute territorial protection (ATP), and the most restrictive vertical price restraint, minimum resale price maintenance (RPM).

The US case law has made significant moves away from *per se* illegality for the hardcore restrictions since the 1970s.<sup>1</sup> Under the influence of the Chicago School, which advocated *per se* legality for all vertical agreements,<sup>2</sup> the Supreme Court repealed *per se* illegality for ATP in 1977,<sup>3</sup> and for minimum RPM in 2007.<sup>4</sup>

By contrast, the EU position of *de facto per se* illegality for the hardcore restrictions is very unlikely to change, despite the incorporation of welfare objectives into EU competition law.<sup>5</sup> The early Court of Justice cases on vertical restraints confirmed they

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<sup>1</sup> S. Marco-Colino *Vertical Agreements and competition law: a comparative study of the EU and US regimes* (1<sup>st</sup> ed. Hart, Oxford, 2010) 75

<sup>2</sup> R.H. Bork *The Antitrust Paradox* (2<sup>nd</sup> ed. Free Press, New York, 1993) 397; R.A. Posner ‘The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality’ (1981) 48 (1) *University of Chicago Law Review* 6

<sup>3</sup> *Continental TV v GTE Sylvania* 433 US 36 (1977)

<sup>4</sup> *Leegin Creative Leather Products v PSKS* 551 US 877 (2007)

<sup>5</sup> Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty (1999) OJ C132/1 (12 May 1999); Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the



engaged Article 101 (1),<sup>6</sup> which has not been disputed since.<sup>7</sup> Subject to no economic analysis under Article 101 (1), any scope for the hardcore restrictions fulfilling the conditions of Article 101 (3) has been wholly rejected by the Commission, and

‘it seems most unlikely that the ECJ could, more radically, be persuaded, as Leegin persuaded the Supreme Court, that either restraint is no longer a suitable candidate for ‘object’ analysis.’<sup>8</sup>

This Chapter will begin with a comparative assessment of the development of the legal positions on ATP and minimum RPM in the US and EU. It will then critique the wider legal and economic debates on the effect of the hardcore restrictions, including the true extent of the free riding problem. It will also assess alternative antitrust policy positions on price and service competition, and interbrand and intrabrand competition. The Chapter will conclude with whether the US and EU’s legal positions on the hardcore restrictions withstand logical scrutiny within their own metrics of policy objectives.

## **4.2. Comparative treatment of Absolute Territorial Protection**

The standard for *per se* illegality in US antitrust is articulated in the *Northern Pacific* case.<sup>9</sup> Its rationale was to provide legal certainty and avoid complex and wasteful economic analysis of patently anticompetitive agreements.<sup>10</sup> Justice Black stated

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application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices (1999) OJ L336/21 (29 December 1999)

<sup>6</sup> C-56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* (‘*Consten and Grundig*’) [1966] ECR 299; C-56/65 *Société Minière v Maschinenbau Ulm GmbH* [1966] ECR 234

<sup>7</sup> F. Wijckmans and F. Tuytschaever *Vertical Agreements in EU Competition Law* (2<sup>nd</sup> ed. Oxford University Press, Oxford, 2011) 49

<sup>8</sup> A. Jones and B. Sufrin *EU Competition Law: Text, Cases and Materials* (4<sup>th</sup> ed. Oxford University Press, Oxford, 2011) 659

<sup>9</sup> *Northern Pacific Railway Co v United States* 356 US 1 (1958)

<sup>10</sup> *Ibid* 5

‘there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.’<sup>11</sup>

*White Motor* was the first case to consider vertical territorial restrictions under the *Northern Pacific* standard.<sup>12</sup> The White Motor Company argued their vertical restraints were necessary for the company to penetrate new markets and challenge more established manufacturers, and thus promoted interbrand competition.<sup>13</sup> They also argued their network of distributors was more efficient than vertically integrating distribution.<sup>14</sup> However, the Court was ambivalent about how to treat vertical territorial restraints. Justice Douglas concluded that further inquiry into their economic effects was required,<sup>15</sup> and the Court ultimately made no statement on whether ATP should be *per se* illegal.<sup>16</sup>

As such, when *Schwinn* came before the Supreme Court in 1967, there was no precedent for treating ATP as *per se* illegal in US antitrust.<sup>17</sup> The lower courts had subjected vertical territorial restrictions to a rule of reason between *White Motor* and *Schwinn*.<sup>18</sup>

The US Government had invited the court to find *Schwinn*’s restrictions illegal under the

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<sup>11</sup> *Ibid*

<sup>12</sup> *White Motor Co v United States* 372 US 253 (1963)

<sup>13</sup> *Ibid* 256 – 257

<sup>14</sup> *Ibid* 256

<sup>15</sup> *Ibid* 270 – 271

<sup>16</sup> *Ibid* 271

<sup>17</sup> E.E. Pollock ‘The *Schwinn* Per Se Rule: The Case for Reconsideration’ (1975) 44 (3) *Antitrust Law Journal* 557, 558

<sup>18</sup> *Sylvania* 433 US at 51 n 17; *Sandura Co v Federal Trade Commission* 339 F.2d 847 (6<sup>th</sup> Circuit, 1964); *Snap-On Tools Corp v Federal Trade Commission* 321 F.2d 825 (7<sup>th</sup> Circuit, 1963)

rule of reason;<sup>19</sup> neither party advocated *per se* illegality for ATP.<sup>20</sup> The judgment, making no reference to the *Northern Pacific* standard, declared ATP *per se* illegal,<sup>21</sup> and it was extensively criticised.<sup>22</sup> The Court rejected an efficiency defence when it stated ‘Schwinn sought a better way of distributing its product: a method which would promote sales, increase stability of its distributor and dealer outlets, and augment profits. But this argument, appealing as it is, is not enough to avoid the Sherman Act proscription; because, in a sense, every restrictive practice is designed to augment the profit and competitive position of its participants.’<sup>23</sup>

*Schwinn*’s stated objective of protecting small businesses by preventing vertical integration of distribution had the opposite effect to the one it intended. The case encouraged extensive vertical integration by large manufacturers, including Schwinn itself, eliminating numerous small distributors.<sup>24</sup>

Bork had been critical of the breadth of *per se* illegality rules since *White Motor*,<sup>25</sup> and he had advocated *per se* illegality for all vertical agreements except those concealing horizontal manufacturer or dealer cartels.<sup>26</sup> Chicagoan ideas gained traction post-*Schwinn*, and the lower courts quickly became openly mutinous.<sup>27</sup> *Adolph Coors*, which dealt with the specialised distribution of beer, is a case in point. The 10<sup>th</sup> Circuit applied *Schwinn* with deep reluctance, and stated the Supreme Court should reconsider it

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<sup>19</sup> *Schwinn* 388 US at 368

<sup>20</sup> Pollock ‘*Schwinn* Per Se Rule’ 566

<sup>21</sup> *Schwinn* 388 US at 379

<sup>22</sup> Pollock ‘*Schwinn* Per Se Rule’ 562

<sup>23</sup> *Schwinn* 388 US at 374 – 375

<sup>24</sup> *Continental TV v GTE Sylvania* 433 US 36 (1977) Brief for Respondent 60

<sup>25</sup> R.H. Bork ‘The Rule of Reason and Per Se Concept: Price Fixing and Market Division’ (1966) 75 (4) Yale Law Journal 373, 377

<sup>26</sup> *Ibid* 397

<sup>27</sup> Pollock ‘*Schwinn* Per Se Rule’ 562

‘Although we are compelled to follow the *Schwinn per se* rule rendering Coors’ territorial restrictions on resale illegal *per se*, we believe that the *per se* rule should yield to situations where a unique product requires territorial restrictions to remain in business. For example, speed of delivery, quality control of the product, refrigerated delivery, and condition of the Coors product at the time of delivery may justify restraints on trade that would be unreasonable when applied to marketing standardised products...Perhaps the Supreme Court may see the wisdom of grafting an exception to the *per se* rule when a product is unique and where the manufacturer can justify its territorial restraints under the rule of reason.’<sup>28</sup>

In 1975, Donald Baker advocated a shift from *per se* illegality to presumptive illegality,<sup>29</sup> providing exceptions for specialised distribution and manufacturers seeking to penetrate new markets.<sup>30</sup> This would have allowed the decision the 10<sup>th</sup> Circuit had desired in *Adolph Coors*, and prevented the need for the 3<sup>rd</sup> Circuit to circumvent *Schwinn* so inventively in their ruling on distribution with health and safety implications in *Tripoli*.<sup>31</sup> *Sylvania*, however, embraced Chicagoan arguments and did away with the need for any such tentative steps.

