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## Antitrust Marathon II

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## ANTITRUST MARATHON II

**Location:** The Competition Appeal Tribunal

**Address:** Victoria House, Bloomsbury Place, London WC1A 2EB

**Date:** 11 April 2008

**Moderated by:** Dr Philip Marsden and Spencer Weber Waller

### Panellists' Biographies

**Christian Ahlborn** is a partner at Linklaters LLP in London, specialising in EC competition law and EC state aid control, UK and German competition law, including notifications to EC and national competition authorities.

**David Bailey** is référendaire at the Competition Appeal Tribunal. He is also a visiting Senior Lecturer at King's College London. He is a Solicitor in England and Wales and an Attorney-at-law in New York. From September 2003 to December 2006 he worked at the law firm Linklaters LLP. Prior to that, he has worked for the Merger Task Force in the European Commission, and as a research assistant to Professor Whish (King's College) and to Professor Kaplow (Harvard). David is the author of Division 1 of *Butterworths Competition Law*. He is a co-editor of the *Competition Law Journal*. He also assists with the running of the Association of European Competition Law Judges and the UK Association of European Law. His current research focuses on the relationship between competition law and public law and various aspects of US antitrust.

**Sir Gerald Barling** is a Justice of the Chancery Division of the High Court of England and Wales and is President of the Competition Appeal Tribunal. He is an Acting Deemster in the Isle of Man Court of Appeal. He was educated at St Mary's College, Blackburn and New College, Oxford (where he was later a lecturer in law for several years) and was called to the Bar in 1972. He commenced his professional life in Manchester but from 1981 onwards his practice was based at Brick Court Chambers in London and Brussels. He has practised in all fields of European law, including competition law, and has worked extensively in the fields of sectoral regulation (particularly telecommunications regulation), pharmaceuticals, data exclusivity, state aids and public procurement. He has frequently represented government and private clients in the national courts (including the Competition Appeal Tribunal) and before the European Court of Justice. He was appointed Queen's Counsel in 1991, elected a Bencher of Middle Temple in 2001 and has sat as a Recorder on the Midland Circuit.

**Professor Margaret Bloom** is a Visiting Professor at King's College London and a Senior Consultant at Freshfields Bruckhaus Deringer LLP. She was Director of Competition Enforcement at the Office of Fair Trading (OFT) for six years until the summer of 2003, and was responsible for the successful implementation of the Competition Act 1998 and the Enterprise Act 2002. She is also a Trustee of the Money

Advice Trust, which is a charity concerned with the provision of free debt advice, and an Independent Member of the LINK Standing Committee on Consumer Issues relating to the LINK ATM Network. Prior to joining the OFT Margaret worked in the Cabinet Office and the Department of Trade and Industry on privatisation, competition policy and public sector finance. She worked in the private sector as an economist before joining the Civil Service. Margaret was a Vice Chair of the OECD Competition Committee for six years to summer 2003. In May 2003, she was presented with a US Department of Justice plaque for “Outstanding Contributions to Effective International Antitrust Cooperation and the Fight Against International Cartels.” In June 2003 she was made a Commander of the Order of the British Empire for her work at the OFT. She read economics at the University of Cambridge.

**John D. Bodrug** is a partner at Davies Ward Phillips & Vineberg LLP. In practice for over 15 years, he has extensive experience in all aspects of competition law, including mergers, price fixing investigations (such as the thermal fax paper inquiry) and other pricing, distribution and advertising matters. John has represented and advised Canadian and US-based corporations across a range of industries and he has also acted as a special counsel for the Director of the Competition Bureau in the Competition Tribunal proceedings relating to the Interac shared electronic financial services network under the Competition Act. John is vice chair of the Competition Law Section of the Canadian Bar Association. He is also a non-Governmental Advisor to the International Competition Network. John has lectured on competition law at the University of Western Ontario Law School, where he obtained his LLB (1985). John is a co-editor of *Competition Law of Canada* (Juris Publishing) and has written numerous articles in the field of competition and trade practice law. John was ranked among the world's top 45 competition lawyers under the age of 45 in a worldwide survey by *Global Competition Review*. He is cited annually in *Chambers Global's The World's Leading Lawyers*, in which he is referred to as “one of the smartest competition lawyers in Canada”.

**Charles Dhanowa OBE** is Registrar at the Competition Appeal Tribunal. He studied European Community Competition Law at King's College London.

**Prof Valentine Korah** is an eminent EC competition lawyer, author of many critical books and articles on competition law and policy and the beneficiary of effusive forewords by distinguished experts from the UK, Belgium and the United States. In the 1960s she started the first LLM course on competition law and policy in the UK together with Professor Basil Yamey. She worked as a civil servant helping to draft a Bill to replace the UK Monopolies and Mergers Commission and to modify the legal framework. Many of the instructions to Parliamentary Counsel and notes on clauses which she had drafted were used when the Fair Trading Bill was passed. She taught at UCL and wrote there from 1951 until her formal retirement in 1993. She has taught at many other universities and institutions for short periods of time including at the College of Europe in Bruges (on her retirement she was appointed Honorary Professor), Fordham University School of Law in New York City, University of Lund (where she received an honorary doctorate), Valencia, Carlos Tercera, Amsterdam and several Australian and New Zealand Universities. Despite her age (80) Val is still in demand around the world and recently lectured in Hong Kong and Macau as well as at Fordham and in Athens and Rome. She spoke at a policy meeting organized in Brussels by the legal service of the EC Commission on the

aims of competition law. This year she spoke in Budapest and at the Como Summit and was a distinguished visitor for a week at Fordham Law School. She has agreed also to lead seminars in Athens, Rome and Singapore.

**Dr Liza Lovdahl Gormsen** joined the Centre for Competition Policy, University of East Anglia in September 2007 as a post-doctoral research fellow. She joined from King's College London, where she did her PhD in Competition Law under the supervision of Professor Richard Whish. Parallel with her PhD, she worked in competition enforcement at the Office of Fair Trading in London. Her research interests are mainly in Article 82 EC, legal theory, consumer welfare, private enforcement and consumer empowerment across the EU.

**Dr Philip Marsden** is a competition lawyer with a particular interest in abuse of dominance, international competition issues and aspects of the law of the World Trade Organisation (WTO) relating to competition policy, telecommunications and dispute settlement proceedings. He earned his DPhil from Oxford University, an LLM in European Law from Leicester University, and an LLB and BA (Hons) from the University of Toronto. He qualified as a Barrister and Solicitor at the Law Society of Upper Canada in 1991, and has been in private practice with law firms in Toronto, Tokyo and London. From 1994–1996, he was a case officer with the Economics and International Affairs Branch of the Canadian Competition Bureau. Philip is a frequent conference speaker on competition and trade issues. He is editor of the *European Competition Journal* and a Founding Director of World Trade Institute Advisors. Philip was recently appointed as a Non-Executive Director of the UK Office of Fair Trading.

**Becket McGrath** is partner at Berwin Leighton Paisner LLP and advises clients on all aspects of competition law, with an emphasis on behavioural issues, compliance and merger control. He has a particular focus on clients in the technology, communications, media and retail sectors. He also advises on broadcasting and rail regulatory issues. Becket was formerly a Branch Director in the Competition Enforcement Division at the Office of Fair Trading (OFT), with responsibility for enforcing competition law in the media, sport and IT sectors. During his time at the OFT, Becket led teams on numerous high profile cases and had a key role in the preparation of the competition provisions of the Communications Act 2003. Becket holds an MA from the University of Cambridge and an LLM in German civil law from Hamburg University. He is member of the Antitrust Section of the American Bar Association, the International Bar Association and the British-German Jurists' Association. He is also a committee member of the Law Society European Group. Becket was identified by *Global Competition Review* in May 2008 as one of the top 40 competition lawyers under the age of 40 worldwide.

**Adam Scott TD** is a member of the Competition Appeal Tribunal. He is also an Honorary Senior Research Fellow at the University of St Andrews, where his interests include economic and legal regulation of competition and of utilities, team working and scenario planning. He has also worked in these fields for various private and public sector organisations. After qualifying at the Bar with an intellectual property background, he worked mainly in the telecommunications industry, and was a corporate planner in the creation and privatisation of British Telecommunications plc, before heading BT's international affairs and latterly its apparatus business. He is a Chartered Engineer, a Fellow of the Institution of Engineering and Technology and a member of Guernsey's

Utility Appeal Panel. His current research interests are the relationship between sensemaking and scenario thinking and the application of judicial review in EU and UK competition and communications law. He earned his BA and MA at Christ Church, Oxford and MSc at the Business School of City University in 1979.

**Maurice Stucke** brought 13 years of litigation experience with him when he joined the University of Tennessee School of Law in 2007. As a trial attorney at the US Department of Justice, Antitrust Division, he successfully challenged anticompetitive mergers and restraints in numerous industries, and focused on policy issues involving antitrust and the media. As a Special Assistant US Attorney, he prosecuted a variety of felony and misdemeanor offenses. As an associate at Sullivan & Cromwell, Maurice assisted in defending Goldman Sachs, CS First Boston, and Microsoft in civil antitrust litigation, and he was presented two awards by The Legal Aid Society for his criminal appellate and defense work. Maurice has also served on the Advisory Panel for Vanderbilt University's Curb Center for Art, Enterprise and Public Policy, a research centre dedicated to designing a new road map for cultural policy in America. He recently was elected to the Advisory Board of the American Antitrust Institute, an independent Washington, DC-based non-profit education, research, and advocacy organisation devoted to competition policy. Maurice is chairing a committee on the media industry that will draft a transition report for the next administration. His scholarship has been cited by the OECD, competition agencies, and policymakers. He earned an AB, (1987), and a JD, *magna cum laude* (1994) from Georgetown University.

**Dr Mike Walker** is a leading expert on the economic aspects of competition policy. He is a Vice President at CRA. Prior to working for CRA, he was the director of competition policy at London Economics, a senior regulatory economist with British Telecom, and an associate at Lexecon Ltd. He holds academic positions at Loughborough University and at Kings College London. He is also the co-author of *The Economics of EU Competition Law*.

**Professor Spencer Weber Waller** served as a staff law clerk for the US Court of Appeals for the Seventh Circuit. He also worked for the US Department of Justice, first as a trial attorney in the Foreign Commerce Section of the Antitrust Division and later as a special attorney in the Chicago Strike Force of the Criminal Division. He then practiced at the Chicago firm of Freeborn & Peters. He was a full-time faculty member at Brooklyn Law School for ten years until joining Loyola University Chicago School of Law in 2000. Professor Waller also serves as the Faculty Director of the Institute for Consumer Antitrust Studies.

**Peter Whelan** is the Research Fellow in Competition Law at the British Institute of International and Comparative Law. He holds both a Degree in Law and French (LLB (Ling Fran)) and a Master of Laws (LLM) from Trinity College, Dublin. He was called to the New York State Bar in October 2007. He is currently studying for a PhD in Law at St John's College, Cambridge; his chosen topic is "Competition and the Criminal Law".

**EUROPEAN ECONOMIC FREEDOM: AMERICAN  
STRUCTURALISM REVISITED? WHAT ROOM FOR CONSUMER  
HARM?**

DR PHILIP MARSDEN: Welcome all to the second Antitrust Marathon. A couple of years ago Spencer Weber Waller and I had this idea that we might pick topics that seem to be intractable and subject to endless discussion with no clear finishing line, and build a conference around it, and also it would allow us to get together at least once a year and have such discussions with experts such as yourselves and also maybe run a little race around the same time. We were very pleased to meet in Chicago last year and you have before you the transcript of the first Antitrust Marathon,<sup>1</sup> and I am very grateful that Spencer is able to come over here from Chicago. I would also like to welcome John Bodrug from Canada and Maurice Stucke from the University of Tennessee, and also all of you.

I am very grateful to Sir Gerald Barling, Charles Dhanowa, Adam Scott and David Bailey for hosting us here at the Competition Appeal Tribunal. As you may know this is the main room for the Members' deliberations and so it is a great honour to be here where a great deal of law on abuse of dominance has been created, reviewed and refined here in the UK. I hope we can try to add to that.

PROFESSOR SPENCER WEBER WALLER: I just want to add my thanks to the Tribunal for letting us use their facilities and being the host of the second part of our marathon, and to thank Philip for organising this leg of the race.

We began this discussion almost a year ago between Philip and myself about the best way to proceed. We think—and we are not alone—that Article 82 and Section 2 have been somewhat under discussed and under theorised until very recently, for a number of reasons. Cases tend to come up less frequently but are often of greater import. Also they tend to be less discussed and less well understood in the current environment in which it is often asserted that cartels are the “supreme evil” and therefore should be the principal and, in some person's views, close to the exclusive focus of competition law. We wanted to use the Marathon to bring greater clarity to the issues of monopolisation and abuse of a dominant position, and discuss whether they are of equal importance to the other issues that get somewhat more attention as of late.

<sup>1</sup> (2008) 20(2) *Loyola Consumer Law Review*.

All of you have a copy of the transcript of the Antitrust Marathon that we held in October in Chicago on the Friday before the actual Chicago marathon where Philip finished in an extraordinarily fast time given the extraordinarily awful conditions—it was nearly 90°F with terrible humidity. I was injured at the time so I just ran a few miles and took off and left the course—about three blocks to my house—had breakfast, a shower, and took a nap and everything was fine. Three hours' later Philip crossed the finish line in an extraordinarily excellent time. So we wish all the runners much greater success and much more hospitable weather for Sunday.

But for today I look forward to basically the same format as we did last time, which is asking our colleagues to prepare short issue papers that either survey the issues or take a position and that can form the focus of our discussion. The discussion in Chicago is available both on line (in several different places) and in the latest issue of the *Loyola Consumer Law Review*.

The format of the discussion was very vigorous; all points of view were represented. People spoke from the heart and often times drew upon their experiences in practice or government, but seemed to be speaking in a very personal nature. It has already drawn considerable attention and considerable response. We know that the issue has been distributed widely. We note that it is being downloaded on-line hundreds of times, and even before we were able to publish it on-line or in print two distinguished American academics—with a very different point of view—chose to respond. It was one of the few times where a response was published prior to the actual publication being published! But that's fine—any publicity is good publicity and it helps air out the issues that we are talking about even more thoroughly.

A similar format is being followed today, where the *European Competition Journal* will, in due course, publish an edited transcript of our discussions today along with the issue papers that have been prepared. That is how we will continue to pass the torch from Antitrust Marathon I to Antitrust Marathon II, and we hope to make this an annual event, and we hope that there will be marathons down the road in other places where competition policy and long distance running are valued.

DR PHILIP MARSDEN: I wanted to start off the first panel by stating that we have this *European Competition Journal*—it comes out twice a year—and for it we have an Advisory Board dinner every year, and at the last dinner we invited two senior officials—one from the US and one from the EU—to say a few words. The US official—this was about a month after the *Microsoft* judgment<sup>2</sup> (17 September 2007)—said roughly “in discussing abuse of dominance we look forward to continued co-operation at the ICN (International Competition

<sup>2</sup> Case T-201/04 *Microsoft v Commission*, Court of First Instance, 17 September 2007.

Network), the ECN (European Competition Network) or any other great fora as ever, but, in particular we look forward to more co-operation on *cases*.” The European official responded by saying something that I thought was unusual at the time, because I would have expected the standard sort of response to be: “Yes, co-operation is good; convergence is good unless there are important interests at stake . . .” and so on—the usual sort of words of encouragement. Instead, the EU official said, and I paraphrase: “We, at the European Commission, are a little bit tired of looking over our shoulders for the last 40, 50 years at whatever particular theory of harm is prevalent in the US on monopolisation and having to justify our cases, or our policy directions on the basis of this theory of harm that may or may not be in ascendance—whether it is Harvard School or some other school. We think that we are now a mature enough jurisdiction with a mature enough *acquis communautaire* to be able to have our own intellectual leadership, in particular on abuse”. Obviously this official may have been rather emboldened by the *Microsoft* judgment from the Court of First Instance, which seemed to focus more on ordoliberal theories of harm to economic freedom, rather than likely consumer harm . . . or if it is consumer harm, it is fairly indirect and speculative. I thought that was quite interesting and so I put an editorial in the recent copy of the journal that came out last year, saying “your intellectual leaders still need some ground to stand upon”, and arguing that, essentially, if you are going to lead with theories of harm, and you are going to say that economic freedom is still important, and your theory of harm will not necessarily make reference to actual consumer welfare harm, or perhaps not even likely consumer welfare harm, then you still need to have some explainable, comprehensible and provable basis for this theory of harm.

So, for today I thought it might be nice to ask one of the leading thinkers in this area, Dr Liza Lovdahl Gormsen, who wrote her PhD on the subject of economic freedom versus consumer welfare harm, who has been an official at the OFT, and is now at the Centre of Competition Policy at the University of East Anglia, to take us through this difference of opinion about economic freedom and consumer welfare. Some of you around the room will remember that we had an interesting discussion between the Competition Law Forum, and the Bundeskartellamt a few years ago in Bonn where we said: “Let’s cut through this argument that there are ordoliberals who just want *per se* formalistic rules with no economic analysis of cases, and then there are these consumer welfare proponents who want to over analyse every case and probably never intervene”. There must be some sort of commonality between the two groups, and we found some commonality, at least at the rhetorical level. Then the discussion got to the nitty-gritty of fidelity rebates’ cases and we differed more than a little bit. But I thought it would be nice to have Liza take us through her thoughts on this area and remind us where we have come from in the US, in the EU and how far are we apart in these theories of harm?





**THE PARALLELS BETWEEN THE HARVARD STRUCTURAL  
SCHOOL AND ARTICLE 82 EC AND THE DIVERGENCES  
BETWEEN THE CHICAGO- AND POST-CHICAGO SCHOOLS AND  
ARTICLE 82 EC**

DR LIZA LOVDAHL GORMSEN\*

**A. INTRODUCTION**

This article considers how the US Circuits departed from their structural approach to the Sherman Act Sections 1<sup>1</sup> and 2<sup>2</sup> to embrace a more economics-based approach focusing on consumer welfare. This is to examine whether a similar departure from a structural approach is possible in Article 82 where the protection of competition is identified with the preservation of a particular market structure.<sup>3</sup> DG Competition is currently trying to change the application of Article 82 by adopting a more economics-based approach.<sup>4</sup> In its *Discussion Paper*, DG Competition made clear that the main objective of Article 82 is consumer welfare<sup>5</sup>—an objective which does not fit well with the current structural approach. For consumer welfare to become a reality, the Commission and/or the Community Courts (the European Court of Justice (ECJ) and the Court of First Instance (CFI)) must assess a particular conduct in the market without prejudice for any particular structure. The article concludes that a similar transition as seen in the US is difficult within the area of Article 82 because of its normative foundation and the juristic principle in Article 3(1)(g) of

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

<sup>2</sup> Sherman Act s 2 prohibits “every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony”.

<sup>3</sup> EAGCP Report on An Economic Approach to Article 82 EC (July 2005) 9. Available at [http://europa.eu.int/comm/competition/publications/studies/eagcp\\_july\\_21\\_05.pdf](http://europa.eu.int/comm/competition/publications/studies/eagcp_july_21_05.pdf) (last accessed on 10 April 2008).

<sup>4</sup> In this context, an economics-based approach is understood to be an approach that “requires a careful examination of how competition works in each particular market in order to evaluate how specific company strategies affect consumer welfare,” *ibid*, 2.

<sup>5</sup> DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December, 2005). While the Discussion Paper is no authoritative source, it indicates DG Competition’s current thinking on Art 82.

the EC Treaty.<sup>6</sup> In order to reach this conclusion section B outlines the strand of Industrial Organisation thinking influencing US antitrust from the 1940s to the mid-1970s to explain how the structural approach developed in the US. Section C considers the rise of the Chicago School and Post-Chicago School to show how the impact of a different line of Industrial Organisation thinking changed the US Circuits' interpretation of the Sherman Act. Section D examines how the structural approach to Article 82 developed and section E why it is difficult to adopt a more economics-based approach within Article 82. Section F concludes. The article does not consider whether the approach taken to the Sherman Act, following the rise of the Chicago and Post-Chicago Schools, is the right one; neither does it consider whether or not a similar approach to Article 82 should be adopted. The article equates a *per se* approach with a formalistic approach and a rule of reason approach with an effects-based approach, but acknowledges that there are different degrees of rule of reason/effects.

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

This section outlines the strand of Industrial Organisation thinking influencing US antitrust from the 1940s to the mid-1970s to explain how the structural approach developed in the US. Some call this period the pre-Chicago thinking.<sup>7</sup>

Early jurisprudence of the Sherman Act Section 2 centres on the different meaning and influence given to both the structural and the conduct elements. For example, *Standard Oil* shows that the accumulation of wealth in the hands of a few was perceived as a threat to both the economic order and democracy.<sup>8</sup> Having to consider both the economic implications and the political dimension made it difficult for the courts to interpret Section 2.

To make the application of the Sherman Act more orientated towards the industry and markets in general, a line of Industrial Organisation thinking—the so-called Harvard “structural” School<sup>9</sup>—developed the S-C-P paradigm.<sup>10</sup> This is in essence about there being necessarily a causal relationship between structure, conduct and performance where market structure influences a firm's

<sup>6</sup> “A system ensuring that competition in the internal market is not distorted.”

<sup>7</sup> C Ahlborn, D Evans and A Padilla “The Antitrust Economics of Tying: A Farewell to Per Se Illegality” [2004] *Antitrust Bulletin* 49.

<sup>8</sup> *Standard Oil of New Jersey v United States* 221 US 1, 50 (1911).

<sup>9</sup> H Hovenkamp, “The Harvard and Chicago Schools and the Dominant Firm” (2007) University of Iowa Legal Studies Research Article No 07-19, 1.

<sup>10</sup> “The Economics of Antitrust Laws”, in B Bouckaert and G De Geest (eds), *Encyclopedia of Law and Economics*, Vol III (Cheltenham, Edward Elgar, 2000), 473; J Faull and A Nikpay, *The EC Law of Competition* (Oxford University Press, 2nd edn, 2007), 6.

conduct, which in turn influences its performance. This is an approach focusing on process. It is contrary to the output approach, advocated by the Chicago School (elaborated below), where performance feeds back to structure. The S-C-P paradigm became dominant in the 1940s, 1950s and 1960s and associated with Harvard economists such as Bain,<sup>11</sup> Mason,<sup>12</sup> Kaysen and Turner<sup>13</sup>—hence the name the Harvard Structural School.<sup>14</sup>

In developing the S-C-P paradigm, Bain showed that the role of market entry was important as high barriers to entry can lead to concentrated markets where collusion is expected.<sup>15</sup> Moreover, there is a relationship between profit and structural characteristics of the industry (profitability-concentration relationship).<sup>16</sup> The Harvard Structural School argued that high concentration enables a firm to exercise market power and earn high profits, due to market power rather than better performance. A leading firm's market shares provide a meaningful indication of the likelihood of market power—not superior efficiency. The aim of antitrust at the time—amongst others—was a preservation of the competitive process as such and a prescription of norms to fair conduct. It was believed that markets are fragile and prone to failure. Given the fragility of the markets, antitrust authorities had large discretionary powers to control conduct by large firms. This led to an interventionist approach and divestitures in highly concentrated markets.

In the period from the 1940s to the mid-1970s, some cases reflect the developments of the S-C-P paradigm.<sup>17</sup> It captured a wide range of conduct which sufficed to create liability for dominant firms,<sup>18</sup> and expanded the rights of the perceived victims of economic exploitation.<sup>19</sup>

<sup>11</sup> J Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Cambridge, MA, Harvard University Press, 1956); J Bain, "Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936–40" (1951) 65 *Quarterly Journal of Economics* 293.

<sup>12</sup> E Mason, *Economic Concentration and the Monopoly Problem* (Cambridge, MA, Harvard University Press, 1957).

<sup>13</sup> C Kaysen and D Turner, *Antitrust Policy: An Economic and Legal Analysis* (Cambridge, MA, Harvard University Press, 1959).

<sup>14</sup> The Harvard Structural School is to be distinguished from the modern Harvard School, taking shape in the early 1970s and linked to scholars such as Areeda and Turner. P Areeda and D Turner, "Predatory Pricing and Practices under Section 2 of the Sherman Act" (1975) 88 *Harvard Law Review* 697. Unlike the Harvard Structural School, the modern Harvard School shares many similarities with the Chicago School, which has made Kovacic call it the Chicago/Harvard Double Helix: W Kovacic, "The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix" [2007] *Columbia Business Law Review* 1. Both Schools embracing economic efficiency in their assessment of single firm conduct under Section 2 of the Sherman Act, M Jacobs, "An Essay on the Normative Foundations of Antitrust Economics" (1995) 74 *North Carolina Law Review* 219, 228–32.

<sup>15</sup> Bain (1956), *supra* n 11.

<sup>16</sup> Bain (1951), *supra* n 11.

<sup>17</sup> L White, "The Growing Influence of Economics and Economists on Antitrust: An Extended Discussion" (2008) *Working Article* 08–05, 6. Available at [www.reg-markets.org](http://www.reg-markets.org) (last accessed on 9 April 2008).

Besides Section 2 of the Sherman Act, authors from the Harvard Structural School, such as Kaysen and Turner, adopted a generally negative view of vertical mergers.<sup>20</sup> They advocated a prohibition of any vertical merger in which the acquiring firm had 20% or more of its market.<sup>21</sup> The courts adopted a similar negative view towards vertical restraints such as tying, bundling, exclusive dealing,<sup>22</sup> requirements contracts,<sup>23</sup> territorial restraints,<sup>24</sup> and resale price maintenance (RPM).<sup>25</sup> A strict view was not only taken in Section 2 but also in Section 1. For example, in *Northern Pacific Ry*<sup>26</sup> the court condemned tying as a *per se* illegal offence of the Sherman Act Section 1.<sup>27</sup>

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

The interpretation of Section 2 has developed over time. Currently, the key offence of monopolisation in Section 2 is the possession of monopoly power in the relevant market, and the wilful acquisition or maintenance of that power.<sup>28</sup> It is interpreted to consist of two elements: a structural element (the possession of monopoly power in the relevant market) and a conduct element (the wilful acquisition or maintenance of monopoly power). The latter element was largely ignored in early jurisprudence. For example in *Alcoa*,<sup>29</sup> Judge Learned Hand said:<sup>30</sup>

<sup>18</sup> Kovacic, *supra* n 14, 6.

<sup>19</sup> E Fox and L Sullivan, "Antitrust—Retrospective and Prospective: Where Are We Coming From? and Where Are We Going?" (1987) 62 *New York University Law Review* 936, 954.

<sup>20</sup> The Court condemned vertical mergers in *US v EI du Pont de Nemours & Co* 353 US 586 (1957); *Brown Shoe Co v US* 370 US 294 (1962); *Ford Motor Co v US* 405 US 562 (1972).

<sup>21</sup> Kaysen and Turner, *supra* n 13, 133.

<sup>22</sup> Exclusive dealing was condemned by the courts in *Standard Fashion Co v Magrane-Houston Co* 258 US 346, 42 SCt 360, 66 LEd 653 (1922); *Standard Oil Co of California et al v US* 337 US 293 (1949); *FTC v Motion Picture Advertising Service Co* 344 US 392 (1953).

<sup>23</sup> The court condemned requirement contracts in *Standard Oil Co* *ibid*; *Richfield Oil Corp v US* 343 US 922 (1952). However, in *Tampa Electric Co v Nashville Coal Co* 365 US 320 (1961), the court said that a requirement contract and exclusive dealing should be judged by a rule of reason.

<sup>24</sup> The court prohibited territorial restraints *per se* in *US v Arnold Schwinn & Co et al* 388 US 365 (1967).

<sup>25</sup> The court condemned retail price maintenance as a *per se* violation in *Dr Miles Medical Co v John D Park and Sons Co* 220 US 373 (1911). This was reaffirmed in *US v Bausch & Lomb Optical Co* 321 US 707 (1944); *US v Parke, Davis & Co* 362 US 29 (1960); *Simpson v Union Oil Co* 377 US 13 (1960); *Albrecht v Herald Co* 390 US 145 (1968).

<sup>26</sup> *Northern Pacific Railway Co v US* 356 US 1, 5; 78 SCt 514, 2 LEd2d 545 (1958).

<sup>27</sup> This view on tying was upheld by the Court in *US v Loew's, Inc* 371 US 38 (1962); *Atlantic Refining Co v FTC* 381 US 357, 85 SCt 1498, 14 LEd 443 (1965); *FTC v Texaco* 393 US 223 (1968); *Fortner Enterprises, Inc v United States Steel Corp* 394 US 495 (1969).

<sup>28</sup> *United States v Grinnell Corp* 384 US 563, 571–72 (1966).

<sup>29</sup> *US v Aluminium Co of America* 148 F2d 416 (2d Cir 1945).

<sup>30</sup> *Ibid*, 428–29.

