



# EUI Working Papers

LAW 2007/32

Parallels and Differences in the Attitudes towards  
Single-Firm Conduct: What are the Reasons?  
The History, Interpretation and Underlying Principles  
of Sec. 2 Sherman Act and Art. 82 EC

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ISSN 1725-6739

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Printed in Italy  
European University Institute  
Badia Fiesolana  
I – 50014 San Domenico di Fiesole (FI)  
Italy

<http://www.eui.eu/>  
<http://cadmus.eui.eu/>

## **Abstract**

In the US and in the EU, the antitrust rules on single-firm conduct are currently under review. Antitrust authorities on both sides of the Atlantic are reconsidering the tests to be applied in order to distinguish between lawful competition on the merits and exclusionary conduct. In the transatlantic comparison that accompanies the review, it has been observed that in the US, the tests for identifying anti-competitive single-firm conduct under Sec. 2 Sherman Act are frequently more narrowly construed than the tests applied in the EU under Art. 82 EC. A standard explanation for the divergence is an in-built regulatory tendency of EU competition law which is frequently ascribed to German ordoliberal influence – a theory supposedly antagonistic to sound economic analysis. This paper challenges this view. Tracing the history of Art. 82 EC and comparing US and EU competition law attitudes towards exploitative abuses, predatory prices and refusals to deal, it argues that transatlantic differences are sometimes less pronounced than is claimed, and may be explained by valid economic and normative reasons where they exist. Along the way, the paper attempts to clarify the frequently misinterpreted concept of ordoliberalism.

## **Keywords**

Sec. 2 Sherman Act – Art. 82 EC – Ordoliberalism – Predatory pricing – Exploitative abuses – Refusal to deal – Chicago School – Abuse of dominant position – monopolization – Single-firm conduct



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**2007 Competition Workshop**

**I. Introduction**

European competition lawyers habitually look across the Atlantic for inspiration and guidance when engaging in policy debates and reforms. As far as rules regarding market power are concerned, this look reveals substantial divergence. In the US, tests for identifying anti-competitive single-firm conduct under Sec. 2 Sherman Act are frequently more narrowly construed than the tests applied in the EU under Art. 82 EC. As far as the enforcement activity of the relevant public enforcement agencies is concerned, cases on anti-competitive single-firm conduct are relatively rare both in the US and in the EU, but nonetheless European agencies appear to be substantially more active than its American counterparts.<sup>1</sup>

These differences seem to indicate some fundamental divergence in attitude, the source of which is unclear. There is, however, a suspicion of a certain backwardness of EU competition law in the air: is EU law repeating the early mistakes of US antitrust law to protect competitors instead of competition? Are the somewhat mysterious theories of ordoliberalism to blame? Is EU competition law too formalistic and slow in receiving insights from modern economic theory?

The scope of divergence between US and EU law and the underlying reasons have been explored repeatedly during the 50 years of coexistence of the two regimes. In a monograph published in 1970 – i.e. at a time when no Art. 82-case had yet been decided by the ECJ – *Joliet* compared wording and possible meaning of Sec. 2 Sherman Act and Art. 82 EC and argued that Art. 82 EC was restricted to the pursuit of exploitative

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<sup>1</sup> Sec. 2 Sherman Act claims are more common in private antitrust litigation in the US.

abuses.<sup>2</sup> He explicitly rejected the findings of a similar comparative study by *Ernst-Joachim Mestmäcker* – an author affiliated with the ordoliberal school – who had argued that Art. 82 EC, like Sec. 2 Sherman Act, was primarily directed against dominant firms’ further restrictions of residual competition.<sup>3</sup> In 1986, and based on the first important ECJ’s decisions applying Art. 82 which had clearly established its applicability to exclusionary abuses, *Eleanor Fox* compared Art. 82 EC and Sec. 2 Sherman Act conceptually and found a certain bias of EU competition law to protect the interests of those who deal with dominant firms, rather than protecting the freedom of action of dominant firms.<sup>4</sup> *Giuliano Amato* identified the US antitrust law’s requirement that consumer welfare must be reduced in order to find an abuse as one of the main differences in comparison to EU competition law which imposes a “special responsibility” on firms in dominant positions to protect existing small competitors.<sup>5</sup> More recent studies frequently focus on specific categories of exclusionary conduct, like refusals to deal<sup>6</sup> and predatory pricing.<sup>7</sup> From a quick survey of this more recent literature, a relatively standard story of the essence of the transatlantic divergence and its reasons unfolds. According to this standard story which pervades current scholarly writing on Art. 82 EC the interpretation of Sec. 2 Sherman Act – initially influenced by political goals, strong popular hostility towards bigness as such and by a desire to protect small and medium businesses, of which the Robinson-Patman Act is evidence – has been revolutionized, and brought into line with economic theory, under the influence of Chicago School scholarship.<sup>8</sup> Art. 82 EC – having repeated mistakes made in “old” Sec. 2-jurisprudence in some respects, and having committed idiosyncratic mistakes in others, has yet to take that step.<sup>9</sup> Like “old” Sec. 2 Sherman Act jurisprudence, the ECJ has allegedly interpreted Art. 82 so as to “protect competitors,

<sup>2</sup> *René Joliet*, *Monopolization and Abuse of Dominant Position. A Comparative Study of the American and European Approaches to the Control of Economic Power*, Liège / La Haye 1970, p. 131.

<sup>3</sup> See *id.*, at 248 et seq.; and *Mestmäcker*, *Unternehmenszusammenschlüsse nach Artikel 86 des EWG-Vertrages*, in: von Caemmerer / Schlochauer/ Steindorff (eds.), *Festschrift für Walter Hallstein*, 1966, pp. 322 et. seq.

<sup>4</sup> *Eleanor M. Fox*, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 *Notre Dame Law* (1986) 981, at 1017-1018.

<sup>5</sup> *Giuliano Amato*, *Antitrust and the Bounds of Power*, 1997, p. 70-71.

<sup>6</sup> See, for example, *Eleanor Fox*, *Monopolization, Abuse of Dominance, and the Indeterminacy of Economics. The US/EU Divide*, 2006 *Utah L. Rev.* 799, at 804 et seq.; *Christophe Hume / Cyril Ritter*, *Refusal to Deal*, College of Europe Working Paper, 6 July 2005; *Stratakis*, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, *ECLR* 2006, 434 et seq.

<sup>7</sup> See, for example, *William J. Kolasky*, *What is Competition? A Comparison of U.S. and EU Perspectives*, 49 *Antitrust Bull.* 29 (2004), at 46 et seq.; *Cyril Ritter*, *Does the Law of Predatory Pricing and Cross-Subsidisation Need a Radical Rethink?*, *World Comp* 27(4) (2004), 613 et seq.; *Brian A. Facey / Roger Ware*, *Predatory Pricing in Canada, the United States and Europe: Crouching Tiger or Hidden Dragon?*, *World Comp.* 26(4) (2003), 625 et seq. See also for a general comparative study: *Reza Dibadj*, *Art. 82: Gestalt, Myths, Questions*, Pre-Publication Draft, to be published in *Santa Clara Computer & High Tech Journal* 2007.

<sup>8</sup> There is broad recognition that the modern „Harvard School“ has likewise influenced the development of US antitrust law – see *William E. Kovacic*, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *Colum. Bus. L. Rev.* 1 et. seq.

<sup>9</sup> For the proposition that the interpretation of Art. 82 EC is out of line with economic theory see, *inter alia*, *John Temple Lang / Robert O’Donoghue*, *Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC*, 26 *Fordham Int’l L.J.* 84, at 84 and 85.



not competition”.<sup>10</sup> Also, it has allegedly pursued fairness or equity goals instead of efficiency goals.<sup>11</sup> In other respects, Art. 82 case law allegedly displays are allegedly “typically European” deficiencies, namely a regulatory or interventionist bias.<sup>12</sup> The coverage of exploitative abuses and the European approach towards refusals to deal are frequently cited as evidence.<sup>13</sup>

As to the underlying reasons for the aberrations of European competition law, different explanations are given. The regulatory tendencies of Art. 82 are frequently traced back to its wording: Instead of adopting a prohibition of monopolization analogous to Sec. 2 Sherman Act, the drafters of the EC Treaty opted for a mere prohibition of abuse of dominance, and thus generally approved of dominance, but established a regime controlling its exercise.<sup>14</sup> There is also a notion that Europe continues to be captivated by a deeply-rooted pro-regulatory philosophy which underestimates the ability of markets to self-correct, puts excessive trust in the ability of competition law enforcement institutions to correct market failures, and is concerned more with avoiding “false negatives” than with “false positives”. Another reason given for the Art. 82-fallacies is German ordoliberal influence<sup>15</sup> – “an approach that has ignored the need for sound economic analysis”<sup>16</sup> and is sometimes also associated with a regulatory attitude towards competition law.<sup>17</sup> The “economic freedom” paradigm, rightly attributed to

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<sup>10</sup> *Richard Whish*, *Competition Law*, 5<sup>th</sup> ed. 2003, Chap. 1, 2(C), pp. 19-20; *Ian S. Forrester*, *Article 82: Remedies in Search of Theories?*, 28 *Fordham Int'l L.J.* 919, at 920; *Stratakis*, *ECLR* 2006, 434; *Rousseva*, *Modernizing by Eradication: How the Commission's New Approach to Article 81 EC Dispenses with the Need to Apply Article 82 EC to Vertical Restraints*, (2005) 42 *CMLRev.* 587, 592; *Sinclair*, *Abuse of Dominance at a Crossroads – Potential Effect, Object and Appreciability under Article 82*, *ECLR* 2004, 491, 494 et. al.