*Sylvania* came before the Supreme Court on appeal against another circumventive lower court attempt to distinguish *Schwinn*; the 9<sup>th</sup> Circuit had held a distribution network permitting only approved retail locations was a distinct proposition from territorial restrictions.<sup>32</sup> The petitioners argued vertical restraints with the effect of eliminating

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<sup>28</sup> *Adolph Coors Co v Federal Trade Commission* 497 F.2d 1178 (10<sup>th</sup> Circuit, 1974) 1187

<sup>29</sup> D.I. Baker ‘Vertical Restraints in Times of Change: From *White* to *Schwinn* to Where?’ (1975) 44 (3) *Antitrust Law Journal* 537, 545

<sup>30</sup> *Ibid* 547

<sup>31</sup> *Tripoli Co v Wella Corp* 425 F.2d 932 (3<sup>rd</sup> Circuit, 1970)

<sup>32</sup> *GTE Sylvania v Continental TV* 537 F.2d 980 (9<sup>th</sup> Circuit, 1976) 989 – 990

intrabrand competition could not be excused because of demonstrable procompetitive benefits to interbrand competition,<sup>33</sup> and invited the Court to apply the *Schwinn per se* rule.<sup>34</sup>

The respondents submitted that the Court should repeal the *per se* illegality of ATP, which carried significant weight in the context of numerous lower court decisions attempting to dodge *Schwinn* and extensive academic criticism.<sup>35</sup> Justice Powell stated *Schwinn* had made an ‘abrupt and largely explained departure from *White Motor*’,<sup>36</sup> and had failed to consider explicitly the *Northern Pacific* standard.<sup>37</sup> He indicated that he doubted that the *per se* illegality of ATP was justified under *Northern Pacific* by stating ‘The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.’<sup>38</sup>

Justice Powell appends this statement with a significant and oft cited footnote, stating that ‘interbrand competition...is the primary concern of antitrust law’, and ‘the degree of intrabrand competition is wholly independent of the level of interbrand competition’.<sup>39</sup> He accepted the respondent’s arguments that vertical territorial restrictions ‘which limit intrabrand competition will presumably serve to increase distributional efficiency’,<sup>40</sup> and thereby increase interbrand competition, whatever the effect on intrabrand competition.<sup>41</sup>

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<sup>33</sup> *Continental TV v GTE Sylvania* 433 US 36 (1977) Brief for Petitioner 2

<sup>34</sup> *Ibid*

<sup>35</sup> *Sylvania* 433 US at 47 – 48

<sup>36</sup> *Ibid* 47

<sup>37</sup> *Ibid* 51

<sup>38</sup> *Ibid*

<sup>39</sup> *Ibid* 51 n 19

<sup>40</sup> *Sylvania* Respondent Brief 47

<sup>41</sup> *Ibid* 59

The wholesale rejection of *Schwinn* was apparent in Powell's description of potential efficiencies, stating

'new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment in capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.'<sup>42</sup>

The *Sylvania* ruling subjected all vertical nonprice restraints including ATP to the rule of reason.<sup>43</sup> It was welcomed broadly by the Chicago School,<sup>44</sup> subject to their continued advocacy for similar changes for minimum RPM,<sup>45</sup> and ultimately for *per se* legality for all vertical restraints.<sup>46</sup> While the Chicagoan ascendancy in the following decade was criticised extensively, sceptics of Chicago largely have accepted *Sylvania*.<sup>47</sup>

Significant criticism coalesced around the structuring of a rule of reason for vertical nonprice restraints. Posner argued the Court's omission in *Sylvania* to structure a new rule of reason left standing the definition articulated by Justice Brandeis in *Chicago Board of Trade*,<sup>48</sup> which he considers deficient.<sup>49</sup> Marco-Colino's view is the emphasis on market power definitions created a situation that 'almost advocates for the *per se* legality for non-price verticals imposed by firms with lack of significant market

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<sup>42</sup> *Sylvania* 433 US at 55

<sup>43</sup> *Ibid* 57 – 58

<sup>44</sup> *Bork Paradox* 287

<sup>45</sup> Posner 'Per Se Legality' 8

<sup>46</sup> *Bork Paradox* 288

<sup>47</sup> E.M. Fox 'The Modernization of Antitrust: A New Equilibrium' (1981) 66 (6) *Cornell Law Review* 1140, 1181; R.L. Steiner '*Sylvania* Economics – A Critique' (1991) 60 (1) *Antitrust Law Journal* 41, 41

<sup>48</sup> *Board of Trade of City of Chicago v United States* 246 US 231 (1918) 238

<sup>49</sup> Posner 'Per Se Legality' 14

power'.<sup>50</sup> However, it is clear that *Sylvania* will remain the consistent legal position on ATP under the Sherman Act.

The EU has not only taken an opposing position on ATP, but has held it consistently since the earliest Court of Justice case law. In *Consten and Grundig*, the Court was presented with a profound fork on the road in defining what economic assessment, if any, was required to find an agreement had as its 'object...the prevention, restriction or distortion of competition'.<sup>51</sup> The initial Commission decision interpreted Article 101 (1) as holding an agreement with 'object' status was *per se* illegal unless exempted under Article 101 (3), stating

'the finding that the parties to the contracts have intended Consten to be freed from the competition of other importers for the import and wholesale distribution of the Grundig products in France is enough for the conclusion that competition is restricted within the meaning of [Article 101 (1) TFEU].'<sup>52</sup>

Advocate General Roemer proposed a different approach, more like the US position at the time (*Consten and Grundig* fell chronologically between *White Motor* and *Schwinn*). He stated

'American law (the 'White Motor Case') requires for situations of the type before us a comprehensive examination of their economic repercussions. Clearly I do not mean to say that we should imitate in all respects the principles of American procedure in the field of cartels...But such a reference is useful nevertheless in so far as it shows that in

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<sup>50</sup> Marco-Colino *Vertical Agreements* 81; *Graphic Products v ITEK Corp* 717 F.2d 1560 (11<sup>th</sup> Circuit, 1983); *Toys "R" Us v Federal Trade Commission* 221 F.3d 928 (7<sup>th</sup> Circuit, 2000)

<sup>51</sup> Article 101 (1) Treaty on the Functioning of the European Union

<sup>52</sup> *Grundig Verkaufs-GmbH* (63/566/EEC) (1964) OJ L161/2545 (20 October 1964); (1964) 3 Common Market Law Reports 489, 496

respect of [Article 101 (1)] also it is not possible to dispense with observing the market *in concreto*...It seems to me wrong to have regard to such observation only for the application of [Article 101 (3)] because that paragraph requires an examination from other points of view which are special and different.’<sup>53</sup>

The Court held no economic analysis was required to condemn agreements with the object of restricting competition,<sup>54</sup> which has made ATP *per se* illegal since that time, almost without further challenge.<sup>55</sup> While the Commission concedes that no agreement can be incapable of exemption in principle,<sup>56</sup> ATP clauses are ‘black clauses’<sup>57</sup> under the Block Exemption Regulation (BER);<sup>58</sup> absolutely prohibited regardless of either party’s market share. The Commission dismisses the possibility that either they or the Court would ever find an ATP clause permissible under 101 (3).<sup>59</sup>

Subsequent case law and decisions have considered parallel imports a red line to protect the market integration objective.<sup>60</sup> In *Nungesser*, the Court accepted that exclusive dealerships or licensing within a territory could be permissible under Article 101, provided there was no prohibition on parallel imports.<sup>61</sup> Where parties have submitted that ATP is necessary for distributive efficiency, it has been rejected by the Commission

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<sup>53</sup> C-56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* (‘*Consten and Grundig*’) [1966] ECR 352 (Opinion of Advocate General Roemer) 358

<sup>54</sup> C-56 and 58/64 *Consten and Grundig* 342

<sup>55</sup> See T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969; reversed by C-501, 513, 515 and 519/06 *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291

<sup>56</sup> Commission Guidelines on Vertical Restraints (2010) OJ C130/1 (19 May 2010) para. 60

<sup>57</sup> Marco-Colino *Vertical Agreements* 104

<sup>58</sup> Commission Regulation (EU) No 330/2010 of 20 April 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 L102/1 (23 April 2010) Article 4 (b)

<sup>59</sup> Commission Guidelines on the application of Article 81 (3) of the Treaty (2004) OJ C101/97 (27 April 2004) Para. 46

<sup>60</sup> C-30/78 *Distillers Company Ltd v Commission* [1980] ECR 2229, 2246

<sup>61</sup> C-258/78 *L.C. Nungesser KG and Kurt Eisele v Commission* [1982] ECR 2015, 2069



on the grounds that it would be less restrictive of competition for the manufacturer to assume certain functions instead.<sup>62</sup> The Commission has also condemned undertakings that have taken action with the effect of creating ATP, such as buying back excess stock.<sup>63</sup>

Even the more economic approach has not shifted the overriding concern for market integration in more recent Commission decisions. Since the introduction of the 1999 BER,<sup>64</sup> the Commission has censured agreements stipulating larger deposits for sales outside distributor territories to restrict parallel imports;<sup>65</sup> and restrictions on passive sales of products with critical downstream markets.<sup>66</sup> As such, it is clear the EU's absolute prohibition of ATP remains rooted in its market integration objective. The Commission's Economic Advisory Group on Competition Policy (EAGCP) observed it would otherwise be hard to justify, stating

‘If the treatment of clauses which try to enforce territorial protection was based on pure *economic efficiency* grounds only, therefore, it would be difficult to argue for their *per se* prohibition (or of clauses which try to enforce it). But in EC competition law, there is not only the objective of economic efficiency but also that of promotion of *market integration*. According to this fundamental objective of the Treaty, goods should be free to circulate in the Common Market: clauses which aim to restricting the free movement of goods among Member States should therefore be prohibited.’<sup>67</sup>

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<sup>62</sup> *Distillers Company Limited* (IV.28.282) (1978) OJ L50/16 (22 February 1978) 29

<sup>63</sup> *Konica* (IV/31.502) (1988) OJ L78/34 (23 March 1988) 41

<sup>64</sup> Regulation 2790/1999

<sup>65</sup> *Mercedes-Benz* (COMP/36.264) (2002) OJ L257/1 (25 September 2002) 23

<sup>66</sup> *PO Video Games* (COMP/35.587), *PO Nintendo Distribution* (COMP/37.706) and *Omega – Nintendo* (COMP/36.231) (2003) OJ L255/33 (8 October 2003) 43, 85

<sup>67</sup> Economic Advisory Group on Competition Policy at the Directorate General for Competition *Hardcore restrictions under the Block Exemption Regulation on vertical agreements: An economic overview* (DG Comp, September 2009). Retrieved from URL <[http://ec.europa.eu/dgs/competition/economist/hardcore\\_restrictions\\_under\\_BER.pdf](http://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf)> (Accessed 25 October 2016) 5

The EAGCP advocated a *de minimis* rule for ATP agreements between parties without significant market power, to introduce some compromise between the established market integration objective and the newer efficiency objectives.<sup>68</sup> The suggestion was not adopted in the redrafted BER in 2010.<sup>69</sup> The ‘strong preoccupation’<sup>70</sup> with market integration could not be wholly overridden, and it remains the case that ATP clauses can never benefit from market share threshold exemptions, either as a matter of Commission policy<sup>71</sup> or EU law.<sup>72</sup>