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

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

Judge Learned Hand further said that “in order to fall within Section 2 the monopolist must have both the power to monopolize and the intent to monopolize”. However, the court did not require much in terms of exclusionary conduct or specific intent to monopolize. It established intent by saying that “no monopolist is unconscious of what he is doing”.<sup>31</sup> The court found Alcoa’s large position in virgin aluminium ingot was the kind of conduct covered by Section 2, but without examining the effects of the conduct. Instead, it based its finding on Alcoa’s ability to maintain a huge market share. Without a thorough examination of intent and the methods employed by the dominant company to acquire or maintain its monopoly as well as the emphasis on the structural element of Section 2 the court was left open to criticism.<sup>32</sup> Essentially, the court condemned active seeking of monopoly power, despite being by means of perfectly legitimate business conduct. The enactment of the Robinson-Patman Act in 1936 and judgments like *Alcoa* gave the impression that consumer welfare was not a goal of US antitrust.<sup>33</sup>

The Supreme Court also endorsed the broad view of exclusionary conduct in *American Tobacco*,<sup>34</sup> where it quoted large parts of *Alcoa*.<sup>35</sup> A similar approach was taken in *US v Griffith*<sup>36</sup> and *Utah Pie*.<sup>37</sup> In *Griffith*, the Supreme Court held that the power to exclude competitors if “coupled with the purpose or intent to exercise that power” violates Section 2.<sup>38</sup> In *Utah Pie*, the Court endorsed the view that evidence of subjective intent can establish liability<sup>39</sup> and pricing below average

<sup>31</sup> *Ibid.*, 432.

<sup>32</sup> The criticism of the case was not immediate, but came with the rise of the Chicago School in the 1970s. Criticism of the Alcoa case can be found in R Bork, *The Antitrust Paradox: a Policy at War with Itself* (New York, The Free Press, 1993), 51–52.

<sup>33</sup> On the grounds that the Robinson-Patman Act protects competitors and harms consumer welfare by prohibiting and discouraging price discrimination that lowers prices for consumers, the Antitrust Modernization Commission has called for the formal abolition of the Robinson-Patman Act: Antitrust Modernization Commission, Report and Recommendations (April 2007), 312, available at: [http://govinfo.library.unt.edu/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/report_recommendation/amc_final_report.pdf) (last accessed on 4 February 2008).

<sup>34</sup> *American Tobacco Co v United States* 328 US 781 (1946).

<sup>35</sup> *Ibid.*, 813–15.

<sup>36</sup> *United States v Griffith* 334 US 100 (1948).

<sup>37</sup> *Utah Pie Co v Cont'l Baking Co* 386 US 685 (1967).

<sup>38</sup> *Supra* n 36, 107.

<sup>39</sup> *Supra* n 37, 696–97.

total cost (ATC) can be unlawful predation.<sup>40</sup> The same position was taken by the ECJ in *AKZO* where it held that prices above average variable costs (AVC) but below ATC are abusive if they are determined as part of a plan for eliminating a competitor.<sup>41</sup> In *Utah Pie*, the court found that the market in question had featured a “drastically declining price structure” as a consequence of the defendant’s pricing tactics.<sup>42</sup> This goes back to the profitability-concentration relationship important for the S-C-P paradigm. Like in *Alcoa*, there is little analysis of the effects on consumer welfare.

In *United Shoe Machinery*, the government challenged the terms on which the largest maker of shoe-making machines leased those machines.<sup>43</sup> The court explained that the defendant “is denied the right to exercise effective control of the market by business policies that are not the inevitable consequences of its capacities or its natural advantages”.<sup>44</sup> Federal District Court Judge Charles Wyzanski outlined three approaches to the interpretation of the Sherman Act: (1) An enterprise has monopolized if it has acquired or maintained a power to exclude others as a result of using an unreasonable restraint of trade in violation of Section 1 of the Sherman Act; (2) A monopolization offence is committed where an undertaking with effective market control uses this control, or plans to use it, to engage in exclusionary practices, even if these are not technically restraints of trade; (3) the acquisition of an overwhelming market share is a monopolization under Section 2, even if there is no showing of any exclusionary conduct.<sup>45</sup> Kaysen, who was associated with the Harvard Structural School, was appointed as a law clerk to provide economic counselling to Judge Wyzanski in this case<sup>46</sup> and these points may have been influenced by Kaysen. The third point highlighted by Judge Wyzanski is very similar to the approach taken in *Alcoa* and by the ECJ in *Michelin I* imposing a special responsibility on dominant undertakings as discussed below in section D.<sup>47</sup>

These few examples highlight the courts’ concern for the structure of competition, which led to a strict approach to conduct by dominant firms. Such an approach runs the risk of discouraging dominant firms from competing aggressively pursuing price-cutting in form of discounts, innovating in product development, or pursuing other strategies which may improve consumer welfare.

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

<sup>40</sup> *Ibid*, 698.

<sup>41</sup> In Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359, [1993] 5 CMLR 215, paras 71–72.

<sup>42</sup> *Supra* n 37, 703.

<sup>43</sup> *US v United Shoe Machinery Corp* 110 F Supp 295 (1953), 347 US 521 (1954).

<sup>44</sup> *Ibid*, 345.

<sup>45</sup> L Sullivan and W Grimes, *The Law of Antitrust: An Integrated Handbook* (Eagan, MN, West Group, 2nd edn, 2006), 101–102.

<sup>46</sup> White, *supra* n 17, 12.

<sup>47</sup> Case 322/81 *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461, [1985] 1 CMLR 282, para 57.

the Chicago School and the Post-Chicago School.<sup>48</sup> These schools showed that the direction of causality is not clear. The Chicago School argued that there may be feed-back loops, for example from performance to structure, ie performance can affect structure,<sup>49</sup> as will be shown in the next section.

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

This section shows the differences between the structural approach advocated by the Harvard Structural School and the efficiency orientated approach promoted by the Chicago School and Post-Chicago School.<sup>50</sup> This is to show how the impact of a different line of Industrial Organisation thinking changed the US Courts' interpretation of the Sherman Act.

While the Harvard Structural School was dominant in the decades following World War II, there was another line of Industrial Organisation thinking developing in the 1950s, under the intellectual leadership of Aaron Director: the so-called Chicago School. Associated with Director were economists such as Friedman, Stigler,<sup>51</sup> Telser,<sup>52</sup> Demsetz,<sup>53</sup> McGee, Bowman,<sup>54</sup> and Burstein.<sup>55</sup> They were all sceptical of the S-C-P paradigm and more sympathetic to vertical restraints and generally supportive of market outcomes.<sup>56</sup> Unlike the Harvard Structural School, which believed in multiple goals, the Chicago School believed that the ultimate goal of US antitrust law is the maximisation of consumer welfare only.<sup>57</sup> Bork—one of the protagonists of the Chicago School—identified consumer welfare as improving allocative efficiency without impairing productive efficiency.<sup>58</sup>

<sup>48</sup> National Commission for the Review of Antitrust Laws and Procedures, *Report to the President and the Attorney General* (1979), 150–63.

<sup>49</sup> S Davies, B Lyons, H Dixon and P Geroski, *Economics of Industrial Organization* (London, Longman, 1988), ch 1.

<sup>50</sup> For a good article on the distinction between the Harvard and Chicago schools, see R Posner, "The Chicago School of Antitrust Analysis" (1979) 127 *University of Pennsylvania Law Review* 925.

<sup>51</sup> G Stigler, "The Dominant Firm and the Inverted Price Umbrella" (1965) 8 *Journal of Law & Economics* 167.

<sup>52</sup> L Telser, "Why Should Manufacturers Want Fair Trade?" (1960) 3 *Journal of Law & Economics* 86.

<sup>53</sup> H Demsetz, "Two Systems of Belief about Monopoly", in H Goldschmid, H Mann and J Weston (eds), *Industrial Concentration: The New Learning* (New York, Columbia University Press, 1974), 164–84.

<sup>54</sup> W Bowman, "Tying Arrangements and the Leverage Problem" [1957] *Yale Law Journal* 19.

<sup>55</sup> M Burstein, "The Economics of Tie-in Sales" (1960) 42 *Review of Economics and Statistics* 68;

M Burstein, "A Theory of Full-line Forcing" [1960] *Northwestern University Law Review* 62.

<sup>56</sup> S Peltzman, "Aaron Director's Influence on Antitrust Policy" (2005) 43 *Journal of Law & Economics* 313.

<sup>57</sup> The proponents of one single objective (that of economic efficiency) do not all necessarily mean to imply any disparagement of other objectives, such as more equitable distribution of income and the diffusion of economic power. They simply believe that a competition policy concentrated on the efficiency objective is likely to be applied more consistently and effectively.

<sup>58</sup> *Supra* n 32, 91 and 427.



To be clear, this is a concern for total welfare and not consumer welfare in form of consumer surplus.<sup>59</sup>

The Chicago School rejected the structural approach by arguing that performance may dictate the existing market structure. For example, a concentrated market structure may reflect efficiency and not necessarily market power. Higher profits can be due to the lower costs of larger firms, because they have economies of scale. Even if dominant undertakings had the ability to leverage their market power, they would have no interest in doing so as there is only a single monopoly profit.<sup>60</sup> Moreover, there are no or few artificial barriers to entry, thus private monopoly can only be temporary.<sup>61</sup> The Chicago School believed that the basic tenets of firms were rationality and profit maximisation. For example, firms would engage in vertical price fixing to avoid free-riding.<sup>62</sup> Thus, vertical price fixing should not be prohibited, as it guarantees better services to consumers. In relation to predation, the Chicago School believed that aggressive prices are generally pro-competitive and enhance consumer welfare, except in rare situations where the predator has sufficient market power to recoup its losses through long-term, supra-competitive prices achieved after its rivals have been eliminated.<sup>63</sup> Rational firms will not engage in predatory pricing since they are not necessarily going to be successful. Given this, predation should be of no concern for competition policy. Finally, the Chicago School believed that collusion is difficult to enforce for market players and thus unlikely, except in regulated industries.

In short, the Chicago School reviewed business practices in terms of their effects on efficiency and prices. It relied on the neo-classical price theory, which developed models of perfect competition and monopoly, to explain firms' behaviour and practices in real-life markets.<sup>64</sup> Bork argued that it was only workable to view markets from an economic efficiency point of view, since the social-political framework is amorphous.<sup>65</sup> Its focus on making the law effective made Judge Easterbrook rename it "The Workable Antitrust Policy School".<sup>66</sup>

<sup>59</sup> Fox and Sullivan, *supra* n 19, 946, have pointed out that consumer welfare in the Chicagoan sense is not consumer welfare at all. For a discussion and critique of Bork's definition of consumer welfare, see R Lande, "The Rise and (Coming) Fall of Efficiency as the Rule of Antitrust" (1988) 33 *Antitrust Bulletin* 429, 433–35.

<sup>60</sup> The post-Chicago economic literature has shown that the theory of the single profit monopoly is not as robust as the Chicago School suggests as it relies on the assumption that the market is perfectly competitive, which is rarely the case.

<sup>61</sup> Jacobs, *supra* n 14, 228–32.

<sup>62</sup> H Marvel, "Exclusive Dealing" (1982) 25 *Journal of Law & Economics* 1.

<sup>63</sup> The Chicago School's economic analysis of predation was accepted by the US Supreme Court in *Brooke Group Ltd v Brown & Williamson Tobacco Corporation* 509 US 209 (1993).

<sup>64</sup> Jacobs, *supra* n 14, 228–29.

<sup>65</sup> Bork even pronounced all contrary views as being so incapable of use as to be "unconstitutional": R Bork, "The Role of the Courts in Applying Economics" (1985) 54 *Antitrust Law Journal* 21, 24.

<sup>66</sup> F Easterbrook, "Workable Antitrust Policy" (1986) 84 *Michigan Law Review* 1696, 1700.

Like the Chicago School, Easterbrook favoured the single goal of economic efficiency.<sup>67</sup>

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

The Chicago and Post-Chicago Schools agree that the essence of antitrust is economics<sup>71</sup> and consumer welfare should be the goal of antitrust. Both schools rejected the relevance of subjective inquiries which they attributed to the political approaches of the past. Regardless of the political or distributive consequences, conduct should be left alone unless it raises prices or limits output.<sup>72</sup> However, they disagreed on market failures. The Chicago School believed that markets tend toward efficiency, that market imperfections are normally temporary, and that intervention should proceed cautiously.<sup>73</sup> Contrary, the Post-Chicago School believed that market failures are not necessarily self-correcting, and that firms can therefore take advantage of imperfections to produce inefficient results even in competitive markets. Moreover, that the distortions to competition made possible by market imperfections should prompt intervention to scrutinise a wider variety of conduct.<sup>74</sup>

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

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

<sup>67</sup> This is supported by Baxter (former Assistant Attorney General in Antitrust Division, DOJ), who said that "the sole goal of antitrust is economic efficiency": *Wall Street Journal*, 4 March 1982, 28. This was opposed by Thorelli, who concluded that, in the absence of a single-minded legislative intent to pursue efficiency goals, antitrust should manifest concern for other social values: H Thorelli, *The Federal Antitrust Policy* (Baltimore, MD, Johns Hopkins University Press, 1955).

<sup>68</sup> The Chicago School relied on neo-classical economics which relies on three assumptions: people have rational preferences among outcomes that can be identified and associated with a value; individuals maximise utility and firms maximise profits; and people act independently on the basis of full and relevant information.

<sup>69</sup> H Hovenkamp, "Antitrust Policy After Chicago" (1985) 84 *Michigan Law Review* 213, 261.

<sup>70</sup> Eg R Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged" (1982) 34 *Hastings Law Journal* 65; J May, "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918" (1989) 50 *Ohio State Law Journal* 257, 260; R Peritz, "A Counter-history of Antitrust Law" (1990) *Duke Law Journal* 263, 272–74.

<sup>71</sup> J Baker, "Recent Developments in Economics that Challenge the Chicago School Views" (1989) 58 *Antitrust Law Journal* 645, 646.

<sup>72</sup> *Ibid.*

<sup>73</sup> F Easterbrook, "The Limits of Antitrust" (1984) 63 *Texas Law Review* 1, 2.

<sup>74</sup> Jacobs, *supra* n 14, 223.

the Chicago School made the US Supreme Court implement some of the Chicago School philosophy during the late 1970s and onwards.<sup>75</sup>

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

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

<sup>75</sup> It even cited Bork in *Reiter v Sono-tone Corporation* 442 US 330 (1979) 343: "Congress designed the Sherman Act as a 'consumer welfare prescription'" followed by citing Bork's *The Antitrust Paradox*, *supra* n 32.

<sup>76</sup> *Berkey Photo, Inc v Eastman Kodak Co* 603 F2d 263 (2d Cir 1979).

<sup>77</sup> *Ibid*, 281.

<sup>78</sup> *Supra* n 76.

<sup>79</sup> *Verizon Communications v Law Offices of Curtis v Trinko LLP* 540 US 398 (2004).

<sup>80</sup> *Matsushita Elec Industrial Co v Zenith Radio* 475 US 574, 594 (1986).

<sup>81</sup> *Supra* n 79, 414.

<sup>82</sup> Brief for the United States and the Federal Trade Commission as Amici Curiae supporting petitioner in Verizon, *supra* n 79.

<sup>83</sup> *Aspen Skiing Co v Aspen Highlands Skiing Corp* 472 US 585 (1985).

of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice”.<sup>84</sup>

It is not only in applying Section 2 that the court’s interpretation has changed. This is also the case when applying Sherman Act Section 1. For example, the rule of reason found its way in *Continental TV*.<sup>85</sup> The court declared that territorial restraints should be examined under a rule of reason, rather than being condemned as *per se* illegal as in *Schwinn*.<sup>86</sup> As regards tying arrangements the court did not suspend the *per se* rule adopted in *Northern Pacific Ry.*<sup>87</sup> However, in *United States Steel Corp.*,<sup>88</sup> the court upheld that in the absence of market power in the tying market a tying arrangement was acceptable. This was reinforced in *Jefferson Parish Hospital*.<sup>89</sup> In the area of maximum retail price maintenance, the court’s previous strict view in *Albrecht* condemning conduct *per se* was loosened to a rule of reason in *State Oil v Khan*.<sup>90</sup>

Since *Dr. Miles*<sup>91</sup> in 1911 resale price maintenance (RPM) agreements have been considered *per se* illegal under Section 1. While the Supreme Court continued to adopt a *per se* rule when interpreting minimum RPM in *Monsanto*<sup>92</sup> and *Sharp Electronics Corp.*,<sup>93</sup> it did raise the standard of proof needed by plaintiffs to succeed. The federal authorities have been trying to abolish the *per se* approach to RPM since the 1980s through both legislative proposals and amicus briefs filed to the courts. However, states are strictly opposed to this strategy as vertical restraints generally have local effects. This is one of the reasons why *per se* prohibition of RPM survived until quite recently.

In its 2007 ruling in *Leegin*,<sup>94</sup> the Supreme Court overruled nearly 100 years of precedent and held that RPM agreements do not *per se* violate Section 1. The *Leegin* case arose from a leather goods manufacturer’s decision to cut off sales to a retailer that had been cutting prices in violation of an alleged RPM agreement. Both the District Court and the Fifth Circuit declined to apply the rule of reason to *Leegin*’s vertical price-fixing agreements. They affirmed that the *per se* rule in *Dr. Miles* made irrelevant any pro-competitive justifications for *Leegin*’s policy. The Supreme Court reversed and explicitly overruled *Dr. Miles*. Both the federal authorities and the states submitted rival amicus briefs.<sup>95</sup> In reversing Justice

<sup>84</sup> *Supra* n 79, 409.

<sup>85</sup> *Continental TV, Inc v GTE Sylvania, Inc* 433 US 36 (1977), in particular 50–59 and note 21.

<sup>86</sup> *Schwinn*, *supra* n 24.

<sup>87</sup> *Northern Pacific Ry*, *supra* n 26.

<sup>88</sup> *United States Steel Corp v Former Enterprises, Inc* 429 US 610 (1977).

<sup>89</sup> *Jefferson Parish Hospital District No 2 v Edwin G Hyde* 466 US 2 (1984).

<sup>90</sup> *State Oil v Khan* 522 US 3 (1997).

<sup>91</sup> *Supra* n 25.

<sup>92</sup> *Monsanto Co v Spray-Rite Corp* 465 US 752 (1984).

<sup>93</sup> *Business Electronics Corp v Sharp Electronics Corp* 485 US 717 (1988).

<sup>94</sup> *Leegin Creative Leather Products, Inc v PSKS, Inc* 127 S Ct 2705 (2007).

<sup>95</sup> Brief for the United States as amicus curiae supporting petitioner No 06–480 in the Supreme Court of the United States, available at: <http://www.usdoj.gov/atr/cases/f221000/221027.htm>

Kennedy explained that, in its recent jurisprudence, the court has applied the *per se* rule only when an agreement “would always or almost always tend to restrict competition and decrease output”. The Supreme Court reviewed recent economic literature and found that, though RPM agreements may harm competition in some circumstances, they often enhance competition by giving retailers incentives to promote the manufacturers’ products, facilitating entry by new competitors and otherwise stimulating competition among rival suppliers of branded products. The court then held that because RPM agreements may have either pro- or anti-competitive effects depending on the circumstances, they should be evaluated under the rule of reason, not prohibited *per se*.

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

#### D. A STRUCTURAL APPLICATION OF ARTICLE 82

To avoid a structural approach as taken towards monopoly power in Section 2 during the 1940s, 1950s and 1960s, early legal scholarship on Article 82 suggested a purely behavioural interpretation. A study by Joliet in the late 1960s argued that the protection of competition in Article 82 means prohibiting exploitative behaviour which harms consumers.<sup>96</sup> It did not mean preventing competitors’ exclusion from the market.<sup>97</sup> He specifically argued that “the major objective of Article 86 [Article 82] is to ensure that dominant firms do not use their power to the detriment of . . . consumers”.<sup>98</sup> Advocate General Roemer came to the same conclusion in his Opinion in *Continental Can*,<sup>99</sup> the first case

(last accessed on 1 April 2008); Brief for the United States as amicus curiae supporting respondent No 06-480 in the Supreme Court of the United States, available at [http://www.oag.state.ny.us/business/antitrust/pdfs/leegin\\_states2.pdf](http://www.oag.state.ny.us/business/antitrust/pdfs/leegin_states2.pdf) (last accessed on 1 April 2008).

<sup>96</sup> R Joliet, *Monopolization and Abuse of Dominant Position* (The Hague, Martinus Nijhoff, 1970) 250–51.

<sup>97</sup> Joliet’s study was comparative in scope—in particular a comparative analysis of s 2 of the Sherman Act and Art 82—and consisted of three parts: American law on single-firm monopolies; a survey of the national laws of the Common Market countries and of Great Britain; and lastly, an analysis of the system of abuse of dominant position under Art 82.

<sup>98</sup> *Supra* n 96, 131.

<sup>99</sup> Opinion of Advocate General Roemer in Case 6/72 *Europemballage Corpn and Continental Can Co Inc v Commission* [1973] ECR 215, [1973] CMLR 199, 254.

before the ECJ under Article 82. The ECJ did not adopt Advocate General Roemer's Opinion:<sup>100</sup>

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

Like in *Alcoa*, the focus was on the structural element. The American metal-packing company Continental Can, the world's largest producer of metal containers,<sup>101</sup> acquired 91% interest in a Dutch metal can manufacturer—Carnaud of France and Thomassen & Drijver-verblijf NV (TDV) through its holding company Europemballage Corporation (Europemballage). Continental Can had transferred its 85% share of a German company Schmalbach-Lubeca-Werke AG to Europemballage to buy the shares of TDV. At the time, there was no Merger Regulation in EC Competition Law, so the ECJ had to assess whether a dominant position realised through a merger falls within the scope of Article 82. This would require the court to examine whether the concept of “abuse” could refer also to changes in the structure of an undertaking, which led to the disturbance of competition in the common market.<sup>102</sup> The court found it did even though it consequently found in favour of Continental Can because of the Commission's wrong market definition.

At the time of *Continental Can*, Ernst-Joachim Mestmäcker—an ordoliberal scholar—was advising the Commission. He argued that Article 82 must be interpreted in the light of “undistorted competition” as set out in Article 3(1)(g). A teleological interpretation of Article 82 meant that dominant firms' conduct which is incompatible with a system of undistorted competition would fall foul of Article 82.<sup>103</sup> Mestmäcker argued that an abuse of dominance can be found: (1) where the residual competition in a particular market is restricted; (2) where a dominant position is defended against current or potential competition, especially by hampering market entry; or (3) in expanding a dominant position into adjacent markets.<sup>104</sup> Mestmäcker's first suggestion is very much the approach taken in, for example, *Hoffmann La-Roche* where the ECJ confirmed that

<sup>100</sup> *Ibid.*, para 26.

<sup>101</sup> Founded in 1904 and incorporated in New York in 1913.

<sup>102</sup> *Supra* n 99, para 20.

<sup>103</sup> The Community Courts continue to apply a teleological interpretation of the competition rules, for example, Case T-83/91 *Tetra Pak International SA v Commission* [1994] ECR II-755, [1997] 4 CMLR 726, para 114: “Article 86 [Article 82] of the Treaty must accordingly be interpreted by reference to its object and purpose as they have been described by the Court of Justice, . . . in accordance with the general objective set out in Article 3(f) [Article 3(1)(g)] of the Treaty as it was then worded.”

<sup>104</sup> E Mestmäcker, “Die Beurteilung von Unternehmenszusammenschlüssen nach Artikel 86 des EWG-Vertrags” reprinted in E Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union* (Baden-Baden, Nomos, 2nd edn, 2006) 597, 603.

Article 82 can be applied to prohibit conduct affecting the structure of the market.<sup>105</sup>

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

This was reiterated by the ECJ a couple of years later in *Michelin I*.<sup>106</sup>

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

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

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

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

<sup>105</sup> Case 85/76 *Hoffmann-La Roche AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211, para 91.

<sup>106</sup> *Supra* n 47, para 70.

<sup>107</sup> *Ibid*, para 57.

<sup>108</sup> Case T-201/04 *Microsoft Corp v Commission*, judgment of 17 September 2007, para 664.

<sup>109</sup> Case C-333/94 *Tetra Pak International SA v Commission* [1996] ECR I-5951, [1997] 4 CMLR 662.

market distinct from the dominant market produces effects on that distinct market:<sup>110</sup>

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

Mestmäcker stressed that to ensure the establishment of a common market and ensure economic rights and freedoms in the form of the freedom to provide services, free movement of goods and freedom of establishment, barriers to trade had to be abolished and undistorted competition ensured.<sup>111</sup> By linking market integration with the competition rules, the latter became a tool to protect the results flowing from eradicating barriers to the markets within the common market. It was understood that the elimination of barriers would not be achieved if private agreements or economically powerful firms were permitted to manipulate, or not prevented from manipulating the flow of trade within the common market.<sup>112</sup> Mestmäcker suggested that third parties shall be protected against harm which they would not risk to suffer in a competitive market. The dominant firm should not be allowed to engage in conduct which was not possible in a competitive market.<sup>113</sup> As seen above, this idea was adopted by the ECJ in *Michelin I*.<sup>114</sup> A dominant firm's special responsibility towards the competitive process may account for some of the more formalistic and interventionist judgments adopted by the Community Courts.

Mestmäcker argued that a finding of an abuse should not depend on whether an elimination of a competitor had a negative effect on the market. In other words, competition law should not protect a certain degree of market efficiency, but should protect individual economic freedom against types of conduct that endanger competition. The protection of individual economic freedom is linked to the protection of competition as an institution. This presupposes the protection of residual competition.<sup>115</sup> This approach is in line with the ordoliberal

<sup>110</sup> *Ibid.*, para 27.

<sup>111</sup> This is very much inspired by The Spaak Report, Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères [Report of the Heads of Delegation of the Governmental Committee], set up by the Messina Conference, named after Paul-Henri Spaak, then the Belgian Prime Minister. Paul-Henri Spaak was the chairman of the preparatory committee in charge of its preparation. The Report was presented on 21 April 1956 and led to the Treaty of Rome of 1957, which came into force 1 January 1958.

<sup>112</sup> *Supra* n 104, 606.

<sup>113</sup> *Ibid.*, 607–608.

<sup>114</sup> *Supra* n 47, para 57.

<sup>115</sup> *Supra* n 104, 608.



competition policy model, where the aim is “the protection of individual economic freedom of action as a value in itself, or vice versa, the restraint of undue economic power”.<sup>116</sup> Another scholar has agreed with this position by arguing that “the protection of competition against restrictions is intended to safeguard competition as an institution or to guarantee the freedom of the individual”.<sup>117</sup> This philosophy underpins Advocate General Kokott’s Opinion in *British Airways*, in particular her reference to competition as an “institution”.<sup>118</sup> In her view, the primary beneficiaries of Article 82 are not consumers.<sup>119</sup> Priority is given to the process of competition, and if this “indirectly” protects consumers, then this is a bonus, but not an aim. This shows that the ECJ statement in *Continental Can*, cited above, has come to stand for the protection of the competitive process, the degree of residual competition that persists in the market as such, without a requirement of direct consumer harm.

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

The Community Courts have taken a less formalistic and somewhat more nuanced approach in some cases under Article 82. For example in *Oscar Bronner*, the ECJ recommended that the national court reject access to the essential facility—a newspaper delivery system.<sup>120</sup> Advocate General Jacobs’ Opinion had highlighted the detriment to innovation if access to a production, purchasing or distribution facility is allowed too easily.<sup>121</sup> In *Volvo Veng*<sup>122</sup> the ECJ held that in the context of an intellectual property right (IPR) there is no general duty to license dominant undertakings.<sup>123</sup> A mere refusal to license could not, in itself, be an abuse. The ECJ dismissed the claim that Volvo’s refusal to grant Veng a license for the registered design was an abuse. However, the court held:<sup>124</sup>

“[T]he exercise of an exclusive right by the proprietor of a registered design . . . may be prohibited under Article 8[2] if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of the prices for spare parts at an

<sup>116</sup>W Möschel, “The Proper Scope of Government Viewed from an Ordoliberal Perspective: the Example of Competition Policy” (2001) 157 *Journal of Institutional and Theoretical Economics* 3.

<sup>117</sup>A Deringer, *The Competition Law of the European Economic Community: a Commentary on the EEC Rules of Competition (Articles 85 to 90) Including the Implementing Regulations and Directives* (New York, Commerce Clearing House, 1968) 14.

<sup>118</sup>Opinion of Advocate General Kokott in Case C-95/04P *British Airways plc v Commission*, delivered on 23 February 2006, para 68.

<sup>119</sup>*Ibid*, para 68.

<sup>120</sup>Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791, [1999] 4 CMLR 112.

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

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

<sup>123</sup>*Ibid*, para 8.

<sup>124</sup>*Supra* n 122, para 9.