<sup>11</sup> See, *inter alia*, *Ian S. Forrester*, *Article 82: Remedies in Search of Theories?*, 28 *Fordham Int'l L.J.* 919; *Michal Gal*, *Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?*, 49 *Antitrust Bulletin* (2004) 343, at 363 et seq.

<sup>12</sup> See, for example, *Fox*, 61 *Notre Dame Law* 981, 983 (1986); *Keith N. Hylton*, *Section 2 and Article 82: A Comparison of American and European Approaches to Monopolization Law*, Boston University School of Law Working Paper Series, Working Paper No. 06-11, p. 2.

<sup>13</sup> See, for example, *Michal Gal*, *Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?*, 49 *Antitrust Bulletin* (2004) 343, at 346 (with regard to exploitative abuses).

<sup>14</sup> For far-reaching claims regarding the practical relevance of the difference in language between Art. 82 and Sec. 2 Sherman Act see, *inter alia*, *Joliet*, *Monopolization and Abuse of Dominant Position*, 1970, p. 9, p. 11-12.

<sup>15</sup> *Richard Whish*, *Competition Law*, 5<sup>th</sup> ed. 2003, pp. 19-20; *James S. Venit*, *Article 82: The Last Frontier – Fighting Wire with Fire?*, 28 *Fordham Int'l L.J.* 1157; *Alexandros Stratakis*, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine*, *ECLR* 2006, 434. For the proposition that a special concern with “fair competition” is a characteristic of German ordoliberalism see, for example, *Pinar Akman*, *Searching for the Long-Lost Soul of Art. 82*, Working Paper 2005, p. 20-21.

<sup>16</sup> *James S. Venit*, *Article 82: The Last Frontier – Fighting Wire with Fire?*, 28 *Fordham Int'l L.J.* 1157 (2005), at 1158. See also at 1163: “It is clear from the foregoing that the basic tenets of ordoliberal doctrine do not cite to, nor rely on, any empirical economic evidence or micro-economic theory. Instead, they appear to be based on a philosophy of political or social economy. Nor does ordoliberalism embrace the twin goals of consumer welfare and efficiency that are widely accepted as the prevailing competition law standards”.

<sup>17</sup> Frequently with reference to *David J. Gerber*, *Law and Competition in Twentieth Century Europe. Protecting Prometheus*, 1998, p. 252, where Gerber describes the concept of “as if”-competition – a

ordoliberal theory, is found to have led European competition law away from the goals of consumer welfare and efficiency.<sup>18</sup> The same is said about EU law's "obsession" with the market integration goal.

This paper strives to find out whether this story describes the different attitudes towards rules regarding market power and the underlying reasons adequately. The interest in capturing the "true" roots of divergence is not merely an academic one. The understanding of the reasons of divergence informs the debate on the reform of Art. 82. The perceived need to bring Art. 82 "in line with sound economics", to introduce a "more economic" or an "effects-based" approach,<sup>19</sup> as well as the widespread perception that Art. 82 is in need of a reconceptualization similar to the one that Chicago School in the 1970s and 1980s introduced into US antitrust law are based on the understanding that the current divergence between Art. 82-jurisprudence and Sec. 2 Sherman Act is due to the use of old-fashioned competition theory in the EU. Implicit is the suggestion that a rational competition policy can only be achieved once the "economic freedom paradigm" is replaced with the consumer welfare goal.

Before advocating such far-reaching steps, it appears opportune to ascertain the principles that have guided Art. 82-jurisprudence so far, their legal anchorage, their factual assumptions and the economic thinking they reflect.

In order to achieve such understanding, the paper shall proceed in two steps. A first part of the paper analyzes the provisions in a historical perspective (II). A second part of the paper deals with the present time interpretation of Art. 82 EC and Sec. 2 Sherman Act. It shall compare some of the doctrines in which the two jurisdictions diverge in an attempt to gain insights into the reasons for the different attitudes (III). The last part summarizes the findings and draws some conclusions which may be relevant in the current reform debate in the EU (IV).

## **II. Sec. 2 Sherman Act and Art. 82 in historical perspective – intellectual roots and shifts**

The history of Sec. 2 Sherman Act is marked by changing political attitudes towards market power and accordant shifts in the interpretation of Sec. 2. In a radical reaction towards an antitrust jurisprudence that had become dominated by political concerns to maintain a market structure in which small and medium enterprises could survive, and had thus distanced itself from protecting the functioning of competition according to economic principles, Chicago School scholarship led to a revamp of Sec. 2 Sherman

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concept which some members of the ordoliberal school have defended, but which has later been overwhelmingly rejected even by those associated with the ordoliberal school – see below.

<sup>18</sup> *James S. Venit*, Article 82: The Last Frontier – Fighting Wire with Fire?, 28 *Fordham Int'l L.J.* 1157 (2005), at 1163

<sup>19</sup> See *Nellie Kroes*, Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of Art. 82, Speech at the Fordham Corporate Law Institute, 23 Sept. 2005.

Act doctrine and jurisprudence, completely oriented towards consumer welfare and efficiency.

The interpretation of Art. 82 EC has hitherto not seen equally distinctive shifts. Different political attitudes towards market power were present at the drafting stage; the final wording of Art. 82 however clearly reflected the abuse theory. It foreclosed moves into the direction of a “no-fault” prohibition of monopolization along *Alcoa*-lines. The ECJ’s interpretation of Art. 82 EC has, from the early judgments on, been driven not by anti-bigness concerns, nor by “pure” efficiency concerns, but by its function within the broader system of the EC-Treaty as articulated in Art. 3(1)(g):<sup>20</sup> Art. 82 EC is one of the pillars of a “system ensuring that competition in the internal market is not distorted”, and from which efficiency, consumer welfare and economic progress is expected to result. Hence, it has been interpreted with a view to the market integration goal and the idea to give effectiveness to the fundamental freedoms against the exercise of private power to preclude market access or to eliminate competitors. Art. 82 EC has been, and continues to be, indissolubly intertwined with the EC’s internal market project – a feature that distinguishes it from Sec. 2 Sherman Act.

The fact that the evolution of Art. 82-jurisprudence has, until recently, been comparatively consistent as to its fundamental orientations is not to say that there are no normative uncertainties. Developing an adequate test for distinguishing between pro- and anticompetitive conduct of dominant firms is a particularly difficult task,<sup>21</sup> and EU law and US law share the same uncertainties in this respect.

The evolution of the two provisions cannot be traced in detail here. A short comparative look at antitrust history in the US and in the EU is necessary, however, for an understanding of the different rules and attitudes. The history of Sec. 2 Sherman Act and its interpretation is well-researched<sup>22</sup> and shall be summarized only briefly here. The history of Art. 82 EC-Treaty, on the other hand, deserves a closer look. The drafting history of the EC-Treaty, at which this paper shall look first, is, strictly speaking, not relevant. The signing of the Treaty of Rome and the establishment of the EC as a supranational entity was accompanied by a deliberate decision of the Member States to commit to a functional interpretation, and not to revert to “original intent”. The EC should be developed dynamically with a view to the implementation of its own goals, and not with a view to the positions taken by the Member States during the negotiations. In order to impede an interpretation based on “original intent”, the official

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<sup>20</sup> *Europemballage and Continental Can v. Commission*, Case C-6/72 [1973] ECR 215, para. 23. For the importance of this functional interpretation see *Thomas Eilmansberger*, How to distinguish good from bad competition under Art. 82 EC: In search of clearer and more coherent standards for anti-competitive abuses, 42 CMLRev. 2005, 129, 132.

<sup>21</sup> See *Evans / Padilla*, Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach, 72 U. Chi. L. Rev. 73: “... the welfare effects of unilateral practices are inherently difficult to assess”. Also: *Antitrust Modernization Commission*, Report and Recommendations, April 2007, p. 81. For the search of a test in the US see, *inter alia*, *Elhauge*, Defining better monopolization standards, (2003) Stanford L. Rev. 254 et. seq. For a recent critical appraisal of EU law see, *inter alia*, *Eilmansberger*, CMLRev. 2005, 129 et. seq.

<sup>22</sup> See, for example, *Rudolph J.R. Peritz*, Competition Policy in America. History, Rhetoric, Law, 1996. For the early US antitrust history see also: *Hans Thorelli*, The Federal Antitrust Policy: Origination of an American Tradition, 1954.

records of the drafting process were not published.<sup>23</sup> Faithful to this fundamental decision, the ECJ has never referred to the drafting history in interpreting the EC-Treaty. Nevertheless, a look at the drafting history is interesting with a view to the frequent claims being made about the fairness concerns, the regulatory tendencies, and the idea to protect competitors instead of competition allegedly enshrined in Art. 82. Legally more relevant, and also more telling with a view to the attitudes that underlie the rules on market power today, is however the interpretation of Art. 82 EC by the ECJ during the formative years of EU competition law.

### ***1. Sec. 2 Sherman Act in historical perspective***

Sec. 2 Sherman Act prohibits monopolization and attempted monopolization, i.e. acts that change or entrench the structure of the market in a way that is undesirable from a competition law point of view. No attempt is made to control the mere exercise of power vis-à-vis consumers, i.e. to address exploitative abuses.