### 4.3. Comparative treatment of minimum Resale Price Maintenance

The *per se* rule against minimum RPM in US antitrust had substantially greater longevity than its ATP counterpart. The *Dr Miles* case in 1911 concerned a medicine manufacturer who imposed a network of minimum RPM agreements on its distributors.<sup>73</sup> The Supreme Court held it should be condemned as *per se* illegal on two grounds, firstly, the supposedly ancient principle that ‘a general restraint upon alienation is ordinarily invalid’,<sup>74</sup> and secondly that

‘in the maintenance of fixed retail prices...the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavoured to establish the same restrictions, and thus to achieve the same result, by agreement with each other.’<sup>75</sup>

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<sup>68</sup> Ibid 6

<sup>69</sup> Regulation 330/2010

<sup>70</sup> Marco-Colino *Vertical Agreements* 105

<sup>71</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81 (1) of the Treaty establishing the European Community (*de minimis*) (2001) OJ C368/13 (22 December 2001) Recital 11 (2) (b)

<sup>72</sup> Regulation 330/2010 Article 4 (b)

<sup>73</sup> *Dr Miles* 220 US at 394

<sup>74</sup> Ibid 404

<sup>75</sup> Ibid 407 – 408

The first rationale can be instantly disregarded. It has been ‘aptly ridiculed as “the solution given three or four hundred years ago by an English judge who was talking about something else.”’<sup>76</sup> The proposition that minimum RPM is equivalent to a horizontal dealer cartel is now largely rejected,<sup>77</sup> though whether it can facilitate horizontal manufacturer or dealer cartels is more controversial.<sup>78</sup>

Following *Sylvania*, Bork described the *Dr Miles* rule as ‘not only at war with sound antitrust policy but...decidedly peculiar even on its own terms’.<sup>79</sup> Its position was certainly compromised by clumsy exceptions created in *Colgate*<sup>80</sup> and *General Electric*.<sup>81</sup> In 1960, the Court had overruled the *Colgate* refusal to deal exception in *Parke, Davis*, censuring a drug manufacturer who cut off distributors who did not sell at catalogue price.<sup>82</sup> A further complication was the Miller-Tydings Act,<sup>83</sup> a Depression-era statute granting states the right to legalise minimum RPM. Congress repealed Miller-Tydings in 1975.<sup>84</sup> In *Sylvania*, the Court were careful to state they were not making any change in the law of minimum RPM

‘As in *Schwinn*, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy...some commentators have argued that the manufacturer’s motivation for imposing vertical price restrictions

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<sup>76</sup> T.B. Leary and J.L. McDavid ‘Should *Leegin* finally bury Old Man Miles’ (2007) 21 (2) *Antitrust* 66, 68

<sup>77</sup> *Ibid* 67

<sup>78</sup> F.H. Easterbrook ‘Vertical Arrangements and the Rule of Reason’ (1984) 53 (2) *Antitrust Law Journal* 142; S.M. Litvack ‘Future Viability of the Current Antitrust Treatment of Vertical Restraints’ (1987) 75 (3) *California Law Review* 955

<sup>79</sup> *Bork Paradox* 280

<sup>80</sup> *United States v Colgate & Co* 250 US 300 (1919)

<sup>81</sup> *United States v General Electric Co* 272 US 476 (1926)

<sup>82</sup> *United States v Parke, Davis & Co* 362 US 29 (1960) 45

<sup>83</sup> Miller-Tydings Act of 1937

<sup>84</sup> Consumer Goods Pricing Act of 1975

may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment. In his concurring opinion in *White Motor Co v United States*, Mr Justice Brennan noted that, unlike nonprice restrictions, “(r)esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands”.<sup>85</sup>

Bork, taking his usual approach to *obiter* inconvenient to Chicagoan thought, stated the ‘reservations may be viewed either as unfortunate wafflings or as judicious concessions necessary either to put together a majority or guard against unforeseen situations’.<sup>86</sup>

Chicagoan pressure to reconsider the *per se* rule against minimum RPM took the form of both academic criticism<sup>87</sup> and Reagan administration judicial appointments. Bork, Richard Posner, and Frank Easterbrook were all confirmed as federal judges between 1981 and 1985.<sup>88</sup>

Posner argued the divergent positions on *per se* illegality ‘warp[ed] the judicial approach to nonprice restrictions’,<sup>89</sup> which was powerfully demonstrated by the 1<sup>st</sup> Circuit *Wild Heerbrugg* case.<sup>90</sup> Wild’s assigned dealer for the state of Rhode Island was free to set its own prices within Rhode Island, but had to obey a minimum list price for sales out of state.<sup>91</sup> The 1<sup>st</sup> Circuit was therefore in the unusual position of being compelled to

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<sup>85</sup> *Sylvania* 433 US at 51 n 18, quoting *White Motor* 372 US at 268

<sup>86</sup> *Bork Paradox* 287

<sup>87</sup> Posner ‘Per Se Legality’ 8; Easterbrook ‘Vertical Arrangements’ 135

<sup>88</sup> Federal Judicial Centre *Biographical Directory of Federal Judges*. Retrieved from URL <<http://www.fjc.gov/public/home.nsf/hisj>> (Accessed 25 October 2016)

<sup>89</sup> Posner ‘Per Se Legality’ 8

<sup>90</sup> *Eastern Scientific Co v Wild Heerbrugg Instruments* 572 F.2d 883 (1<sup>st</sup> Circuit, 1978)

<sup>91</sup> *Ibid* 884

condemn an agreement with a less restrictive effect than ATP because it had minimum RPM elements.<sup>92</sup> Posner considered

‘If the defendant in the *Eastern Scientific* case had imposed an absolute prohibition on sales outside of a dealer’s territory, that would have been tantamount to setting a minimum resale price of infinity. By instead allowing dealers to sell outside of their territories at list price, the defendant in effect reduced that infinite price to a finite price at which some sales occurred, and thus increased the amount of intrabrand price competition in its product. In these circumstances, to allow the territorial restriction but prohibit the resale price provision would be perverse indeed.’<sup>93</sup>

The flaw in Posner’s argument is that a reasonable application of the rule of reason would be to condemn an ATP clause that facilitated minimum RPM outside the assigned territory. Wild could explicitly assign dealers to, say, the tiny states of Rhode Island and Delaware, with the purpose of thus effectively fixing minimum prices by granting those dealers *de facto* exclusivity over the nearby and much larger states of New York and Pennsylvania. Ultimately, the 1<sup>st</sup> Circuit rejected that the agreement constituted minimum RPM,<sup>94</sup> and the Supreme Court declined to clarify the matter, refusing to certify an appeal.<sup>95</sup>

*Monsanto*<sup>96</sup> was indicative of the process by which *Dr Miles* was ‘defanged’.<sup>97</sup> It reversed *Parke, Davis*<sup>98</sup> and reaffirmed the *Colgate* doctrine<sup>99</sup> ‘as if it had never been

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<sup>92</sup> Ibid 886

<sup>93</sup> Posner ‘Per Se Legality’ 11

<sup>94</sup> *Wild Heerbrugg* (1<sup>st</sup> Circuit) 885

<sup>95</sup> *Eastern Scientific Co v Wild Heerbrugg Instruments* 439 US 833 (1978) *certiorari denied*

<sup>96</sup> *Monsanto Co v Spray-Rite Service Corp* 465 US 752 (1984)

<sup>97</sup> R.M. Brunell ‘Overruling *Dr Miles*: The Supreme Trade Commission in Action’ (2007) 52 (4) *Antitrust Bulletin* 475

<sup>98</sup> *Parke, Davis* 362 US at 29

<sup>99</sup> *Colgate* 250 US at 300

questioned and its distinction of *Dr Miles* made sense'.<sup>100</sup> The Court in *Sharp*<sup>101</sup> indicated its struggle to find a principled distinction between vertical nonprice and price restraints.<sup>102</sup> And in *Khan*,<sup>103</sup> the Court reversed the *per se* illegality of maximum RPM.<sup>104</sup>

However, the *Leegin* case presented the court with the clearest opportunity to reconsider *Dr Miles*.<sup>105</sup> It was undisputed that the agreement constituted minimum RPM,<sup>106</sup> and the petitioner submitted the Court should reverse the *per se* rule.<sup>107</sup> Their submissions stated 'The *per se* rule against resale price maintenance established in *Dr Miles* squarely conflicts with this Court's modern antitrust jurisprudence, which limits the use of *per se* rules to practices that "always or almost always tend to restrict competition and decrease output"<sup>108</sup>...Like all other vertical agreements, the validity of resale price maintenance agreements should be determined on a case-by-case basis under the rule of reason – rather than under a rigid *per se* rule – because economic analysis demonstrates that such agreements often have substantial *procompetitive* effects.'<sup>109</sup>

The embedded quotation from *Sharp*, per Justice Scalia,<sup>110</sup> was a clear indication of Chicagoan influence in the petitioner's case. Scalia's articulation of a standard for *per se*

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<sup>100</sup> L.A. Graglia 'Leegin Creative Leather Products, Inc v PSKS, Inc: The strange career of the law of resale price maintenance' (2008) 53 (3) Antitrust Bulletin 803, 820

<sup>101</sup> *Business Electronics Corp v Sharp Electronics Corp* 485 US 717 (1988)

<sup>102</sup> W.J. Liebler 'Resale Price Maintenance and Consumer Welfare: *Business Electronics Corp v Sharp Electronics Corp*' (1989) 36 (5) UCLA Law Review 889, 891

<sup>103</sup> *State Oil Co v Khan* 522 US 3 (1997)

<sup>104</sup> *Kiefer-Stewart Co v Joseph E Seagram & Sons* 340 US 211 (1951); *Albrecht v Herald Co* 380 US 145 (1968)

<sup>105</sup> Leary and McDavid 'Old Man Miles'

<sup>106</sup> *Leegin* 551 US at 884

<sup>107</sup> *Leegin Creative Leather Products v PSKS* 551 US 877 (2007) Brief for Petitioner 2

<sup>108</sup> *Sharp* 485 US at 723

<sup>109</sup> *Leegin* Petitioner Brief 5 – 6

<sup>110</sup> *Sharp* 485 US at 723

illegality is not a wholesale departure from *Northern Pacific*,<sup>111</sup> but it is articulated in Chicagoan language of efficiency and output,<sup>112</sup> rather than in the terms of an antitrust policy focused on protecting the process of competition. Antitrust policy with the latter focus is sceptical of RPM because of the effects such agreements can have on price flexibility, a critical element of dynamic markets.<sup>113</sup> This leads to the conclusion that the Court chose to overrule *Dr Miles* because it accepted Chicagoan metrics.