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

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

One explanation for *Volvo Veng* could be that it concerned an IPR (UK registered design for the front wing panels of Volvo series 200 protected by the Software Directive)<sup>125</sup> and on a balance between Article 82 and the exercise of an IPR, the ECJ favours the latter. This explanation is however doubtful given later cases such as in *Magill*,<sup>126</sup> where the ECJ found that the exercise of an exclusive right by the proprietor may involve abusive conduct<sup>127</sup> and *IMS Health*<sup>128</sup> confirming *Magill*. A more likely explanation for *Volvo Veng* is that it was referenced from the national court under Article 234 where the ECJ is unable to review the facts. This is supported by the court’s statement “[i]n the present case no instance of any such conduct has been mentioned by the national court.”<sup>129</sup>

The *Magill* and *IMS* cases were upheld in the recent *Microsoft* judgment<sup>130</sup> although it did—unlike *Magill* and *IMS*—discuss the prejudice of consumers. While competition law and IPR law ought to share the same objective of promoting innovation and enhance consumer welfare, as highlighted in Advocate General Gulmann’s Opinion in *Magill*,<sup>131</sup> this is not immediately obvious in Article 82. Instead, the general approach to Article 82 was reaffirmed in *British Airways*,<sup>132</sup> *Michelin II*,<sup>133</sup> and *France Télécom*.<sup>134</sup> Although the ECJ’s judgment in *British Airways* contains some promising indications, such as the need to establish some form of competitive impact and an appreciation of economic benefits, it confirmed that there is no requirement of direct harm to consumers.<sup>135</sup> In *Michelin II*, the CFI said that to establish an infringement, it is enough to show that conduct of the dominant undertakings *tends* to restrict competition, or is *capable* of having that effect.<sup>136</sup> In other words, for the purposes

<sup>125</sup> Directive 91/250/EEC.

<sup>126</sup> Joined Cases C-241/91 P and C-242/91 P, *Radio Telefís Éireann and Independent Television Publications Limited (RTE & ITP) v Commission* (“*Magill*”) [1995] ECR I-00743.

<sup>127</sup> *Ibid.*, para 50.

<sup>128</sup> Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2002] ECR I-3401, [2002] 5 CMLR 44, para 52.

<sup>129</sup> *Supra* n 122.

<sup>130</sup> *Supra* n 108.

<sup>131</sup> Opinion of Advocate General Gulmann in *Magill*, *supra* n 126, delivered on 1 June 1994.

<sup>132</sup> Case C-95/04P *British Airways plc v Commission* (2007) ECR I-02331.

<sup>133</sup> Case T-203/01 *Manufacture Française des Pneumatiques Michelin v Commission (Michelin II)* (2003) ECR II-04071.

<sup>134</sup> Case T-340/03 *France Télécom SA v Commission* (2007) ECR II-00107.

<sup>135</sup> *Supra* n 132, para 107.

<sup>136</sup> *Supra* n 133, para 239.

of Article 82, anti-competitive object and anti-competitive effect is one and the same thing.<sup>137</sup> In *France Télécom*, the CFI recognised that the Commission was “right to take the view that proof of recoupment of losses was not a precondition to making a finding of predatory pricing”.<sup>138</sup> Contrary to the legal position in the US,<sup>139</sup> there is no recoupment requirement in relation to predatory pricing under Article 82.<sup>140</sup>

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

### E. THE PROCESS OF COMPETITION

This section explains why it is so difficult to change the interpretation of Article 82 to a more economics-based approach with a methodology capable of showing harmful effects on consumers. It argues that a similar transition to the one seen in the US seems unlikely in Europe given the normative foundation of Article 82, the juristic principle in Article 3(1)(g) and the different transatlantic views on the process of competition.

The EU and the US have a different understanding of the process of competition. As mentioned above, the protection of the process of competition and the opportunities to compete on the merits under Article 82 results from the realisation of the free movement rules.<sup>141</sup> It is believed that the process of competition is protected by the exercise of individual rights. This approach has been linked to Kantian philosophy.<sup>142</sup> This is a philosophy preferring the protection of human dignity and fight against the instrumentalisation of human nature rather than a neo-classical position. The latter position values efficiency without any consideration of the position of individuals in its utilitarian calculus.<sup>143</sup> Protecting the competitive process in this way makes it difficult to make consumer harm the ultimate test of anticompetitive conduct.

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

<sup>137</sup> *Ibid.*, para 241.

<sup>138</sup> *Supra* n 134, para 228.

<sup>139</sup> *Supra* n 63.

<sup>140</sup> *Supra* n 109.

<sup>141</sup> Arts 28, 39, 43 and 49 of the EC Treaty.

<sup>142</sup> E Mestmäcker, “Bausteine zu einer Wirtschaftsverfassung—Franz Böhm in Jena” *supra* n 104, 123–27.

<sup>143</sup> W Möschel, “Competition Policy from An Ordo Point of View”, in H Willgerodt and A Peacock (eds), *German Neo-liberals and the Social Market Economy* (Basingstoke, Macmillan, 1989), 148–49.

have influenced EC competition law<sup>144</sup> or the principles underlying Article 82.<sup>145</sup> The aim of ordoliberalism was not economic efficiency. This was confirmed by Franz Böhm, one of the founding fathers of ordoliberalism:<sup>146</sup> “The real motives behind the enactment of antitrust law were . . . not economic efficiency and the effectiveness of economic control, but social justice and civil liberties which were held to be threatened by monopolies.”

Some argue that a focus on competition as an institution does not imply that EC competition law is insensitive to economic efficiency. They argue that the undistorted competitive process will generally tend to maximise wealth and consumer welfare, at least in the medium term.<sup>147</sup> This implies that the protection of an undistorted process of competition and the competitors participating in it, is an intermediate goal of consumer welfare and not an end in itself. While the protection of individual economic freedom to safeguard an undistorted process of competition may not necessarily conflict with the promotion of consumer welfare, the two goals are based on fundamentally different normative views and may not always lead to the same outcome.<sup>148</sup>

With the rise of the Chicago and Post-Chicago Schools, the position in the US is different. The US denies the significance of factors leading to consumer welfare as intermediate goals. It relies on an ultimate goal of consumer welfare,<sup>149</sup> which requires a showing of verifiable effect in the marketplace and excludes considerations of individual liberties. This is an approach focusing on the market outcome not the process.

The Commission does not focus on the protection of a particular market outcome, but accepts an individual right of each competitor not to be excluded regardless of whether the exclusion results in verifiable harm to consumers or efficiency in the marketplace. The danger of such an approach may be a chilling of the incentives of firms to compete for dominance by innovation (dynamic competition). One commentator has argued that “[t]he Commission attributes

<sup>144</sup> *Ibid*, 142; J Kallaugher and B Sher, “Rebates Revisited: Anti-competitive Effects and Exclusionary Abuse Under Article 82” (2004) 5 *European Competition Law Review* 263, 268; see also D Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, Clarendon Press, 1998).

<sup>145</sup> L Lovdahl-Gormsen, “Where Are We Coming From and Where Are We Going To?” (2006) 2(2) *Competition Law Review* 1, 8.

<sup>146</sup> F Böhm, “Democracy and Economic Power”, in *Cartel and Monopoly in Modern Law* (Karlsruhe, CF Muller, 1961), 28.

<sup>147</sup> T Eilmansberger, “How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses” (2005) 42 *Common Market Law Review* 129, 135.

<sup>148</sup> L Lovdahl Gormsen, “The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC” (2007) 3 *European Competition Journal* 329.

<sup>149</sup> Bork, *supra* n 32, *Reiter v Sonotone Corp* 442 US 330, 343 (1979), reaffirmed in *NCAA v Board of Regents of University of Oklahoma* 468 US 85, 107–108 (1984): “A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.”

comparatively lower weight to a dominant player's freedom to run its own business, and comparatively more weight to the protection of competitors than U.S. courts".<sup>150</sup> It is assumed that the commentator refers to recent US jurisprudences rather than early jurisprudence.<sup>151</sup>

A consequence of protecting competition as an "institution" and the competitive process in itself, instead of making consumer harm the ultimate reference point, is that it becomes extremely difficult to find a proper legal framework for Article 82.<sup>152</sup> This approach falls short especially under the influence of economics and bears difficulties of application and measurement. To provide means that seem easier to measure, an approach focusing on the outcome (and not the process in itself) seems more suitable. Moreover, focusing on competitors' freedom to compete instead of harm to consumers, presupposes that an effective protection of competitors against exclusionary acts will increase the incentives of non-dominant market players and potential newcomers to invest and compete. Unless there is good evidence that a specific market is characterised by innovation and high entry, such an assumption may be dangerous.

## F. CONCLUSION

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

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

The Community Courts have never done that within the scope of Article 82.<sup>154</sup> Second, the courts' different role in the EU and the US. While the Community

<sup>150</sup>I Forrester, "Article 82: Remedies In Search of Theories?" (2005) 28 *Fordham International Law Journal* 919, 920.

<sup>151</sup>For example, the Supreme Court in *US v Topco Associations* 405 US 596 (1972) 610: "Antitrust laws in general . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete . . ."

<sup>152</sup>Within the scope of Art 82 it is unclear who the consumer is. In some Art 82 cases harm on the intermediate level becomes a proxy for harm to the final consumer. This question will not be answered in this short article—not because it is irrelevant but because it would require another volume.

<sup>153</sup>*NCAA*, *supra* n 149, 107–108.

<sup>154</sup>Although the CFI has done so within the scope of Art 81, case T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, paras 118 and 273.

Courts can change the framework of Article 82 by developing the law, they cannot drive competition policy. Only the Commission can develop its policy.<sup>155</sup> As it is well-known, the ECJ did not act upon Advocate General Kokott's invitation in *British Airways* to change its framework of Article 82 to give the Commission some room to develop its policy.<sup>156</sup> The judges of the US federal courts have been moulding and developing policy over time through their construction and interpretation of the provisions of the Sherman Act. This has allowed the interpretation to be influenced by modern thinking and has meant that the goals underpinning that interpretation and application have changed and evolved over time. This has made the Supreme Court more willing to reconsider its previous decisions where necessary to make antitrust a rational enterprise.

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

<sup>155</sup> Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* 1991 ECR I-935.

<sup>156</sup> *Supra* n 118, para 28.

<sup>157</sup> *Supra* n 103, para 114.

DR LIZA LOVDAHL GORMSEN: Thank you very much both to you and to Spencer for inviting me here today. I do not know whether you have read the paper or not, but the main point is really the structural approach to Article 82.

What do I mean by the “structural approach”? Basically I mean that Article 82 has been applied in a way that has prohibited conduct that affects the market structure. So if you have a conduct that affects the structure of the market it has been prohibited. Is it such a bad idea to do this? In theory no it is not, but under Article 82 it has become associated with harm to competitors in some of the cases under Article 82, so therefore, yes.

Where has it all come from? It comes from the case *Continental Can*<sup>1</sup> which many of you will know was the first case before the ECJ. There were other decisions under Article 82 before that, but that was the first case that came before the ECJ. So if we go back to the case what did the Court say? The ECJ said that there needs to be a connection between significant changes to the structure of the market and harm to consumers. Basically, what they did in *Continental Can* was establish a connection between significant change in the market structure and harm to consumers. Is that a bad idea? Not really, I even think it is a rather good idea.

What happened from then (the beginning of the 1970s) onwards? The connection that was established between significant changes of market structure and consumer harm became neglected. The change in market structure became associated with harm to consumers, so Article 82 became a remedy for even insignificant change in the market structure and therefore such a change in the market structure was found whenever a competitor’s access to the market was impeded. When the Community courts—first the ECJ and later the CFI—kept referring back to *Continental Can*, and talked about “consumer harm”, they gave a very narrow meaning to this concept. It became associated with the limitation of consumers’ choice to source the supply from different suppliers. Such a narrow definition makes it quite easy to find consumer harm; whenever a competitor is squeezed out of the market that basically means that there is one less supplier in the market. If that is considered consumer harm then that makes it quite easy to establish harm to consumers. One can wonder whether it became a disguised policy for protecting competitors.

In some cases it is seen that harm to competitors is used as a proxy for harm to consumers. You can ask: “Is that a problem as we know that competition law is not here to protect competitors?” Yes, it is a bit of a problem right now where DG Competition is trying somehow to develop a more efficiency-based approach. Therefore, I would argue that that very narrow definition, which has been adopted throughout the years, needs to be broadened and relaxed.

<sup>1</sup> Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215, [1973] CMLR 199, 254.

DG Competition is in charge of making policy. The European Court of First Instance, and the European Court of Justice cannot make policies, so obviously they depend upon DG Competition to move its policy forward. However, as Advocate General Kokott said in her opinion in *British Airways*<sup>2</sup> there may be a way forward, but basically the Commission will have to develop its policy within the framework created by the Community Courts. By saying that she also allowed the Courts to change their framework; they would have to change their framework in order to give some room for the Commission to develop its policy. As we have seen lately even though there is some positive indication in some case law, it looks like the Community Courts are not that willing to change their Article 82 framework.

DR PHILIP MARSDEN: Shall I open the discussion briefly by trying to play devil's advocate and by asking the question whether this is not a completely a false debate? Would the Bundeskartellamt, or any ordoliberalists who remain in Brussels, not just say that we are all working to the same objective and that we are trying to have competition policy ensure that the markets work fairly for consumers? It is all in the end about consumer welfare? If ordoliberalists decide to protect small enterprises and ensure that there is enough room for them in the market and that they are not being squeezed out, so that the structure of the market stays in some way 'rivalrous', even if some of these competitors are small and inefficient by some standards then so be it: competition policy is more than just economics and consumer welfare and therefore in the end we are all trying to protect consumers, and if we have to make a few remedies that might actually be short-term price raising then that is not really a problem and we should encourage that because we are taking a longer view of the market and we are trying to sustain this structure of competition as an institution, as Advocate General Kokott would have it. Enough devil's advocacy: what do we think about that?

PROFESSOR MARGARET BLOOM: I am not sure that Advocate General Kokott was actually concerned about consumers. I think what she said was that if you adversely affect the structure of the market that is sufficient. Now it may, or may not, adversely affect consumers. My concern would be that sometimes if you are addressing a change in the structure of the market, the very change that an authority might want to prevent would actually have been beneficial to consumers. In your interesting intervention, Philip, you assumed that it was important to protect the smaller and medium size firms. But what about some innovative development that a big firm introduces which then affects the structure of the market, and is beneficial to consumers? If the competition

<sup>2</sup> Case C-95/04P *British Airways plc v Commission* [2007] ECR I-2331.



authorities come and say: “No, you can’t do that”, then you are going to reduce consumer welfare.

You mentioned Advocate General Kokott and the *BA/Virgin* case, which was admittedly started years and years ago by the European Commission, concerning discounts to travel agents. You only need to look and see what has happened in that market since to see that those discounts were not having an adverse effect on consumers. Across the Atlantic the US 2<sup>nd</sup> Circuit Court of Appeals upheld the District Court’s dismissal of Virgin’s claim,<sup>3</sup> admittedly in a summary judgment. The facts were slightly different in the US because BA was not as important in the market. But the 2<sup>nd</sup> Circuit said: “These discounts are positively beneficial to consumers”; so there were very different approaches on the two sides of the Atlantic.

CHRISTIAN AHLBORN: The problem you always get, once you move away from protecting competition—whatever that means—to some sort of operational targets, you can either try to measure consumer harm directly in terms of prices going up or down, or a market structure alternative. The first problem with the structural approach is the one that Margaret has identified, namely, you cannot distinguish properly between efficient behaviour and consumer welfare enhancing behaviour which may lead to the growth of a firm which already has a high market share.

The other problem we have is that you destroy the incentives of firms when what you are saying is: “If you get more than X per cent market share we will take it away from you”, and that is a very negative dynamic of competition. I think it is just not operational to have a market structure analysis in this way.

But even in the UK I think we are not entirely adverse to a structural approach if you look at the supermarket proposal—if you have 60% market share you are not entitled to open a new shop even if that might actually increase supply to the consumers—people are grappling with that. The comeback from advocates of a structural approach is that you are kidding yourself if you think you can measure directly any impact on consumer welfare. The errors are just too big. What you need to have is some bright line test and market structure is the best we have.

MAURICE STUCKE: One thing that interests me is the extent to which a private cause of action in Europe will force the courts to consider consumer welfare. How will the court be able to identify when a consumer is harmed? What will be the standard the court employs? In particular, there may be different classes of plaintiffs that may allege different harms, some of which may be pro-competitive and others anti-competitive. Will this then bring greater

<sup>3</sup> *Virgin Atlantic v British Airways PLC* 257 F3d 256 (2d Cir NY 2001).

convergence when the court must determine: (i) when an individual has suffered harm, and what sort of harms are within the realm of Article 82; and (ii) whether that plaintiff's harm was indeed caused by the alleged antitrust violation?

DR PHILIP MARSDEN: Can I just add something to that? We have been waiting a long time for some guidance that is of a more economic effects basis from the Commission in particular and other authorities; meanwhile the case law seems to be staying in a relatively rigid way, or perhaps might even be becoming more rigid. So how can we just rely on private actions? So far we have been relying on primarily competitor complaints in this area, but is it really the case that gradually over the next few years, or maybe a decade or two, enough consumer-based private actions would arise in this area that we could actually see the development of a consumer-welfare-based theory of harm arising in European law, not by dictate or policy but through the development of these sort of consumer complaints? Or is that completely unlikely and it is really going to stay as battles between very large companies arguing about whether or not their conduct is exclusionary or efficient.

ADAM SCOTT: It seems to me that behind this there is an implicit question about the allocation of a scarce resource of investigating and prosecuting matters in the area of competition. I put it in that way because deploying Article 82 is a bit of an erratic *ad hoc* process and DG Competition is recognising that, and we recognise it in the UK in terms of the ability to have market studies. Then you have the question: "How do you decide where your leverage is greatest?" The advantage of deploying Article 82 is that you have a focused approach. The disadvantage of a focused approach is that that focus may not be on the most urgent area in terms of consumer welfare. It may have arisen for very particular reasons to do with very particular behaviour.

Of course, you then have the question that the advantage of that, and the advantage of private actions, can be seen in terms of deterrence, and what you then say is that, by having the particular focus, you have produced leverage against markets in general. Whether there is evidence for that actually happening in reality I am more doubtful, but it does seem to me that you have this implicit question: where should the energies of a national competition authority, the Commission and the courts properly be devoted?

JOHN BODRUG: I was going to initially respond to Philip's question about the merits of relying on private actions in part by saying that before you choose private actions as the right way to go, you have to make sure you have the right law. There is no private action available in Canada today for abuse of dominance. The Competition Bureau has been advocating the introduction of

such a right for some time, and we have an ongoing debate as parts of the business community and the legal community are quite concerned about creating a chilling effect and suppressing business conduct that would be more efficient. At the same time, we do not see many abuse of dominance proceedings brought by the Bureau which raises the question as to whether there really is a problem out there.

I also wanted to comment on Dr Lovdahl Gormsen's paper. I think it is very helpful from my perspective, coming from Canada and a smaller market, to shine a light on the issue of whether market integration (rather than just consumer welfare) is really a driving force that explains a lot of the EC case law, because in Canada, on paper, if you look at our Bureau's Guidelines, it looks like they are advocating market efficiency or consumer welfare type standards. Yet when it comes to prosecuting cases, the Bureau cites EC case law, and it is not explicitly understood—or as understood as it could be—that there may be other dynamics at work in those cases. If we are sacrificing efficiency for other goals, I think it should be more explicit. This should be a particular concern in smaller economies that have less flexibility to sacrifice efficiency. In a smaller economy, minimum efficient scale may lead to relatively more concentration and more “dominant” entities within the economy. At the same time, the smaller economies may be less able to absorb the inefficiencies that are inherent in that kind of approach reflected in many of the EC abuse cases.

PROFESSOR MARGARET BLOOM: I just wanted to respond to what Maurice said and follow on from John in terms of can the courts resolve all this. As I see it, the problem is that the courts are bound by EC case law precedents, and some of those precedents are decidedly unhelpful. Just to take the example of the recent *France Telecom/Wanadoo*<sup>4</sup> case, in which the Court of First Instance said that it is not necessary to prove recoupment in order to make a finding of predation.

A competition authority, of course, has the ability to decide on its priorities, and if it looks at a predation case it can decide: “There is no chance of recoupment and therefore prices are going to be low and consumers are not going to be harmed, and we will not take the case.” Until we have suitable case law I would have thought it was extraordinarily difficult for the courts to be the saviour that Maurice was asking about. They could, of course, send an Article 234 question off to the European Court of Justice which will take a fair time but might not come back anyway with the answer they are looking for. Also, I suspect a significant proportion of the private actions are going to be follow-on cases after the competition authority has already proven the infringement and then the plaintiff may go to court.

<sup>4</sup> Case T-340/03 *France Télécom SA v Commission* [2007] ECR II-107.

PROFESSOR SPENCER WEBER WALLER: I want to make one purely descriptive comment, and one normative comment about referring to what Adam Scott asked—a very good question—about what are the priorities. At least in the US the public investigation of monopolisation is a distinctly very low priority. The agencies have said that they want to make cartels the number 1 priority. That is primarily the work of the Department of Justice because of the criminalisation of price fixing and that tradition in the US. The second priority being the investigation of mergers, where modern practice dictates that you need something close to a merger to monopoly—perhaps not literally—to get the agency’s attention.

In recent years, the Department of Justice has not brought significant monopolisation cases. The FTC has brought a series of important and challenging cases that have focused primarily on the abuse of governmental processes, misuse of laws intended to promote generic entries in the pharmaceutical markets that have in fact worked to the contrary, and abuse of what I call “quasi-governmental” processes, such as standard setting. These are important cases. They have worked very hard, and some of the remedies have been terrific. But these are not cases that are controversial in terms of the theory. Obviously the defendants fight quite hard, with tremendous resources, to defend against these charges, but these are the kinds of things that go back all the way to Robert Bork and *The Antitrust Paradox*.<sup>5</sup> Even if you do not believe in antitrust enforcement as being particularly useful, most think it is useful to prevent the government from supporting arrangements that are anti-competitive.

So what I will call “traditional monopolisation cases”, which are purely private unilateral conduct and not directly invoking governmental processes, are a fairly low priority in terms of what the agencies say. Obviously the majority of all antitrust cases are private in nature, and there are occasionally monopolisation cases between large, well-founded competitors. *Pepsi v Coke*<sup>6</sup>—if you go back a number of years, is certainly a version of that. Those are primarily fights over damages and those private cases are not about transforming market structure. That is my descriptive comment of what I think the priorities are.

But as to the normative side, I think we do antitrust a great disservice. I think one of the lasting impacts of Robert Bork’s work (going back to *The Antitrust Paradox*) has been the transformation of language, where we use a term to mean something very much different from its ordinary meaning. When we talk about “consumer welfare”, it has been defined in a certain way that is very limiting for us. There is a standard way of talking about it which primarily relates to allocative efficiency and that is usually the sense we use it in. However, it has long

<sup>5</sup> RH Bork, *The Antitrust Paradox: A Policy at War With Itself* (New York, The Free Press, 1978).

<sup>6</sup> *PepsiCo, Inc v Coca-Cola Co* 315 F3d 101 (2d Cir 2002).

since been divorced from what consumers actually want. We need to look at other disciplines beyond economics to tell us exactly what consumers want.

There is a large body of work in the United States by two people I respect tremendously, Bob Lande and Neil Averitt, which focuses on consumer choice as what consumers want.<sup>7</sup> If that is your starting premise then structuralism does not work entirely so badly. It needs to be operationalised, and there is a tremendous difficulty in that, as was alluded to, but operationalising any rule is really the tricky part.

These concepts of consumer choice suggest that we do not want to abandon structuralism as a starting place. We have abandoned it in the United States as an ending place, but it is not a bad place to start. I would throw out the following challenge, because I would be interested to see whether people think Article 82 would deal with the situation, or what they think it should deal with in Canada and elsewhere. What if you have a durable monopolist in some technology market, where they are the sole (or virtually sole) supplier of some good where they are able, through technological means, to almost perfectly price discriminate? Year after year, output is close to what you would expect under a competitive market—not exactly, but close—and prices are close to what you would expect under a competitive market, and yet year after year they are the sole or nearly sole supplier of that good. Is that something we should worry about? We can talk about that normatively or descriptively, whether the law would, in fact, do anything about it.

DR PHILIP MARSDEN: Just working on the choice point, we have had an example of how that has been operationalised recently in European competition law where, as I understand it, a chap called Ballmer offered a chap called Monti the choice to have a CD with five media players from different providers, packed with each operating system, and that choice was rejected and the product that was mandated by the competition authority was a product that was of less value technologically, it had a media player removed from it and the consumers chose not to buy this product. So a policy that seems to want to foster choice did not seem to work in that case.

ADAM SCOTT: At the same price, remember.

DR PHILIP MARSDEN: At the same price.

<sup>7</sup> NW Averitt and RH Lande, “Using the ‘Consumer Choice’ Approach to Antitrust Law” (2007) 74 *Antitrust Law Journal* 175, 180, note 12 (citing to prior work on this issue).

PROFESSOR SPENCER WEBER WALLER: One could argue that that particular remedy served neither traditional consumer welfare nor traditional consumer choice.

BECKET McGRATH: Partly going back to what Margaret said about the role of the courts and Article 82, I think the difficulty is that, whatever people would say about this, there is a very high degree of subjectivity in Article 82 in terms of what is “good” conduct and what is “bad” conduct. A competition authority can get around that element of subjectivity through internal debate and the exercise of administrative discretion, hence the low number of Section 2 cases in the US, hence the low number of Article 82 cases coming out of the OFT, whatever the OFT might say about the desirability of such cases.

When you look at this in the context of the courts, it leads to a high degree of unpredictability and I think we saw that in the UK horseracing cases. The OFT’s British Horseracing Board investigation deliberately stayed away from analysing the BHB’s conduct in an Article 82 context, preferring instead to look at it under Article 81, as embodied in the Rules of Racing. Issues like excessive pricing were very deliberately avoided, due the difficulties of proving an infringement. However, when a similar issue came before the High Court in the *Attheraces* case,<sup>8</sup> the judge was quite happy to dive straight in and say “Clearly this was excessive pricing; clearly they should stop doing that.”

However, when it went to the Court of Appeal,<sup>9</sup> the Court of Appeal took a much less interventionist line and overturned the first instance judgment. I would also say it was very interesting in that context that the Court of Appeal put some comments into the judgment which made it clear that the judges were actually quite uncomfortable with having to make those kinds of essentially policy decisions. They were effectively saying: “We really feel that this sort of issue is more appropriately adjudicated by a specialist competition authority”, so it is a kind of a passing of the ball, but I think what came out of that quite clearly was that the nature of Article 82 cases does not fit comfortably with the traditional adjudicative approach of the court system—at least in this country.

DR LIZA LOVDAHL GORMSEN: I was going to make a point to Margaret but I will start with you, Spencer, since you dipped into choice. I think there is a great danger in using choice as a starting point, because this is exactly where consumer welfare and economic freedom overlap, meaning that I remember, Philip, you hosted a conference at the British Institute just after the *Microsoft* case had been published where a senior official from the Commission came and said that the *Microsoft* case shows that this is all about consumer welfare now, because

<sup>8</sup> *Attheraces Ltd v British Horseracing Board Ltd*, Chancery Division [2006] EL Rev 654.

<sup>9</sup> *Attheraces Ltd v British Horseracing Board Ltd* [2007] EWCA Civ 38.

this case was argued in form of choice. This is where we need to be rather careful because the main point of individual economic freedom is choice, and you protect suppliers in the market to create choice, and is it a bad thing to have different suppliers in a market? No, not necessarily, but the minute they start exiting the market that is when choice decreases and that is when they say economic freedom has been violated, therefore we have an abuse, so I think one needs to be a little bit careful.

I know choice is part of the “consumer” definition here in Europe that they talk about quality, innovation and choice, so I am not saying that we should disregard choice but I think one needs to be careful not to focus only on choice because that again becomes just another way of saying that we are doing this for consumers, but it could equally be for competitors. So that was one point.

On Margaret’s point on Article 234, some national competition authorities may be regarding how long it takes to ask a question like that and get a reply and may actually think: “Okay, we do not like the policy . . .” for example on rebates “. . . we want our competition policy in this country to be more efficiency based. So we are going to address a question to the ECJ.” The ECJ is obviously just going to say: “But the law is clear. It is one thing that you do not like the law, and do not like the way the law is going, but that does not make it unclear.” I know you did not suggest that, but an Article 234 reference on these matters will be an utter failure, I think, because the court is just going to come back and say: “The law is clear; it is not unclear, therefore we are not going to answer that question.”

**CHRISTIAN AHLBORN:** It is an interesting factor if you do not work on presumptions. I think where we would have problems is if you were to say: “We just presume that more choice is what people want”. If you look at the separate product test in the US *Microsoft* case where you try and say: “What we really want to assess is whether consumers want more choice”. There is a trade-off between if you wanted more choice and lower prices, how do consumers behave if they have the choice between a bundled product and two separate products; everyone buys the bundled product without any coercion—that is a measurement of what consumers want. So I would be careful to say that consumers have shown through their behaviour that they prefer lower prices over choice, and you then come in and say: “Never mind what they show in practice, they’re going to get more choice, even if that means higher prices”. What we need to do is to test what consumers really want.