The structural focus of Sec. 2 Sherman Act notwithstanding, Sec. 2 Sherman Act does not prohibit the existence of monopolies per se. Rather it prohibits certain types of conduct that create or threaten to create monopoly. The early history of Sec. 2 Sherman Act jurisprudence revolves to a significant extent around the different meaning and weight given to the structural and the conduct element at different times.<sup>24</sup>

As has frequently been recounted, the enactment of the Sherman Act was motivated by the economic conditions and sentiments of the times.<sup>25</sup> In the words of *Chief Justice White* in *Standard Oil*, this were:

“the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that this power had been and would be exerted to oppress individuals and injure the public”.<sup>26</sup>

The accumulation of wealth in the hands of a few was perceived as a threat not only to the economic order, but also to democracy. With both the political dimension and the

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<sup>23</sup> *David J. Gerber, Law and Competition in Twentieth Century Europe*, 1998, p. 343.

<sup>24</sup> In *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953), *Judge Wyzanski* distinguished 3 different approaches towards Sec. 2 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 Sec. 2, even if there is no showing of any exclusionary conduct. But the defendant escapes liability if it can show that he owes his monopoly power to legitimate causes (superior skill, business acumen etc.). The Chicago School added a fourth approach, based on the assumption that ‘exclusionary conduct’ is normally not viable.

<sup>25</sup> See, e.g., *Lawrence A. Sullivan / Warren S. Grimes, The Law of Antitrust: An Integrated Handbook*, 2<sup>nd</sup> ed. 2006, pp. 4-7.

<sup>26</sup> *Standard Oil of New Jersey v. United States*, 221 U.S. 1, 50 (1911).

economic implications of antitrust law in mind, courts struggled with the interpretation of Sec. 2, oscillating between more structure- and more conduct-oriented approaches (“abuse theories”). Bemoaning the uncertainties surrounding Sec. 2, *Levi* wrote in 1947: “We are not sure whether we are against monopolies or the abuse of monopoly ... We do not know whether we are opposed to size or merely to unreasonable high prices”.<sup>27</sup>

The famous *Alcoa* case marks an apex of the structuralist approach in the interpretation of Sec. 2 Sherman Act. In this case, the court found an offence mainly based on the fact that Alcoa held, and had managed to maintain, an overwhelming market share. Although the *Alcoa* decision stopped short of establishing a per se-prohibition of monopoly power, it did not require much in terms of exclusionary conduct or of specific intent to monopolize.<sup>28</sup> The simple pursuit of normal business practices without predatory tendency but with the effect to defend the dominant firm’s superior market position could apparently suffice for finding a violation of Sec. 2 Sherman Act. Based on the assumption that the Sherman Act’s aim was “to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other”,<sup>29</sup> and that it would be absurd to condemn price fixing contracts in Sec. 1 Sherman Act, but not to extend this condemnation to monopolies who fix a price necessarily as they sell, Judge Learned Hand essentially held that the active seeking of monopoly power, even if by means of perfectly legitimate business conduct, could be qualified as illegal monopolization under Sec. 2 Sherman Act.<sup>30</sup>

This far-reaching interpretation of Sec. 2 Sherman Act was critically discussed in the US antitrust community. According to a widespread opinion, it took the structural elements of Sec. 2 Sherman Act too far. A more intense inquiry into intent and into the competitive legitimacy of the methods employed to acquire or maintain monopoly

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<sup>27</sup> *Levi*, *The Antitrust Laws and Monopoly*, 1947 U. Chi. L. Rev. 153 (1947).

<sup>28</sup> *United States v. Aluminium Co. of America*, 148 F.2d 416, at 432 (2d Cir. 1945): “[I]n order to fall within Section 2 the monopolist must have both the power to monopolize, and the intent to monopolize”. But to require a more specific intent would cripple the Act “for no monopolist is unconscious of what he is doing”.

<sup>29</sup> *United States v. Aluminium Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945)

<sup>30</sup> *Judge Learned Hand* does stress that, “[s]ince the [Sherman] Act makes ‘monopolization’ a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress” to include instances in which a firm has become a monopolist by force of accident. The decision also states that “the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor having been urged to compete, must not be turned upon when he wins”. On the other hand, *Alcoa* was found to have violated Sec. 2 Sherman Act on the following grounds: “It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret ‘exclusion’ as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not ‘exclusionary’. So to limit it would in our judgment emasculate the Act”. It therefore seemed that a defence that monopoly was “thrust upon” a firm would be limited to cases where the achievement of power was not deliberate, but due to circumstances outside the free choice of the firm.

should be required to establish illegal monopolization.<sup>31</sup> The debate about the necessity to distinguish legitimate and illegal conduct, and thus to flesh out the features of illicit exclusionary conduct, intensified.

When Chicago School scholars started their comprehensive reconceptualisation of US antitrust law, the *Alcoa*-position towards Sec. 2 Sherman Act was thus already on a slow retreat, but still good law. It became a favorite target of attack for the Chicago School. According to Robert H. Bork, *Alcoa* stood for the proposition that “monopoly ... is illegal unless the monopolist could not avoid it. Superior efficiency is not only no excuse, it is an ‘abuse’”.<sup>32</sup> Indeed, with *Alcoa*, Sec. 2 Sherman Act jurisprudence appeared to have reached a point that left firms with monopoly power little room to compete. This, as well as the Robinson-Patman-Act that made protecting competitors an explicit goal of the law,<sup>33</sup> were obvious targets of critique. The Chicago School’s reform project had more fundamental ambitions, however: consumer welfare was to be established as the only ultimate goal of antitrust law,<sup>34</sup> and price theory as the method based on which to predict consumer welfare effects.<sup>35</sup> Applied to unilateral conduct, this translated into a highly permissive approach:<sup>36</sup> firstly, most unilateral practices would, so Chicago School scholars, typically create efficiencies. Secondly, firms with monopoly power would lack incentives to engage in welfare-reducing practices. Most unilateral practices should therefore be lawful per se.

Although Chicago School scholarship was never adopted into antitrust doctrines wholesale,<sup>37</sup> it did gain significant influence in the courts, particularly during the 1970s and 1980s. The empirical claim that, due to a lack of rational incentives or of ability, instances of (successful) exclusionary conduct will be rare have led to the development of rather narrow tests for finding an infringement of Sec. 2 Sherman Act. No less importantly, the claim that consumer welfare is the only, or at least the primary goal of antitrust law and should directly guide the legal appraisal of single-firm conduct has had strong resonance in the academic community as well as in the courts.

During the last decade or so, Chicago School thinking has lost some of its influence. “Post-Chicago” scholarship, while subscribing to efficiency as the ultimate objective of antitrust law, has started to challenge the overly simplifying assumptions on which

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<sup>31</sup> See, for example, *United States v. United Shoe Machinery Co.*, 110 F. Supp. 295, 342 (D.C. Mass. 1953)

<sup>32</sup> *Robert H. Bork, The Antitrust Paradox*, p. 170.

<sup>33</sup> For a critical appraisal of the Robinson-Patman Act see *Mestmäcker, Der verwaltete Wettbewerb*, 1984, pp. 45-47.

<sup>34</sup> For the broad agreement in today’s US antitrust scholarship that consumer welfare is antitrust’s ultimate purpose see: *Hovenkamp, The Antitrust Enterprise*, 2005, p. 31.

<sup>35</sup> See *Richard A. Posner, The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925, at 928.

<sup>36</sup> See *Richard A. Posner, The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925, at 928, summarizing the conclusions of Chicago School scholarship on unilateral conduct as follows: “firms cannot in general obtain or enhance monopoly power by unilateral action – unless, of course, they are irrationally willing to trade profits for position. Consequently, the focus of antitrust laws should not be on unilateral action ...”.

<sup>37</sup> See *Hovenkamp, The Antitrust Enterprise*, 2005, p. 37; *William E. Kovacic, The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 1 et seq, both emphasizing the continuing influence of Harvard School scholarship.

Chicago School theory was based<sup>38</sup> and has defined conditions under which unilateral conduct can well have anticompetitive effects.<sup>39</sup> The opportunities and incentives for strategic behaviour and exclusionary conduct, largely negated by traditional Chicago School scholarship, are generally acknowledged today.<sup>40</sup> This goes along with a widespread recognition that many of the tests currently applied under Sec. 2 to identify illegal monopolization tend to be underinclusive conceptually<sup>41</sup> and can create a significant number of “false negatives”. Nonetheless, these tests continue to enjoy widespread support by leading scholars of various schools, including the modern Harvard School. With a view to certain features of the US system of private antitrust enforcement, *inter alia* treble damages and the involvement of potentially error-prone juries,<sup>42</sup> they argue that broader and less underinclusive tests could create excessive incentives to sue.

## **2. The history of Art. 82 EC-Treaty**

### *a) The drafting history*

A confrontation with the diversity of ideas and projections, the utter uncertainty about the future role of competition and competition rules in the EU, the “veil of ignorance” under which the negotiations took place is fascinating for everyone used to deal with today’s so well-established system of rules. After plans for a political integration of Europe had failed, the creation of a common market was at the centre of the European project: it was to foster economic growth and stability, raise living standards and most of all to ensure harmonious and peaceful relations between the Member States.<sup>43</sup> From the outset, the negotiating parties agreed that the common market was to be based on free movement rules to prevent the Member States from impeding or distorting cross-border trade; but would need to be backed up by competition rules so that the state barriers to trade would not be replaced by private restraints.

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<sup>38</sup> For a summary of the criticism see *Hovenkamp*, *The Antitrust Enterprise*, 2005, pp. 34-35.

<sup>39</sup> See, for example, *Thomas G. Krattenmaker / Steven C. Salop*, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 *Yale L.J.* 209 (1986); *Jonathan B. Baker*, *Recent Developments in Economics that Challenge Chicago School Views*, 58 *Antitrust L.J.* 645 (1989). For an overview see: *Hovenkamp*, *Antitrust Policy after Chicago*, 84 *Mich. L. Rev.* 213 (1985); *Hovenkamp*, *Post-Chicago Antitrust: A Review and Critique*, 2001 *Colum. Bus. L. Rev.* 257.