Briefs for the Petitioner<sup>114</sup> and the Bush Administration<sup>115</sup> both attempt to focus the Court's attention exclusively on the economic effect minimum RPM has on interbrand competition. They also emphasise the efficiencies and consumer welfare benefits derived from the promotion of services and market penetration minimum RPM can facilitate.

The respondent was forced to articulate that '*Dr Miles* could be right...for the wrong reasons',<sup>116</sup> and submitted that the objective of antitrust policy should be the promotion of low prices for consumers.<sup>117</sup> The Miller-Tydings Act had provided a natural experiment which had shown consumer goods had had significantly higher prices in 'fair trade' states, where minimum RPM had been legal.<sup>118</sup> The respondent's authorities are rooted in competitive process objectives, and variously describe price competition and flexibility as 'the central nervous system of the economy',<sup>119</sup> 'the very essence of

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<sup>111</sup> *Northern Pacific* 356 US at 5

<sup>112</sup> *Bork Paradox* 289

<sup>113</sup> Fox 'Equilibrium' 1184

<sup>114</sup> *Leegin* Petitioner Brief 6 – 7

<sup>115</sup> *Leegin Creative Leather Products v PSKS* 551 US 877 (2007) Brief for the United States as *amicus curiae* supporting Petitioner 9

<sup>116</sup> Leary and McDavid 'Old Man Miles' 68

<sup>117</sup> *Leegin Creative Leather Products v PSKS* 551 US 877 (2007) Brief for Respondent 21

<sup>118</sup> *Ibid* 12

<sup>119</sup> *National Society of Professional Engineers v United States* 435 US 679 (1978) 692, quoting *United States v Socony-Vacuum Oil Co* 310 US 150 (1940) 226 n 59

competition’,<sup>120</sup> and inherent to ‘well-functioning competitive markets’.<sup>121</sup> The respondent’s articulation of a price competition objective is understandable, as the Court in *Sylvania* considered the divergent effect on price competition the distinguishing feature between ATP and minimum RPM.<sup>122</sup>

The Court ultimately overruled *Dr Miles* by a 5 to 4 majority,<sup>123</sup> subjecting minimum RPM to a rule of reason standard.<sup>124</sup> Justice Kennedy justifies his majority opinion by reference to the free riding problem and stimulation of interbrand competition arguments that were decisive in *Sylvania*.<sup>125</sup> He goes further and suggests there will be circumstances where minimum RPM could be permissible even in the absence of a free riding problem.<sup>126</sup> Justice Breyer’s dissent was surprisingly strong,<sup>127</sup> criticising the failure to structure a rule of reason adequate for minimum RPM and their reliance as gospel on the free riding problem. He asks

‘How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*. For one thing, it is often difficult to identify *who* – producer or dealer – is the moving force behind any given resale price maintenance agreement. Suppose, for example, several large multibrand retailers all sell resale-price maintained products. Suppose further that small producers set retail prices because they fear that, otherwise, the large retailers will favour (say, by allocating better shelf space) the goods of other producers who practice resale price maintenance... Who “initiated” this practice, the retailers hoping for considerable

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<sup>120</sup> *Matsushita Electric Industrial Co Ltd v Zenith Radio Corp* 475 US 574 (1986) 594

<sup>121</sup> *Barry Wright Corp v ITT Grinnell Corp* 724 F.2d 227 (1<sup>st</sup> Circuit, 1983) 231

<sup>122</sup> *Sylvania* 433 US at 51 n 18; *White Motor* 372 US at 268

<sup>123</sup> *Leegin* 551 US at 882

<sup>124</sup> *Ibid* 880

<sup>125</sup> *Ibid* 890 – 891

<sup>126</sup> *Ibid* 891 – 892

<sup>127</sup> Brunell ‘Overruling *Dr Miles*’ 480



insulation from retail competition, or the producers, who simply seek to deal best with the circumstances they find? For another thing, as I just said, it is difficult to determine just when, and where, the “free riding” problem is serious enough to warrant legal protection.’<sup>128</sup>

The lack of a structured rule of reason in the majority opinion is the focus of much of the academic criticism of *Leegin*. A similar problem was created by *Sylvania*, where ‘in practice the rule of reason operates as a rule of *de facto per se* legality’.<sup>129</sup> Lambert notes the FTC favoured a presumptive illegality rule that

‘would deem any instance of RPM presumptively illegal unless the defendant proved: (1) that RPM is not used by manufacturers collectively comprising a significant share of the relevant product market; (2) that the manufacturer, not its dealers, initiated the RPM; and (3) that there is no dominant manufacturer or dealer with market power. These are three factors the *Leegin* Court emphasised as relevant to the question of whether a particular instance of RPM is pro- or anticompetitive, and the FTC reasoned that the defendant should have the burden of proving the nonexistence of each.’<sup>130</sup>

Lambert criticises the FTC’s approach as too likely to condemn minimum RPM clauses, which he asserts are more often pro- than anticompetitive.<sup>131</sup> Those who are more sceptical also favour presumptive illegality but with well structured ‘safe harbour’

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<sup>128</sup> *Leegin* 551 US at 916

<sup>129</sup> G.T. Gundlach ‘Overview and contents of the special issue: Antitrust analysis of resale price maintenance after *Leegin*’ (2010) 55 (1) Antitrust Bulletin 1, 7; R.L. Steiner ‘The *Leegin* Factors – a mixed bag’ (2010) 55 (1) Antitrust Bulletin 25, 56

<sup>130</sup> T.A. Lambert ‘A decision-theoretic rule of reason for minimum resale price maintenance’ (2010) 55 (1) Antitrust Bulletin 167, 212

<sup>131</sup> *Ibid* 213

exceptions;<sup>132</sup> principally for cases where undertakings lack market power or are attempting to penetrate a new market.<sup>133</sup>

The EU position, that minimum RPM is a hardcore restriction, now stands in contrast to the US policy. While the EU has a wealth of case law and Commission decisions on ATP, the EU's treatment of minimum RPM is relatively sparse. This is due to the significance illegal territorial restrictions played during the early period of the Community, when competition policy had the near-exclusive objective of market integration.

Outside of the context of minimum RPM, statements on price competition were first articulated in the 1970s when the Commission diversified the objectives of Community competition policy to include the protection of effective competition. In *Metro*, the Court stated that 'price competition is so important that it can never be eliminated'.<sup>134</sup> When the Court directly considered vertical price fixing in the selective distribution case of *Binon*, it upheld the Commission's view that

'any price-fixing agreement constitutes, of itself, a restriction on competition and is, as such, prohibited by [Article 101 (1)]. The Commission does not deny that newspapers and periodicals and the way they are distributed have special characteristics but considers that these cannot lead to an exclusion of such products and their distribution from the scope of [Article 101 (1)]. On the contrary, those characteristics should be put forward by the undertakings relying upon them in the context of an application for exemption under [Article 101 (3)].'<sup>135</sup>

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<sup>132</sup> J.B. Kirkwood 'Rethinking antitrust policy toward RPM' (2010) 55 (2) Antitrust Bulletin 423, 428

<sup>133</sup> Ibid 465 – 468

<sup>134</sup> C-26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, 1905

<sup>135</sup> C-243/83 *SA Binon & Cie v SA Agence et Messageries de la presse* [1985] ECR 2015, 2046

The subsequent *Pronuptia* case drew the distinction between illegal vertical price restrictions and permissible price recommendations in the context of franchising agreements.<sup>136</sup> The Court affirmed this position more recently in *Pedro IV*, finding that recommended resale prices for fuel, calculated on an assumed distributor's margin, were not illegal if they were genuinely a recommendation.<sup>137</sup> A fixed distribution margin, by contrast, would have the same economic effect as minimum RPM.

The 1999 BER listed minimum RPM as a hardcore restriction not capable of exemption.<sup>138</sup> Despite speculation that the *Leegin* judgment would encourage changes in Commission policy,<sup>139</sup> the legal position on minimum RPM was unchanged by the 2010 BER.<sup>140</sup> As with ATP, the EAGCP advocated for market power tests, rooted in welfare economics, for minimum RPM agreements; a *de minimis* presumptive legality approach for undertakings with under 15% of market share, a burden to prove procompetitive benefits on undertakings with between 15% and 30% of market share, and presumptive illegality for undertakings with greater market power.<sup>141</sup>

The rejection of the EAGCP's recommendation has been criticised. Vettas considers that anticompetitive effects are unlikely to be realised unless the undertakings involved have substantial market power.<sup>142</sup> Jones states the Commission accepts minimum RPM can have procompetitive benefits under specific circumstances but nonetheless subjects it to

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<sup>136</sup> C-161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353, 384

<sup>137</sup> C-260/07 *Pedro IV Servicios SL v Total Espana SA* [2009] ECR I-2437 Para. 78

<sup>138</sup> Regulation 2790/1999 Article 4 (a)

<sup>139</sup> Marco-Colino *Vertical Agreements* 105

<sup>140</sup> Regulation 330/2010 Article 4 (a)

<sup>141</sup> EAGCP *Hardcore Restrictions* 4

<sup>142</sup> N. Vettas 'Developments in vertical agreements' (2010) 55 (4) *Antitrust Bulletin* 843, 871

‘object’ status.<sup>143</sup> Kneepkens criticises the inconsistency with the Commission’s commitment to the more economic approach.<sup>144</sup>