The second point, your hypothetical example of the monopolist, where the only problem is really a transfer of wealth from consumers to the producer if I understand you correctly, and I think then my answer would be that unless you are absolutely sure that there is no possible innovation I would say do not intervene, because the incentive to innovate—I would say—outweighs any transfer of wealth from the consumer to the producer. Therefore if you want to

lower prices now versus more innovation tomorrow we would probably go for more innovation tomorrow, as I say, unless you can show there are absolute barriers to entry through government regulation or the like.

DR PHILIP MARSDEN: As I understand it, there is this divergence between the US and the EU on this subject of harm to innovation in the sense that in the US it seems to be taken for granted that chilling incentives to innovate is going to be harmful and therefore the court does not require you to show that much evidence of it, whereas the Court of First Instance clearly came down on the other side and said that a dominant firm would have to show evidence that some form of remedy is actually going to really have an impact on its own innovative capacity as well as innovation of the market.

But on choice, surely the policy focus to have is to ensure that rivals, or potential new entrants have the opportunity to enter and shine if they have the ability to then garner share and custom, but no more than that, no direct assistance, or no ring fencing of a particular market so that a small, inefficient competitor can survive in that sense. You should at least at some point let market forces operate in that regard. So I take the point that obviously most competition authorities would say “We are about entry”, “We are about low prices and choice”, and then argue about how they operationalise it. But maybe it is time that we hear from an economist and see if they can shed some light on the operationalisation of these choice criteria which are, admittedly, important.

DR MIKE WALKER: First, before coming on to choice, very briefly on Spencer’s hypothetical example, I think maybe I have not understood it properly, because that is a case where consumer welfare is zero, and the monopolist makes lots of money which, in social welfare terms, is just fine but I have always been led to believe—contrary to what economists believe—that actually competition law is about consumer welfare, and if we actually have a consumer welfare stand then I think your example is interesting but I think it dies, because actually under a consumer welfare standard we prefer a non-price discriminating monopolist, so at least consumers gets some consumer surplus there. I am not sure that provides us with a difficulty.

In terms of choice, it is quite clear that consumers value choice, and it is quite possible to carry out studies where you get consumers to do a trade-off between different packages with basic different prices, and different quantities and that is fine, they clearly value that.

I am a bit concerned by this idea that we use choice really as the decision variable because it is terribly easy to get lots of choice in a market; we just have loads and loads of inefficient competitors. So to take the example of corner stores: they are added choice over the supermarkets, but they are fundamentally inefficient, and that is what the market has shown us over time, and they are



dying out. It seems to me that whilst we can recognise that choice is important to consumers we should not therefore think it is a decision variable for us to worry about.

BECKET McGRATH: That is a good point on choice. I think difficulties arise as well where the choices of individual consumers over time ultimately reduce their choice going forward. That should be allowed to happen provided, as Philip says, entry remains possible, because if you look particularly where there are positive network externalities, like Google or iTunes, Google has grown in market share in a market where there are no barriers for the users, they can easily switch between search engines, and it has gone from zero to being the dominant search engine simply because users chose it because they thought they were getting the best results. Again with iTunes, people have had a choice of music players but the reason Apple has developed the position it has is because it is a better product and therefore consumers have chosen it. You could say: “What value do you place, even though everybody goes out and buys iTunes, in the possibility of being able to buy a Microsoft tune instead”. Ultimately that does not have much value, and as long as competition law can step in at the end of the day to stop them unlawfully protecting that position, and enable the possibility of entry if the monopolist gets lazy and the qualitative edge is lost, then that should be the focus; it should not say “We need to make sure that it is possible for others to stay in the market and to try and manipulate the market to that end”.

DAVID BAILEY: Going back to a point that Liza made at the beginning in relation to there being a very close link between changes in market structure and the competitors’ access to the market, and how the case-law almost equates the two, so that if there is any deterioration in the competitiveness of the market that can be attributed to someone being prevented from entering it. I am not entirely sure whether the case-law is so clear-cut. The difficulty with Article 82 of course is that inevitably cases are going to turn on their specific facts. I jotted down three cases that came to mind in which I am not so sure the Court of Justice has held that changes in structure automatically result in an abuse of a dominant position just because a smaller competitor is unable to access the market.

The first case that came to mind was the first *Tetra Pak*<sup>10</sup> case where the CFI went out of its way to say that just because a dominant firm acquires an exclusive patent licence does not mean there is an abuse *per se*; the Court emphasised the need to take into account all the surrounding circumstances.

Second, the opinion of AG Jacobs in *Bronner*<sup>11</sup> provides an excellent explanation of how policy has developed in respect of refusals to deal, and in

<sup>10</sup> Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-309.

<sup>11</sup> Case C-7/97 *Oscar Bronner GmbH & Co v Mediaprint Zeitungs* [1998] ECR I-7791, [1999] 4 CMLR 112.

explaining what the limits of the essential facilities doctrine should be. The judgment in *Bronner* held that, where a dominant firm has not allowed anyone to use its facilities, and where realistic alternatives are available, it is not an abuse for the dominant firm to refuse to assist the smaller competitors, even though that refusal may mean that those competitors are unable to compete as effectively.

Third there is the maritime case, the Trans-Atlantic Conference Agreement case, in which a number of liner shipping companies were held to be collectively dominant. What is quite interesting about the CFI judgment in *Atlantic Container*<sup>12</sup> is that it represents one of the rare occasions when the Court reversed the Commission's finding of abuse. It did so primarily on factual grounds and in particular the lack of evidence supporting the Commission's case that TACA had unlawfully altered the competitive structure of the market by inducing potential entrants to join the conference.

So for me a lot of the "Article 82 debate" comes down to the need to put forward a credible theory of harm and then find evidence to support that theory. If one looks at the UK experience, for example, we made the point about private actions earlier on, one of the things that is quite interesting in the ordinary courts is that you can observe a series of stand-alone private actions, that have been brought, eg *Arkin*,<sup>13</sup> *Chester City Council v Arriva*,<sup>14</sup> and the *Attheraces* case we have just mentioned. In all three of those cases the claimants were unsuccessful, but it seems to me that one of the reasons they were unsuccessful was largely down to the fact they did not satisfy the standard of proof: the claimants were unable to produce sufficient evidence to credibly show that there was either dominance, or there was dominance but there was not in fact any abuse. So I would slightly question that in all Article 82 cases that changes in structure automatically result in abuse—I think it is a bit more nuanced than that.

A further difficulty in attempting to expound a unifying theory of abuse for the purposes of Article 82, it seems to me, is that the cases will invariably turn on their peculiar facts. There may have been cases where action has been taken against dubiously dominant companies, and obviously *British Airways* is a case that people often refer to in that regard, but I would also point out that there are many Article 82 cases—*Microsoft*, *Deutsche Telekom*,<sup>15</sup> *Tetra Pak II*,<sup>16</sup> *Irish Sugar*<sup>17</sup>—all of which concern what you might loosely call super-dominant undertakings, and where the risks to competition from their behaviour are commensurately greater.

<sup>12</sup> Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB and Others v Commission* [2003] ECR II-03275.

<sup>13</sup> *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655.

<sup>14</sup> *Chester City Council v Arriva* [2007] EWHC 1373 (Ch).

<sup>15</sup> Case T-271/03 *Deutsche Telekom AG v Commission* Court of First Instance Judgment of 10 April 2008.

<sup>16</sup> Case C-333/94 P *Tetra Pak International SA v Commission* [1996] ECR I-5951.

<sup>17</sup> Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969.

Such cases help support the credibility of public enforcement action taken under Article 82.

PROFESSOR SPENCER WEBER WALLER: This goes back to evidence—when the evidence is unknown or unknowable cases turn on presumptions and burdens of proof. So if you simply presume as most industrial economists did in the 1940s that monopolies were inefficient that led to certain presumptions and certain burdens of proof. Even the most expansive reading of *Alcoa*<sup>18</sup> certainly allowed even an admitted monopolist to win if it could prove that its monopoly was the result of superior skill, industry and foresight rather than any conscious act of monopolisation. That leads to one set of results, and if you assume that monopolies are efficient—which seems to be the current assumption—then you get certain other burdens of proof and you get different results when the evidence is either neutral or unavailable. But those ultimately are just presumptions and burdens of proof, and to be honest I am not really sure we are any further along the road to actually understanding whether monopolies are the result of efficiencies, predation or just “dumb luck” in many cases.

I think if monopolisation and abuse of a dominant position cases are going to mean anything, it has to mean something other than just dead weight loss to allocative efficiency, because if it is then it is not worth the coin. These cases are complicated, expensive, long and uncertain, and the dead weight loss for monopoly is not that great in our economy. If that is your only basis for concern then the current priorities are probably right—at least in the US—of putting it at the bottom of the barrel, so I think there has to be something more. The something more is, I think, in part what David I think was alluding to and I am going to invoke the name of Joseph Schumpeter,<sup>19</sup> but in a very different context. If what we hope for is the emergence of the next big thing, and waves of creative destruction as Schumpeter envisaged then the one thing we have to guard against is the strategies of dominant firms to prevent the next big thing from emerging. If that is a decent way to establish our priorities for the use of scarce resources in these types of cases then *Microsoft* got it right on both sides of the Atlantic. In the United States our Court of Appeal upheld liability where Microsoft engaged in conduct that involved a deliberate degrading of its product or other sorts of unexplainable strategies to maintain its monopoly over operating systems. It reversed liability for those things that had some potential to be explained in some other way. I think the CFI case can be explained in a similar way even if the CFI itself did not articulate it in all those terms.

So I would offer as a model: look to Schumpeter as an example, allow the next big thing to emerge, but be suspicious of the strategies that the long term or

<sup>18</sup> *United States v Aluminum Co of Am* 148 F2d 416 (2d Cir 1945).

<sup>19</sup> See generally TK McGraw, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction* (Cambridge, MA, Harvard University Press, 2007).

super-dominant firm engages in that prevent the emergence of efficient, innovative, technologies products or services that would then supplant the firm in that dominant position.

DR PHILIP MARSDEN: I thought you were going to say the convergence was that in the US the court upheld the offence of monopolisation when Microsoft was deliberately degrading its product and DG Competition over here asked Microsoft to deliberately degrade its product.

DR LIZA LOVDAHL GORMSEN: Just to go back to the concept of choice without this being a session on choice only: I think that in order to understand choice it is necessary not only to look at competition law but also to look at consumer law. Both competition law and consumer protection law aim at protecting choice, but at different levels. Competition law is basically trying to look at whether there are any artificial barriers to entry into the market, etc whereas when we have dealt with that and you are a consumer in the market then it becomes more a consumer law issue with: “Do we [ie consumers] have choice? Do consumers choose the right thing?” Consumers are not all rational. So in order to understand the concept of choice it is not enough just to understand competition law, one also needs to understand consumer law because they are integrated in some ways.

Just a minor point to David, as you know, I do acknowledge in my paper that there are cases that have taken a separate path, but of course the main point today was really to say that this connection between market structure and consumer harm is just somehow lost in some cases, even though I do obviously acknowledge that is not always the case.

DR PHILIP MARSDEN: There is just one point I want to throw out before turning to Christian, and it is something I have been puzzling over for some time. When the DG Competition discussion paper on Article 82<sup>20</sup> came out, there was a term used that I had not seen a lot in the case law before, which was the term “anti-competitive foreclosure”.

PROFESSOR SPENCER WEBER WALLER: As opposed to what?

DR PHILIP MARSDEN: It seemed to me that the discussion paper, as we have said before, started out talking about consumer harm, foreclosure that leads to consumer harm, and then suddenly this term “anti-competitive foreclosure” was used, but the evidence it seemed to be asking for in the later examples was just of

<sup>20</sup> European Commission, Discussion Paper on the Application of Art 82 of the Treaty to Exclusionary Abuses, December, 2005.

“foreclosure” not of “anti-competitive” foreclosure, so just to throw the question out: what are people’s views on what does anti-competitive foreclosure mean? Mine would be there was something more than the foreclosure or hindering of a rival. There is something more than that, which requires an actual or likely negative effect on the market; that would be my answer, but maybe we could go around at some point and canvass views.

CHRISTIAN AHLBORN: First, can I catch your question again before it goes out, because I think it is quite an interesting question for the next session, because anti-competitive foreclosure comes up in obviously the non-horizontal merger guidelines, and so we can park that.

I have to respond to David and his three examples, of which I think two are slightly disingenuous. The *Liner Conference*<sup>21</sup> is a cartel case with a little bit of Article 82 attachment, and it was just the fact that you could not really get to the cartel under the normal Article 81 rules. *Tetra 1* also has a slight edge or feel of merger control at the time. The other case, which is much, much harder to explain is *Bronner* and I think *Bronner* is just the shining light of a very good Advocate General who got it right in what was otherwise, I would say, pretty bleak territory. As you see *Microsoft* is now basically going right back on *Bronner* wherever possible. So it is almost the European reverse of *Aspen Skiing*.<sup>22</sup> It is the one case that you cannot really explain; it is still there and you do not want to overturn it, but it does not fit.

Then I just have one comment on Spencer’s point, and that is that the protection of the competitive process is key. I agree that that should be the aim of the competition authorities; the problem is it is so hard to identify and protect. If you look at *Microsoft* I would have thought that is an example where it did not work in the sense that the remedies have been largely ineffective as everyone would acknowledge, and actually if you look what happened both on the media player side—where there have been new products—it has probably market protected itself better than what the Commission was able to do in Europe and on the inter-operability side with software on the clouds where basically no one asked Microsoft for licences.

ADAM SCOTT: We have heard about Schumpeter. The difficulty is that the destruction has normally taken place before courts and Tribunals get involved, and Schumpeter would expect some destruction to take place that is actually healthy. So it could have been destructive in a healthy way; it could have been destructive in an unhealthy way. Where it is for the better and then people

<sup>21</sup> Case T-213/00 *CMA CGM and Others v Commission* [2003] ECR II-913.

<sup>22</sup> *Aspen Skiing Company v Aspen Highlands Skiing Corporation*, 469 US 1204, 105 SCt 1163 (Mem), 84 LEd2d, 315 US 1985.

subsequently oppose it, you have the danger of a chilling effect coming in, where it was actually a bad thing—and in competition law terms “improperly occasioned”—then you have a lack of a really effective remedy, because the market structure has already been destroyed and deterrence in that sense is not an effective remedy.

So it does seem to me that talking of Schumpeter has some important things to say, but it does make Article 82 look like a rather impotent weapon.

**MAURICE STUCKE:** I would like to respond to two points. The first is in respect to choice. I agree with Liza, but in certain industries, such as the media, there may be normative reasons for wanting consumers to have more choices. These industries where choice is important may be distinguishable from other industries, where as the Court of Appeals noted in *Microsoft*, consumers opt for less choice when the efficiencies from bundling are significant.<sup>23</sup> So I agree with Christian as well on this point. But with media policy, you might want greater choice to have a more vibrant marketplace of ideas. Now, the question is should this diversity issue be part of competition policy generally, or be a separate specific media policy. This is another debate.

Secondly, with respect to Liza’s point about process versus outcomes it could also depend on your conception of economic theory. If you believe in the Chicago school static equilibrium model then it shouldn’t really matter. Invariably market forces will return the market to its natural equilibrium.

But if you believe that the industry dynamics are better understood under an evolutionary economic theory, whereby past market action can affect future courses of action, then it is very important promoting access to the market. This is particularly important in terms of network effects and path dependence: actions that were or were not taken in the 1960s and 70s can affect us today. This is an emerging area of economic theory and there is still more empirical work that needs to be done. Fundamentally it questions two critical assumptions: will the market automatically correct itself, and is there a natural single equilibrium for such a market?

**DR MIKE WALKER:** I want to agree absolutely with what Adam has just said: this issue about whether Article 82 is impotent. I think Article 82 very largely is impotent and the reason is because it takes too long. Coming from an economist’s point of view the answer to all of this is in one sense really clear—there is an allegation of abuse; we can just get all the data; we will carry out a really proper investigation, work out exactly what happened to consumers now and over time, so it is not just static deficiency; we will get our answer and then we can decide the case. Well, of course, that is dreadful policy and even an attenuated version of that

<sup>23</sup> *United States v Microsoft Corp* 253 F3d 34, 87–88 (DC Cir 2001).

in *Microsoft* took us eight years, maybe, and gave the decision which may be right but it is irrelevant.

Given that I wonder—and I do not say this lightly—whether actually the Commission is right, because I don't normally agree with the Commission, given that one way to try and look at this in a manageable framework that takes account of both price and choice is this “as efficient competitor test” that runs all the way through their discussion paper. The question you are asking: does the abuse stop somebody who is as efficient as the abuser from entering the market? If they are entering with the same product they will be able to enter if they are more efficient, and that is what we want to see. If they are entering with a different product that consumers value then again they will enter and that is what we want to see. Judge Jackson in *Microsoft* I think precisely said that the problem here is not that Netscape has exited the market—that is a problem—the real problem is the signal it sends everybody else, it is dynamic competition that is a concern. So I wonder whether actually the way to think about this is some sort of version of the “as efficient competitor” test as implementable.

DR LIZA LOVDAHL GORMSEN: Just a short comment to the remedy in *Microsoft* because obviously one needs to distinguish between the harm to competition and then the remedy on the other hand. I think if you look at the remedy from a consumer law point of view, it makes total sense. So this goes back to my point that these two areas need to interrelate at some point because for some consumers what was important was quality, and the Commission relied on evidence that consumers said that the quality of the media player was not that great.

For other groups of consumers what is important is convenience. For them having a default option, or having something pre-implemented is the thing they are looking for, maybe not quality. So different parameters; different ways of measuring things. So by having a remedy where Microsoft is still allowed to sell the bundled version but now they also have to sell the unbundled version make a lot of sense from a consumer law perspective, whereas from a competition law point of view it does not.

PROFESSOR MARGARET BLOOM: A couple of quick points. First, on Liza's—the interrelation between competition and consumer law—I agree there is quite a strong interrelationship. Consumer law, for example, prohibits misleading advertising which makes the market work well from the point of view of both consumer law and competition law. But where I think you need to be incredibly careful is this concept of fairness which is important in consumer law and sometimes seems to creep into competition law. But it should not be present, I would maintain, in relation to competition law. So that is an area in which one needs to be careful about the overlap.

My second quick point is in relation to both Mike and Adam on this question about is there a chilling effect? Is Article 82 impotent? One of the things that struck me when I went from being an enforcer to being in private practice is that I had always thought as an enforcer there was some sort of chilling effect probably. I am now far more conscious that in certain areas if you are advising an international company on, for example, pricing, or intellectual property, these are areas where it may be very difficult to insulate the company from what it wants to do, say, in the US compared with what it wants to do in Europe. Hence the company will need to apply the toughest approach worldwide if it wants to be absolutely certain that it is not going to have claims made against it. That is more significant than I thought. There are certainly cases in which pricing options which would be more attractive for consumers have not been introduced because of a concern they might lead to investigations. I am aware—nothing whatsoever to do with my personal experience and private practice—of one big international company where once it gets over 30% in any European market alarm bells start to ring. Management is advised to keep below 30% to be safe from investigations. The company has been fined pretty heavily in the past. This caution must restrain their competitiveness, I would assume. We do not know how much such behaviour is costing consumer welfare; it is impossible to assess. I suggest Article 82 is not impotent—indeed, some of its impact may be harmful to consumers.

BECKET McGRATH: I was just returning to Maurice's specific point about what happens where you have certain markets where plurality and diversity is valued over and above the normal competitive process, in media markets in particular, and I would say it is very important to have specific rules to deal with that issue rather than it "polluting" the competition analysis. That is why I think the position we have got to in the UK with media mergers is actually quite a good one, even though it came out of a slightly last minute compromise in the Bill process, because you have the bifurcation of the process that says: "Okay, competition issues go this way, and the public interest plurality issues go this way and then they meet back again at the Secretary of State".

What that does not fully address is what happens when you are weighing up the two factors. We saw that process being tried out for the first time in *Sky/ITV*<sup>24</sup> The issue of how to balance factors was avoided in that case by the

<sup>24</sup> See "Acquisition by British Sky Broadcasting Group plc of a 17.9% stake in ITV plc", OFT report to the Secretary of State for Trade and Industry, 27 April 2007, available at [http://www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/Mergers\\_home/BSkyB](http://www.offt.gov.uk/advice_and_resources/resource_base/Mergers_home/BSkyB); and full Competition Commission proceedings, including final report, available at <http://www.competition-commission.org.uk/inquiries/ref2007/itv/index.htm>, currently under appeal as *British Sky Broadcasting Group plc v (1) Competition Commission (2) The Secretary of State for Business, Enterprise and Regulatory Reform*, CAT case number 1095/4/8/08, and *Virgin Media Inc v (1) Competition Commission (2) The Secretary of State for Business, Enterprise and Regulatory Reform*, CAT case number 1096/4/8/08.



conclusion that there was a competition issue, so the lack of concerns on plurality had no impact on the final conclusion. But if it came the other way around it would be interesting because if there was not a competition issue but was a plurality issue, ultimately it just disappears into the black box of the Secretary of State, and the Secretary of State comes out and gives an answer, but at least it stops those kind of rather vague debates that get politicians rather excited but not the rest of us. It leaves that in a contained zone I think otherwise you get into all sorts of problems, as you see in the States where the FCC has a separate jurisdiction that involves not just public interest plurality issues, but also competition issues.

## ABUSE VS NON-HORIZONTAL MERGERS: CONFLICTING THEORIES OF HARM?

PROFESSOR SPENCER WEBER WALLER: In marathon terms we have completed the first 10k or so, and as in the Chicago Antitrust Marathon we began with a lively discussion of really the purpose that brings us here. I thank Liza for her paper and leading the discussion on why we are doing all this. As a couple of people noted you cannot have intelligent rules, theories of liability and intelligent remedies unless you have some overriding purpose. It does not mean a single purpose but you have to have some clear idea of where you are going or you cannot really get there.

We now turn to the continuation of that discussion. Whatever purpose brings us all here to focus on notions of monopolisation and abuse of a dominant position, assuming the firm that we are looking at qualifies as having the appropriate level of market power, what are the harms that trigger liability. Christian Ahlborn has put together some thoughts on the conflicting theories of harm and what distinguishes harm in abuse of dominance vs harm in non-horizontal mergers. For those of you who are not familiar with him, Christian is a partner at Linklaters specialising in all aspects of EC competition law, as well as UK and German competition law issues.

CHRISTIAN AHLBORN: The starting point is really that there is a lot of comparison going on between EU and US law in relation to Article 82 comparing, for example, *Jefferson*<sup>1</sup> in the US to *Hilti*<sup>2</sup> in the EU and *Microsoft* in the US to *Microsoft* in Europe. Then we had Philip giving us the example of the growing self-confidence of Europeans where officials have been saying: “We do not need to compare constantly to what you are doing over there; we are grown up; we know what we are doing”.

In that respect it is actually quite interesting to compare two different policy instruments in Europe, because I do not think the divide is only EU/US, it is to some extent Article 82 on one side and other policy instruments on the other side, and first I would like see how Article 82 and non-horizontal mergers hang together; and secondly, where do they differ? I will look at four aspects:

- Do they have different policy goals?;
- Do they have different thresholds of intervention?;

<sup>1</sup> *Jefferson Parish Hospital District No 2 v Hyde* 466 US 2 (1984).

<sup>2</sup> Case T-30/89 *Hilti AG v Commission* [1991] ECR 1439; Case C-53/92 P [1994], ECR I-667.

- Do they have different analytical frameworks and *a priori* beliefs and presumptions?; and
- Do they have different standards and burdens of proof?

Then as a final point I will just wrap up and see what are the implications of any differences which I may discover.

So if we look first briefly at what is the relationship between abuse of dominance and non-horizontal merger control, at a very general level they deal with vertical/conglomerate relationships in most instances, and they are partly substitutes in the sense that they sometimes address comparable solutions for particular problems. So I may have a vertical exclusive relationship or I may decide to vertically integrate, and so to some extent Articles 81 and 82 are alternative control mechanisms to non-horizontal mergers, plus refusal to supply issues.

In some respects Article 82 is part of the non-horizontal merger assessment. If you look at it one must say: do I have the ability and incentive to foreclose, and then do I have—and here we come again—anti-competitive foreclosure? So one would expect that in many of the notions you have to have market power in certain markets, and the idea of anti-competitive foreclosure which follows from a structural change should, in many ways, be very close in its way of assessment to some of the Article 82 issues on tying and other issues. So how does that look if you look first at anti-trust goals and then the various other aspects? Are they really that closely aligned?

Starting off with the non-horizontal merger guidelines, as the abstract goal we have the protection of effective competition and that is fine. As the operational goal, I think the non-horizontal guidelines make it pretty clear that what you are aiming for is consumer welfare, and it is well understood and made clear in the notice that that is shorthand for an increase in prices, degradation of quality, etc. But it is very clear that the operational goal which you have for non-horizontal merger control is consumer welfare.

If you then look at abuse of dominance, the position is not very clear, but I think using *Microsoft* as the latest part in the story what you have is not necessarily protective of effective competition, but protection of competition on the merits where you are much more prescriptive as to what type of competition you would want to protect. Then in terms of operational goals, as I said, first you look at: do you have competition which is not based on the merits and then as an operational goal some sort of protection of the market position of firms which you believe would be performing better if competition were actually to take place on the merits. So to the extent that the market position shifts from the firm which is engaging in competition, not on the merits, what you would like to do is to make sure that it does not gain market share and you have this emphasis on the market structural element where you say: “If I see sales shifting away from the other firms to that

dominant firm, what I want to preserve as an operational goal is that that shift does not take place, so I want a strong emphasis on the preservation of a particular market structure to the extent that competition does not take place on the merits.”

Then the next point—the answer to the question of thresholds of intervention is relatively similar in both cases: what you need is a significant degree of market power. The notice says that if you have less than 30% it is unlikely that intervention would be necessary. It says that you do not need dominance, but quite frankly given that dominance can already start at 40% (and possibly below) I think in intervention thresholds there is not a big difference between non-horizontal mergers and Article 82 in Europe.

In terms of safe harbour you have at least a weak safe harbour in the non-horizontal merger guidelines, namely you need to have 30% upstream and downstream unless some exceptions apply, while you do not have any comparable safe harbour at the moment unless you believe that the draft guidelines under Article 82 are still alive—but very few people believe that that is the case.

So on the thresholds and safe harbours where you come out is you have greater safe harbours under non-horizontal merger guidelines than you do under Article 82, and the interesting question is why that is the case.

Then if you turn, thirdly, to the analytical framework, what you have under non-horizontal mergers is a three step analysis: ability to foreclose, incentive to foreclose; and then an assessment of the effects on competition, in the case of input foreclosure in the downstream market. The type of analysis which you employ is generally a rule of reason analysis, and your prior beliefs are at least that non-horizontal mergers are generally less problematic than horizontal mergers, but the notice does not go quite as far as saying “generally they are fine”, but at least there is no presumption that non-horizontal mergers are bad *per se*. There is also no particular presumption that the false negatives are more costly than the false positives in that context.

Now, if you turn to abuse of dominance the situation of the analytical framework looks at it quite differently. You have *per se* illegality in relation to predation, *de facto* or *per se* illegality in relation to exclusivity (never mind *TetraPak*; I think in terms of burden of proof you come very close at least to a *per se* illegality standard), and I would say probably *per se* illegality also on retro-active rebates following the opinion of A. G. Kokott in *BA v Commission*. You have a weak effects-based analysis in relation to tying: I think you have to establish that the incumbent at least wins some market share but you do not have to establish anything further. The only exception to the *per se* or *quasi-per se* illegality is *Bronner*, as modified by *Microsoft* which arguably follows a rule of reason approach, possibly even a strong rule of reason. So what you have in terms of prior beliefs, at least in relation to a large part of Article 82, is that

most practices by dominant firms are generally presumed to be harmful because that must be the implied prior belief for the almost *per se* illegality standard, again with the exception of refusal to supply and/or the belief that your false negatives are much, much more harmful than false positives.

Finally we have a presumption—a structural presumption—which is expressed both in *BA/Virgin* and in *Microsoft* that in general a market structure where the incumbent increases its market shares can be presumed to be harmful for consumers.

Then finally on standard of proof, if we start off with harm to competition, the non-horizontal merger guidelines make it clear that we have a standard of likelihood, ie there has to be a *likely* impact on competition. That gets repeated a number of times in the non-horizontal merger guidelines, for example, it has to be established that the merging parties would be likely not to supply potential downstream competitors. With Article 82 as always it is the “appropriate standard” but the European Courts have carefully avoided defining what “appropriate” actually means, and I think the court in *Microsoft* has not provided great service in its quote “risk of elimination”; “likelihood of elimination” is all the same thing in the greater scheme of things. Then it refers to “What the Commission means is there should be a prospective analysis” which I think everyone would accept but it does not address the question of what is your standard of proof. Clearly, it must make a difference whether it is a risk or whether it is a likelihood.