<sup>40</sup> See *Richard Posner*, *Antitrust Law*, 2<sup>nd</sup> ed. 2001, p. 194 et. al.

<sup>41</sup> See, for example, *Hovenkamp*, *The Antitrust Enterprise*, 2005, pp. 45 et seq.; *William E. Kovacic*, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *Colum. Bus. L. Rev.* 1, at 53, 63-64 and 74 et seq.

<sup>42</sup> For a discussion see *William E. Kovacic*, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *Colum. Bus. L. Rev.* 1, at 51 et seq.; *Hovenkamp*, *The Antitrust Enterprise*, 2005, p. 47.

<sup>43</sup> See Intergovernmental Committee of the Messina Conference, Report by the Heads of Delegations to the Foreign Ministers (*Spaak Report*) 21<sup>st</sup> April 1956, Titel II Chap. 1 – Competition Rules, p. 57

This idea was fully developed already in the so-called *Spaak Report* of 1956.<sup>44</sup> It addressed both the problem of cartels and of positions of market power in a section entitled “monopolies”. The common market, so the Report, would create opportunities for companies to grow and realize economies of scale without endangering competition.<sup>45</sup> For the potential gains to be realized, the future Treaty would, however, need to contain provisions ensuring that existing monopolies or abusive practices would not frustrate the common market goal.<sup>46</sup> While the Spaak-Report did not propose an exact formulation of the future competition rules, it did anticipate much of their content and structure.<sup>47</sup> The competition rules were to be directly applicable in the Member States, and would enjoy primacy over national law. They should be interpreted by the Commission and be further developed by a European court over time.<sup>48</sup>

The Spaak-Report by no means summarized a consensus, but it was the basis on which the future Member States entered into the negotiations of the Treaty of Rome.<sup>49</sup> For the drafting of the competition rules it was an important reference point<sup>50</sup> – eventually more important than the ECSC Treaty’s competition rules.<sup>51</sup> The design of the Treaty of Rome’s competition rules was initially controversial among the negotiating parties,<sup>52</sup> as was the economic order of the future European Community in general. The German and the French position marked the two poles of the debate. The German delegation envisioned a common market based on principles constitutive for a market-economy.<sup>53</sup> The French delegation, while subscribing to the idea of a market economy of some sort,

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<sup>44</sup> See *Spaak Report*, Titel II Chap. 1 b) – Monopolies, pp. 59-60. The Spaak-Report was prepared by Paul Henri Spaak (presiding), Ophuels (Germany), Felix Gaillard (France), Benvenuti (Italy), Baron Snoy (Belgium), Lindhorst Homann (Netherlands) and Lambert Schaus (Luxemburg), i.e. the heads of the national delegations to the Messina conference, who were, however, in preparing this report, not bound by instructions of the Member States. A draft of the report was prepared by Pierre Uri and Hans von der Groeben. For an insider’s perspective on the drafting of the Spaak-Report see *Hans von der Groeben, Deutschland und Europa in einem unruhigen Jahrhundert*, 1995, pp. 269 et seq., and particularly pp. 276-279.

<sup>45</sup> See *Spaak Report*, p. 8.

<sup>46</sup> *Id.*, p. 59-60

<sup>47</sup> Apart from rules on cartels and undertakings with market power, the Spaak-Report also envisaged a system of merger control – see *Spaak-Report*, p. 60.

<sup>48</sup> *Id.*, p. 60.

<sup>49</sup> See *Hans von der Groeben, Deutschland und Europa in einem unruhigen Jahrhundert*, p. 279.

<sup>50</sup> For the relevance of the Spaak Report for the drafting of the EC Treaty’s competition rules see: Dokument 53, Vermerk über die Sitzung der Arbeitsgruppe „Gemeinsamer Markt“ in Brüssel vom 3.9.-5.9.1956, 7.9.1956, in: *Schulze/Hoeren* (eds.), *Dokumente zum Europäischen Recht*, Band 3: Kartellrecht (bis 1957) pp. 163-164

<sup>51</sup> They encompassed a prohibition of cartels, an abuse control for undertakings with market power, and a system of merger control.

<sup>52</sup> For a report on the negotiations see *Hans von der Groeben, Deutschland und Europa in einem unruhigen Jahrhundert*, pp. 280-289.

<sup>53</sup> A number of members of the German delegation were to some extent affiliated with the ordoliberal school. Hans von der Groeben was involved in the drafting of the Spaak Report. He also presided the Working Group “Common Market” during the negotiations of the Treaty of Rome itself. Müller-Armack – secretary of state in the cabinet of Ludwig Erhardt and author of the term “social market economy” – was a member of the German delegation for negotiating the Common Market rules.



favoured a more dirigistic approach with vaster potentials for Member States' intervention and state planning.<sup>54</sup>

These positions were reflected in the delegations' propositions for how to frame and enforce the Treaty's competition rules. The French proposal<sup>55</sup> started out with a broad and non-specific prohibition of discrimination: all firms should be required to treat competing buyers or sellers equally both with regard to price and with regard to conditions of trade.<sup>56</sup> Secondly, it featured a general prohibition of cartels, monopolies, and abusive practices directed towards, or potentially resulting in an impediment to competition. Examples listed included price fixing, the restriction or control of production, technological development or investment, the partitioning of markets or the enabling of a total or partial domination of markets for certain products by a firm or a group of firms. No less general than the prohibition was the exception foreseen: it took the form of a broad efficiency defence. Practices should be exempted from the prohibition where they contributed to the improvement of production or distribution or to fostering technological and economic progress. These rules were not meant to be directly applicable, but should be implemented by the Member States. Where trade between two or more Member States was affected, Member States could request the EC Commission to engage in a consultation procedure. Ultimately, the Council would decide. State monopolies and "services publics" should not be subject to these general rules, but to special rules which the proposal didn't specify.<sup>57</sup> A Belgian-Dutch proposal was similar to the French proposal in that it treated anti-competitive agreements and dominant positions under one single rule, but it suggested to subject both to an abuse control, no more. On the other hand, the EC Commission – and not the Member States – should be in charge of this control.<sup>58</sup> The German proposal differed significantly: it contained separate rules for anti-competitive agreements and market dominance. Cartel agreements should generally be prohibited, subject to a narrow exception. With regard to monopolies and oligopolies, the German delegation proposed to prohibit merely the abuse of dominance. This prohibition should be applicable to private and state undertakings and state monopolies alike.<sup>59</sup> No rules on the enforcement of the EC

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<sup>54</sup> See *Hanns Jürgen Küsters*, *Die Gründung der Europäischen Wirtschaftsgemeinschaft*, 1982, p. 364 with further references

<sup>55</sup> See Document 51 in *Schulze/Hoeren* (eds.), *Dokumente zum Europäischen Recht*, Band 3: Kartellrecht (bis 1957), Vorschlag der französischen Delegation, 4.9.1956, p. 158.

<sup>56</sup> See: Dokument 51, in: *Schulze/Hoeren*, *Dokumente zum Europäischen Recht*, Band 3: Kartellrecht (bis 1957), p. 157, Article X: „Innerhalb des gemeinsamen Marktes sind verboten: Preiserhöhungen und –senkungen, sowie Änderungen von Verkaufsbedingungen für vergleichbare Geschäfte gegenüber Käufern oder Verkäufern, die miteinander im Wettbewerb stehen.“ The German delegation proposed to abandon this general non-discrimination principle and to include a more limited prohibition into the rules of abuse of dominant positions. They should, however, be restricted to cross-border trade. See Dokument 53, in: *Schulze/Hoeren*, *Dokumente zum Europäischen Recht*, Band 3: Kartellrecht (bis 1957), at p. 163.

<sup>57</sup> See Document 57, Entwurf eines Protokolls über die Sitzungen der Arbeitsgruppe vom 3.-5.9.1956 in Brüssel, 10.9.1956, in: *Schulze/Hoeren* (eds.), *Dokumente zum Europäischen Recht*, Band 3: Kartellrecht (bis 1957), at p. 172.

<sup>58</sup> See Document 59, Synoptische Darstellung der Artikelentwürfe über die Wettbewerbsregeln für Unternehmen, in: *Schulze/Hoeren* (eds.), *Dokumente zum Europäischen Recht*, Band 3: Kartellrecht (bis 1957),

<sup>59</sup> See Document 57, in: *Schulze/Hoeren* (eds.), *Dokumente zum Europäischen Recht*, Band 3: Kartellrecht (bis 1957), p. 172.

competition rules were proposed. Such rules were to be established in a separate Treaty to be concluded between the Member States within a period of 2 years. Should no agreement be reached within this time period, the EC Commission should enact an enforcement regulation with the approval of 2/3 of the Council. The controversial question of whether the Commission or the Member States should be primarily entrusted with the enforcement of the competition rules,<sup>60</sup> as well as the question of direct applicability should thus be decided at a later point of time.

The negotiations mainly revolved around the non-discrimination principle which the French delegation had proposed; around the question whether to have one single rule or separate rules for cartels and dominant firms; and around the question whether the competition rules should apply only to private undertakings or also to state undertakings and “services publics”.