While the EU maintained its position on minimum RPM in the 2010 BER despite apparent pressure,<sup>145</sup> the Commission was compelled to increase its stated justifications.<sup>146</sup> The 2000 Guidelines cite the principal anticompetitive effects of RPM as ‘(1) a reduction in intra-brand price competition, and (2) increased transparency on prices’.<sup>147</sup> The 2010 Guidelines list a rather more extensive set of anticompetitive effects ‘Firstly, RPM may facilitate collusion between suppliers by enhancing price transparency...Second, by eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers...Third, RPM may more generally soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors...Fourth, the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand. Fifth, RPM may lower the pressure on the margin of the manufacturer...Sixth, RPM may be implemented by a manufacturer with market power to foreclose smaller rivals. The increased margin that RPM may offer distributors, may entice the latter to favour the particular brand over rival brands when advising customers, even where such advice is not in the interest of these customers...Lastly, RPM may reduce dynamism and innovation at the distribution

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<sup>143</sup> A. Jones ‘Completion of the revolution in antitrust doctrine on restricted distribution: *Leegin* and its implications for EC competition law’ (2008) 53 (4) Antitrust Bulletin 903, 942 – 943

<sup>144</sup> M. Kneepkens ‘Resale Price Maintenance: economics call for a more balanced approach’ (2007) 28 (12) European Competition Law Review 656, 664

<sup>145</sup> Wijckmans and Tuytschaever *Vertical Agreements* 140

<sup>146</sup> *Ibid* 141

<sup>147</sup> Commission Notice: Guidelines on Vertical Restraints (2000) OJ C291/1 (13 October 2000) Para. 112

level. By preventing price competition between different distributors, RPM may prevent more efficient retailers from entering the market...'<sup>148</sup>

#### **4.4. Free Riding and Provision of Services under Vertical Restraints**

It is undisputed that free riding exists in any economy. In what circumstances the law should intervene to correct a free-riding problem has become a critical question for antitrust policy, because the scope of the theory is of fundamental importance in assessing whether vertical restraints are pro- or anticompetitive. In *Sylvania*, Justice Powell states vertical restrictions can be justified because under

market imperfections such as the so-called “free rider” effect...services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer’s benefit would be greater if all provided the services than if none did.’<sup>149</sup>

Marco-Colino considers the *Sylvania* position weak when it is used to justify vertical restraints to prevent free riding on established manufacturers, who are likely to have lower promotional costs and greater market power.<sup>150</sup> The Commission carefully limits its scope of recognition of free rider issues in the 2010 Guidelines, stating that

‘For there to be a problem, there needs to be a real free-rider issue. Free-riding between buyers can only occur on pre-sales services and other promotional activities, but not on after-sales services for which the distributor can charge its customers individually.’<sup>151</sup>

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<sup>148</sup> 2010 Vertical Restraints Guidelines Para. 224

<sup>149</sup> *Sylvania* 433 US at 55

<sup>150</sup> Marco-Colino *Vertical Agreements* 108; citing *Toys “R” Us* (7<sup>th</sup> Circuit)

<sup>151</sup> 2010 Vertical Restraints Guidelines Para. 107 (a)

Warren Grimes criticises *Sylvania* for failing to take the same position on after-sales services.<sup>152</sup> He considers it a ‘broad-brush’ departure from the refined free-rider theory first postulated by Lester Telser in 1960.<sup>153</sup> The sheer breadth of free riding problems the Chicago School perceive has been subject to sustained criticism. Popofsky cites the Chicagoan tendency to presume vertical restraints were correcting a free riding problem.<sup>154</sup> Lao notes that the School tends to equate discounters with free riders.<sup>155</sup> Grimes reserves the sharpest criticism for Justice Scalia’s opinion in *Sharp*,<sup>156</sup> stating ‘Justice Scalia ignored record facts and a jury finding to justify a cutoff of a discounting dealer. Although there was virtually no evidence of free riding by the discounter, Scalia rated the defense as “holy writ”, not as a concept to be measured against the evidence.’<sup>157</sup>

Justice Kennedy also equates discounters with free riders in *Leegin*.<sup>158</sup> Low-service discounters can free ride on a high service distributor, ‘forcing it to cut back its services to a level lower than consumers would otherwise prefer’.<sup>159</sup> However, Justice Breyer was sceptical about whether this is a problem with which antitrust policy should be concerned. He articulated his preferred mode of analysis as questioning ‘how often the “free riding” problem is serious enough significantly to deter dealer investment’.<sup>160</sup>

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<sup>152</sup> W.S. Grimes ‘The *Sylvania* Free Rider Justification for Downstream-Power Vertical Restraints: Truth or Invitation for Pretext’ in R. Pitofsky (editor) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (1<sup>st</sup> ed. Oxford University Press, Oxford, 2008) 181, 186

<sup>153</sup> L.G. Telser ‘Why Should Manufacturers want Fair Trade’ (1960) 3 *Journal of Law and Economics* 86

<sup>154</sup> M.L. Popofsky ‘*Sylvania* – Fifteen Years after from the Perspective of a (Sometimes) True Believer’ (1991) 60 (1) *Antitrust Law Journal* 27, 35 citing *Valley Liquors v Renfield Importers Ltd* 678 F.2d 742 (7<sup>th</sup> Circuit, 1982)

<sup>155</sup> M. Lao ‘Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance’ in R. Pitofsky (editor) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (1<sup>st</sup> ed. Oxford University Press, Oxford, 2008) 196, 201

<sup>156</sup> *Sharp* 485 US at 717

<sup>157</sup> Grimes ‘Truth or Invitation for Pretext’ in Pitofsky *Overshot the Mark* 181, 181

<sup>158</sup> *Leegin* 551 US at 890

<sup>159</sup> *Ibid* 891

<sup>160</sup> *Ibid* 915

Lao broadens Breyer's point slightly, observing that antitrust policy should not be concerned with free riding that deters dealer investment unless it deters investment that enhances consumer welfare.<sup>161</sup> Assuming a consumer welfare objective, a critical consideration is to what extent vertical restraints ensure provision of, or cause overprovision of, services. Ensuring services enhances consumer welfare, but overprovision causes consumer detriment due to unnecessarily higher prices. Justice Kennedy attempts to justify minimum RPM in circumstances with no free riding problem, stating

‘Resale price maintenance can also increase interbrand competition by encouraging retailer services that would not be provided even absent free riding. It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services.’<sup>162</sup>

However, arguments justifying the hardcore restrictions in the absence of a free riding problem are unconvincing. Valuable services will be provided by distributors because of consumer demand unless a genuine free riding problem renders them unviable. Steiner considers contractual mechanisms superior to vertical restraints for compelling dealers to provide valued services,<sup>163</sup> while Bork dismisses contractual provisions as having

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<sup>161</sup> Lao ‘Free Riding’ in Pitofsky *Overshot the Mark* 196, 197

<sup>162</sup> *Leegin* 551 US at 891 – 892

<sup>163</sup> R.L. Steiner ‘Manufacturers’ promotional allowances, free riders and vertical restraints’ (1991) 36 (2) *Antitrust Bulletin* 383, 386

uneconomic enforcement costs for manufacturers.<sup>164</sup> However, dealers subject to vertical restraints may choose to pocket the guaranteed margin rather than provide services,<sup>165</sup> and may only be compelled to provide services by a genuine threat of termination. To maintain such a threat, a manufacturer would also incur enforcement costs, and it is difficult to see why these would require less investment than contractual enforcement costs.

Klein and Murphy, who generally are sympathetic to vertical restraints, express scepticism about whether they can ensure provision of services.<sup>166</sup> They consider minimum RPM an ineffective way of preventing free riding and promoting services, because it is flawed economic analysis that assumes service provision is the only means by which dealers can improve their position while subject to it.<sup>167</sup> They cite tying arrangements as an option for circumventing vertical restraints, and consider territorial restraints superior to price restraints to prevent dealers from ‘shirking’ on providing services.<sup>168</sup>

The ‘quality certification’ justification also raised in *Leegin* similarly draws a distinction between nonprice and price restraints. Quality certification arose in the 1980s<sup>169</sup> as an attempt to extend the ‘standard theory’ of the free-riding problem.<sup>170</sup> The Bush

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<sup>164</sup> Bork *Paradox* 290 – 291

<sup>165</sup> Steiner ‘Promotional Allowances’ 386; R. Pitofsky ‘Are retailers who offer discounts really “Knaves”? The coming challenge to the *Dr Miles* rule’ (2007) 21 (2) *Antitrust* 61, 63

<sup>166</sup> B. Klein and K. Murphy ‘Vertical Restraints as Contract Enforcement Mechanisms’ (1988) 31 (2) *Journal of Law and Economics* 265, 266

<sup>167</sup> *Ibid* 266

<sup>168</sup> *Ibid* 280

<sup>169</sup> H.P. Marvel and S. McCafferty ‘Resale Price Maintenance and Quality Certification’ (1984) 15 *Rand Journal of Economics* 346

<sup>170</sup> Klein and Murphy ‘Enforcement Mechanisms’ 265



Administration submitted in *Leegin* that quality certification could justify minimum RPM, stating

‘Prestige retailers have developed reputations for stocking only high quality or especially fashionable products, which may be costly for the retailers to identify. Many customers may evaluate products largely on the basis of the stocking choices made by the prestige retailers – an effect known as quality certification or signalling. Other retailers may seek to sell at a discount the same products stocked by prestige retailers, thereby free riding on the prestige retailers’ quality certifications. When quality certification is important to consumers, a manufacturer’s best strategy may be to impose RPM, which induces prestige retailers to carry its product when free riding otherwise would make it unprofitable to do so.’<sup>171</sup>

The argument is fundamentally flawed. Consumer welfare is not promoted by restricting output to ‘quality certifying’ retailers if consumers are willing to buy from discounters. The very fact that consumers will buy a product from discounters undermines the case that the consumer considers quality certification of that product important at all. The European Commission frames quality certification as a free-rider problem, not a discrete consideration.<sup>172</sup> The Commission considers that a nonprice restriction like exclusive distribution or selective distribution can be justified on quality certification grounds when it is ‘vital’ for the market penetration of a new product that they are only placed in ‘quality certifying’ retailers.<sup>173</sup> As such, quality certification is a limited justification for territorial restraints to promote market penetration, but a thoroughly unconvincing justification for minimum RPM.