If we look to the standard and burden of proof in efficiencies for non-horizontal mergers it is the same as for horizontal mergers, so the burden is on the parties and they have to be merger specific, verifiable and obviously it has to be passed on to the consumers. If you look at the abuse of dominance cases again in *Microsoft* it is not quite clear whether it says there that to the extent that the efficiencies are closely linked to the abusive behaviour then those types of efficiencies need to be disregarded—I am referring to the tying part of the case where the court said:

“The fact that tying enables software developers and internet site creators to be sure that Windows Media Player is present on virtually all clients’ PCs in the world is precisely one of the main reasons why the Commission correctly took the view that bundling led to foreclosure of competing media players from the market.”

So does that mean if a particular action has a foreclosing effect, and at the same time creates efficiencies, that I must not take those efficiencies into account? The Court does not move on and then balance the standardisation benefits which result from the tying behaviour. It seems to me that the Court is saying it is entitled to disregard them because they are so closely linked.

Finally, as to balancing of harm and efficiencies the burden is on the Commission, and that is also something which the Court in *Microsoft* has made clear; the burden is on the Commission once the incumbent has shown objective

justification, efficiencies and the like; the burden lies with the Commission which would present some problems for the Commission if ever there were revised guidelines because one of the cornerstones for the Commission was that that burden was with the incumbents.

So where I would come out is that you have a pretty big gulf both in terms of the goals the Commission actually pursues, the analytical framework, the *a priori* beliefs and the presumptions, and in fact even the standards of proof which are applied to establishing consumer harm and establishing efficiencies.

I would like to make three comments in relation to these differences: first, it must be quite schizophrenic for an enforcer to constantly hop between different policy goals depending on the policy instrument, so that they say: “Oh this is a merger case, consumer welfare—oh, no, I am moving now to Article 82, now we are back to some sort of Freiburg School ordoliberalism.” That cannot be a particularly efficient way of running competition policy.

The second implication is that it leads to a concentration privilege in the sense that if I want to achieve a particular outcome I am much better off doing that through a vertical merger than, for example, through unilateral or bilateral behaviour. It is questionable whether it is such a bright idea for an authority to drive the market into vertical integration by applying completely different standards to what might result in very similar effects. A good example is trading platforms and clearing houses, if you really want to avoid any obligation to deal, make sure you are vertically integrated, and then the *Bronner/Microsoft* standard applies. If you have an exclusive relationship then you are under the *per se* standard of Article 82 so it is better to make sure that you cement that relationship through an acquisition.

The last implication is that the interaction of merger control analysis and Article 82 may lead to a very bizarre analysis. If you look at a merger and you then say: “Okay, I think purely on the merger analysis I have not established a particular competitive harm because it is not likely and I take into account particular efficiencies” and then I have to say what happens after the merger, obviously the firm may well be prevented from doing certain things under Article 82 where the standard for establishing harm to competition is lower, and efficiencies may not be taken into account, you may get completely different outcomes in your assessment.

**PROFESSOR SPENCER WEBER WALLER:** I very much appreciate Christian focusing us on the relationship between merger policy and abuse of dominance, and these issues exist in the US as well, and we can bring them out in the discussion. I also wanted to highlight one point you did not dwell on: the similarities in the choice of remedies once you conclude there is a problem—whether an abuse of dominance or vertical or horizontal mergers. It

raises exactly the same sort of structural remedies versus conduct remedies that we will probably get into later this afternoon.

DR MIKE WALKER: I have a number of points and then a question. As for having different standards under different policy instruments, look at cartels and horizontal mergers. It is illegal for two players each of 10% to form a cartel, but it is perfectly legal for them to merge. So the fact that we have different policy instruments leading to different implications for effectively the same competitive outcome I agree is troubling, but it is not something that is specific to this area.

As for the second point I would make—and this is also a question to you—you made the point that if you cannot take account of efficiencies there isn't this efficiencies foreclosure trade-off under Article 82—yes? That seems to me to be mad because I am not quite sure what anti-competitive foreclosure means. Because if you are only saying foreclosure is making it harder for somebody to compete then it is really hard to compete against efficient rivals, so of course efficiencies are deeply anti-competitive in that sense. But if you actually mean anti-competitive foreclosure, and that must mean some sort of harm to consumers, as we said earlier, it is unclear how you cannot take account of efficiencies. So I agree absolutely that that issue is mad.

My final point is a question which concerns your comment that there is *per se* illegality on predation and retrospective rebates and so on. I find it hard to square this with the fact that Article 82 cases just take so long. If it is generally true that we have had *per se* rules then I do not understand why *Microsoft* could take eight years for instance, or why *AstraZeneca*<sup>3</sup> would take seven years—that is the question.

BECKET McGRATH: A small observation on intervention thresholds. What is interesting at the moment is that we have two non-horizontal merger cases going through Phase 2 in the same market: *TomTom/Tele Atlas*<sup>4</sup> and *Nokia/Navteq*.<sup>5</sup> It reminds me of an interesting issue which I discussed with Mike on a case: whether you can have two singly dominant players on a market under Article 82. The traditional legal approach is no, you can only have one singly dominant player. So the threshold for intervention in Article 82 in that market would seem to be different from the intervention threshold on the merger analysis, where you can potentially have two cases creating a sufficient level of market power to justify remedies or even prohibition, whereas they cannot both be singly dominant in law. The complexity here is the question as to what happens when you are looking at two merger cases in parallel in the same market, but as separate procedures. At least under Article 82 you would be looking at one

<sup>3</sup> Case C-223/01 *AstraZeneca A/S v Lægemiddelstyrelsen* [2003] ECR I-11809.

<sup>4</sup> Case COMP/M.4854 *TomTom/Tele Atlas* (2007).

<sup>5</sup> Case COMP/M.4942 *Nokia/Navteq* (2008).

factual situation in one case but I think it does raise the question of whether the thresholds for intervention are really that similar.

DR LIZA LOVDAHL GORMSEN: Just on Mike's point—how could *Microsoft* take so many years if it was *per se*? If so it should just have taken half a year: they are dominant; what they are doing is an abuse. I do like the Commission's decision a great deal better than I like the judgment that came out from the CFI and where I think what they were trying to do in a way was trying to adopt a more economics-based approach. So what is meant by that? I do not think we have a clear picture right now what is meant by that. It seems to me that it is no more than a more thorough analysis—a better analysis of the facts and of the evidence and therefore that is what took so many years, because they were trying to change the policy. I think that must be distinguished from the outcome. When you look at it I would not say *per se* but rather rigid; so I think it took many years simply because they wanted to adopt a more thorough analysis—whether or not that is a more economics-based approach or not, I don't know.

CHRISTIAN AHLBORN: I agree with you that maybe in itself it is not that shocking or that different. Policy instruments have different analytical frameworks, but—and there is a “but”—if you do that then you need to have an *a priori* belief that, for example, cartels are different from mergers, and because you say two companies, a horizontal sort of cartel, with 20% market share, whatever, “we think there is almost never ever any efficiency, and it is likely to be harmful, and I take a completely different approach”. If we think that is the case for the distinction between Article 82 and a non-horizontal merger—fine—so we have a completely different *a priori*, because of the vertical integration we think that vertical mergers are more efficient and less harmful than either contractual arrangements or behavioural arrangements, fine, but I do not think it is that clear. You could say that with vertical integration sometimes it is more efficiencies than contractual arrangement but you could also say vertical integration sometimes makes anti-competitive foreclosure easier because it allows you commitment. So I do not think you have those *a priori* beliefs which you have in cartels where there are mergers.

The second point is that it is not just that it has comparable instruments, but in my view Article 82 is part of, or *de facto* part of, the non-horizontal merger assessment. Assessing the third step is what is the effect of anti-competitive foreclosure. What else is that than an Article 82 analysis because I need significant market power, so it is very hard to say “Ah, but that is something completely different from a stand alone”. The only difference is that in a vertical merger case the concern is triggered by structural change. I have other aspects which I also want to analyse—whether I have the ability to foreclose, whether I have the incentive to foreclose, but once I have gone down that route the third



element is then what is the effect of this foreclosure, and that to me is very similar to an Article 82 analysis, and I see no good reasons why you should have completely different beliefs, frameworks, etc.

DR PHILIP MARSDEN: I am really glad you said that because I have to take the blame for presenting this topic to Christian, because I rang him and said: “I have just been thinking generally about this subject and about trans-Atlantic divergences, and I think that the theories of harm in abuse cases, and the theories of harm in non-horizontal merger cases, and specifically about the issue of what is anti-competitive foreclosure, are really quite similar, so, Christian, could you go off and think about this?” Then he delivered his paper and seemed—except on that small point there—to dispute much of what I was hoping he would agree with me about. But I wanted to tell you why I had been thinking about it, because it came from something a Commission official said to me.

The divergences that came up trans-Atlantically with *BA/Virgin*, or the divergences in terms of conduct on *Michelin*,<sup>6</sup> came to light when I talked to in-house counsel at Michelin and they were very clear that they will not introduce in Europe at all any of the innovative pricing that they do in the United States and other countries because they have been hit so heavily by the Commission and the Courts here. You also see *GE Honeywell*<sup>7</sup> and the difference there; so there is a conglomerate merger—a non-horizontal merger—and a lot of the reasoning in that decision in Europe and a lot of the rhetoric that came out of it in terms of criticism in US literature in particular seemed to focus on the idea that when you had this exquisite problem of some form of exclusionary conduct or a merger that might result in some form of exclusion of rivals who cannot keep up and cannot make the same kind of offering that the conglomerate can make, that somehow efficiency becomes some form of offence.

Then we heard rhetoric from officials saying: “In Europe efficiencies aren’t an offence”, and now we hear Christian noting some of the *Microsoft* decisions going back to 82 and saying: “Well no, actually here you see an example of some of the dicta in the decision saying that if we found some foreclosure or some exclusion then we are not going to consider efficiencies at all”.

Of course while I was thinking about this the discussion paper was coming out, and there were various thought balloons coming out from officials in the discussion paper and around it about what does anti-competitive foreclosure mean. Many members of the Chief Economists’ Office at DG Competition said “Just wait, not for the discussion paper, and not for the eventual guidelines—if they ever come out—but wait for our non-horizontal merger guidance because

<sup>6</sup> Case T-203/01 *Manufacture française des pneumatiques Michelin v Commission* [2003] ECR II-4071.

<sup>7</sup> Case COMP/M.2220 *General Electric/Honeywell*; Case T-210/01 *General Electric Company v Commission* [2005] ECR II-5575.

there you are going to see how we define anti-competitive foreclosure, and that is going to be a unifying theory that we are going to probably be applying in Article 82 cases”.

So wherever we come out eventually regarding Article 82, the view at DG Competition at least is that merger analysis will lead the way in terms of a unifying theory of harm of what anti-competitive foreclosure is. I just query whether or not that is the case, and if anti-competitive foreclosure in the non-horizontal merger guidelines is what we think it is, and involves some form of harm to consumers in some way, contrasted with the Article 82 case law.

PROFESSOR SPENCER WEBER WALLER: A couple of comments on the comparative side, because Christian’s presentation has really got me trying to think about the conflicts we have in the US concerning merger laws versus monopolisation. A direct comparison is difficult because we just do not have much of a recent tradition of going after non-horizontal mergers. There are a few vertical mergers that have been attacked, and vertical aspects of horizontal mergers, but there have been no real conglomerate cases for ages. In the horizontal area, we begin looking at structure, and then take the next step of trying to suggest what is the theory of harm that would arise from the change of structure, and whether that is unilateral or co-ordinated effects. Then, if we still have any causes for concern, we look at entry and then efficiencies. If you look in the merger guidelines we take the efficiencies seriously but it is really on the parties to present and explain how, if at all, those efficiencies counteract the likely harm. Maurice can speak to this in terms of more recent Agency practice, but it has always been my impression that efficiencies are often a tie breaker in a close case where the Agencies will not proceed if there are really strong, demonstrable efficiencies, but if there is substantial harm it is almost never outweighed by the efficiency arguments presented. So in that context I think we have a stronger emphasis on structure and a somewhat weaker emphasis on efficiencies.

With monopolisation cases it is almost the opposite. If you take *Trinko* as an example,<sup>8</sup> our Supreme Court has put a tremendous stamp of approval on the seeking of monopoly power as an essential aspect of the capitalist system, and really has quite a few presumptions that firms with power unilaterally acquired are efficient and should be left alone absent a strong case by the plaintiff.

But even in the *Microsoft* case—I got into this a little bit in the article from the *Utah Law Review* that you have in your packs<sup>9</sup>—the DC circuit created an analysis that is akin to our rule of reason and applied it in the monopolisation context, where they put the burden on the plaintiff to articulate a theory of harm. If

<sup>8</sup> *Verizon Commc’ns Inc v Law Offices of Curtis W Trinko, LLP*, 540 US 398 (2004).

<sup>9</sup> S Weber Waller, “*Microsoft* and *Trinko*: A Tale of Two Courts” [2006] *Utah Law Review* 741.

successful the defendant has to explain the pro-competitive justifications and then—and only then—do you get to a balancing test, but the reality is you never actually get to the balancing test. Microsoft won every single issue where it could articulate a plausible factual and legal pro-competitive justification for what it did, and it lost when that justification was either a pretext or simply silly on the facts and the law, and that was the end of it. So if they came forward for something that was serious and facially plausible that was the end of the case. That is true in almost every rule-of-reason case in the United States. When the defendant has something plausible to say they win, and courts almost never get to that balancing because they don't know how to do it. So I just offer that as a comparative contrast for our discussion.

ADAM SCOTT: I think the use of the word “plausible” is quite plausible here because it is a very human trait to look for plausibility. Plausibility is a lot easier than provability; so, if I can grasp something that is plausible, I get a sense of contentment that I can then try and wrap up in some judicial reasoning.

Life is much less comfortable if I am dealing with words like “dominance” or “monopolisation” and then trying to apply that in a sense where my pure Anglo-Saxon definition of dominance or monopolisation is looking a bit shaky. That, it seems to me, is where that delightful adjective “significant” is rather more flexible. If I can move off monopolisation and dominance to something like significant market power, or a significant lessening of competition, then in my thinking (or my writing) I have gained myself a degree of flexibility which enables me, whether as a policy maker or as a judge, to think in a broader sense about when significance has cut in, or when are we dealing with something which is either insignificant or, for some reason, justifiable. So I suppose I ask myself the question: how far does the way in which language has been used on both sides of the Atlantic mean that we are searching for ways of developing our thinking in, for example, the way that copes with your parallel mergers. Presented with two individual cases when the logic economically is to do a market review, we think: “Oh help! How conceptually do we deal with this?” But that is not how the situation is presented. How do officials, how do judges cope with the fact that they are made uncomfortable by the way in which things are presented, whether as a matter of drafting in the original instrument, or as a matter of the particular case in the way that it comes before us?

MAURICE STUCKE: I wanted to follow up on Spencer's and Adam's points about the courts' capability to undertake such a weighing analysis. In the United States there are at times certain screens. For example in merger analysis, where there is a greater likelihood of efficiencies, the court still does not weigh every proposed efficiency. First, the efficiencies have to be merger specific. Second, the efficiencies have to be verifiable. Third, merger-specific and verifiable efficiencies

almost never justify a merger to monopoly or duopoly.<sup>10</sup> The Court of Appeals in *FTC v H.J. Heinz Co.*<sup>11</sup> required proof of extraordinary efficiencies, which the merging parties failed to provide. Fourth, even in the Section 2 case involving *Microsoft*—as Spencer pointed out—the DC Circuit articulated a weighing test but infrequently weighed the pro- and anti-competitive conduct.

One criticism of our Supreme Court in the 1950s, 60s and early 70s was its use of presumptions and *per se* rules. But one reason for creating such presumptions was so that the trial court need not ramble through the wilds of economic theory and undertake this weighing test.<sup>12</sup> We can debate the Court's choice of presumptions. But to what extent would you be comfortable with the court weighing the efficiencies against the anti-competitive effects, and is this a proper role for the court?

CHRISTIAN AHLBORN: I think the short answer is that neither the Commission nor the courts are really capable of balancing; that does not work. I think what you need to have is proper screens and then a shifting of the burden of proof. What you need to do is to see how hard you make it for each person to satisfy that screen and that must somehow tie in with your prior beliefs based on the economics of the day and what you think about the likelihood of a particular practice or a particular merger being anti-competitive, or pro-competitive. Ultimately I would agree; I mean Article 81 is the legal structure of balancing and it never really works in that sense. How do you want to do it? You can't quantify it and you can't say the costs are whatever—700 million with efficiencies of 850—so efficiencies win. You need proper screens but that is something different from simple *per se* legality.

PROFESSOR MARGARET BLOOM: I was just thinking about Christian's interesting comparison of Article 82 abuse versus non-horizontal mergers. One forum in which this has been looked at in terms of how the different jurisdictions are treating these practices is the ICN. The ICN has produced the Merger Guidelines Workbook, and it is now trying to do something on unilateral conduct. The Merger Guidelines Workbook provides an extremely helpful set of guidelines. There are parts on non-horizontal mergers which discuss: "This is where we think it will be harmful; this is where it wouldn't be harmful; this is the kind of evidence you look for." There was admittedly a tension in preparing the Workbook in that the US would have preferred to have nothing on conglomerates at all and the US would have preferred to describe vertical

<sup>10</sup> US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* § 4 (1992, revised 1997), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

<sup>11</sup> *FTC v HJ Heinz Co* 246 F3d 708 (DC Cir 2001).

<sup>12</sup> See, eg *Klor's Inc v Broadway-Hale Stores, Inc* 359 US 207 (1959); *United States v Philadelphia Nat'l Bank* 374 US 321 (1963); *United States v Topco Associates, Inc* 405 US 596 (1972).

mergers as “generally beneficial” and “sometimes harmless”, whereas most Europeans preferred to say “generally harmless” and “sometimes harmful”. So there is a slight difference but they managed to get together enough and different jurisdictions were in different positions along the spectrum from “beneficial” to “harmful”. You can predict which jurisdictions would have been where. But the ICN came out with something that spans these different views adequately.

PROFESSOR MARGARET BLOOM: ICN members have so far produced papers where they have come out with something fairly general in terms of dominance or substantial market power. But it is a considerable achievement that they have managed to reach agreement on actually producing something even if it is not nearly as specific as the merger material. Of course they are only just starting on the abuse bit, and if you look at the various questions that have gone out to different jurisdictions, they tick different boxes and the differences are quite striking. I think there is a much greater difference in terms of unilateral conduct across the Atlantic than there is in non-horizontal mergers; yet it is a very interesting exercise to compare.

CHRISTIAN AHLBORN: But I think the differences are due to intra-European differences, with much less knowledge on the US side, but as you say you have very few s.2 cases and probably very few vertical cases—at least you seem to have a common *a priori* of almost always beneficial and very, very rarely harmful, while in Europe you have completely different *a priori* for very vertical mergers and Article 82 which are, in my view, not justified. I like your idea, or the Commission’s officials’ idea of the non-horizontal merger guidelines as a Trojan horse into Article 82, because it is obvious that once you have enough case law it becomes untenable to have this funny Article 82 assessment out there which is completely inconsistent with what you do.

PROFESSOR SPENCER WEBER WALLER: I had limited involvement as a private sector adviser on both of the ICN exercises, as I think Margaret did. I do agree with your observation that the unilateral conduct exercise was much more contentious. There seemed to be much greater distinctions and harder lines being drawn between the United States and other jurisdictions. I am not privy to what the conversation would have been intra-Community or intra-Europe as to those issues. It points to a real irony that I think was implicit in your remarks, Christian, which is: why is it that we are all closer together on harmonisation and in a way taking a stronger stance against prohibiting transactions that yield substantial market power, yet further apart once firms have achieved that higher degree of market power whether through merger or other means. That just strikes me at one level as a little odd.

PROFESSOR MARGARET BLOOM: I think, Spencer, isn't it partly the history? In Europe here you have large companies, many of which are large because they were originally government owned, whereas in the US more of your large companies are large because they were successful in the market. Then you have another factor that you have in the US—Maurice referred to this earlier—treble damages. The courts have narrowed standing because of the implications if you bring a case—whereas in Europe we have not yet had that pressure; who knows whether we will have it. These two alone are factors that would, I think, argue for there actually being a right to have differences. I suspect the difference between the two jurisdictions, European and US, is much greater—or is greater—than would be justified by those arguments, but I think they are quite good justifications for having at least some difference.

PROFESSOR SPENCER WEBER WALLER: I understand the different paths between the jurisdictions. I think it is interesting in the United States' tradition—and I do agree history is much of the explanation—that we have an incredible body of resources, governmental primarily, invested in the merger review process, and yet such a lower priority for, let's say, substantial market power coming to fruition represented by our s.2 than we do by our s.7, which is designed to clip in the bud and stop the incipency, the growth of that market power.

CHRISTIAN AHLBORN: With merger control the procedural differences are much, much smaller than Article 82/s.2 and I think at least part of the difference you can explain with procedural over-enforcement in the US leads to substantive under-enforcement and you can say the reverse is true in Europe, that a procedural under enforcement leads to a substantive over enforcement. You do not have that sort of difference on the mergers' side, where it is an administrative process.

The other point I would make, which goes to Margaret's direction, is that there is a strong moral element on the Article 82 side, and the favourite quote from *BA/Virgin* is the question concerning whether it was shocking that BA as a dominant firm gives these rebates. It was not a question of efficiencies, consumer welfare or whatever; it was just morally wrong and that is something which you do not have on the merger side.

JOHN BODRUG: How do you weigh the anti-competitive effects against the efficiencies of certain conduct? There is the well known *Superior Propane*<sup>13</sup> case in

<sup>13</sup> *Canada (Commissioner of Competition) v Superior Propane Inc* (2000), 7 CPR (4th) 385 (Comp Trib) [2001] 3 FC 185, 11 CPR (4th) 289, DLR (4th) 130 (CA), leave to appeal to SCC refused 14 CPR (4th) vii; 202 DLR (4th) vi; (2002), 18 CPR (4th) 417 (Comp. Trib.), affd [2003] FC 529, 23 CPR (4th) 316, 223 DLR (4th) 55 (CA).

Canada where the Tribunal was forced not only to quantify the efficiencies and the dead weight loss but to subjectively weigh the anti-competitive effects of a merger. They didn't want to do that, but the Federal Court told them they had to. The only thing the Tribunal could really do was say: "Well here are the anti-competitive effects—the dead weight loss and the redistributive effects are approximately \$8.6 million. The efficiencies are approximately \$29.2 million. We would have to give the adverse effects a weight of more than three times the efficiencies to outweigh the efficiencies, and we don't think we can get to that number." That was as far as they would take it. That decision really drew out for me the social value decisions that are involved in any balancing of efficiencies against adverse effects. For example, if you were examining a cigarette merger, you may actually give a positive weight to a decrease in output flowing from a price increase—so this kind of weighing or balancing exercise is a very difficult and artificial thing for a court or Tribunal to do.

Christian referred to the different legal standards influencing behaviour and pushing people towards vertical mergers. I had a similar thought in reading the *Microsoft* case. I think you have to be very careful about overly aggressive enforcement in the abuse area because you can actually create incentives, it seems to me, for a firm that might be considered dominant, not to supply competitors at all. It seemed to be a significant factor in *Microsoft* that Microsoft had at one point supplied information on interoperability connections. I think you have to be careful that you are not creating a system where a firm is better off not to even start supplying competitors or dealing with other non-vertically integrated entities.

**PROFESSOR SPENCER WEBER WALLER:** In the United States, with the lower court decisions that have followed *Trinko* that relate to essential facilities and refusal to deal, the only ones that have survived—even got past preliminary challenges—have been those where there is a prior course of dealing.

**JOHN BODRUG:** It is the same in Canada.

## **BUNDLING: ARE US AND EUROPEAN VIEWS CONVERGING?**

MIKE WALKER\*

I argue below that the US and EU approaches to bundling and tying are probably quite similar, but that neither is actually conducive to good policy or good policy implementation.

### **1. A Brief Survey of the Economic Thinking on Bundling and Tying**

The problem for economists with bundling and tying as an abuse is that there is no unifying theory of harm. There are at least three different theories of why a firm bundles a product that are routinely discussed in the economics literature and that may have an adverse effect on consumer and social welfare. They overlap to some extent and there are multiple versions of each.

1. Bundling and tying as a method of price discrimination. There are two forms of this. The first is metering, which is based on tying sales of an input to the sale of a consumer durable. The classic example of this that is often referred to is the tying of paper to photocopiers. If the photocopier manufacturer insists that only its paper is used in its photocopiers, then it can effectively charge heavy users of photocopiers more than light users. The effect of this is that those who value the photocopier more (ie who use it the most), pay the most, whilst some consumers who would not buy the photocopier at the “competitive” price are bought in to the market. A more up to date example might be the tying of games to games consoles. Whether this price discrimination is good or bad for social welfare is ambiguous. Those who value the durable good the most, end up paying more than in the absence of bundling, but those who value it less end up paying less.

The other form of price discrimination is achieved with mixed bundling. This occurs where two products (A and B) are offered separately but are also offered as a bundle at a discounted price. For instance, A might be priced at £10, B at £10, but the bundle at £15. Those who value A (B) at more than £10 but the bundle of A and B at less than £15 will buy only A (B). Those who value the bundle at more than £15 will either buy the bundle or one of the products on its own (eg if you value

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the bundle at £16 but A at £12, then you get more consumer surplus from buying A rather than the bundle). This sort of scheme can bring consumers into the market who value A and B separately at less than £10 but the bundle at more than £15. This form of price discrimination is likely to be pro-competitive, but as with most price discrimination the social welfare effect is actually ambiguous.

2. Bundling to foreclose or leverage monopoly across markets. There are a number of theories of harm related to the use of bundling to foreclose. The basic idea is quite simple and intuitive. Suppose that a firm is a monopolist in one market (the widget market) but also operates in a competitive market (the gadget market). If the monopolist bundles the sales of widgets and gadgets together, this is likely to reduce the demand for gadgets sold by “gadget only” firms. By bundling the two products together, the monopolist is likely to increase its sales of gadgets and so reduce the residual demand curve faced by other suppliers of gadgets. This might so reduce the sales that a gadget only firm can make that they exit the market or do not enter it in the first place.

There are numerous versions of the entry deterrence argument. At its most basic, if gadgets are only useful when used in conjunction with widgets, then the widget monopolist can simply foreclose the market for gadgets to other suppliers by bundling the two products together. The idea here is that by bundling two products together, the monopolist might be able to use its monopoly of widgets to also become a monopolist of gadgets. Whether it has an incentive to do this is not always clear (ie the Chicago critique is relevant), but the broad argument is clear.

Another version is that bundling can be used by the monopolist effectively to commit to pricing the competitive product lower and this leads to foreclosure. The idea is that if the monopolist bundles widgets and gadgets together, then each time it fails to make a sale, it has lost two margins and this makes it compete more strongly than if only one margin was in danger of being lost.<sup>1</sup> For this to lead to consumer harm there must be some idea that the short run benefit of lower prices is outweighed by longer term dynamic loss, such as through reduced innovation by new entrants or by prices rising once potential entrants have disappeared.

Another version is the Microsoft/Internet Explorer argument. This provides an answer to the question “Hang about, if IE and Navigator are effectively the same and Microsoft is giving IE away for free, where is the harm to consumers?” The answer given is that Navigator was a potential threat to the Windows monopoly and so the harm to consumers comes

<sup>1</sup> This “two margin” story explains why “competition in bundles” (ie competition between firms both offering bundles) can be fiercer than competition between individual products.

from (i) a potential competitor to Windows being excluded from that market; and (ii) other potential competitors to Microsoft concluding that fighting Microsoft was unlikely to be profitable and so not innovating or entering in the first place. The final paragraph of Judge Jackson's decision makes it very clear that this was his main concern: bundling as a signal to potential competitors to keep out.

The Commission's theory of harm in the Windows Media Player case is a version of the bundling to foreclose argument. By bundling WMP in with Windows, Microsoft ensures that WMP becomes ubiquitous and thus drives out competitors such as Real and Quicktime. Whether this strategy does actually foreclose is an empirical question since many consumers use multiple media players, but the theory is clear enough.

3. Bundling to soften price competition. There are at least two versions of this theory. Suppose the monopolist of widgets bundles its sales of gadgets with widgets. This reduces the incentive for a gadget-only suppliers to cut prices. When the monopolist is engaged in bundling, any reduction in the price charged by a gadget only supplier will lead to a smaller increase in demand for the gadget only supplier than would be the case if the monopolist was not bundling. This is because some consumers who would switch in the absence of bundling to the gadget only supplier will not switch in the presence of bundling because they value widgets highly. If the benefit to a firm of cutting prices is lessened, it will typically price higher.