The broad non-discrimination principle was highly controversial. For the French delegation, it was an essential pre-condition to the implementation of the competition rules.<sup>61</sup> This idea was a variation of a more general notion in France that the competition rules should apply only subject to the prior establishment of a “level playing-field”, i.e. subject to the condition that all “distortions” of competition, like different working conditions, wages, social burdens, tax systems etc. had previously been equalized.<sup>62</sup> This notion had already been discussed and rejected in the Spaak Report.<sup>63</sup> In the negotiations for the Treaty of Rome, the idea of a broadly construed prohibition of discrimination as part of the competition rules was most strongly opposed by the German delegation. *Müller-Armack* stressed the important function of price-discrimination in competition and warned against regulatory tendencies of the future competition rules.<sup>64</sup> Ultimately, the idea was abandoned. Instead, a general prohibition

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<sup>60</sup> The German and the French delegation generally favored a competence of the Member States for the enforcement of the competition rules. The Italian delegation favored a Community competence. See: Document 57: Entwurf eines Protokolls über die Sitzungen der Arbeitsgruppe vom 3.-5.9.1956 in Brüssel, 10.9.1956, in: *Schulze/Hoeren*, Dokumente zum Europäischen Recht, Band 3: Kartellrecht (bis 1957), p. 170 and p. 173.

<sup>61</sup> See Document 57, Entwurf eines Protokolls über die Sitzungen der Arbeitsgruppe vom 3.-5.9.1956 in Brüssel, 10.9.1956, in: *Schulze/Hoeren*, Dokumente zum Europäischen Recht, Band 3: Kartellrecht (bis 1957), at p. 171.

<sup>62</sup> For a reaction to this position see Günther, Das Kartellproblem in internationaler Beleuchtung, 19.7.1956, in: *Schulze/Hoeren*, Dokumente zum Europäischen Recht, Band 3: Kartellrecht (bis 1957), Document 50, p. 155: „Dabei wird verkannt, dass es nicht Aufgabe der Mitglieder eines Gemeinsamen Marktes sein kann, die unterschiedlichen Produktionskosten der Betriebe ganz oder auch nur zum Teil einander anzugleichen, und dass es eine Verfälschung des Zieles der Herstellung eines Gemeinsamen Marktes bedeuten würde, wenn man die Produktionskosten oder Teile von ihnen durch staatliche Maßnahmen angleichen wollte. Es soll gerade der Sinn des Gemeinsamen Marktes sein, unterschiedliche Produktionskosten von Unternehmen im Qualitäts- und Preiswettbewerb dem Verbraucher zugute kommen zu lassen“.

<sup>63</sup> *Spaak-Report*, Chapter 2 Section 1: Distortions, pp. 64-65: “Es herrscht vielfach die Auffassung, ein wirklicher Wettbewerb sei erst dann möglich, wenn die Hauptfaktoren der Gestehungskosten überall einander angenähert worden sind. Gerade auf der Grundlage gewisser Unterschiede kann sich aber ein Gleichgewicht bilden und der Handel entwickeln. Dies gilt z.B. für die Unterschiede im Lohnniveau, wenn sie Unterschieden in der Produktivität entsprechen. ...“.

<sup>64</sup> See Document 55, Darlegungen des Sprechers der deutschen Delegation zu den Entwürfen der Artikel 40-43, 8.9.1957, in: *Schulze/Hoeren*, Dokumente zum Europäischen Recht, Band 3: Kartellrecht (bis 1957), p. 167, no. 3: „Die sogen. Diskriminierung oder die unterschiedliche Preisstellung gehört zu den legalen Formen des Wettbewerbs. Würde man die unterschiedliche Behandlung von Abnehmern oder

of discrimination *on the basis of nationality* was made part of the introductory Treaty norms. This left open the question whether it would apply only to Member States or also to private firms.

A compromise was found also on the question whether competition rules should apply to private undertakings only, or also to state undertakings and “services publics”: the competition rules were formulated in a broad and general way. Art. 86(1) EC clarified that they would apply to state undertakings as well. Art. 86(2) EC, however, provided for a possible exception for “services of general economic interest” – an exception the scope of which was all but clear at the time of the signing of the Treaty of Rome.

On the last question whether to have a single, comprehensive prohibition for cartels and abuses of dominant positions with a generally applicable exception to both or rather two separate rules, the German delegation ultimately prevailed. In fact, the competition rules as ultimately drafted, and particularly Art. 82 EC (then Art. 86 EC-Treaty), came closest to the original German proposals, although those proposals by no means survived unchanged. The German influence on the shape of the EC competition rules likely resulted from the particular importance which the German delegation attached to them – not only, and maybe not even primarily with a view to the impact they would have in shaping the future Common Market, but rather against the background of a parallel inner-German debate on a national competition law to be passed.<sup>65</sup> Throughout the negotiations, *Ludwig Erhard*, the German minister of economic affairs, was concerned that European competition rules, if they deviated too much from the German competition rules he intended to enact, would torpedo his attempt to pass an effective German competition law (GWB) against the intense opposition of the German industry. No other delegation appears to have given similar weight to the exact shape of the EC competition rules – particularly since the question of their enforcement was left open. Against the background of generally prevailing pro-competition attitude<sup>66</sup> in the Working Group for the Common Market which was entrusted with the drafting of the competition rules, the proposal ultimately presented by *Hans von der Groeben*<sup>67</sup> who presided the group was ultimately approved.

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Lieferanten verbieten, so würde damit eine Regel zur Behinderung und nicht zur Förderung des Wettbewerbs geschaffen. Auf vielen Märkten, namentlich den oligopolistisch strukturierten, ist die unterschiedliche Behandlung häufig die Vorstufe einer allgemeinen Preisänderung; sie hält auf diese Weise die Preisstellung elastisch. Das Verbot der unterschiedlichen Behandlung kommt einer staatlichen Aufforderung zur Kartellbildung sehr nahe. Zu untersagen wäre lediglich die mit der Schädigungsabsicht verbundene unterschiedliche Behandlung von Käufern oder Lieferanten durch Kartelle oder marktbeherrschende Unternehmen“.

<sup>65</sup> For the relevance of this inner-German debate for the negotiations in Brussels see Document 62 and Document 66, in: *Schulze/Hoeren* (eds.), *Dokumente zum Europäischen Recht*, Band 3: Kartellrecht (bis 1957), at p. 195 and at pp. 204-205.

<sup>66</sup> The French delegation was somewhat divided, but important members of the delegation, namely Marjolin, Donnedieu de Vabres and Deniau were generally favorable to strengthening competition as a means to increase the performance of French industry. Similarly, leading economic circles in Italy at the time favored a liberal market regime with strong competition rules at EC level and perceived herein an opportunity to create a level competitive playing field in Europe – see *Hanns Jürgen Küsters*, *Die Gründung der Europäischen Wirtschaftsgemeinschaft*, 1982, at pp. 364-366.

<sup>67</sup> The competition provisions as they appear today in the EC-Treaty were eventually based on a draft presented by Thiesing – see Document 56, Entwurf zu den Artikeln 42, 42a-d, vorgelegt von H. Thiesing, 10.9.1957, in: *Schulze/Hoeren*, *Dokumente zum Europäischen Recht*, Band 3: Kartellrecht (bis 1957), p. 168 et. seq. The draft still contained a separate prohibition of discrimination of buyers or

There were, however, a number of points on which the German delegation did not prevail. Art. 81(3) (then: Art. 85(3) EC-Treaty) provided for much broader exceptions to the general prohibition of cartels than the German side had proposed. According to *Müller-Armack*, this turned Art. 81 into a hybrid between a prohibition principle and an abuse principle.<sup>68</sup> Also, the EC-Treaty did not contain rules on merger control – in the eyes of proponents of the ordoliberal school an important component of a full-fledged system of competition rules.

Does the German influence on the drafting of the competition rules, and particularly on Art. 82 EC, support the claim that Art. 82 EC is a creature of ordoliberal theory? In fact, the degree of congruence between Art. 82 EC and ordoliberal positions is difficult to determine. No fully developed ordoliberal position on the treatment of market dominance existed at the time. Against the background of a heavily cartelized German industry, the main concern of German ordoliberals had been on how to deal with cartels. Some thoughts on the problem of dominance existed, of course. In the context of the German competition law debate, *Walter Eucken* had proposed that, wherever possible, monopolies should be prohibited per se.<sup>69</sup> Those monopolies that were technologically or economically unavoidable, i.e. natural monopolies, were to be placed under regulatory supervision and be required to act “as if” competition existed. This (in)famous concept of “as if”-competition, which *Eucken*,<sup>70</sup> for the narrow case of regulating infrastructure monopolies, had adopted from *Miksch*<sup>71</sup> who advocated its

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sellers which are in competition with one another based on their nationality (see Art. 42). The cartel prohibition (Art. 42a) and the prohibition of abuses of a dominant position (Art. 42b) come, however, close to final version that was finally adopted into the EC-Treaty.

<sup>68</sup> The German delegation, and in particular Müller-Armack, was of the opinion that an excessive number of exceptions had been integrated into Art. 81(3) (then: Art. 40(2) of the draft), and that this in effect led to a mixing of the “prohibition” principle and the “abuse” system. See: Document 73, in: *Schulze/Hoeren* (eds.), *Dokumente zum Europäischen Recht*, Band 3: Kartellrecht (bis 1957), at p. 228.