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<sup>171</sup> *Leegin* United States *amicus* Brief 14

<sup>172</sup> 2010 Vertical Restraints Guidelines Para. 106 (c)

<sup>173</sup> *Ibid*

Ultimately, sound analysis of the effect of vertical restraints must be based on a sound definition of the free rider problem. Observing the use of minimum RPM in markets with no plausible free rider problem,<sup>174</sup> Lao advocated a structured rule of reason for minimum RPM; a ‘quick-look’ test for a material free riding problem, condemning any agreement where it is absent.<sup>175</sup> As such, there is an inherent risk to a flawed definition of free riding. The presumption of free riding in *Sharp*<sup>176</sup> risks permitting the entrenchment of services that do not promote consumer welfare, which causes consumer detriment by increasing final costs to the consumer. Comanor criticises the Chicago School for failing to properly assess differences in consumer preferences for level of service.<sup>177</sup> He characterises this in terms of ‘marginal’ and ‘inframarginal’ consumers, stating

‘Economic theory alone cannot predict whether the imposition of vertical restraints – and dealers’ provision of additional services – will benefit consumers and enhance efficiency. Whether consumers benefit depends on whether gains to marginal consumers outweigh losses to their infra-marginal counterparts...Marginal consumers are likely to value information more highly than do infra-marginal buyers, who have generally used the product before or at least understand how to use it...As long as these relationships hold true, producers may induce distributors to supply an excessive level of information services.’<sup>178</sup>

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<sup>174</sup> Lao ‘Free Riding’ in Pitofsky *Overshot the Mark* 196, 200 – 201

<sup>175</sup> *Ibid* 216

<sup>176</sup> *Sharp* 485 US at 717

<sup>177</sup> W.S. Comanor ‘Vertical Price-Fixing, Vertical Market Restrictions, and the new Antitrust Policy’ (1985) 98 (5) *Harvard Law Review* 983, 990

<sup>178</sup> *Ibid* 999

Comanor's position is consistent with the consensus that vertical restraints are most likely to be procompetitive when used to promote market penetration. A new product is vulnerable to free riding, when consumer demand for information will be at its highest.<sup>179</sup> 100% of consumers of new products are marginal, which will gradually reduce as the product becomes established.

The US Government's brief in *Leegin* rebuts that Comanor's position justifies *per se* illegality for minimum RPM, and Comanor did not support either party in his own *amicus* brief in *Leegin*.<sup>180</sup> The government contended that interbrand competition would correct any potential harm to inframarginal consumers.<sup>181</sup> However, they add that 'higher prices may enhance consumer welfare as a whole because consumers effectively receive a different and better product at the higher price'.<sup>182</sup> It is a flawed argument because vertical restraints have the potential to cause an overprovision of services. Higher prices resulting from services for which there is insufficient consumer demand cannot be said to increase consumer welfare.

#### **4.5. Antitrust policy on the forms of competition**

Antitrust policy is assessed in the context of its effect on two sets of forms of competition: (1) price competition and service competition; and (2) interbrand competition and intrabrand competition. A policy position on vertical agreements can be defined by the extent to which it is concerned with the restriction of one half of each pair for the purposes of stimulating the other. *Leegin* allows the elimination of intrabrand

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<sup>179</sup> Ibid 1002

<sup>180</sup> *Leegin Creative Leather Products v PSKS* 551 US 877 (2007) Brief for William S. Comanor and Frederic M. Scherer as *amici curiae* supporting neither party

<sup>181</sup> *Leegin* United States *amicus* Brief 23

<sup>182</sup> Ibid

price competition by minimum RPM to promote intrabrand service competition. Justice Kennedy states

‘If the consumer can...buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer’s retailers compete among themselves over services.’<sup>183</sup>

Kennedy’s position is problematic because it fails to deal with Comanor’s arguments on consumer preference. It adopts the Chicagoan assumption that the interests of manufacturer and consumer will always coincide when vertical restraints are used to promote efficiency.<sup>184</sup> For instance, if there is a universal consumer preference for high-service sales, there should not be a viable market for low-service discounters. In his *Leegin* dissent, Breyer articulates the potential adverse effects of agreements eliminating intrabrand price competition to promote intrabrand service competition thus

‘they can prevent dealers from offering customers the lower prices that many customers prefer; they can prevent dealers from responding to changes in demand, say, falling demand, by cutting prices; they can encourage dealers to substitute service, for price, competition, thereby threatening wastefully to attract too many resources into that portion of the industry; they can inhibit expansion by more

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<sup>183</sup> *Leegin* 551 US at 891

<sup>184</sup> Comanor ‘New Antitrust Policy’ 990; see also M. Spence ‘Monopoly, quality, and regulation’ (1975) 6 *Bell Journal of Economics* 417

efficient dealers whose lower prices might otherwise attract more customers, stifling the development of new, more efficient modes of retailing; and so forth.’<sup>185</sup>

However, the majority rejected the respondent’s submission that lowering consumer prices should be the principal objective of US antitrust policy.<sup>186</sup> Justice Kennedy stated the

‘Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct...for, as has been indicated already, the antitrust laws are designed to protect interbrand competition, from which lower prices can later result.’<sup>187</sup>

The statement that ‘price competition is so important it can never be eliminated’<sup>188</sup> continues to define the EU’s contrasting position on price competition, and the 2010 Guidelines articulate the negative effects of minimum RPM in this context.<sup>189</sup> It incorporates both what Rey and Verge describe as the ‘price uniformity’ effect of eliminating intrabrand price competition,<sup>190</sup> and the effects on distributive efficiency argued by Breyer in *Leegin*.<sup>191</sup> The US and EU policies can be distinguished by their faith in interbrand competition to correct the adverse effects of eliminating intrabrand competition. *Sylvania* cemented the ‘unequivocal’ position of interbrand competition in US antitrust,<sup>192</sup> as

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<sup>185</sup> *Leegin* 551 US at 910 – 911

<sup>186</sup> *Leegin* Respondent Brief 12

<sup>187</sup> *Leegin* 551 US at 895

<sup>188</sup> C-26/76 *Metro* 1905

<sup>189</sup> 2010 Vertical Restraints Guidelines Para. 224

<sup>190</sup> P. Rey and T. Verge ‘Economics of Vertical Restraints’ in P. Buccirossi (editor) *Handbook of Antitrust Economics* (1<sup>st</sup> ed. MIT Press, Cambridge, 2008) 353, 373

<sup>191</sup> *Leegin* 551 US at 910 – 911

<sup>192</sup> Popofsky ‘(Sometimes) True Believer’ 35

‘the primary concern of antitrust law...The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer...when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power’<sup>193</sup>

Easterbrook states ‘inter- and intrabrand competition...are not commensurable’<sup>194</sup> and, in probably a clearer exposition of the Chicago School’s attitude, ‘Intrabrand competition as such is worthless’.<sup>195</sup> It is a Chicagoan fundamental that antitrust policy should not be concerned with the protection of intrabrand competition. *Consten and Grundig* stated an equal concern for interbrand and intrabrand competition thus

‘Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of [Article 101 (1)] merely because it might increase the former.’<sup>196</sup>

At that time, the Court rejected Advocate General Roemer’s justifications for the restriction of intrabrand competition to promote interbrand competition.<sup>197</sup> Since the introduction of the ‘more economic approach’, however, EU competition policy has adopted a more nuanced position. The Easterbrook argument that the two levels of competition are ‘not commensurable’ has become unchallenged in EU competition policy. The 1996 Green Paper on vertical restraints concluded their ‘Anti-competitive

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<sup>193</sup> *Sylvania* 433 US at 52 n 19

<sup>194</sup> Easterbrook ‘Vertical Arrangements’ 155

<sup>195</sup> *Ibid* 156

<sup>196</sup> C-56 and 58/64 *Consten and Grundig* 342

<sup>197</sup> C-56 and 58/64 *Consten and Grundig* (AG Opinion) 358 – 359

effects are only likely where interbrand competition is weak and there are barriers to entry.<sup>198</sup>

However, protection of intrabrand competition has not been disregarded by EU competition policy. The 2000 Guidelines stated ‘if there is insufficient inter-brand competition, the protection of inter- and intra-brand competition becomes important’.<sup>199</sup> While the 2000 Guidelines evidently prioritise interbrand over intrabrand competition, the 2010 Guidelines are more ambiguous, stating

‘For most vertical restraints, competition concerns can only arise if there is insufficient competition at one or more levels of trade, that is, if there is some degree of market power at the level of the supplier or the buyer or at both levels.’<sup>200</sup>

The *Leegin* majority stated ‘vertical nonprice restraints have impacts similar to those of vertical price restraints’.<sup>201</sup> It is undeniable that the illegality distinction between the hardcore restrictions in the period from *Sylvania* and *Leegin* appeared contradictory, and Justice Kennedy considered it ‘an anachronistic distinction that finds no support in sound economic analysis’.<sup>202</sup> Steiner, a critic of the Chicago School, concedes there is a case for identical treatment of the hardcore restrictions, but rejects it due to the dangers of permitting RPM under an antitrust policy which accepts the Chicagoan position on intrabrand competition.<sup>203</sup>

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<sup>198</sup> European Commission *Green Paper on Vertical Restraints in EC Competition Policy* (1996) COM (96) 721 Retrieved from URL <[http://ec.europa.eu/competition/antitrust/others/96721en\\_en.pdf](http://ec.europa.eu/competition/antitrust/others/96721en_en.pdf)> (Accessed 25 October 2016)

<sup>199</sup> 2000 Vertical Restraints Guidelines Para. 6

<sup>200</sup> 2010 Vertical Restraints Guidelines Para. 6

<sup>201</sup> *Leegin* 551 US at 903 – 904

<sup>202</sup> *Leegin Creative Leather Products v PSKS* 551 US 877 (2007) Brief for *amici curiae* economists supporting Petitioner 2

<sup>203</sup> Steiner ‘*Sylvania Economics*’ 58 – 59

There is a clear distinction in the effect of the hardcore restrictions at the intrabrand level. ATP wholly eliminates intrabrand competition. Minimum RPM eliminated intrabrand price competition but does not directly restrict intrabrand competition for provision of services. However, the argument that both restrictions should be subject to the same rule of reason is based on a precarious Chicagoan assumption. The contention that the two levels of competition operate independently of each other, and that restrictions on intrabrand competition can never have the effect of restricting interbrand competition, is fundamentally flawed.