Another version of this theory is that bundling of widgets and gadgets by a monopolist has the effect of increasing product differentiation. Assume that the gadgets sold by the monopolist and by its competitors are effectively the same. Then we should expect to see very competitive pricing in the gadget market. If the monopolist bundles its gadgets with its widgets, then this creates product differentiation between the monopolist and suppliers of only gadgets. Depending on the strength of competition between gadget only suppliers, this may lead to a softening of prices.

To this can be added a fourth, which economists think is an efficiency but which some European regulators are less sure about.

4. Cournot complements. If two products are Cournot complements, then a firm will price them lower if it sells them both than if they were sold by two different firms. The logic for why this is so is clear. If they are sold by two separate firms then neither firm will take into account the positive externality between sales of each product (ie increases in sales of widgets will increase sales of gadgets and vice versa). However, if they are sold by the same firm, then that firm will take this positive externality into

account and so price the two products lower than would the separate firms. Formally, this effect does not require bundling, but it is likely to be stronger if the products are bundled together in addition to just being sold by the same firm. To an economist this looks like a welfare improving efficiency, but European regulators have disagreed on occasion (eg the GE/Honeywell merger), fearing that the bundling firm might be able to price so low as to drive competitors out of the market and then raise prices in the longer run.

Before moving on, there are three things to note from the above list. First, there are a number of different theories of potential harm from bundling. Second, they have different short run effects: bundling can soften prices in the short run or raise them. Third, whether bundling harms consumer welfare is not clear even within a particular theory of harm: the specific facts of the case matter. To put it bluntly, the economics of bundling and tying is not settled and policymakers need to bear this in mind.

## 2. What are the Current Policies on Bundling in the US and EU?

This is not an easy question to answer. In the US the issue is that policy is set by the courts and can differ across circuits. However, the Ninth Circuit has recently endorsed a form of the “as efficient competitor” test in the *PeaceHealth* case.<sup>2</sup> Suppose a firm offers two products (A and B) both separately and as a bundle, with the bundle being sold at a discount to the combined prices of the separate products. The question is whether the incremental price at which the potentially competitive product is sold is above the incremental cost of production for the monopolist. So suppose A and B are sold for \$10 each but for \$15 as a bundle. The incremental price of B in the bundle is \$5 (ie \$15 for the bundle less \$10 for A). If the incremental cost of producing B is more than \$5, then the discount is held to be exclusionary under Section 2.<sup>3</sup>

This is not quite an “as efficient competitor” test as a competitor with the same average variable costs as the monopolist might still be excluded if the competitor had significant fixed costs. It is actually more akin to the standard predation test. It is, however, a much clearer test than came out of *LePage v 3M*<sup>4</sup> and is, I understand, probably the best guide to how a US court would treat a bundling case in the near future.

The EU approach to bundling under Article 82 is also not clear. This is because we have a clear statement from the European Commission about their preferred approach to bundling, but the Commission is constrained by the

<sup>2</sup> *Cascade Health Solutions (fka, McKenzie-Willamette Hospital) v PeaceHealth* 05-35627 and 05-35640 (9th Circuit, 4 September 2007).

<sup>3</sup> The standard used for incremental cost in *PeaceHealth* is average variable cost.

<sup>4</sup> *LePage's Inc v 3M*, 324 F3d 141 (3rd Circuit 2003).

European Courts' case law and this is not always consistent with the Commission's preferred approach. The approach suggested by the Commission in their December 2005 Discussion Paper on Article 82<sup>5</sup> is to compare incremental prices to long run incremental costs. If it appears that incremental prices are below long run incremental costs,<sup>6</sup> then the next thing to do is to see whether any potentially exclusionary effect covers a significant portion of the market. If it does, then the bundling may be abusive.

The comparison of incremental costs and prices looks similar to the US approach, but it should be noted that the use of long run incremental cost is different to average variable costs. Long run incremental costs include fixed costs and so the EC's test is close to a genuine "as efficient competitor" test. It should also be noted that the EC's Discussion Paper deals only with exclusionary abuses and not exploitative abuses.

### **3. So What?**

It looks like the US and EU approaches are quite similar. There has been a significant difference of opinion over the Cournot complements issue, but hopefully this has been resolved in favour of the US approach (ie no efficiency offence). But there is a much more fundamental issue to be discussed: so what? Does the approach advocated by either jurisdiction with reference to bundling really get us very far?

There are two points that I want to make here. The second is the more important one. The first point to note is that the "as efficient competitor" test is not relevant to all the theories of harm outlined above. It is not relevant to the theories based on price discrimination or softening pricing competition. It is not always relevant to the theories of foreclosure. For instance, if B is bundled with A at an incremental price above LRIC, this may still exclude rival suppliers of B if B is only useful in conjunction with A. The tests advocated by the 9<sup>th</sup> Circuit and the Commission are both based on mixed bundling and so would not be useful in cases of pure bundling.

My second point is that designating an abuse as "bundling" or "tying" and so applying a particular test does not help the policy debate. The different theories of harm above really are quite different and should be looked at in different ways. For instance, the price discrimination theories are quite different to the foreclosure theories and should be looked at in a different way. Price discrimination typically has ambiguous welfare effects, but a reasonable test is to ask whether the practice is likely to raise total output on the market. If it does, it is

<sup>5</sup> "DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses", December 2005.

<sup>6</sup> The Commission notes in the Discussion Paper that formally incremental revenues should be compared to incremental costs, but argues that it is easier to measure incremental price than incremental revenue.

very likely welfare improving. The “as efficient competitor” test is just irrelevant here.

The foreclosure theories are better suited to the “as efficient competitor” test. However, it is not clear what is added by designating a practice as “bundling” as opposed to some other designation, such as predation. In general, the question is whether the practice is likely to foreclose the market to other firms and, if so, whether this is likely to harm consumers. These are questions that can be answered directly without raising the spectre of “bundling” and the associated lack of economic clarity. Designating Microsoft’s behaviour with respect to Explorer or Windows Media Player as bundling may be right but it adds nothing to the analysis. The analysis is pretty straightforward predation in both cases (a firm gives away a product for free, thus potentially excluding rivals and leading to long term competitive harm) and we have pretty standard tests for this (eg Areeda-Turner or the Akzo test). Whether the theory of harm is right depends on the facts, but that is another matter.

#### **4. Conclusion**

The economic analysis of bundling and tying is a mess. There is no unifying theory and the implications of the various economic models are often highly sensitive to the exact inputs and assumptions used. These are not the characteristics of economic theory that is likely to be useful to policymakers. So rather than designating a case as a “bundling” case and trying to apply these models to cases, a better approach is to go back to first principles. What is the theory of harm? What evidence do we need to substantiate it?

## BUNDLING: ARE US AND EUROPEAN VIEWS CONVERGING?

PROFESSOR SPENCER WEBER WALLER: Dr Mike Walker, who is one of the co-Chairs of the European Competition Practice at Charles Rivers Associates, is going to lead us through the thorny issue of bundling, an issue which has arisen in both EU, US and Member State competition policy, and has tied commentators, courts, tribunals and enforcement agencies into knots. One of the things I very much appreciate about the paper is that it takes us beyond what has been a fairly arid discussion of trying to characterise, or categorise what bundling is. Some people say it is like tying, some people say it is like price predation. I think what Mike is really trying to get at is to take us beyond labels but trying to craft legal rules and responses to this phenomena within the context of monopolisation and abuse of a dominant position.

DR MIKE WALKER: Are US and European views converging on bundling? From an economist's point of view the most obvious thing about bundling and tying—words often used interchangeably—is that the economics is a complete mess. We know that bundling is often engaged in by firms acting in highly competitive markets, typically where there are economies of scope in the production cost of a product, or there are complementarities in the demand side (ie consumers want to buy these things together). We have an understanding about the pro-competitive rationale, but then we have a load of theories about the anti-competitive rationale, and these give us some clear rules which are that bundling might make prices go up, or it might make prices go down, or it might make them go down for a bit and then go up afterwards. There is a lot of really neat theory in this area but the results tend to be quite dependent upon the particular assumptions in the model employed. So that is a brief point on the economics of it.

Now, moving more directly to the question and then what does the state of economics imply about the answer. Are the EU and US approaches converging? Well I am no lawyer—that should be clear—but I can make a few comments here. We both, I think, on bundling have a rule of reason type approach, and have certainly moved away from a *per se* approach in the US as I understand it. I do not think we have ever had a *per se* approach in Europe. Both jurisdictions have a rule of reason approach. If we look at the narrow example of mixed bundling, so this is the idea where you have two products, A and B, and you can either buy them both separately—so either buy A or either buy B, or you can

<sup>1</sup> *Cascade Health Solutions v PeaceHealth* 479 F3d 726, 727 (9th Cir 2007).

buy them in a bundle, A plus B—in that area we also have some convergence. In the recent *Peace Health* decision<sup>1</sup> in the 9<sup>th</sup> Circuit in the US the test that was advocated for as to whether mixed bundling by a dominant firm was anti-competitive was a form of the “as efficient competitor” test, which was basically if you are dominant in A and you also bundle B in with A, the question is whether a firm that only sold B, but was as efficient as the dominant firm, could survive; it is a test the European Commission has going through their discussion paper.

In the discussion paper the European Commission has a test concerning bundling which is not quite the “as efficient competitor test”; it is actually closer to predation test—well it is a predation test—but they claim it is an as efficient competitor test, and the differences are not great, so there are some similarities.

My real point here, and it is a point I make in the paper, is frankly so what? What does it add to say: “Well here we have a bundling case”. Given that the economics is unclear, it is not like saying: “Oh well, this is predation. We want to know what price predation means. It means pricing very low, below cost in order to drive a competitor out in order to later raise prices. We understand that theory—we have to look at the facts in every case, but we understand the theory.” When somebody says: “Oh well this is a case of anti-competitive bundling, are we any better off? Are we any the wiser? I don’t think we are at all.

To give an example of this, and it actually relates to something Christian said earlier, if we look at the *Microsoft/Internet Explorer* case,<sup>2</sup> the case in the US Microsoft is competing against Netscape in the sale of web browsers. Microsoft decides to start giving away Internet Explorer for free, by integrating it into Windows at no extra charge, and so that is bundling. Okay, but it is also I think a fairly clear case of predation. What is happening? This product is being sold below cost, whatever the marginal cost of the product was—if we have an Areeda-Turner test—whatever the average variable cost of the product was it was being sold below that because it was being sold for zero. Microsoft have said: “This is a no revenue product”, so it is clearly predation in that sense. Now, of course, you still have to go through the standard predation analysis, or at least from an economist’s point of view the standard predation analysis of thinking “It’s okay, it’s pricing below cost, that will drive other firms out of the market; is this actually anti-competitive in the sense that consumers will be harmed in the long run?” ie could Microsoft in that case recoup its short run losses? So as economists we still want to go through that, but it is fairly clear the right framework is it is predation. Of course, Christian is saying that predation is *per se*. That would be terribly easy; we could have done Microsoft, as Liza said, in six months. We all earned lots of money from it but I don’t think it was good public policy spending eight years on that decision. So my view is that we should not

<sup>2</sup> *United States v Microsoft* 87 F Supp 2d 30 (DDC 2000).

talk about bundling we should think about what is the real issue. Sometimes it will be predation, and we have a good test for predation; we understand that. Sometimes it will be a form of exploitative pricing. It will be you're bundling so as to be able to charge a particular set of consumers a high price.

We also have—from an economic perspective anyway—an approach that has positive abuses. There is not a lot of case law but we have some understanding about the economics of excessive pricing.

Alternatively bundling might be an attempt, or least the economic literature tells us it might be an attempt, to soften competition between firms. Again, don't call it "bundling", think about it as softening competition between firms. Is that what is happening? It is an empirical question.

PROFESSOR VAL KORAH: There was a lovely paper, at least I thought it was lovely, produced by the Economic Consulting Group of the Commission<sup>3</sup>— it came when the discussion paper had gone to Member States, but had not yet gone to the general public—and it was saying, as I understand it, "look for the competitive harm of the practice, and balance any benefits". Well, I can see that is difficult. It then sank without trace, and I don't know what was wrong with it, do you?

DR MIKE WALKER: Well I didn't know about the existence of this paper. There are clearly case law issues around this and I do not know enough about the law of tying and bundling, but just from an economic point of view that seems to me to be the correct approach. But we still have lots of cases talking about "bundling" as if it actually adds some clarity; I don't think it does.

PROFESSOR SPENCER WEBER WALLER: As you know, in *Microsoft* in the US, both the Justice Department and really the court systematically refused to think about Microsoft's behaviour in terms of predatory pricing terms. The facts certainly would have permitted it had they wished to. I don't know what conclusion they would have reached, but on most of this Microsoft was in fact charging a negative price. It wasn't just giving it away, it was providing incentives and payments to developers so that one could actually suggest that they were paying for distribution, so satisfying the first prong of any predation test would have been easy. But again, they chose to really think of it in very different conceptual terms. I am not sure it helped them any to characterise it as tying/bundling, but it took them in a different swamp.

DR MIKE WALKER: Yes, so why did they characterise it as predation?

<sup>3</sup> EAGCP, available at [http://ec.europa.eu/comm/competition/publications/studies/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf).



PROFESSOR SPENCER WEBER WALLER: Why did they not?

DR MIKE WALKER: I don't know. There has been no successful predatory pricing case to my knowledge where the plaintiffs have won since the *Brook Group*<sup>4</sup> case which established almost an almost impossible threshold to meet of proving price below some relevant measure of cost, plus likelihood of recoupment. It may also have been simply because the government's theory of the case was that the bundling was primarily to maintain Microsoft's dominant position in operating systems, and not an attempt to achieve monopoly power in these bundle related markets. Beyond that I am not privy to what their thinking was, either for the Justice Department, or the group of individual States that were the co-plaintiffs.

PROFESSOR SPENCER WEBER WALLER: Because when I read Judge Jackson's judgment in *Microsoft*, and we get to the end of it, paragraph 412—whatever it is—it says: “. . . and above all else what is bad about Microsoft's behaviour is the chilling effect it has on innovation because it says to other competitors “don't bother coming in to compete against me'.” So there is your recoupment test. Judge Jackson is making it plain that he thinks Microsoft benefits from this behaviour across a wide range of markets, and potential markets, so I have always been bemused as to why there was no predation rule run. Again another place where economic literature is not always terribly helpful is that it was a case where one genuinely used the products in fixed proportions, one operating system, one browser, and there is one place where the Chicago critique that bundling does not have any anti-competitive effects actually potentially works. So slightly oddly the US government ended up having to provide this rather novel reason as to why it was so anti-competitive, defended the Windows monopoly, but I just think it didn't help them.

BECKET McGRATH: I don't know, but it may be that they were reluctant to adopt the predation argument because of the public policy implications—free downloads is a very accepted and widely enjoyed feature of software markets, and I think to say if you are not dominant you can provide free downloads, but if you are dominant you have to charge users for those downloads would have had rather unfortunate implications, or unpopular implications. I could also suggest that the difficulty of working out what the appropriate measure of cost is in those circumstances makes the telecoms cases look easy by comparison. You could say zero is always going to be less than whatever your cost is however you allocate it, but I am not sure that would fly and reach the appropriate legal standard.

<sup>4</sup> *Brooke Group Ltd v Brown & Williamson Tobacco Corporation* 509 US 209 (1993).

PROFESSOR SPENCER WEBER WALLER: But once you have proven market power—really substantial, durable market power, doesn't that change everything, because we might value certain strategies by non-dominant firms and new entrants where exclusive dealing, tying, bundling—any number of pricing strategies—simply does not raise an eyebrow, and yet if those strategies are being used by a dominant firm, it is a grand tradition on both sides of the Atlantic that they are cause for concern. Now, I agree with you that in the context of software free downloads strikes one as a good thing not a bad thing, but as a general proposition we are not really saying that dominant firms get to do exactly what a non-dominant firm would get to do—are we?

BECKET McGRATH: I think it is just the context of that particular issue, but it is tricky.

PROFESSOR MARGARET BLOOM: In Mike's very interesting paper he looks at different economic effects of so-called bundling or tying, as one form of abuse. I would like to look a bit wider than this and at what I would call "abuse shopping". Here in Europe in particular there is margin squeeze, or what they call in the US "price squeeze". Instead of taking a margin squeeze, you could argue it is predation downstream, or you could argue it is exploitation upstream, or you could argue it is refusal to supply case. Generally it is easier for authorities to show margin squeeze than it is to prove predation, exploitation or refusal to supply; they are all the same economic effects, but the legal descriptor is different and so you have cases brought labelled as a "margin squeeze" when they might never have been brought if they had to bring a refusal to supply case. I think that is quite troubling if the same economic effect has different legal labels, some of which are easier to prove than others. It is a similar sort of issue to the one that Mike is addressing. In both cases we are saying: "What is the real effect?" And you should look at the actual effect rather than whatever label is attached to it.

DR MIKE WALKER: Dealing with Margaret's points: you are absolutely right about margin squeeze, predation, exploitative pricing, whatever. The thing about margin squeeze is I do not think it leads us away from clarity. It may be easier to prove than predation or excessive pricing in particular, and I accept there is an issue there, but saying it is a margin squeeze rather than saying it is a predation or excessive pricing you are still getting a fundamental competitive effects analysis right. We understand what the issue is. I do not think that "margin squeeze" is a term that leads us away from focusing on the right issue—you maybe disagree—and I do not think that is true of bundling.

PROFESSOR MARGARET BLOOM: I think with margin squeeze all you have to prove is there was a margin squeeze, not whether it actually had an adverse

effect on the market. I think it is rather easier to get there by just saying “Look, there is a squeeze in the margin”; that’s it.

DR MIKE WALKER: I agree, and I don’t have a problem with that. I am very much in favour of simple rules, but they just need to be simple rules that make economic sense.

SIR GERALD BARLING: Margin squeeze is tough. It is slightly troubling though; we seem to have got to a situation where you can have a non-exploitative price upstream and be admittedly competing and not dominant downstream and still be at risk of being guilty of a margin squeeze, as I understand it.

PROFESSOR MARGARET BLOOM: If you can prove that there is a “margin squeeze” for an equally efficient competitor that is all you have to do. That does not seem to me enough to show there is actually anti-competitive harm. This is why I have some concerns over it.

DR MIKE WALKER: Merely saying it is margin squeeze does not mean you have shown harm, but it seems to me it is a relatively simple rule that makes sense. It will not be 100%, but it is relatively easy to follow. I take the point that it might not be exploitative upstream, or predatory downstream but still it comes out as a margin squeeze—I wonder was that just because we do not know how to deal with exploitative pricing. We have this really unhelpful *Attheraces* judgment—the one thing that is clear about that is it is just a squabble about rents. It had no effect on consumers at all—it had no effect on output or the price that they paid, so I think that is unhelpful.

ADAM SCOTT: I am reluctant to throw bundling out just as quickly as Mike is. I appreciate the point you are making about considering the underlying damage, but I suppose the sorts of areas where I think it is helpful to conceptualise bundling is where there is some sort of barrier to entry in one market, but not normally a barrier to entry in a cognate market. An example is *Genzyme*,<sup>5</sup> where you have a barrier to entry in relation to the substance turned into an effective barrier to entry in terms of delivery. Or in terms of mobile telephony you have a barrier to entry in terms of network turned into a barrier to entry in terms of the free market in mobile telephones, and there it does seem to me to be useful to conceptualise bundling as between the markets specifically distorted by intellectual property rights or other licences and markets which are being distorted as a consequence of a carry over from the controlled market.

<sup>5</sup> *Genzyme Limited v OFT* [2004] CAT 4.

PROFESSOR VAL KORAH: I would like to go back to Margaret's point about margin squeeze. If I am under no duty to supply you, why on earth should it be worse that I will supply you at an excessive price? I don't know what an excessive price is, so I would want to get rid of margin squeeze.

PROFESSOR SPENCER WEBER WALLER: Let me just follow up on something Mike mentioned about this recent US case. It is a case from the 9th Circuit that has only been published a week or two in the official reporter. The dominant hospital chain in one of the western States was able to supply a broad range of primary/secondary/tertiary services to insurance companies, often health plans, and its smaller competitor who could only compete in one or more of those segments brought this case.<sup>6</sup>

What the court did was to treat this case like a predatory pricing case, but as follows. We will attribute the entire discount to the bundle to the product or service where there is competition, then ask if that price as discounted is above or below the appropriate measure of costs. They next talked about what the proper cost measures are, and then looked at issues of recoupment. If you do that, no one will win a bundling case in the United States, absent the most crystalline and unusual facts. It will happen occasionally but if you set it down the road of predatory pricing you will end up where most predatory pricing cases go in the United States, which is in the rubbish bin.

A lot of commentators have said the reason we have such extraordinarily difficult rules for predatory pricing cases really has nothing to do with the fact that predatory pricing can sometimes be bad. The commentators who support the current rules simply say our institutions are not capable of sorting out the good ones from the bad ones and so we will have a case where almost everybody wins unless your facts are extraordinary and extraordinarily clear.

That is just a fork in the road that you can take if you are so inclined, but I wanted to see if I could get people's reactions to what is—at least implicitly—in Mike's paper, that we need to start talking about this “as efficient” competitor rules, and we need to start creating rules and institutions to deal with these cases to sort out the good ones from the bad ones, or simply come up with default rules if we cannot do that.

MAURICE STUCKE: I would like to follow up on that. With predatory pricing, it is hard to determine what the optimal competitive price should be and that leads to the courts' consternation. In particular, the plaintiff is telling the court that consumers have to forego a short-term benefit of lower prices in exchange for a possible long-term harm. Whereas, with bundling, there may be an immediate short-term harm, namely forcing consumers to buy something which

<sup>6</sup> *Cascade Health Systems v Peacehealth* 515 F 3d 883 (9th Cir 2008).

they would rather not buy. In *Microsoft*, I thought the Court of Appeals had an ingenious test that Christian brought out earlier: the extent to which there is perceptible separate demand for two products is inversely proportional to net efficiencies.<sup>7</sup> Thus, when consumers find that the efficiencies from bundling outweigh the benefits from choosing two different products, consumers will choose the bundled product, such as matching left and right shoes. So consumer demand for two products can be a measurement of net efficiencies.

Now, the Court of Appeals in *Microsoft* found that there was sufficient consumer demand for two separate products. But the court was still concerned that given the dynamic innovation in this market, its consumer demand test would chill innovation. In such dynamic industries, a firm may innovate by integrating two formerly separate products. Thus, the Court of Appeals held that the *per se* standard for tying was inappropriate. So with bundling, the courts can take into account efficiency from both a backward- and forward-looking analysis. I wonder whether they can do so readily with a predation claim?

BECKET McGRATH: It is quite funny what Spencer was saying about the state of predation cases in the US, because, from the point of view of somebody who was enforcing the law, I always found predation cases the most easy case to litigate out of all the Article 82/Chapter II cases, because, as Mike said, there is a clear test, and okay it is easier over here because you do not have to prove recoupment, but I think in the case I am thinking of,<sup>8</sup> we even presented the argument for recoupment as well, and it was nicely clear, compared with the morass of greyness you get in some Article 82 cases. In predation you had the test, you had plenty of additional evidence as to intent—I know intent is not an element of the case, but there was lots of very clear evidence of predation—and the case was ultimately upheld, so that is just an observation on litigating predation cases.

PROFESSOR VAL KORAH: My point was: why worry about whether it is in a distinct market? It was mentioned in the *Hyde* case. Phillip Areeda thought that it applied to s.1 cases, but not to s.2 cases, and we just swallowed it whole.

DR MIKE WALKER: “It” being?

PROFESSOR VAL KORAH: The need to prove that they are in distinct markets. If we go back to the report I mentioned earlier, we should just look to consumer harm and balance it against efficiencies. I realise that is a very difficult,

<sup>7</sup> *United States v Microsoft Corp* 253 F3d 34, (DC Cir 2001) 87–88.

<sup>8</sup> Office of Fair Trading infringement decisions CA98/5/2001 and CA98/14/2002 *Predation by Aberdeen Journals*; appealed as UK Competition Appeal Tribunal Cases 1009/1/1/02 and 1005/1/1/01 *Aberdeen Journals v Director General of Fair Trading*.

and often arbitrary test, but I find it very difficult to look at each of these sorts of conduct separately under separate tests.

**PROFESSOR SPENCER WEBER WALLER:** Do we have to then introduce a concept that I do not think we have really touched on in our discussion, which is the different state of leveraging theories in the United States, in the EU and the Member State jurisprudence. We have no theory of leverage. It simply does not exist under the wording and current interpretation of s.2 of the Sherman Act. Firms are either guilty of monopolisation—or attempted monopolisation—or they aren't. So if they are using their power in one market to achieve something in another market, unless they are achieving monopolisation in that other market, or something quite close to it, they are not liable; it doesn't matter. Obviously the theory of leverage to abuse your dominant position in one market to achieve some advantage in another fits very nicely in the history, the wording and the practice of Article 82. That is the root concept that creates more paths to liability for these tying, bundling, and predation-type offences than we would otherwise find in the United States.

**DR MIKE WALKER:** I am not sure I understood that first point. So there is no leveraging abuse under s.2. So if you take Adam's example, if you have a monopoly of one market (a) and you also compete in market (b) which is competitive, but you now say, no, in order to get (a) you have to buy (b) from me, that let us say forecloses the market to only produce (b) which is potentially anti-competitive, are you saying, Spencer, that under US law there is no offence there that could be thought about analytically?

**PROFESSOR SPENCER WEBER WALLER:** Unless you can prove either that it is part of a strategy of unlawfully maintaining your monopoly in market A, which is the Microsoft theory, or that your actions in market B, have achieved market power or are so close that it amounts to an attempt under our law, there would be no liability unless you could do one of those two things. The mere fact that you have achieved some advantage in market B, but not monopolisation, is not an offence. The Supreme Court has said so fairly clearly in the *McQuillan* case<sup>9</sup> and said it as well in a footnote in the *Trinko* case.

**PROFESSOR MARGARET BLOOM:** When you said “market power” did you mean monopoly power?

**PROFESSOR SPENCER WEBER WALLER:** Yes, I did, yes, monopoly power. There are certainly some commentators who have advocated for more use of

<sup>9</sup> *Spectrum Sports v McQuillan* 506 US 447, 459 (1993).

leveraging theory in the US, but it doesn't exist under the wording of current interpretation of s.2. I don't see that changing in our jurisprudence anytime soon.

DR LIZA LOVDAHL GORMSEN: But here in the EU what you need is close links between the two markets, if these two markets are not closely linked, then you would have the same situation as in the US. But if you do find they are closely linked then the leverage theory comes into play? That came apparent in *TetraPak* and I think that that was to broaden the scope of Article 82 basically, because so few cases were being considered under Article 82—that was a political comment.

DR MIKE WALKER: I am not convinced that what you describe is actually different to what would happen in the EU. I am not sure that we would see a case—a leveraging case as you put it—where a firm was leveraging its monopoly from A into firm B, to full advantage, but it is not going to become dominant in firm B. I am not sure we would see that litigated. If we look at Microsoft Windows' Media Player the concern was that Windows Media Player was going to become the monopoly; it was going to be tipped to monopoly. I have not myself been aware of any recent cases where the concern was less than that.

PROFESSOR MARGARET BLOOM: Windows Media Player was regarded as having achieved dominance during the period of the case.

DR PHILIP MARSDEN: That has changed subsequently.

PROFESSOR MARGARET BLOOM: Admittedly the level you need for dominance is less than you would in the US for monopolisation.

PROFESSOR SPENCER WEBER WALLER: That is one important difference. If the firm, through its leveraging strategy achieved the share of 45/50%, you would, if you could prove it, have grounds to take action, we would not.

PROFESSOR MARGARET BLOOM: Yes—assuming that you could show the firm had significant market power.

PROFESSOR VAL KORAH: Assuming we know what “market” is.

BECKETT McGRATH: There was an issue on the server interoperability case as well, because Windows' market share of server operating systems was actually quite low from memory, but the Commission effectively said: “We do not need to prove that they have actually achieved dominance on the neighbouring market, it

is enough just to show it makes life harder for competitors (and thus ultimately makes dominance on that market more likely)". It is a very low threshold.

DR LIZA LOVDAHL GORMSEN: But only because the markets were linked.

PROFESSOR SPENCER WEBER WALLER: John, has Canada faced up to this issue explicitly?

JOHN BODRUG: Well we do not have a lot of case law in Canada on bundling. The *Canada Pipe*<sup>10</sup> case dealt with bundling in a sense, but there wasn't any suggestion of predation in that case.

DR PHILIP MARSDEN: Spencer made this point about Microsoft, a dominant firm, paying people or giving them incentives to use certain products. It just reminded me of what seemed to be a very core concern in *GE Honeywell*—a conglomerate merger case. I am still thinking that there are similarities to the theory of harm there, where there was an awful lot of time spent looking at the fact that GE had its own bank, and it was able to provide loans to customers in this admittedly long term market, so they would be able to make the investments to be able to buy these avionics or engines, and it seemed to me that whether that was an efficiency or not it was part of the product bundle of "airframes and avionics and a bank"—or a loan—that the Commission had such a problem with. Is there something wrong in providing financial incentives to use your products?