<sup>69</sup> *Walter Eucken*, Überlegungen zum Monopolproblem, in: *Wirtschaftsmacht und Wirtschaftsordnung*, edited by the Walter Eucken Archiv 2001, p. 79, 83. This idea was influential in the ordoliberal group during and immediately after the 2<sup>nd</sup> World War, under the impression of the significant contributions of dominant German firms to the rise of the Nazi regime and the war economy. See, for example, the “Entwurf eines Gesetzes zur Sicherung des Leistungswettbewerbs” (so-called *Josten*-draft) of 5.7.1949, in the preparation of which Franz Böhm, one of the leading ordoliberals, had participated. This draft envisaged the elimination of all positions of dominance, wherever possible, if necessary by way of breaking firms up (§ 15 of the draft). Undertakings which had achieved their dominant position by way of competition on the merits were, however, exempted from this rule – see Begründung zu § 3, p. 38 of the draft: “Auch echter Leistungswettbewerb kann für Spitzenunternehmen zu Sonderstellungen im Markt führen. Sie sind jedoch dadurch von Machtstellungen im Sinne des Gesetzes unterschieden, daß sie ihrer Natur nach nur vorübergehender Art sind und gegenüber anstürmendem Wettbewerb täglich neu erworben werden müssen. Es ist geradezu der Sinn des Leistungswettbewerbs, dem technischen Fortschritt und der Gütesteigerung zu dienen, den auf diesem Gebiet erfolgreichen Unternehmen die Möglichkeit zu einer wirtschaftlichen Besserstellung zu geben und auf diese Weise die unternehmerische Initiative anzuregen. Es entspricht daher nur dem Zweck des Gesetzes, den Wettbewerb anzuregen und den Fortschritt zu fördern, wenn Sonderstellungen dieser Art, wie sie aus Pionierleistungen, einem Leistungsvorsprung anderer Art und Liebhaberleistungen erwachsen, von den Vorschriften dieses Gesetzes ausdrücklich freigestellt werden“.

<sup>70</sup> *Walter Eucken*, *Grundsätze der Wirtschaftspolitik*, Mohr Siebeck, 7. unveränderte Aufl. 2004, p. 295: „Ziel der Monopolgesetzgebung und der Monopolaufsicht ist es, die Träger wirtschaftlicher Macht zu einem Verhalten zu veranlassen, als ob vollständige Konkurrenz bestünde. Das Verhalten der Monopolisten hat ‚wettbewerbsanalog‘ zu sein“.

<sup>71</sup> *Miksch*, *Wettbewerb als Aufgabe. Grundsätze einer Wettbewerbsordnung*, 2. Aufl. 1947, pp. 98, 99.

application on a broader scale, and which many today associate with ordoliberalism generally,<sup>72</sup> was not, however, a proposition uniformly accepted by ordoliberals. It was one of the concepts discussed in ordoliberal circles after the 2<sup>nd</sup> World War; it appeared in the “*Josten*”-draft of a future German competition law (GWB) of 1949,<sup>73</sup> but it was already abandoned in the draft for a German GWB, presented to the German Parliament by *Franz Böhm* and others in 1953.<sup>74</sup> This draft proposed to place holders of a dominant position under “supervision” (§ 10),<sup>75</sup> but, contrary to first impression, did not envision a full-fledged regulatory scheme, but rather a selective control of specific abuses of dominant positions. The draft did address exploitative abuses,<sup>76</sup> the focus was, however, clearly on preventing exclusionary abuses. Tying practices, predatory pricing, abusive discrimination and refusals to deal in essential facility settings were specifically addressed. Like the *Böhm*-draft, the official draft for a GWB presented by the government also distanced itself explicitly from the concept of “as-if” competition.<sup>77</sup> In the competition policy debate, it continued to be advocated by some for a while. Scholars associated with the ordoliberal school, namely *Ernst-Joachim Mestmäcker*, were among the most outspoken critics of the concept of “as if”-competition,<sup>78</sup> and influential in ensuring that it never became part of German competition law.

All in all, the question of how to best deal with positions of market power was generally an open one as the negotiations on the Treaty of Rome took place. No hard and fast answers, no clear role model, existed. The debate which anteceded and accompanied the drafting of Art. 82 during the negotiation of the Treaty of Rome is evidence of this general uncertainty. The negotiating parties were certainly aware of the existence of Sec. 2 Sherman Act, but a prohibition of monopolization analogous to the US model was not explicitly discussed as a potential option for the EC Treaty. The possibility of a per se prohibition of monopoly positions shone up in the Spaak Report and was – subject to broad exceptions – taken up by the French delegation; but it was unacceptable to the German delegation. The general perception in Germany was that positions of dominance could be obtained by competition on the merits, that competition for a

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<sup>72</sup> See, e.g., *David Gerber*, *Law and Competition in Twentieth Century Europe*, pp. 252-253.

<sup>73</sup> § 22 „*Josten*-Entwurf“ (“Verhalten im Markt”): “Inhaber wirtschaftlicher Macht sollen sich im Geschäftsverkehr so verhalten, wie sie sich verhalten würden, wenn sie einem wirksamen Wettbewerb ausgesetzt wären”. Note, however, that, again, those who had achieved a position of dominance by competition on the merits were exempted from this regulatory scheme.

<sup>74</sup> Antrag der Abgeordneten Dr. Böhm, Dr. Dresbach, Ruf und Genossen: Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen, BT-Drs. II/1269.

<sup>75</sup> Unlike Art. 82 EC, the draft did not entail a general prohibition of abuses of dominance, but merely placed dominant firms under the supervision of the cartel authority. The idea of a per se prohibition of dominance had been given up. Böhm and others acknowledged the important incentive function that competition for a superior market position can have. Also, the idea of breaking up dominant positions was politically unacceptable in Germany at the time, and perceived to be a continuation of „*Siegerjustiz*“ (“victor’s justice”).

<sup>76</sup> § 11 No. 2 of the draft.

<sup>77</sup> See *Mestmäcker*, *Verpflichtet § 22 GWB die Kartellbehörde, marktbeherrschenden Unternehmen ein Verhalten aufzuerlegen, als ob Wettbewerb bestünde?*, DB 1968, 1800, at p. 1804.

<sup>78</sup> See *Mestmäcker*, *Die Beurteilung von Unternehmenszusammenschlüssen nach Artikel 86 des EWG-Vertrags*, reprinted in: *Mestmäcker*, *Wirtschaft und Verfassung in der Europäischen Union*, 2. Aufl. 2006, pp. 597, at p. 607; *Mestmäcker*, *Verpflichtet § 22 GWB die Kartellbehörde, marktbeherrschenden Unternehmen ein Verhalten aufzuerlegen, als ob Wettbewerb bestünde?*, DB 1968, 1800, particularly at pp. 1803-1806.

superior market position could have important incentive effects, and that positions of dominance should therefore not be generally outlawed or dismantled. The Spaak-Report had already suggested the idea that, if firms were kept from abusing their power, the opening up of national markets would dismantle monopoly positions while at the same time allowing for firms' growth. It was probably against this background that the German proposal of a prohibition of the abuse of market dominance could gather support. A further, not outspoken reason for the German opposition to a per se prohibition of dominance may have been the political unacceptability of a competition law that would threaten to break up leading German companies.

There is no evidence in the documents regarding the negotiations that the drafters, by framing the provision as a prohibition of abuse, envisioned a regulatory scheme to be put in place. Members of the German delegation, namely *Müller-Armack*, at various occasions strongly warned against any regulatory tendencies of competition law. The prohibition of abuses simply appeared to be the only clear-cut alternative to a per se prohibition of dominance at that time. The fact that the list of examples of possible abuses entailed exploitative abuses (see Art. 82(a) EC) is no proof to the contrary. The idea to implement competition rules which would cover exploitative abuses could even appear as a "deregulatory" move. Previously, price controls had been an accepted (but utterly ineffective) instrument to fight inflation which had repeatedly hit European economies hard in the recent past, such as to threaten political and economic stability. In the period in which the EC Treaty was drafted, levels of price were still an important concern. The concept of exploitative abuses preserved an instrument of intervention, but – and this was new – linked it to the concepts of competition policy. The way in which this new concept would work in practice was neither much discussed nor clearly foreseen. The change from anti-inflationary state price controls to controlling excessive pricing policies by dominant firms in a competition law regime implied, however, a rejection of the idea of ongoing price controls. Only clear excrescences should be controlled. In its utter vagueness, the concept of exploitative abuses was apparently immediately acceptable to all delegations. No debate ensued between the more liberal delegates and those that tended more towards a planning approach. Even to the liberal, market-oriented delegates, a limited control of excessive pricing or other exploitative abuses may have appeared acceptable in a market environment in which many of the dominant firms had achieved their position of dominance with the help of governments, e.g. through government privilege and protection, as it was characteristic for the post-war period.

The fact that the examples in Art. 82 clearly cover exploitative abuses does not, however, imply that the drafters were concerned *only* with exploitative abuses. There was an awareness of the relevance of exclusionary abuses and the need to prevent the acquisition of positions of dominance by means other than competition on the merits. Again, the available documentation of the negotiations in the Common Market Working Group does not give evidence of much debate. It is obvious, however, that the examples in Art. 82 stand for both exploitative and exclusionary abuses. Even Art. 82(a), prohibiting "unfair prices", was not only directed against unfairly high prices, but at the same time against "unfairly low" prices, i.e. predatory pricing schemes. The parallel debate in Germany concerning abuses of dominant positions under German competition

law was clearly focused on exclusionary abuses<sup>79</sup> – not on exploitative abuses – a relevant observation also for shedding light on the intent of the drafters of Art. 82, given the German influence. The list of examples in Art. 82(a)-(d) was not meant to be comprehensive. Rather, the examples stand for those types of conduct which were perceived to present the most pressing problems at the initial stage of the Common Market. Especially *Müller-Armack* cautioned against an attempt to provide a full list of possible abuses in order to give room to evolution in the light of growing experience.