#### **4.6. Justifications of the US and EU hardcore restrictions policies**

Following *White Motor*, Comanor argued that vertical nonprice restraints could restrict interbrand competition by product differentiation,<sup>204</sup> the process by which manufacturers attempt to create a unique market for their product. However, product differentiation is frequently a result of innovation, and as such cannot reasonably be considered anticompetitive *per se*. Comanor concedes this, stating

‘While some measure of product differentiation may be desirable, even though price competition is lessened, the attainment of differentiation is not a valid reason for rejecting the normal presumption of antitrust policy in favour of maximum competitive behaviour on the part of independent firms.’<sup>205</sup>

Fox argued for antitrust policy based ‘on an environment that is conducive to vigorous rivalry’.<sup>206</sup> As such, antitrust policy based on the process objectives advocated by

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<sup>204</sup> W.S. Comanor ‘Vertical Territorial and Customer Restrictions: *White Motor* and its Aftermath’ (1968) 81 (7) *Harvard Law Review* 1419, 1425

<sup>205</sup> *Ibid* 1437

<sup>206</sup> Fox ‘Equilibrium’ 1169



Comanor and Fox would justify the *per se* illegality of ATP, assuming the objective of maximising competition was not limited solely to the interbrand level.

Under an antitrust policy of consumer welfare, however, ATP can be justifiable in certain circumstances. Consumer welfare can be promoted by subjecting ATP to a rule of reason based on market power thresholds rooted in robust economic assumptions and a principled mode of defining relevant markets. The former should prevent oligopolistic abuse of distribution agreements for anticompetitive purposes; the latter should counter anticompetitive actions such as product differentiation.<sup>207</sup>

The absolute prohibition of ATP under EU law is rooted in the EU's market integration objective.<sup>208</sup> The European Project not only had to merge national markets, but different economic traditions. There remains a strong risk of the EU developing 'national affinity' distribution oligopolies, where distributors monopolise national markets due to domestic familiarity rather than merit. ATP presents a serious tendency to isolate national markets and reinforce national affinity oligopolies. The EU's market integration objective is ultimately a structural objective required to prevent market division, which logically justifies its absolute prohibition of ATP.

While some consider ATP and minimum RPM broadly to have similar economic effects, much academic opinion considers the latter more anticompetitive.<sup>209</sup> Einer Elhauge states

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<sup>207</sup> Comanor 'White Motor' 1425

<sup>208</sup> EAGCP *Hardcore Restrictions* 5

<sup>209</sup> Marco-Colino *Vertical Agreements* 81; Brunell 'Overruling *Dr Miles*' 520 – 521

‘The differences in possible anticompetitive effects are various. Unlike vertical minimum price-fixing, vertical nonprice restraints don’t have a possible adverse effect on *interbrand* competition by impeding the ability of retailers to adjust prices in response to competition from other brands. Vertical limits on territories and customers also don’t facilitate oligopolistic coordination between manufacturers’<sup>210</sup>

The Respondent in *Leegin* argued minimum RPM had a negative effect on consumer welfare by inhibiting dealer efficiency.<sup>211</sup> The fundamental contention is that vigorous interbrand competition depends on price responsiveness. Minimum RPM tends to spread among competing manufacturers and entrenches oligopolistic market power.<sup>212</sup> In such circumstances, no dealer has an incentive to reduce costs, or be any more innovative than the least efficient dealer among them because they will not be able to charge a lower price to encourage business.

Ultimately, the *Leegin* decision is flawed because the circumstances in which minimum RPM can promote consumer welfare are too limited not to justify *per se* illegality. It can only be characterised as promoting consumer welfare when the analysis of its economic effect is based on flawed Chicagoan assumptions. The argument that restrictions on intrabrand price competition cannot affect interbrand competition are unconvincing. The judgment does not properly engage with Post-Chicagoan economics; despite the significant issues with the *Kodak* judgment,<sup>213</sup> the fact that it is not mentioned in *Leegin* has allowed an unprincipled distinction to emerge between aftermarket effect and intrabrand effect on interbrand competition. The Court, therefore, failed to find a robust

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<sup>210</sup> E.R. Elhauge *United States Antitrust Law and Economics* (2<sup>nd</sup> ed. Foundation Press, New York, 2011) 444

<sup>211</sup> *Leegin* Respondent Brief 25

<sup>212</sup> Elhauge *Antitrust Law and Economics* 444

<sup>213</sup> *Eastman Kodak Co v Image Technical Services* 504 US 451 (1992)

economic justification for repealing the *per se* illegality of minimum RPM, as it does not promote consumer welfare except on Chicagoan assumptions.

By contrast, the European Union's position on minimum RPM is justified logically under most interpretations of its multivalued competition law objectives. In particular, it is clear that it is wholly inconsistent with the objectives of protecting effective competition and the competitive process, and that it has been so since the statements in *Metro* on the importance of price competition in 1977.<sup>214</sup>

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<sup>214</sup> C-26/76 *Metro* 1905

## CHAPTER 5. CONCLUSION

### 5.1. Summary

This thesis set out to ascertain the present competition policy objectives of the US and the EU, consider their political context and historical development, critique their underlying economic principles, and conclude whether their legal positions on the hardcore vertical restrictions were logically justified.

The second chapter concluded that the prevailing present objective of US antitrust policy was the promotion of consumer welfare.<sup>1</sup> The US federal courts have had authority to interpret the Sherman Act dynamically, and shifting political and economic imperatives have caused revolutions in antitrust policy. The antitrust laws were originally borne out of a period of industrial revolution and agricultural depression following the Civil War,<sup>2</sup> and the significant early case law focused on challenging railroad industry cartels.<sup>3</sup> Academics advocating a variety of antitrust policy objectives have scrutinised closely the early case law, from the 1890s to the 1920s, and each school of thought cites evidence supporting their positions.<sup>4</sup> The Warren Court period, following the Second World War, was defined by a desire to promote small business welfare, and to prevent the economic concentrations which had facilitated totalitarianism in Europe.<sup>5</sup>

However, cases preventing concentrations in critical heavy industries, such as *Alcoa*,<sup>6</sup> were followed by decisions to block mergers that could never have dominated markets,<sup>7</sup>

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<sup>1</sup> Chapter 2.8, page 40

<sup>2</sup> Chapter 2.2, page 5

<sup>3</sup> Chapter 2.4, pages 14-18

<sup>4</sup> Chapter 2.3, pages 6 – 14

<sup>5</sup> Chapter 2.5, pages 24 – 31

<sup>6</sup> *United States v Aluminum Co of America* 148 F.2d 416 (2<sup>nd</sup> Circuit, 1945)

<sup>7</sup> *United States v Brown Shoe Co* 370 US 294 (1961); *United States v Von's Grocery Co* 384 US 270 (1966)

and problematic failures to comprehend the interplay between differing levels of competition.<sup>8</sup> By the 1970s, Warren Court antitrust policy had become economically untenable in the eyes of the business community, and the forceful arguments of the Chicago School rapidly became the dominant force in US antitrust.<sup>9</sup> Chicago's sole antitrust policy objective was the promotion of consumer welfare, which they defined by the economic metrics of efficiency and restriction of output.

However, the Chicago School is characterised by flawed and overly simplistic economic assumptions,<sup>10</sup> and it began to lose favour following the end of the Reagan Administration. Case law departing from Chicago, principally *Maricopa County* and *Kodak*, generally failed to find a principled and comprehensive economic metric to replace Chicago.<sup>11</sup> As such, the language of Chicago has been retained by US antitrust, and while Post-Chicagoans differ between themselves in modes of economic analysis, they largely have retained Chicagoan policy objectives. Thus, consumer welfare remains, essentially, the sole objective of US antitrust policy.<sup>12</sup>

The third chapter concluded that EU competition policy has retained a multivalued set of objectives.<sup>13</sup> It contrasts with US antitrust policy because it has incorporated multiple new policy objectives over time instead of replacing them. Antitrust came about in Europe as an imperative following the end of the Second World War.<sup>14</sup> Germany's late period of industrialisation and its imperial aspirations were factors that made it

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<sup>8</sup> *United States v Philadelphia National Bank* 374 US 321 (1963)

<sup>9</sup> Chapter 2.6, pages 31 – 35

<sup>10</sup> Chapter 2.7, page 35

<sup>11</sup> *Arizona v Maricopa County Medical Society* 457 US 332 (1981), see Chapter 2.6, pages 33 – 35; *Eastman Kodak Co v Image Technical Services* 504 US 451 (1991), see Chapter 2.7, pages 36 – 38

<sup>12</sup> Chapter 2.8, page 40

<sup>13</sup> Chapter 3.6, page 75

<sup>14</sup> Chapter 3.3, pages 46 – 47

particularly vulnerable to cartelisation,<sup>15</sup> which ultimately facilitated the Nazis' hegemonic economic power.<sup>16</sup> The historical development of European competition policy has thus been linked inextricably to the European Project. Its initial policy objective was that of market integration, the principal policy objective of the ECSC as conceived by Schuman and Adenauer,<sup>17</sup> which continued following the foundation of the EEC.