My second point concerns the bundling side of Microsoft. I remember asking one of the officials at the conference we had the week after the judgment: "So what does this mean? Does this mean that every time Microsoft innovates or adds something to its product bundle it has to trot into DG Competition for some form of approval, otherwise it will be viewed as some form of—as Christian might say—*per se* violation, that you have added a product innovation to your bundle?" The official said: "Of course not. What we found as an abuse—and it was upheld by the CFI—was that Microsoft was shipping Windows with Media Player, while not making available a version without Media Player". So they said that Microsoft does not have to come in to them at all ever again, so long as they provide for the European market a product that does not have these features. The question I want to ask the group is: is that the kind of way we want to go forward in terms of an innovative society in a competitive market, that we make sure that the largest player, with clearly the most efficient

<sup>10</sup> *Canada (Commissioner of Competition) v Canada Pipe* (2005), 40 CPR (4th) 453, 2005 Comp Trib 3, appeal allowed and returned to Tribunal for rehearing 49 CPR (4th) 241, 2006 FCA 233, cross-appeal dismissed 49 CPR (4th) 286, 2006 FCA 236, 149 ACWS (3d) 790, leave to appeal to SCC refused 55 CPR (4th) vi, 277 DLR (4th) viii.



distribution mechanism is not allowed to ship innovations for a certain large economy in the world unless it makes sure there isn't a lesser product on offer there as well.

PROFESSOR MARGARET BLOOM: In *GE Honeywell*, given that the CFI concluded that the Commission had not proven either that GE's financial strength or that bundling of GE and Honeywell products would create or strengthen a dominant position, I don't think you can use that case as an example of Community case law creating your new offence.

PROFESSOR SPENCER WEBER WALLER: The US has been down that path and we have been caught up into knots for a 10 year period until they actually managed to get their thinking hats on straight. There is a series of cases involving US Steel where they were briefly in the pre-fabricated housing market, where they used cheap financing to sell expensive pre-fabricated homes. A plaintiff who was, I think, a competitor in the home market, said this was illegal tying. It took the Supreme Court the longest period of time to figure out what was wrong with this argument. There are two separate opinions in this *US Steel v Fortner* litigation.<sup>11</sup> I won't get into the details of the case, but ultimately they said: "Look, we can't quite figure out what it is you are saying as to what is the tying product, and what is the tied product. If you're saying that money is the tying product, then money is fungible; you have no market power. You have just a small in-house finance group, although you have a lot of dollars. Other than that we can't tell what you mean, and please go away." And that was the end of the case—but it took them two tries and obviously very expensive lengthy litigation.

It takes a while to work through—I am not sure what the plaintiff wanted, other than to sell its prefab housing using US Steel's financing. I am not sure exactly what, so we don't go there either is the short answer on that. I can't imagine that theory being revised any time soon. I must say either there is something very special and unique about GE's money, but I can't imagine why that would be the case as opposed to *US Steel*.

DR MIKE WALKER: Just on one of Philip's comments. I think the GE bundling was a pure efficiency offence. It was quite explicit—this bundling will give them an incentive to lower the combined price on two products—not below cost—but that will be bad for competitors and that will be bad for competition; it is a pure efficiency offence which I do not think you have had in the US for decades. You have been there but you have for decades. That is my first comment.

<sup>11</sup> *US Steel Corp v Fortner Enterprises, Inc* 429 US 610 (1977); *Fortner Enterprises, Inc v US Steel Corp* 394 US 495 (1969).

My second comment on your “question” about *Microsoft*, of course you are right, but there are two sides to this: we do not want to have the most efficient platform not being able to innovate, but the problem is that there is an issue that we also do not want to have other firms not innovating because they fear they will be squashed by somebody who happens to be the most efficient platform. So we can make good arguments on both sides—well it is obvious what the answer is, and actually of course the answer is somewhere in the middle and that is very difficult, and no doubt we will discuss that later.

PROFESSOR SPENCER WEBER WALLER: Mike, I want to make sure you and Philip are actually on the same page. When you say “the most efficient platform” do you mean distribution of software by the Internet, or are you making a claim that the Windows’ operating system is in fact the most efficient operating software.

DR MIKE WALKER: Okay, when it comes to software I don’t make claims; it is a fair thing. All I mean is that it is quite clear that consumers value the convenience of having it all bundled in together. It is efficient in that sense; there are huge demand side complementarities; and about the only piece of the economic literature on bundling which is not controversial is that where you have demand side complementarities bundling is very efficient—that is the only point I am making.

PROFESSOR SPENCER WEBER WALLER: Mike’s challenge to all of us is how to operationalise. His point is entirely and indisputably correct, that from an economic theory bundling sometimes is harmful. How do we operationalise that as to have enforcement agencies find the right cases to bring and have Tribunals reach the right result in the cases that are brought to them?

JOHN BODRUG: I would bring a different perspective and starting point: how do you advise clients? In reading the *Microsoft* case, one thing I wondered is if Microsoft had made available this unbundled product from day 1, which nobody bought, would that have been a defence? Does that mean going forward, if you are advising clients, that you should be saying: “At least make something theoretically available for customers on an unbundled basis”, and is that going to help you in a proceeding in front of the European Commission?

DR PHILIP MARSDEN: I think on the reading of the Court and what these officials have said that that is clearly correct. If Microsoft had made sure that somewhere in the European market were a few copies of XPN around, if they add a new bundle, they can have XP-Y, and XP-Z and then you have a market with supposedly— theoretically or really—shelves of products that consumers

don't want. My point is I just don't see the point in that. Going back to the initial purpose of this which is to provide consumers with a benefit, you are providing them with choice: the choice of products that they don't want.

JOHN BODRUG: As absurd as the result may be I wonder whether, as things have turned out, you can rely on this case law and say that it is sufficient to also offer the product on an unbundled basis.

PROFESSOR SPENCER WEBER WALLER: Well that has been an important definitional difference, at least in the United States between tying and bundling. A bundle is an optional thing where you do have a choice to buy separately. It may be a distinction without a difference but it has always been a dictionary difference.

ADAM SCOTT: I want to follow John's point from the point of view of a practitioner advising the client, because, having regard to professional liability, the professional adviser is concerned about the advice that they are going to give. But then think about the recipient of the advice, and the sort of advice they are going to want to seek. Part of the implication of what we have discussed, not just in this session but in earlier sessions, raises the question how far should the discussion between the legal adviser and the corporate executive go like this: Corporate executive: "Surely they're not going to be after me?" At that point you pause and say: "Well is this a player who is so salient in . . ." whichever market place it is that the answer to that is "Well, hard luck, they will be. They'll be looking for some reason to get after you, so we had better go on to the next part of the discussion". Or, will it be: "Well, you are quite right, we have looked at the administrative priority decisions taken by the regulatory agencies over the last 10 years, and the answer is you are likely to get away with it". Do you want to spend the money on the next bit of advice?

So you are going to have that pragmatic bit of discussion. Now, what is going to impact on that pragmatic bit of discussion is going to be a nagging doubt there about whether there will be public enforcement or private enforcement, and what the deterrent effect is about. Then you are going to be into an economic calculation of: "Does the risk we face mean that we have to take this seriously, or do we just go for it anyway?"

That then cycles you back into "Is there a special responsibility on major players in their behaviour?" and leaving aside the law for a moment, and just thinking about the politics, in a political sense there probably is a responsibility that rests on major players. However, it does seem to me that those of you who are educating future private practitioners, or being private practitioners, have to think through not just what is the best legal advice, but what is the nature of the discussion that you have with your client, and an educated client

is going to think about the question: “What is the nature of the debate that we wish to have?”

Once you are into risk management you are then going to be asking yourself the question: What sort of risk management should we be undertaking? That is presumably what happens in *Microsoft* now.

Then the questions come in: what sorts of risk management should be seen as legitimate? What sort of risk management should be seen as likely at least to moderate if not to exclude a significant financial penalty, because of course the worry is that having gambled one way you then end up with a significant financial penalty calculated on a deterrent basis.

You are also going to have to think through in Europe, and already in the United States, the whole question of private enforcement, and what is the risk of that? People will become better at managing that as we see what happens in Europe. This has been very pragmatic rather than jurisprudential about what we are talking about, and I do not know which way you want to take the debate—whether you want to keep the debate at the principled, economic legal basis, or whether you want to descend to the awful level of pragmatism and what does a private practitioner and what does a private business actually do in the face of this.

**PROFESSOR SPENCER WEBER WALLER:** I am often a pragmatist. I am happy to continue the discussion on that level. What would people advise a truly global dominate firm who was thinking currently about adding an additional feature or product for which there is ascertainable separate demand from whatever their first product is.

**BECKET McGRATH:** I thought Adam’s point was very interesting, because he has put his finger on something which intuitively I come across when advising clients: “How far does this risk analysis go?” Somehow you have to get clients over a hurdle to say: “This is just risk analysis. You have to work out what are the chances of being found out for this”. They might feel uncomfortable about that, but I think that is because it depends on the seriousness of the conduct that would be found out. I think it is quite clear that, with hardcore cartel activity, it is not really a great path to go down to say “Well, yes go in there and fix prices, the authorities will never find out”. But at least you could ask logically: “What is the difference in kind between that discussion and saying to a dominant company price like this, you’ll never get found out”.

In terms of what I advise a client I think often we have to take them into the frame of mind where they are comfortable to have that discussion on Article 82 issues, to weigh up that risk and to look at it in a commercial sense. It is ironic that we have to make the client think commercially about risk, when we are the legal adviser and they are the business people. But often they just say: “Come to

us, tell us what we can and can't do. We've had a bit of a look at that and we think we can't do any of this". We often have to take them away from this approach. I like to get economists involved at that stage to help get them over that hurdle, because economists tend to be a bit more bullish on these things to say "No, look, you've got to look at the real risk, the real effect".

I always think it would be a foolish client to run its business trying to ensure everywhere that it complied with Article 82, because it wouldn't actually be able to innovate in its price structures, in its product, at least in many efficient ways. But I can see that if you've got a client like Michelin, like some other companies who have been "once bitten" it would be very hard in those circumstances, because the dominant company that runs its pricing policy, according to the letter of competition law, is (a) going to be very confused; (b) going to have very confused customers; and (c) is probably going to go out of business. At least you can say that that solves the problem because if its (compliant) pricing means it loses business, it's not dominant any more and suddenly it can do all the pricing that it couldn't have done last week, but it would be very unsatisfactory.

PROFESSOR MARGARET BLOOM: Just to continue the pragmatic theme. I do not think you should assume that *Microsoft* applies to all dominant companies. The Commission itself was very clear that this is an exceptional case. Microsoft had a 90–95% market share and there were significant network effects, which the court was clearly concerned about. The CFI was also concerned that customers of alternative media players thought that they were superior and they were being denied a superior product. There are no doubt other distinguishing factors, but there are at least those three that distinguish it.

So yes, it draws on clear legal precedents as far as the court is concerned, but the CFI leaves the Commission with an immense amount of discretion in terms of the economic analysis. I do not think one should assume that every company that is dominant—and that is a pretty low threshold as we have already discussed—if it is thinking about integrating two products is immediately going to get into a Microsoft position. Even in *Microsoft* the CFI said that if you are in fast moving industries like IT and communications what are currently two products might, with evolution, clearly become a single product and therefore no concept of tying or bundling would apply at all. So I think you can be not quite as pessimistic as you fellows are!

DR PHILIP MARSDEN: But if you are advising Microsoft you just tell them that the sunset is coming and you can't do anything, because the European Court and the European Commission have chosen quality over ubiquity.

PROFESSOR MARGARET BLOOM: I wouldn't say you can't do anything, but clearly if it is a case that applies to Microsoft then you read it as *Microsoft*.

JOHN BODRUG: One comment on the scope and relevance of *Microsoft*. While I agree with Margaret's comments, there is still a more general risk because this analysis happens after the fact. If you are adopting certain policies and then your product is wildly successful to the exclusion of others, you still have this risk that regulators or courts are going to look back and say that some of your policies which have exclusionary effects amounted to an abuse of dominance.

PROFESSOR MARGARET BLOOM: As I said earlier, I think Article 82 is extremely unclear, and I think that has a cost for consumer welfare. All I am saying is that *Microsoft* is not a clone for every Article 82 case. But I agree with what you said, John, you cannot be certain; it would be very much better if there was greater certainty and, for a start, I should strongly prefer a higher amount of market power. I know market share is a rather imperfect measure, but I should like a safe harbour of at least 50%. I would go for something higher if I thought there was any chance of getting it in Europe. I think that would be of considerable help in removing some of these concerns, so you would have to be a very powerful player before you started to worry about Article 82. If there was 60% for a safe harbour, I think many of these concerns would disappear.

BECKET McGRATH: I think there is another good, real life example with Apple. You saw in the computer area how their market model was based on being the underdog, or having a product that they were in control of, based on a very high degree of integration, so they were bundling a lot of products, but that was their particular thing. But now that has led to the reversal of the position in music players, where they have become the arguably dominant model, but based on that model of control of the process, control of all the elements of the platform, control of the bundle. As you say, there could be a situation where that could suddenly flip and that model becomes unlawful, even though it was the root of their success, and the root of their business model when they were very much the minority player.

DR MIKE WALKER: One comment on the Apple point—again, I should express an interest here that they are a client—for years strategy people said that Apple made a huge mistake of bundling everything together. For years we have said they really blew it in the mid-80s; they had the better product; they had the first graphic user interface, but because they bundled it with their hardware they blew it. They carried on doing it and in this particular market they don't seem to have blown it—people are going after them in the US already. You clearly do have to advise clients about risk management but you just cannot foresee a lot of these things and there is nothing you can do and therefore the answer is you are going to end up having to deal with them on an *ad hoc* basis.

BECKET McGRATH: Look at Psion, they split the software and the hardware. Now, how many people still walk around with Psions in their pocket? Look at 3Com and the Palm Pilot, and they separated the platform and the software.

## DISCLOSURE AS DIVESTURE AND OTHER THOUGHTS ON INTERCONNECTION AND ACCESS

SPENCER WEBER WALLER\*

The hornbook law on remedies for monopolization and abuse of a dominant position is remarkably unhelpful. There is little in the case law, the treatises, and the government guidelines to guide the crafting of an appropriate remedy for unlawful monopolization beyond common sense, logic, and experience. The most likelihood explanation is that monopolization cases and abuse of dominance cases (particularly successful ones) are relatively rare birds. While these cases are of great importance, they arise only episodically and rarely in the same industries, making comparisons between different industries and time periods not very helpful.

Despite different substantive provisions and different formal enforcement powers, the remedies applied by the US and the EU are not that different, at least in the modern era. To be sure, the US has the unique remedy of criminal sanctions, but these have not been applied for more than thirty years.<sup>1</sup> In addition, divestiture is an option in the US, although only a theoretical possibility in the EU. However, divestiture of the assets of an integrated defendant has been used only a handful of times in the history of the United States.<sup>2</sup> The 2001 US *Microsoft* opinion suggests a very high burden on the government (and an almost impossible burden on a private plaintiff) to obtain this relief despite plenty of language throughout older cases that divestiture should be the remedy of choice.<sup>3</sup>

In the EU, the unique statutory remedy is the ability to impose a fine of up to 10% of the annual turnover of the enterprise in question. A number of real

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<sup>1</sup> The last litigated criminal s 2 case appears to be *United States v Empire Gas Corp et al* Criminal No 23917-1 in the 1970s, where the defendant was acquitted. There is no reported opinion in the criminal action but the result is described in a civil companion case, *US v Empire Gas Corp* 393 F Supp 903, 912 (DC Mo 1975).

<sup>2</sup> R Crandall, "The Failure of Structural Remedies in Sherman Act Monopolization Cases" (2001) 80 *Oregon Law Review* 109.

<sup>3</sup> Compare *United States v Microsoft Corp* 253 F 3d 34, 80 (DC Cir 2001) ("divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain") with *United States v Grinnell Corp* 384 US 563, 577 (1966) ("We start from the premise that adequate relief in a monopolization case should put an end to the combination and deprive the defendants of any of the benefits of the illegal conduct, and break up or render impotent the monopoly power found to be in violation of the Act.").



world circumstances combine to render this a helpful, but subsidiary, remedy in monopolization cases. First, the Commission has never actually imposed a fine of this magnitude. Second, there is no evidence that fines alone are an effective punishment and/or deterrent for anticompetitive behaviour by dominant firms. Finally, while there is no governmental fine possible in U.S. antitrust,<sup>4</sup> there are private treble damage actions which normally exceed any fines actually imposed in the EU.<sup>5</sup>

The real action in both jurisdictions appears to be in the crafting of injunctive relief that will prevent future violations by the dominant firm and restore competition in the markets in question. Thus, specific conduct that is found illegal in one or both jurisdiction will be prohibited whether it is tying, bundling, exclusive dealing, loyalty rebates, pricing strategies, licensing restrictions, or sui generis strategies affecting the market in question. More controversially, each case will then focus on how best competition can best be restored to the market or markets that were affected by the unlawful conduct. All of this suggests that the future will look much like the past with two prominent exceptions relating to access and information. Public monopolization cases will remain the primary enforcement tool, but episodic in nature, and with relief almost sui generis in each case. Despite lip service to the importance of divestiture as a remedy in the United States, it will be limited to three main situations. First, where the monopoly was illegally acquired, divestiture will be used to restore the competitive situation that existed before the illegal acts if other forms of relief are deemed ineffective. Second, divestiture will be more likely where the monopoly power arose out of mergers or other combinations and the transactions can be relatively easily unwound, drawing on the accumulated wisdom from relief in Section 7 Clayton Act cases. Third, divestiture will be implemented when the defendant can be separated relatively painlessly either horizontally, vertically, or through the separation of regulated versus unregulated operations. At this stage, there is no reason to believe that the EU will follow this path either through amendment of the Regulations granted the Commission powers to enforce the competition laws or through reinterpretation of its existing powers. One is therefore likely to see an increasingly complex series of behavioural remedies and injunctions that require innovative monitoring and compliance

<sup>4</sup> Statutory amendments to permit the imposition of civil fines as a remedy for monopolization (or other antitrust violations) have been proposed from time to time, but have been rejected by the recent Antitrust Modernization Commission and stands little chance of adoption. Antitrust Modernization Commission, *Report and Recommendations* (2007) 285–91 (recommending against creating civil fine remedy); S Calkins, “Civil Monetary Remedies Available to Antitrust Enforcers” (2006) 40 *University of San Francisco Law Review* 567 (discussing the Antitrust Modernization Commission report). For better or worse, the US will not pursue the path of the EU in this regard.

<sup>5</sup> WH Page and JE Lopatka, *The Microsoft Case: Antitrust, High Technology, and Consumer Welfare* (Chicago, IL, The University of Chicago Press, 2007), 78–80 (describing the principal private treble damages in the wake of the government case against Microsoft and the resulting settlements totaling nearly \$2 billion).

obligations that strain the capabilities of courts and Commissions to administer. The enforcers and the courts are likely to turn to special masters, alternative dispute resolution mechanisms, compliance committees, and private bargaining in the shadow of the law to enforce these obligations to avoid the experience of the court acting as a de facto regulator as it did under the Modified Final Judgment in the AT&T case in the 1980s and 1990s.<sup>6</sup>

Future monopolization cases and their remedies are likely to feature an increased emphasis on information disclosure and non-discriminatory access. Simply put, disclosure is divestiture when it comes to our high-tech information-based IP economy. So too is mandatory licensing of IP rights when those rights represent the principal source of the monopoly power or market dominance in question.<sup>7</sup> Cases like the FTC's consent decree with Intel also show the importance of information and disclosure as a remedy for alleged exclusionary conduct in connection with the ongoing relationship between licensors and licensees.<sup>8</sup> Although not seriously pursued in either jurisdiction, the licensing of the Windows source code would have constituted just such divestiture by disclosure. The essence of ongoing compliance issues in the *Microsoft* case in both the U.S. and the EU is whether Microsoft has or has not disclosed sufficient information to create a more competitive environment in the creation of competing software applications to work with Windows and on competing operating systems.

In addition to information and disclosure, access and interoperability will be the other key component of monopolization litigation and remedies for the foreseeable future. While I do not go as far as some commentators in suggesting access is the only issue to matter,<sup>9</sup> access to networks, platforms, and other forms of infrastructure is already the focus of the debate in antitrust, telecommunications, and in most regulated industries. Antitrust needs new and old tools to determine when access is required, when non-discriminatory access is necessary, when antitrust liability ensues for denial of access without legitimate business justification, and how to best create effective remedies to remedy such violations. As I have argued elsewhere,<sup>10</sup> U.S. antitrust needs a revitalized form of the essential facilities doctrine to address these questions at precisely the time when we appear to be on the verge of jettisoning this traditional tool altogether. Similarly, the EU needs a sounder foundation for its increasing use of its version

<sup>6</sup> *United States v Am Tel & Tel Co* 552 F Supp 131 (DDC 1982).

<sup>7</sup> See Crandall, *supra* n 2, 116 (compulsory licensing required in 20.5% of civil monopolization cases through 1996).

<sup>8</sup> *In re Intel Corp* 1999 WL 701835 (FTC) (No 9288) (consent to cease and desist).

<sup>9</sup> KD Werbach, "Only Connect" (20 February 2007), available at <http://ssrn.com/abstract=964991>.

<sup>10</sup> B Frischmann and S Weber Waller, "Revitalizing Essential Facilities" (2008) 75 *Antitrust Law Journal* 1; S Weber Waller, "Areeda, Epithets, and Essential Facilities" [2008] *Wisconsin Law Review* 360.

of the essential facilities doctrine so its decisions and remedies are applied and enforced in a sound and consistent basis.

Think for a moment about the important monopolization issues that have arisen but have not yet been litigated. They include 1) access to iTunes and its compatibility with other hardware to play downloaded audio and video; 2) access to the Google book project as it becomes a vital tool for basic research; and 3) more generally whether a defendant ever has the obligation to license intellectual property. Non-discriminatory access to the new infrastructure and the required information disclosures to make it happen are likely to be the new battleground when these rare, but dramatic, public monopolization cases arise and a violation is found.

Looking at the *Microsoft* case in both the US and the EU from this perspective suggests only a partial victory for competition policy in both jurisdictions. The US was correct in barring the specific practices which harmed Netscape's access to customers and OEMs, but probably did not go far enough to ensure a future of access and interoperability between Windows and other applications and middleware software products. In the EU, the required information disclosures in the server operating system market appear to be on the verge of allowing a significant competitor to offer a competing server operating system that interfaces seamlessly with Windows, but it is simply too early to tell.<sup>11</sup>

On the bundling side of the EU case, the remedy of requiring an unbundled Windows sold alongside the fully bundled Windows at the same price, appears to have next to nothing to offer consumers in terms of meaningful choice or access. In this regard, it appears even less effective that the remedy proposed by Microsoft of including a disk containing competing media players with every copy of Windows.

As the focus of monopolization remedies shifts from physical to virtual divestiture and access/interconnection, I also anticipate an increased focus on innovative compliance mechanisms to assist the court or tribunal in monitoring disclosure, pricing, and non-discriminatory access. The United States is just beginning to come to grips with the best combination of judicial supervision and options such as special masters, private monitors, compliance committees and trustees, use of expert public regulatory bodies, and alternative dispute mechanisms to ensure compliance without overburdening the courts. These issues are just a glimmer in E.U. competition jurisprudence at this point, but similarly should be the critical remedy issues as long as the Commission remains committed to the enforcement of Article 82.

<sup>11</sup> WH Page and SJ Childers, "Bargaining in the Shadow of the European Microsoft Decision, The Microsoft-Samba License", available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1117641](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117641).

## REMEDIES

DR PHILIP MARSDEN: I think, to continue the pragmatic theme, one of the most important areas is remedies—what do you do about this conduct? Spencer has an excellent paper which he will introduce and take us through the main points.<sup>1</sup> One of the things I most liked about it is the reminder, which I do not think is the language used on this side of the Atlantic much, but it is quite well used in Canada—which is the idea that, yes, there are structural remedies which we can recognise; yes, there are behavioural remedies which we can recognise; and then there are hybrid remedies. Hybrid remedies to me I always feel are really strong behavioural remedies that are pretty well structural in effect, so compulsory licensing or giving away your source code, or something that cannot be unscrambled again.

Also what I liked about Spencer's paper is the fact that he is focusing on things that are innovative in the remedial area. It may not actually be changing the way that a competitive dynamic is going, between a couple of parties or three or four rivals, but changing the involvement of the regulator and so getting away from this idea that you shouldn't really have continuing monitoring of a dominant firm, but that actually some form of monitoring—monitoring trustee, or monitoring disclosure—some form of checking that the non-discriminatory access is all right, is something that some of the regulators at least are capable of and it might not have as chilling an effect as some people seem to think. So it is something that Europe is testing out with some success here and there. In the *Microsoft* judgment there were some questions about the monitoring trustee—it didn't necessarily go to the substance of the case, but it is something where these innovative monitoring remedies are coming up, I think, primarily on this side of the pond, and we will see how they transplant around.

PROFESSOR SPENCER WEBER WALLER: It is always a little daunting to talk about remedies because if you think that we have no fundamental consensus as to what our goals are, no fundamental consensus as to how to define a market and measure power within it, and no agreement yet on exactly what conduct violates the law, we would have even more of a mess in the area of remedies in terms of trying to get back to first principles, and come up with a theory and a magic bullet. I have to say I don't think there is a magic bullet and I don't think that is necessarily a bad thing, but we clearly do not have one. The purpose of

<sup>1</sup> A longer version of this paper will appear as: S Weber Waller "The Past, Present and Future of Monopolization Remedies" (2009) 76 *Antitrust Law Journal* forthcoming.

my paper was to simply take you through the history of remedies in the United States with occasional references to what is going on in the EU and elsewhere. In the time that Philip has given me I really just want to focus on the fact that as the Sherman Act was being drafted there was very little attention being paid to remedies, particularly with respect to monopolisation.

It was thought that most monopolies were the product of trust or trust-like agreements which meant either cartels or multiple mergers toward monopoly. If you could prevent those kinds of behaviours you would largely prevent monopolies and not have much to worry about. But that is not really the way the Statute was drafted in the 1890s. You have equal penalties, equal remedies in s.1 and s.2 and, as all of you know, violations of either provision of the Sherman Act can be either criminal offences or civil offences, and can be brought by either the government or by private parties. The private parties, of course, may seek treble damages and the full range of injunctive relief. The government is the sole criminal prosecutor, which is not very surprising. However, they cannot bring a civil action for a fine, although they may seek treble damages when they are the buyer, when their interests as a buyer have been affected.

So generally in the monopolisation area while at the dawn of history there were a large number of criminal prosecutions, there really have not been any for 30 or 40 years. There is still a little bit of a game going on—where I'm losing—where you try to find the very last criminal indictment that is solely based on s.2. I thought that was the most recent that I could find was from 1967. Maurice Stucke already has one that is later and Don Baker who is former head of the Antitrust Division emailed me with one that is also from the 70s. We simply haven't done it for decades and there is simply no chance whatsoever that criminal penalties will be revived as a way of proceeding in s.2.

As I mentioned, our government does not have the ability to seek fines for civil action or bring government civil actions for damages except when it is the buyer and have been overcharged. The government can seek injunctive remedies but not civil fines, so we simply have no analogue of the 10% of annual turnover that the Commission and most national competition authorities have as part of their arsenal.

It has been proposed from time to time, but those proposals have not gone anywhere. Most recently Steve Calkins has made an excellent case that this is something we ought to think about.<sup>2</sup> However, the Antitrust Modernisation Commission has made an equally strong case that this is not something we should think about and I am not aware of any substantial political movement towards giving either the FTC or the Department of Justice those powers. So

<sup>2</sup> S Calkins, "Civil Monetary Remedies Available to Federal Antitrust Enforcers" (2006) 40 *University of San Francisco Law Review* 567.

when the government brings a s.2 case it is bringing a civil case for either injunctive relief or some form of divestiture as an injunctive remedy.

When a private person brings a monopolisation case it is almost entirely a case for treble damages. I am speaking both historically and pragmatically. The United States Supreme Court has said private persons can seek the full range of injunctive remedies, just like the government, but as a practical matter no court in our country is going to order divestiture or something similar in a private suit. More often than not the private plaintiff is seeking treble damages, and some combination of some simple, traditional injunctive relief to stop whatever is the unlawful conduct.

So to the extent there is divestiture, it would be the province of the public monopolisation suit, which is a relatively rare bird. It is not a unicorn. It is not a myth. They are there, but they do not come very often, and obviously they are a great moment when they do. There have been relatively few cases in our history where divestiture has been ordered, where the defendant has acquired its dominance through something other than a merger or to have suffered trust-like or cartel-like agreement. So to rephrase this in simpler English: the courts have been reluctant to dissolve integrated entities because of the difficulties of how to do that, the speculative nature of the benefits and the harm to growth efficiency and corporate interest, shareholder interest, other stakeholder interests, and society in general.