Summing up, the drafting history confirms only few of the standard claims about the attitudes and philosophy underlying Art. 82 EC. One of them is the close link between the competition rules and the market integration goal. Indeed, creating rules that would constrain the ability of dominant firms to impede foreign entry to “their” national markets was a driving concern. This goal was by no means found to contradict efficiency concerns. Rather, the national boundaries were believed to be artificial and inefficient, and their opening was expected to create new potential for realizing efficiencies. Similarly, the debate about the competition rules themselves reflects efficiency concerns. In the discussions surrounding Art. 82, the tension between allowing dominant firms to compete and restraining their capacity to exclude competitors was clearly identified, as well as the danger that a provision on the abuse of dominant positions could become regulatory if it tried to micro-manage firms’ behavior. Such regulatory approach was, however, clearly rejected, particularly by the German delegation. Nor does the drafting history support the proposition that the drafters were more concerned with equity than with efficiency. The proposals presented by the French delegation probably came closest to such a stance, with a very broad and strong general anti-discrimination principle for the whole of the economy, dissociated from the requirement of market power, and the idea that a paramount challenge of the Common Market would be to create a level playing field in all respects. This position was, however, repudiated.

All in all, the discussions in the Working Group for the Common Market give the impression that the negotiating parties strived to create a system of competition rules that would allow the Common Market to become reality. This was the clear and primary concern. With regard to the details of their design, the drafting history provides only limited insight into what types of rules were envisioned. It is important to recall that, as these rules entered into force in 1958, they were a mere potentiality the actual functioning of which was not predictable. The Treaty of Rome left open the all-important question of how and by whom the competition rules should eventually be enforced<sup>80</sup> after an initial period in which the enforcement would be left to the Member States – this fundamental question was decided only later in the Regulation 17/62. The direct applicability of the competition rules was not foreseen at the time the EC Treaty entered into force. *Müller-Armack* had stressed at various occasions that the competition rules at EC level should state general principles and guidelines, no more.<sup>81</sup> Whether

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<sup>79</sup> In Germany, the main concern was with boycotts and similar exclusionary techniques – the most pervasive types of abuses during the 1920s. Contrary to exploitative abuses, which were merely placed under the supervision of the German Cartel Authority, they were generally prohibited in the GWB of 1958 (§ 26(2) GWB), and this provision was made directly applicable.

<sup>80</sup> These uncertainties was resolved only much later, with the enactment of Regulation 17.

<sup>81</sup> See Document 55, Darlegungen des Sprechers der deutschen Delegation zu den Entwürfen der Artikel 40-43, 8.9.1957, in: *Schulze/Hoeren*, Dokumente zum Europäischen Recht, Band 3: Kartellrecht (bis

these rules would gain practical relevance, and to what extent, was completely unclear. When the first Commission took up work and divided the competences among its members, neither France nor any other Member State was particularly interested in the competence for the free movement and competition rules. The competence was assigned to a somewhat disappointed *Hans von der Groeben* – the last one to choose.<sup>82</sup>

*b) The interpretation of Art. 82 EC – the formative period*

The Treaty of Rome entered into force in 1958. For the first decade, Art. 82 was not applied. The first case that reached the ECJ was *Continental Can*. It continues to be of fundamental importance for the understanding and interpretation of Art. 82.

Before *Continental Can*, the ideas about the meaning and relevance of Art. 82 had strongly diverged. Representative for the uncertainties surrounding Art. 82 is the monograph by *René Joliet* on Monopolization and Abuse of Dominant Position published in 1970.<sup>83</sup> In contrasting Art. 82 with the at that time strongly structural approach towards monopoly power under Sec. 2 Sherman Act, *Joliet* hypothesized that Art. 82 would lack any structural component and take a purely behavioral stance. According to *Joliet*, the application of Art. 82 was limited to controlling exploitative abuses, and would not extend to exclusionary abuses.<sup>84</sup> In concentrating on exploitation, the EC Treaty would exhibit a purely regulatory character:

“The EEC Treaty [...] tends to curb only the abuses of power and thus to regulate the market behavior of dominant firms. The approach taken by Article 86 [Art. 82 EC] is based upon an attitude of neutrality toward the existence of market dominant positions. It does not try to break up monopolistic positions, but instead, is confined to supervising the conduct and performance of dominant firms. Remedies are thus behavioral rather than structural. In cases of abuses, the enforcement agency could go as far as to set prices at which dominant firms can sell or to fix the quantities which they must produce. The EEC approach amounts to a kind of public utility regulation”.<sup>85</sup>

The main preoccupation of the EC Treaty was not the maintenance of a competitive system, *Joliet* concluded. Rather, “the major objective of Article 86 is to ensure that dominant firms do not use their power to the detriment of utilizers and consumers”.<sup>86</sup>

*Mestmäcker*, – at that time special advisor of the DG competition and an influential voice in the development of EU competition law – took a radically different view. In preparing the EC Commission’s position on *Continental Can*, he started with the assertion that Art. 82 had to be interpreted with a view to the overriding purpose of the

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1957), p. 167: „Die Erfahrungen aus der Kartellgesetzgebung sprechen dafür, in den Vertrag über den Gemeinsamen Markt nur einige präzise Leitsätze aufzunehmen. Andernfalls müßte eine weitgehende Kasuistik vorgesehen werden, die wohl nur in der Form des unmittelbar anwendbaren supranationalen Rechts geschaffen werden könnte. Die Leitsätze hingegen sollen noch kein unmittelbar anwendbares Recht darstellen“.

<sup>82</sup> See *Hans von der Groeben*, *Deutschland und Europa in einem unruhigen Jahrhundert*, 1995, pp. 300-301

<sup>83</sup> *René Joliet*, *Monopolization and Abuse of Dominant Position. A Comparative Study of the American and European Approaches to the Control of Economic Power*, Liège / La Haye 1970.

<sup>84</sup> *Id.*, p. 131.

<sup>85</sup> *Id.*, pp. 127-128

<sup>86</sup> *Id.*, p. 131.



EC competition rules to protect a system of undistorted competition in the Common Market against distortions.<sup>87</sup> Actions of dominant firms that are objectively incompatible with a system of undistorted competition must therefore fall under Art. 82. Abuses of dominance can, however, not be defined based on the effects of a dominant firm's actions on third parties alone. Art. 82 prohibits a certain type of market conduct, not a certain type of market structure itself.<sup>88</sup> Yet, an abuse of a dominant position can lie in the restriction of (residual) competition, in defending a dominant position against current or potential competition, especially by hampering market entry, or in expanding a dominant position into adjacent markets. The fact that Art. 82 does not oppose the formation of dominant firms does not preclude a further strengthening of market dominance from being treated as an abuse. Rather, by covering the maintenance and strengthening of dominance, Art. 82 covers the most widespread, typical and dangerous exclusionary acts. *Mestmäcker* went on to establish certain guiding principles for the interpretation of Art. 82. First of all, he stressed the close links between competition policy and the protection of open markets within the EC. The competition which the EC competition rules protect results from the opening up of the markets within the EC. EC competition law must hence take particular care to ensure that dominant firms will not use their power to impede the entry to markets which the elimination of state barriers to trade has made possible.<sup>89</sup> Secondly, he proposed the following criterion for determining an abuse under Art. 82: Third parties shall be protected against such harm which they would not risk to suffer in the presence of effective competition. The dominant firm must not engage in such acts which it could not engage in in a competitive environment.<sup>90</sup> Thirdly, he stressed that the finding of an abuse should not depend on a finding that the elimination of a competitor has had a negative market effect. Competition law does not merely protect a certain degree of market efficiency, but it protects individual liberties against types of conduct that endanger competition if generalized. The protection of individual liberties is, at the same time, closely linked to the protection of competition as an institution, and to competition law's economic rationale: Art. 82 shall, in the medium and long term, protect the possibility of correcting positions of dominance. This presupposes the protection of those elements of competition that still persist.<sup>91</sup>

In *Continental Can*, the ECJ has followed the principle lines of *Mestmäcker's* arguments. In interpreting Art. 82, it strongly relied on a functional approach. The general objective of the EC Treaty's competition rules to institute a system of undistorted competition in the common market as articulated in Art. 3(1)(g) EC<sup>92</sup> was found to be directly relevant for the interpretation of Art. 82.<sup>93</sup> The non-exhaustive list

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<sup>87</sup> *Mestmäcker*, Die Beurteilung von Unternehmenszusammenschlüssen nach Artikel 86 des EWG-Vertrags, reprinted in: *Mestmäcker, Wirtschaft und Verfassung in der Europäischen Union*, 2. Aufl. 2006, pp. 597, at p. 603.

<sup>88</sup> *Id.*, p. 604.

<sup>89</sup> *Id.*, p. 606.

<sup>90</sup> *Id.*, pp. 607-608.

<sup>91</sup> *Id.*, p. 608.

<sup>92</sup> At that time: Art. 3(f) EC-Treaty.

<sup>93</sup> The ECJ rejected the applicant's allegation that Art. 3(1)(g) would merely contain a general program, devoid of legal effect – see *Europemballage and Continental Can v. Commission* [“*Continental Can*”], Case C-6/72 [1973] ECR 215 para. 23.

of abusive practices in Art. 82(a) to (d) clearly covered both exploitative and exclusionary abuses, i.e. “practices which may cause damage to consumers directly, but also [...] those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Art. 3(f) [today: Art. 3(1)(g) EC] of the Treaty” (para. 26). In light of the EC Treaty’s fundamental decision to establish a common market with real or potential competition, and to effectively protect residual competition – a concept taken from Art. 81(3)(b) – the ECJ concluded that the prohibition of abuse of dominance in Art. 82 extends to a merger that would lead to a significant strengthening of dominance.<sup>94</sup> Beyond *Continental Can*’s importance for the development of a European merger control, two enduring messages flow from *Continental Can*: Firstly, the goal of Art. 82 is to protect a competitive structure of the market, i.e. one that does not render any serious chance of competition practically impossible (para. 25); and secondly, although Art. 82 EC does not prohibit dominance, it protects residual competition, i.e. the competition that remains in spite of existing dominance (“Restwettbewerb”). These far-reaching determinations have clarified that the main focus of Art. 82 EC is not on exploitative, but on exclusionary abuses.