The market integration objective is rooted in Ordoliberalism,<sup>18</sup> the school of economics that defined postwar West German economic policy.<sup>19</sup> It was articulated as the principal objective of European competition policy in the 1960s in the *Consten and Grundig* case on ATP.<sup>20</sup> The DG Competition was first headed by the Ordoliberal Hans von der Groeben,<sup>21</sup> but subsequent Commissioners introduced a 'Keynesian discourse',<sup>22</sup> the influence of other economic schools of thought that led to the incorporation of the effective competition objective in the 1970s.<sup>23</sup> While this discourse incorporated the industrial and social policy goals of the Community into its competition policy,<sup>24</sup> the particular importance of upholding the competitive process was apparent in 1970s case law.<sup>25</sup>

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<sup>15</sup> Chapter 3.2, pages 42 – 44

<sup>16</sup> *Ibid*, page 45

<sup>17</sup> Chapter 3.3, pages 48 – 49

<sup>18</sup> Chapter 3.4, page 57

<sup>19</sup> *Ibid*, pages 50 – 53

<sup>20</sup> C-56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* ('*Consten and Grundig*') [1966] ECR 299

<sup>21</sup> Chapter 3.3, page 55

<sup>22</sup> S.M. Ramirez-Perez and S. van de Scheur 'The Evolution of the Law on Articles 85 and 86 EEC [Article 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge' in K.K. Patel and H. Schweitzer (editors) *The Historical Foundations of EU Competition Law* (1<sup>st</sup> ed. Oxford University Press, Oxford, 2013) 19, 30 – 31

<sup>23</sup> Chapter 3.4, pages 60 – 61

<sup>24</sup> *Ibid*, page 61

<sup>25</sup> See C-6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215 and C-26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875

Finally, the EU's more economic approach, introduced in the 1990s, relaxed its restrictions on vertical agreements and introduced consumer welfare and efficiency objectives into EU competition policy.<sup>26</sup> However, the EU has not resolved the conflicting nature of its multiple objectives, with the process objectives of effective competition clashing with the consumer welfare objectives of the more economic approach.<sup>27</sup> Notably, an attempt by the General Court to introduce further economic considerations into the construction of Article 101 (1) TFEU was reversed by the ECJ.<sup>28</sup>

The fourth chapter considered the economic principles underlying adjudication of vertical restraints, in particular the free riding theory and its effect on provision of services,<sup>29</sup> and the distinctions between the different forms of competition.<sup>30</sup> While the *Sylvania* argument that vertical restraints can be justified to ensure provision of services are not prevented by free riding is sound,<sup>31</sup> the Chicagoan tendency to attempt to stretch the scope of the free riding theory is apparent.<sup>32</sup> This is evident in Scalia's presumption of a free riding problem in *Sharp*,<sup>33</sup> where he equates discounters with free riders; and in the fundamentally flawed quality certification theory.<sup>34</sup> There is clear scepticism in the economic literature that vertical restraints are, in fact, always effective at ensuring appropriate provision of services.<sup>35</sup> Comanor considers that Chicagoan interpretation of

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<sup>26</sup> Chapter 3.5, pages 65 – 68

<sup>27</sup> *Ibid*, page 74

<sup>28</sup> T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, reversed by C-501, 513, 515 and 519/06 *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291; see Chapter 3.5, pages 69 – 71

<sup>29</sup> Chapter 4.4, pages 97 – 103

<sup>30</sup> Chapter 4.5, pages 103 – 108

<sup>31</sup> Chapter 4.4, page 97

<sup>32</sup> *Ibid*, pages 98 – 101

<sup>33</sup> *Business Electronics Corp v Sharp Electronics Corp* 485 US 717 (1988), followed by Justice Kennedy in *Leegin Creative Leather Products v PSKS* 551 US 877 (2007) 890; see Chapter 4.4, page 98

<sup>34</sup> Chapter 4.4, pages 100 – 101

<sup>35</sup> *Ibid*, pages 99 – 100

vertical restraints can lead to an overprovision of services, causing higher prices and thus consumer detriment.<sup>36</sup>

The fourth chapter concluded that the EU logically justifies its absolute prohibition of ATP and minimum RPM under its multifaceted set of policy objectives.<sup>37</sup> Under its sole objective of consumer welfare, the US justifies its position on ATP,<sup>38</sup> but has failed to provide a convincing justification for repealing the *per se* illegality of minimum RPM.<sup>39</sup>

The US position on ATP follows the *Northern Pacific* standard for *per se* illegality.<sup>40</sup> ATP was ruled *per se* illegal in *Schwinn* without reference to *Northern Pacific*,<sup>41</sup> and lower courts continually attempted to circumvent it<sup>42</sup> until it was reversed in *Sylvania*.<sup>43</sup> Subject to a rule of reason based on market power thresholds with robust economic assumptions and principled definitions of relevant markets,<sup>44</sup> ATP can be justifiable under a consumer welfare objective, as intrabrand territorial restrictions do not have the same adverse effect on interbrand competition as intrabrand price restrictions.<sup>45</sup>

By contrast, the EU has consistently prohibited ATP since the *Consten and Grundig* judgment.<sup>46</sup> In that case, the ECJ chose to structure its interpretation of Article 101 (1)

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<sup>36</sup> W.S. Comanor 'Vertical Price-Fixing, Vertical Market Restrictions, and the new Antitrust Policy' (1985) 98 (5) Harvard Law Review 983, 990; see Chapter 4.4, pages 102 – 103

<sup>37</sup> Chapter 4.6, pages 109 – 111

<sup>38</sup> *Ibid*, page 109

<sup>39</sup> *Ibid*, page 110-111

<sup>40</sup> *Northern Pacific Railroad Co v United States* 356 US 1 (1958); see Chapter 4.2, pages 77 – 78

<sup>41</sup> *United States v Arnold, Schwinn and Co* 388 US 365 (1967); see Chapter 4.2, pages 78 – 79

<sup>42</sup> See *Adolph Coors Co v Federal Trade Commission* 497 F.2d 1178 (10<sup>th</sup> Circuit, 1974), *Tripoli Co v Wella Corp* 425 F.2d 932 (3<sup>rd</sup> Circuit, 1970); see Chapter 4.2, pages 79 – 80

<sup>43</sup> *Continental TV v GTE Sylvania* 433 US 36 (1977); see Chapter 4.2, pages 80 – 83

<sup>44</sup> Chapter 4.6, page 109

<sup>45</sup> *Ibid*, pages 109 – 110, see E.R. Elhauge *United States Antitrust Law and Economics* (2<sup>nd</sup> ed. Foundation Press, New York, 2011) 444

<sup>46</sup> C-56 and 58/64 *Consten and Grundig* 342



TFEU as requiring no economic assessment of agreements with ‘object’ status,<sup>47</sup> despite Advocate General Roemer proposing the contrary.<sup>48</sup> That has remained the case, and the market integration objective articulated in *Consten and Grundig* has been followed in many significant Commission and ECJ decisions on ATP since.<sup>49</sup> As such, the market integration objective, critical to the success of the European project, continues to render the absolute prohibition of ATP imperative.<sup>50</sup>

The EU’s absolute prohibition of minimum RPM has primarily been defined by the objective of protecting effective competition.<sup>51</sup> The EU continues to follow the price competition statements made in the *Metro* case.<sup>52</sup> As such, it is still classified as a hardcore restriction,<sup>53</sup> despite criticism that its ‘object’ status is inconsistent with the more economic approach.<sup>54</sup> However, it is apparent that the effects on both interbrand and intrabrand price competition of minimum RPM justify its absolute prohibition on the grounds of protecting effective competition.<sup>55</sup>

The *per se* illegality of minimum RPM in US antitrust subsisted from the flawed *Dr Miles* case in 1911<sup>56</sup> until it was finally reversed by *Leegin* in 2007.<sup>57</sup> However, the lack of an articulated, structured rule of reason in *Leegin*, which has been subject to

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<sup>47</sup> Ibid

<sup>48</sup> C-56 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* (‘*Consten and Grundig*’) [1966] ECR 352 (Opinion of Advocate General Roemer) 358, with reference to *White Motor Co v United States* 372 US 253 (1963)

<sup>49</sup> Chapter 4.2, pages 84 – 85

<sup>50</sup> Chapter 4.6, page 109

<sup>51</sup> Chapter 4.3, pages 94 – 95

<sup>52</sup> C-26/76 *Metro* 1905

<sup>53</sup> Commission Regulation (EU) No 330/2010 of 20 April 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 L102/1 (23 April 2010) Article 4 (a); see Chapter 4.3, page 95

<sup>54</sup> Chapter 4.3, pages 95 – 96

<sup>55</sup> Chapter 4.6, page 111

<sup>56</sup> *Dr Miles Medical Co v John D Park & Sons Co* 220 US 373 (1911), see Chapter 4.3, pages 86 – 87

<sup>57</sup> *Leegin* 551 US at 877, see Chapter 4.3, pages 90 – 93

significant criticism,<sup>58</sup> ultimately means that the US has failed to justify the repeal of *per se* illegality for minimum RPM.<sup>59</sup> US antitrust analysis is based on the precarious premise that interbrand competition operates wholly independently of intrabrand competition, and that interbrand competition should therefore be the sole form of competition with which antitrust is concerned.<sup>60</sup> *Leegin* failed to engage with Post-Chicagoan economics and justifies minimum RPM by reference to flawed Chicagoan assumptions,<sup>61</sup> such as stretching the scope of the free riding theory. Minimum RPM can have significant effects on interbrand competition, including keeping final consumer prices artificially high across an entire market. Accordingly, the US should reconsider the *Leegin* decision, returning the *per se* illegality rule for minimum RPM; or failing that, put in place a properly structured rule of reason based on presumptive illegality for all but minimum RPM agreements for the purposes of market penetration.

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<sup>58</sup> Chapter 4.3, pages 93 – 94

<sup>59</sup> Chapter 4.6, pages 110 – 111

<sup>60</sup> Chapter 4.5, pages 105 – 106

<sup>61</sup> Chapter 4.6, pages 110 – 111

## **APPENDIX**

### **Excerpts of Substantive Legislation**

#### **Section 1 of the Sherman Antitrust Act of 1890**

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

#### **Section 2 of the Sherman Antitrust Act of 1890**

Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

## **Article 101 of the Treaty on the Functioning of the European Union**

- (1) The following shall be prohibited as incompatible with the internal market; all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  - (b) limit or control production, markets, technical development, or investment;
  - (c) share markets or sources of supply;
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- (2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
- (3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
  - any decision or category of decisions by associations of undertakings,
  - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

### **Article 102 of the Treaty on the Functioning of the European Union**

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.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices 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 the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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