This is unlike merger cases where divestiture is the natural remedy. If you conclude that two or more firms should not have been joined together, you simply break them apart. We simply do not break apart integrated firms very often. The most important recent one would be the ATT, which was a voluntary consent decree. The government may well have won that suit and may well have achieved that anyway, but the final result was the product of an agreement between the Justice Department and the defendant.

A remedy that does not come up very often is the creation of new competition. We typically have not used government ownership, management, subsidisation or other sorts of public sector initiatives to create competition. The most important one that I can think of is an accident of history, and frankly government needs during war time where: in *Alcoa*, the government finally, after decades of litigation, established an unlawful monopolisation in the famous 1945 opinion by Judge Learned Hand.<sup>3</sup> The court deferred the question of remedy until the end of World War II. Our war needs were simply far more significant than what to do about this long running monopoly.

However, the government had built a large number of aluminium processing plants because of its needs for the military. At the end of the war, pursuant to

<sup>3</sup> See generally, S Weber Waller, "The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases", in EA Fox and DA Crane (eds), *Antitrust Stories* (St Paul, MN, Foundation Press, 2007) 121.

Statute, they were to be sold off in a manner to promote competition which meant that you had to sell them to someone other than Alcoa because there was literally no one else who produced aluminium other than Alcoa and those companies who were operating the government owned plants.

Now, the government was able to create competition where there was none by selling the plants to Kaiser and Reynolds Aluminium. Although it is often overlooked, ownership and management was also separated between Alcoa and its Canadian subsidiary, Alcan, which, over time, created a fourth viable competitor. So Alcoa began as a complete monopoly, two new firms were created through the sale of the US Government plants, and over time Alcan became a true and independent player in the North American and world markets. That is a great success, but let me suggest to you that that is almost *sui generis* and not likely to arise because our government does not really operate that much that could be used in that fashion to create competition in private markets.

So we are left with a series of injunctions and they come in all flavours, both positive and negative and forbidding defendants to use different techniques forbidding exclusive dealing, forbidding tying arrangements, and the full range of very fact dependent practices. In addition we typically require licensing of patents, and other intellectual property, usually for reasonable royalties, occasionally on a royalty-free basis. This will continue to be the remedy of choice for the foreseeable future in most monopolisation cases, despite lingering questions of how effective these remedies are and how administrable they are by the courts that must oversee them.

I want to mention the notion of doing nothing as a remedy. It allows me to quote Peter Ustinov's advice to young actors, which was: "Don't just do something, stand there", which is if you are convinced of Schumpeterian waves of creative destruction and you are convinced that the firm has not simply entrenched itself in a way that prevents those waves from occurring, you sit back and let those waves unfold, and let the market correct itself. As long as you think it is going to happen reasonably quickly and you do not have another strong viable remedy—certainly our government, and our Justice Department chose this option in abandoning its case against IBM where it just turned out, given the scorched earth nature of the litigation over more than a decade, by both the government and the defendant, the market had so significantly changed that there was no further remedy the government thought was needed.

I therefore think the future looks like the past with two prominent exceptions. I think the real issue has to do with disclosure and access. I think almost all of the good and important public monopolisation cases for the foreseeable future will be about one of these issues and maybe I'll call interoperability just another notion for the combination of access and information in our high-tech economy.

So I think we are going to see increasing numbers of cases when they arise—we are never going to see a lot of them—but in the cases that do arise

that matters. Beckett has already referred to iTunes, we know about pending investigations involving Intel, we know of questions relating to Google that are already on the horizon, if not on the docket, continuing issues relating to Microsoft, and all the other dominant firms in more traditional sectors of the economy.

I think the real issues are going to be how the relief that is granted will create access to the market that normally requires a tremendous amount of information. We need some new tools and some reliance on old tools. I am a fan of the essential facilities' doctrine, not as a seat of the pants doctrine by which courts figure out whether something is important, very important or absolutely essential and then create remedies accordingly. I have written elsewhere that I think there is an economically justifiable case for open non-discriminatory access to infrastructure in a way that I have defined with my writing partner, Brett Frischmann, in an article that just appeared in the *Antitrust Law Journal* called: "Revitalizing Essential Facilities".<sup>4</sup> I think most of the good essential facilities' cases deal with assets that we can consider infrastructure, that really do require a regime of open access so as not to choke off downstream innovation in different ways. I think *MCI*<sup>5</sup> is a great example of that in a telecom market. Although some of the ECJ cases are hard to defend, they are best defended on a notion of a truly indispensable non-duplicable infrastructure where society as a whole is better off if a regime of open access is granted. I think *Bronner* is a wonderful case. It came out exactly right because there is nothing infrastructural or non-duplicable about a newspaper distribution system in Austria at the time of the case.

What I see is increased emphasis on information disclosure, and non-discriminatory access. While I might prefer more traditional divestiture remedies for monopolisation cases than is currently in vogue, I think Philip is exactly right that basically disclosure is divestiture. If you go back to the consent decree with *Intel*<sup>6</sup> and the Federal Trade Commission in the 90s, it is all about disclosure of information to rivals. If you look at *Microsoft* in both the US and the EU the whole case was about whether Microsoft has or has not disclosed sufficient information to create a more competitive environment. For example, I think the CFI got it exactly right as to the interoperability. As a result I think some good things are happening. I am following with great interest the licensing arrangement between Microsoft and Samba, which is the first licence taken out, to my knowledge, under the CFI holding and the settlement between the company and the Commission.

<sup>4</sup> B Frischmann and S Weber Waller, "Revitalizing Essential Facilities" (2008) 75 *Antitrust Law Journal* 1.

<sup>5</sup> *MCI Commc'ns Corp v AT&T Co*, 708 F 2d 1081 (7th Cir 1983).

<sup>6</sup> *In re Intel Corp* 1999 WL 701 835 (FTC).



On bundling, my sense is the Commission got it dead wrong. If you care about access and you care about information, I think Microsoft offered a far more beneficial remedy of providing direct consumer access to competing media players than the remedy the CFI upheld. So I think it in some ways involved snatching defeat from the jaws of victory.

So I would like to hear your thoughts as to whether I am off base as to either the history or a future where we are going to be focusing on access and information and trying to come up with rising to the challenge of figuring out what combination of courts, Tribunals, regulators, special masters, trustees and alternative dispute resolution mechanisms will be necessary to administer these kinds of highly complex—I will take Philip’s terminology—hybrid remedies.

DR PHILIP MARSDEN: Thanks very much, Spencer. That is something that I have been struggling with as well. If we are going to use the idea that disclosure is divestiture, and in that sense disclosure of information—to provide access for a competitor to a market—is some form of structural remedy, or hybrid remedy, then what does that mean for Article 82 cases after the *Microsoft* decision. Even if we can say that the *Microsoft* judgment and decision is just about Microsoft, nevertheless, it is testing out some new, innovative type of remedy. It goes without saying in any of these access cases, as we know from other sectors, that the remedy is highly dependent on the willingness of the dominant firm to continue complying with that remedy and providing that information on a timely, non-discriminatory basis, and we know from telecoms’ cases that all sorts of complaints and problems and even deaths of rivals arise when you base a remedy on something like that and the dominant company after a year or two (or even less) decides to just degrade that access, and it just seems to create litigation rather than solutions.

It raises the question I brought up at the beginning which is: are the tribunals, are the officials, up to the task of monitoring and being able to act quickly enough in that kind of framework? So this is not a case where we are going to take five or six years to litigate something, you have already decided there is a problem, here’s the remedy you are trying to implement, and you are already highly suspicious of the dominant firm regarding whether they are going to continue allowing some form of access to continue. So what can you do about that, what tools do you have to monitor that? My guess is that the experience from the telecoms’ sector is not helpful, and there are even more fragile hi-tech sectors that these theories might be applied to. Is it more likely to be good in theory, but not so good in practice? I agree with Spencer that I think this is the way that remedies are going; it is far better than some form of structural divestiture, it is far better than merely . . . saying “We’d like to see Microsoft’s market share drop 40%” and hive off companies and split them all up and so on. But if you are going to have this innovative hybrid remedy how best will we

make it work practically rather than just relying on continued litigation, or really heavy dead hand regulation determining the price of the access.

PETER WHELAN: I want to make a general point as well as ask a question. Spencer, I have read your paper, which I found to be very interesting and very enlightening. There is a sentence that I have read on p.2: “Logic tells us that the point of a remedy should be some blend of punishment, deterrence, restitution . . .” etc. I think first of all that this statement might blur the line between what we should mean by “a remedy”, and by what we should mean by “a sanction”. I would conceptualise a “remedy” as something that either rectifies the damage or puts an end to the abusive conduct; it is not something that punishes. A “sanction”, by contrast, is that which punishes, usually in the pursuit of two aims: (general or specific) deterrence or retribution (ie holding people effectively to account because they deserve to be punished for what they have done). That might just be a definitional issue and that’s fine; I am perhaps being pedantic on that issue.

A more important question that I have concerns the use of “punishment” and “deterrence” in that sentence. Presumably if you are using both the words “punishment” and “deterrence” you are saying there is something else beyond deterrence in the punishment that should also form part of the remedy. I would suggest perhaps that you are saying that the remedy should include retributionist theory as well, in other words, that the monopolist/dominant company should be punished because it deserves to be punished. I am just wondering what role that should have in s.2 cases, or in the European context in Article 82 cases, as opposed to those cases that involve cartels, which are obviously objectionable.

PROFESSOR SPENCER WEBER WALLER: I was referring more to the history of the United States, which at least as a starting point Congress viewed both anti-competitive agreements and single firm monopolisation as matters of equal concern, and to be treated both through criminal and civil remedies. So when I am including “punishment” and “deterrence” I am really speaking to the original criminalisation of all aspects of our competition practice, other than merger review.

ADAM SCOTT: Peter mentioned both remedies and sanctions and I suppose the word that springs to my mind is “rehabilitation” and how far are we trying to be a bit more positive in the way in which we think about remedies. If we think about *AT&T*,<sup>7</sup> what distinguishes *AT&T* from the sort of situation which would exist in the United Kingdom or in the European Union today is that Judge Green sat on it for year after succeeding year.

<sup>7</sup> *United States v AT&T*, 552 FSupp 131 (D.DC 1982).

Now, the CAT is not a Court of First Instance in the way that Judge Green was, and we have abandoned the concept of individual regulators. So that idea of a single dominant personality handling an AT&T'er like this, is no longer a possibility in the way in which we do things this side of the Atlantic, though as I would understand there is still a possibility the way things can happen on your side of the Atlantic?

PROFESSOR SPENCER WEBER WALLER: Although a remote one in terms of the specifics of what Judge Green did on his own for a dozen years or so.

ADAM SCOTT: I saw the UK end of that because I was the person responsible for relating to our government on trying to stop BT being broken up in parallel to AT&T, because there were people who wanted to do just that.

But then to take the longer view, I suppose the question in my mind is: how well the *AT&T* saga or the *Microsoft* saga will look when economic historians look back on it in a few decades' time, and we are already looking back on *AT&T*: we know what happened. Let me pick you up, Spencer, on Ignatius. Ignatius would probably say: "Get hold of the regulator or the judge and say: 'Look ahead to somebody writing your obituary. For what contribution would you like to be recognised in terms of the outcome of the remedy that you applied? Can you take a view about the remedy that you are applying?'" Now, whether you do so explicitly or whether you do so implicitly, it is the question whether you are looking at it forward, or are you taking what Garfinkel would call "a future perfect perspective" and trying to look back on it, which is quite difficult to do in evidential terms, but it does raise issues about how do we think about remedies. What is the conceptual framework in which we are doing just that?

DR LIZA LOVDAHL GORMSEN: Just a general point. It seems like the remedy is often dealt with at the end, but one can ask oneself is there a need to intervene in a market if there is no appropriate remedy in the first place? So if we want to pursue a goal of consumer welfare one would imagine that the remedy needs to be one benefiting consumers, so would it be an idea basically to start with the remedy? This is a bit upside down, but unless we have the appropriate remedy here would there be a need to intervene?

DR PHILIP MARSDEN: One of the points I would add to that, I suppose, is that many of the case teams in many of the authorities have an eye to their obituary in a way when they are sending the case up to management, because they have already got a pretty good idea of what the remedy is that they want. They may not have completely worked out their theory of harm, but they pretty well have an idea, so it actually almost works backwards that way as it is rising up—and former officials do correct me—and they are building their case as it is

going along. But even at some of the very early meetings they are already saying: “Look, we think this is the problem, we are going to have to try to prove it, but what we will be asking for is this”, because that all goes into the whole question of resource allocation, case selection, prioritisation, litigation risk and those sorts of decisions. So it is all bound up in a sort of holistic way.

DR LIZA LOVDAHL GORMSEN: Well in that case what about *Microsoft*? How would you explain that?

DR PHILIP MARSDEN: I can’t explain the *Microsoft* case, not in terms of likely harm to consumer welfare!

JOHN BODRUG: I just had a comment about the tools that are available to deal with some of these remedies. There are a handful of cases in Canada arising not in abuse cases, but in merger cases with some vertical issues where a code of conduct was put in place. The idea was to set up a contractual arrangement and codes of conduct containing a fast track arbitration procedure so that if any of the intended beneficiaries, in some cases suppliers, felt that the code of conduct was not being complied with they could resort to this fast track arbitration.

I know in one case there was at least a threatened use of this arbitration procedure, but I think even the threat of resorting to that procedure brought the parties to a settlement. The Competition Bureau’s intent here is “We don’t want to get involved in the enforcement, but we’re setting up this mechanism so that the parties who want to can do it”, and it seems to have worked.

Another case I was just going to comment on, and I am not really sure where this takes you, but it raises some issues about effectiveness of remedies. There was a Canadian case involving AC Nielsen<sup>8</sup> which had exclusivity contracts with many retailers for exclusive access to their scanner data. That data is used for market reporting, and economists use such data frequently in merger cases, and pay a lot for it. AC Nielsen’s exclusive contracts were challenged under the abuse of dominance provisions in the Canadian Competition Act. The Competition Tribunal held that the conduct was an abuse and the remedy included an order that AC Nielsen could not use these exclusivity contracts any more. The remedy also included a mandatory supply of historical scanner data to competitors, because access to such historical data was determined to be necessary to compete in the business.

So the Tribunal issued this order, thinking it had solved the problem, and there was a complainant that was on the doorstep and had intervened in the Tribunal proceedings. But the complainant never did enter the Canadian

<sup>8</sup> *Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd.* 64 CPR (3d) 216 (Comp Trib 1995).

market. There has been some writing speculating about what more the Tribunal could possibly have done.<sup>9</sup> But you can put the best remedy in effect and you can bring the horse to water but you can't make it drink. So sometimes there just may be no remedy.

DR MIKE WALKER: That is absolutely fine to have no remedy that directly benefits consumer welfare. It is ideal if you have the remedy that will benefit consumer welfare, but if you haven't you can still fine them a lot to stop the next one, and that is still a worthwhile exercise.

Suppose there is no worthwhile remedy to the Windows' Media Player case—and I suspect there isn't—certainly to the Internet Explorer case—does that mean if it was abusive we should just say: "Oh, that's fine"? No, we just fine them a lot because you have to create the deterrent.

One of the things I wanted to say is if we could talk about remedies in the future being all about access and information then I agree, but there is a serious pricing issue which is genuinely difficult. It is not reasonable to expect somebody to give away their intellectual property for free. Of course, you can set the price too high for the remedy to have any meaning, so actually setting the price is a really significant issue, and as I think with the Call Com litigation is going on in Europe at the moment, I do not think we have a good framework for doing that. We have this reasonable non-discriminatory licence fees, but that does not mean anything. Non-discriminatory does not help us because if you are vertically integrated that is fine, you just take the monopoly and pop it upstream, and "fair" is begging the question. So I think you are right we need access remedies, and I am actually a big fan of the essential facilities' case—the fact it is different is not a reason for not doing it. I do think pricing issues will be very serious.

BECKET McGRATH: This may be over simplistic, but on the different aims of remedies I would highlight quite a narrow aim, which is simply specifying what is needed to end the abuse. I appreciate that is easier to say in the abstract than in practice, but I think if you lose sight of that key purpose of remedies it can otherwise become just an opportunity to reform the market whilst you have leverage over the party under investigation. Classically, you see that in merger cases where the parties sometimes will agree to anything to get the deal through, but you can also see it in market investigations. The Competition Commission may say: "Oh great, we've got this market, how could we bring

<sup>9</sup> M Gal, "The Nielsen Case: Was Competition Restored?" (1997) 29 *Canadian Business Law Journal* 17, where the author argues that the Tribunal's order did not go far enough and that an order against the suppliers of scanner data was necessary to remedy the anti-competitive outcome in the relevant market.

this a bit closer to perfect competition? Let's tweak this, let's tweak that, let's see what we end up with".

It can also be an issue in settlements, almost more than with final infringement decisions, where parties are just trying to come up with a package to get the authority off their back, and you can get some quite interesting issues coming out there, but it has to be handled with care. What we see in the *Microsoft* case is that, ironically, I think many more people agreed on the finding of abuse on the interoperability element of the case than the music player element of the case, and yet on the remedies it has been much more of an on-going fight, in terms of the resources expended on getting the remedies to work on the server interoperability side, because of the sheer complexity of the task, compared with the fact it was apparently relatively easy for Microsoft to create a degraded version of Windows XP and put it on the shelf. I think that shows the real difficulty with these issues and the need to keep them focused.

DR PHILIP MARSDEN: It is an excellent point. I remember in the *Vodafone/Mannesmann* merger transaction<sup>10</sup> the acquirer being relatively at ease, in order to receive a slightly extended Phase 1 clearance, at agreeing to provide a remedy with undertakings to provide reasonable and non-discriminatory access to their network by their rivals if they were to produce this new product, the one rate roaming product. The effect of that remedy was to delay the launch of one rate roaming in Europe by the merged entity for three years until the undertaking expired, which I do not think was a particularly competitive answer and, indeed, if it had been launched in the first place all the pricing would have been tied to the dominant firm's pricing in the first place, so it wouldn't have been particularly competitive.

But you are quite right, that is the institutional dynamic and pressure that comes about and it would have required monitoring that I think the Commission probably did not have in terms of moving quickly enough to be able to check access pricing to ensure that things were happening in a competitive way.

MAURICE STUCKE: Just two points. First, the goals of a remedy include general deterrence, compensating the victim, and rehabilitation. One thing I question is the belief that fines and the like lead to rational behaviour. In the US at least, we never examine what happens after fines are imposed on the cartel members. We assume that prices return to their competitive levels. But do they for every industry? We need more post-fine studies as to what happens to industry prices and to what extent has the cartel experience shaped the members' behaviour. Given their time expressly colluding, can they now tacitly collude?

<sup>10</sup> Case COMP/M.1795 *Vodafone Airtouch/Mannesmann* (2002).

Moreover, to what extent do members of a cartel stop colluding elsewhere? The belief under optimal deterrence theory is that the parties will not collude after internalising the cost.

My second point concerns the remedy's administrability. The Supreme Court in *Trinko* expressed concern about mandating the sale of goods or services, which were not previously marketed or publicly available.<sup>11</sup> That being said, there is some divergence of viewpoints on this issue of administrability, as our agencies' recent IP Hearings reflect.<sup>12</sup> Some panellists at the IP Hearings argued that the courts and antitrust agencies are ill-equipped to determine appropriate licensing terms and conditions and, as a result, compulsory licensing would be problematic. Other panellists disagreed. They thought these concerns were overstated: the courts set licensing rates in other contexts (such as infringement suits), could do so in this context as well or, alternatively, could send the parties back to the bargaining table. With respect to misappropriation of trade secrets, for example, the courts at times may threaten an injunction unless the parties agree to licensing terms. So I question the extent to which such pricing issues are insurmountable. Can the courts use innovative methods from other areas of the law to fashion an antitrust remedy?

PROFESSOR SPENCER WEBER WALLER: I think John made this point, and Maurice has just alluded to it—in merger practice in the United States and Canada, and the EU there are all kinds of really interesting, very innovative mechanisms that we do not think about in terms of the monopolisation area. The handful of consent decrees that have arisen in the United States involving innovation markets have raised these concerns, and the FTC also has done a merger remedies' study. Obviously they don't want to require the parties to spin-off assets if it is not going to be a viable new competitor.

When you are talking about two pharmaceutical companies in late stage research to address a particular disease through a particular gene therapy, and there really are only two companies in the world that have the combination of capital, technology, and regulatory approval to do this, and they want to merge and 90% of what they want to merge has no effect on competition, but this one area may have a huge effect on competition, the odds are they are going to require the spinning-off of some combination of intellectual property, employees, and supply agreements, such that someone who is not currently in this line of work can remain that viable second competitor. That is something that at least we need to think about.

<sup>11</sup> *Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP*, 540 US 398, 410 (2004).

<sup>12</sup> US Department of Justice and the Federal Trade Commission, *Antitrust Enforcement & Intellectual Property Rights: Promoting Innovation & Competition* (April 2007), 22–23, available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

We do not have the capability to fine in the United States. However, we do have the capability to bring a government suit, even if the only relief is a declaratory judgment which then becomes prima facie evidence for private treble damage suits. I think that is at least a reasonable possibility.

The goal of it all? No one has said “restore competition that would have existed but for this series of illegal practices”, and I think that is important. We should not take traditional structural remedies off the table; we should simply ask “Are they worth it?”. You do not want a situation where the costs are manifestly out of proportion to the benefits.

I am sensitive to the pricing concerns, but I do not think they arise as often as you may think they arise, and I will tell you why. If you look at a lot of the essential facilities’ cases—at least in the United States’ practice—you can go all the way back to *Terminal Railroads*.<sup>13</sup> The point is either an individual group of competitors controls a facility that is necessary for competition. If there is a pre-existing course of dealing, the remedy is to let them deal on whatever the pre-existing course of dealing is. That is easy; that does not require anything that a court can’t handle.

There were pricing issues relating to access to that railroad terminal, and the court simply said that our Interstate Commerce Commission is in charge of that, they will continue to be in charge of that, but you must grant them equal and non-discriminatory access. The same with our *Otter Tail* case,<sup>14</sup> which was about the transmission of electrical power. The court did not have to do anything particularly complicated as to pricing because a regulatory authority existed that did that. Even in *Trinko*, there were no serious pricing issues. The plaintiff said: “What you are doing is degrading our service and otherwise interfering with our service in different ways that injure competition.” Either that’s true or that’s not true, but that’s not a pricing issue. Again, there may well be a case where there has never been a market established price for whatever it is for which access now has to be granted, and that is the hardest case of all. If you then cannot figure out an innovative remedy that is within the capabilities of the court, only then would the court have to throw up their hands and say: “I don’t know”. I just think that is a smaller subset of cases than most people usually acknowledge.

**PROFESSOR MARGARET BLOOM:** My first point was a point that Spencer has already made in relation to regulators, certainly in Europe but obviously from what Spencer said in the US too, in a fair number of these markets there are regulators. In the UK the regulators, of course, have the unilateral conduct powers as well. Their scope to do something more is rather greater because they are constantly regulating the companies concerned.

<sup>13</sup> *United States v Terminal R.R. Ass’n of St. Louis* 224 US 383 (1912).

<sup>14</sup> *Otter Tail Power Co v United States* 410 US 366 (1973).



The second point is to do with if you have a remedy you need to be able monitor it. When I was at OFT there was a most extensive register of all the undertakings that had been given for a monopoly investigation, market investigation and mergers, it was amazingly extensive and it was intended to be reviewed on a regular basis. Of course it was reviewed, but to monitor actively all of that would have taken an immense amount of resources. With unilateral conduct generally the monitoring is going to be done by a plaintiff or complainant. It is most difficult to monitor undertakings following a market investigation because who is going to complain actively? If it is unilateral conduct there are probably going to be one or two obvious complainants, and there are sanctions which you can use, as we have seen in the *Microsoft* case, so all is not doom and gloom in terms of applying remedies in this area. However, I would agree very much with Mike that in terms of pricing in relation to access and information I think that is an extremely difficult area. If you do not have a regulator and the product has not been provided before, as Spencer was saying, you are then into what is FRAND? We have the European Commission investigations into Qualcomm and Rambus. No doubt we are going to see more cases addressing what IP is worth, and how much should be paid for a licence. These are going to require quite difficult judgements.

DR MIKE WALKER: Spencer went through a list of places where price is not an issue, and that sounded to me absolutely right. So it may well be that pricing is only an issue on a subset of cases, and that is a very good point.

A point on what Margaret has just said, there are lots of cases where, as you say, you can get the market to do the monitoring, either with customers or competitors, and maybe that is something that should be more explicitly taken into account when people are formulating remedies. Is it possible to create remedies that the market itself will monitor?

PROFESSOR MARGARET BLOOM: Can I just add that some remedies concerning transparency can be problematic in terms of enabling parties to collude. I do not want to go into details, but I am aware of at least one case that came back to the OFT and the remedy proposal for monitoring would have enabled participants then to have colluded more effectively. So we suggested that perhaps was not the best remedy in terms of pricing.

DR PHILIP MARSDEN: The point is taken also, because when you have these sorts of access remedies that are by definition going to link up a number of rivals to a dominant company for a period of time—three or four years or something, depending on the access terms—the effects can be tantamount to collusion, because in effect they are all basing their pricing on the same costs, it is

something that you have to be concerned about—whether that leads to actual collusion or something like that is another and more serious question of course.

ADAM SCOTT: I would first underline what Margaret has just said about that, because, in my pre-CAT experience, I have seen some of the difficulties of industry generated solutions, or what Ofcom called “co-regulation”. What I was going to say, speaking from our perspective, is that it would be a fine idea for some good PhD student to apply themselves to the issue of Fair, Reasonable and Non-Discriminatory—FRAND is the acronym for it—because I have a suspicion that we are going to be coming back to this over and over again. It would be quite a help, ahead of receiving specialist expert advice paid for by parties, if some people could have given some thought to this at a bit of a distance, and begun to inform the debate so that, as we return to this, which I think we will do for a number of reasons, whether it is in regulated industries or intellectual property matters or standards matters. I can see this as a fertile field, and helping regulators or the judiciary to work out good means for establishing a sensible pricing level would be something which would be a help.

DR MIKE WALKER: There is a significant amount of economic research to be done on FRAND from difficult angles. Carl Shapiro down California has done a load of work on it from quite a theoretical background, and LECG and David Evans have done a lot of work on it so that it happened. The problem is that what we are getting to at the moment is a load of theoretical models which are rather neat but not implementable, and so at the moment we are pushed back to working out something to be fair and reasonable on the basis of comparators, which is fine if you have comparators there, but if they do not then it is difficult. But the work is happening.

DR PHILIP MARSDEN: As we are near the close it is always good to have a view towards the future, especially since it is something where we need to move from theory to pragmatism.

One of the things we try to do with this annual Antitrust Marathon is to move together towards greater understanding, and all of us in the room here are either studying, advising, teaching or deciding on these very important issues, and Spencer and I are very grateful to you for giving your time today to create a great discussion and hopefully greater understanding. Obviously we use this to try to promote greater understanding beyond these walls, and that is why we are very grateful to Sue Solomon for being here and recording all of this for us so that we can publish it, ideally in the next issue of the ECJ which comes out in late June.

I want to thank you all again for participating. Chicago was a great discussion. I didn't get a personal best in the run, but it has been a personal best for all of us

in here; I am very grateful to the Competition Appeal Tribunal for hosting this. Thank you also to Peter Whelan, Floor Rombach and Justine Stefanelli from the British Institute for helping us out today with the editing. I hope that we are able to continue this discussion—I am hopeful that we will induce some form of response to this marathon—maybe have a response to every marathon, and we are hoping to do this every year from now on. We are looking at race venues as we speak—Dublin is in our sights; we might call that the “Antitrust Marathon with Authority” and join up with the Irish Competition Authority, but Boston, Toronto, Israel, Tokyo and other places are also in our sights, so we hope we can continue this with familiar faces and fresh faces as well.

PROFESSOR SPENCER WEBER WALLER: Thanks to you, Philip and the British Institute and the CAT for being our hosts and to all of you for being here today, wading into these deep waters and hopefully some clarity will come both within and between our jurisdictions.

DR PHILIP MARSDEN: A final thanks to Adam Scott, who I understand usually sits in the Chair in this room during deliberations and has conceded that spot to allow us to do our best, and I hope we did not disappoint.

ADAM SCOTT: It has been a pleasure for the CAT having you here. I am sorry that colleagues had to go back to work to keep up the supply of judgments! It has been a delight to see you here in this capacity, and I sat here thinking to myself in the years’ ahead how many of you will be back here either as advocates or as witnesses or, indeed, as members—who knows? So very best wishes from us to you in your various endeavours, and thank you to you both for co-organising us and best wishes for your running at the weekend.

DR PHILIP MARSDEN: Thank you very much.