In a series of decisions of the 1970s and 1980s, the ECJ has further developed the contours of Art. 82. In *Hoffmann-La Roche*, the ECJ defined the concept of abuse as

“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 the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”.<sup>95</sup>

It thus adopted the distinction between “competition on the merits” (“Leistungswettbewerb”) in which every undertaking, dominant or not, may engage, and illegal exclusionary conduct – a distinction which it has maintained ever since. While it highlighted the important principle that under EU competition law dominant firms are entitled to compete vigorously and aggressively, *Hoffmann-La Roche* failed to establish a clear test that would help to specify where exactly the line between the legitimate competition and exclusionary conduct will be drawn.<sup>96</sup>

An indication that has created some controversy and confusion is the phrase first used by the ECJ in *Michelin I*, according to which a dominant firm has a “special responsibility not to allow its conduct to impair undistorted competition on the common market”.<sup>97</sup> While some have associated the concept of “special responsibility” with a tendency of EU competition law to protect smaller and less efficient competitors, this is, as has meanwhile been clarified, not what the Court meant. What the concept of “special responsibility” does entail is the generally uncontroversial observation that conduct engaged in by a dominant firm may be abusive, even when the same conduct

<sup>94</sup> *Continental Can* [1973] ECR 215, para. 26. More recently see *British Airways plc. v. Commission* [“*British Airways*”], Case C-95/04P, 15 March 2007 [not yet published in the ECR], para. 57 with further references.

<sup>95</sup> *Hoffmann-La Roche v. Commission*, Case C-85/76 [1979] ECR 461, para. 91. More recently see *British Airways plc. v. Commission*, Case C-95/04P, 15 March 2007, para. 66.

<sup>96</sup> *O’Donoghue/Padilla*, *The Law and Economics of Article 82 EC*, p. 176.

<sup>97</sup> *NV Nederlandsche Banden-Industrie Michelin v. Commission*, Case 322/81 [1983] ECR 3461, para. 57.

carried out by a non-dominant firm is perfectly legitimate.<sup>98</sup> Methods of competition which are, in principle, legitimate, can lead to the maintenance and extension of market power when they are used by dominant firms.<sup>99</sup>

While this is not the place to attempt a comprehensive summary of the ECJ's Art. 82 jurisprudence, some of its important features which distinguish it from current Sec. 2 Sherman Act jurisprudence shall be highlighted here:

First of all, Art. 82 EC is aimed not only at practices which may cause prejudice 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)(g) EC.<sup>100</sup> While this phrase was originally used by the ECJ to confirm the applicability of Art. 82 not only to exploitative, but also to exclusionary abuses, it has today come to stand for the more far-reaching claim that EU competition rules protect the competitive process, the degree of residual competition that persists in the market as such, and do not require a finding of direct consumer harm.<sup>101</sup> The protection of consumer interests is mediated through the protection of competition from which consumer welfare is generally thought to result. This approach is based on the assumption that competition will typically result in more innovation and efficiency than monopoly. It is preferable to let the market enforce efficiency and innovation than to rely on the announced efficiency goals of private monopolists, or on appraisals of likely efficiencies by competition authorities and courts.

Secondly, Art. 82 jurisprudence has maintained a focus on protecting market access for competitors.<sup>102</sup> Actions of dominant firms that produce an "exclusionary effect" are not necessarily abusive per se, but the ECJ will have a closer look whether they are economically justified.<sup>103</sup> Generally, the ECJ appears to favor a balancing approach: an exclusionary effect disadvantageous to competition may be counterbalanced or outweighed by advantages in terms of efficiency. But if the exclusionary effect bears no relation to the advantage for the market and consumers, or goes beyond what is necessary to attain those advantages, it will be regarded as an abuse.<sup>104</sup>

Thirdly, and parallely, the ECJ's jurisprudence has maintained its fundamental understanding that Art. 82 is not only about protecting outcome efficiency, but is about protecting individual rights of competitors at the same time. According to some, this

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<sup>98</sup> See *Atlantic Container Lines AB and Others v. Commission*, joined cases T-191/98, T-212/98 to T-214/98 [2003] ECR II-3275, para. 1460: "special responsibility means only that a dominant undertaking may be prohibited from conduct which is legitimate where it is carried out by non-dominant undertakings".

<sup>99</sup> *Mestmäcker*, *Das Marktbeherrschende Unternehmen im Recht der Wettbewerbsbeschränkungen*, Tübingen 1959, p. 6: „... die rechtliche Behandlung von Marktmacht ist vor allem deshalb so schwierig, weil Inhaber von Macht befähigt sind, die Institute des Privatrechts und die unter den Voraussetzungen freier Konkurrenz legitimen Mittel des Wettbewerbs in den Dienst der Marktbeherrschung zu stellen.“

<sup>100</sup> See *Continental Can*, para. 26. For a recent confirmation: *British Airways plc. v. Commission*, Case C-95/04P, 15 March 2007, para. 106.

<sup>101</sup> *British Airways plc. v. Commission*, Case C-95/04P, 15 March 2007, para. 107.

<sup>102</sup> *British Airways plc. v. Commission*, Case C-95/04P, 15 March 2007, para. 67.

<sup>103</sup> *British Airways plc. v. Commission*, Case C-95/04P, 15 March 2007, para. 69.

<sup>104</sup> *British Airways plc. v. Commission*, Case C-95/04P, 15 March 2007, para. 86.

demonstrates that EU competition law is about protecting competitors instead of competition. This is, however, an “empty slogan”.<sup>105</sup> The challenge, both in EU and US antitrust law is to distinguish those acts with exclusionary effect that result from legitimate competition on the merits from those acts the exclusive effect of which cannot be justified as normal acts of competition, but exploit the special power that a dominant firm possesses to entrench its position in the marketplace. The difference between the EU and the US approach is that EU competition law, based on this distinction, assumes an individual right of each competitor not to be excluded by illegal acts, whether or not the exclusion results in a verifiable overall decrease of competition or efficiency in the marketplace. US antitrust law, on the other hand, declaring consumer welfare to be the only goal of antitrust, tends to require a showing of verifiable effect in the marketplace, and thus negates the notion that the competition which is protected by competition law is constituted by the exercise of individual liberties.

### **III. Exploitative and Exclusionary Abuses: Regulatory tendencies of Art. 82?**

The insights we can gain into the different attitudes underlying Art. 82 EC and Sec. 2 Sherman Act by looking at the drafting history are by necessity limited. This section shall, therefore, look at three of the areas which are frequently said to stand for a divergence of interpretation and philosophy of Art. 82 EC and Sec. 2 Sherman Act: exploitative abuses (1.); predatory pricing (2.) and refusals to deal / the essential facilities doctrine (3.).

#### ***1. Exploitation of monopoly power under Sec. 2 Sherman Act and Art. 82 EC***

A difference between Sec. 2 Sherman Act and Art. 82 that is frequently held out to be indicative of fundamentally different attitudes towards rules regarding market power is the fact that Art. 82, but not Sec. 2 Sherman Act, addresses exploitative abuses.<sup>106</sup> Pursuing exploitative abuses implies building judgments about price and output decisions of a dominant firm, and thus necessarily comes into the vicinity of regulatory supervision. The fact that Art. 82 EC covers exploitative abuses is thus taken as proof for the EU competition law’s regulatory approach<sup>107</sup> as well as for an overriding

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<sup>105</sup> *Wolfgang Wurmnest*, The Reform of Article 82 EC in the Light of the “Economic Approach”, Working Paper, October 2006, p. 14 [on file with the author].

<sup>106</sup> See, for example, *Eleanor Fox*, 61 *Notre Dame Law* 981, at 993-994 (1986).

<sup>107</sup> *Joliet*, Monopolization and Abuse of Dominant Position. A Comparative Study of the American and European Approaches to the Control of Economic Power, Liège / La Haye 1970, pp. 127-128 and p. 131. For the inherently stronger regulatory tendencies of EU competition law see also: *Fox*, 61 *Notre Dame Law* 981, at 983 and 992-994 (1986); and at p. 993-994.

concern with fairness rather than efficiency.<sup>108</sup> Frequently, the decision to address exploitative abuses is traced back to the alleged ordoliberal influence on the formulation and interpretation of Art. 82,<sup>109</sup> and particularly to the supposedly ordoliberal “as-if” competition approach.<sup>110</sup> According to this view, competition authorities are, under Art. 82(a) and (b), required to ensure that dominant firms set output and price as if they operated in competitive markets.<sup>111</sup>

Sec. 2 Sherman Act, on the other hand, does not control the exercise of monopoly power,<sup>112</sup> but only its acquisition or maintenance. It protects the openness and competitive structure of the market to which the determination of price and output level are then left. The decade before the enactment of the Sherman Act had been one of rapid economic growth and declining prices, even in those industries dominated by trusts.<sup>113</sup> Congress was therefore not concerned with implementing controls against excessive prices. Price and output controls would furthermore have contravened the dominant “freedom of contract” philosophy of the times. In one of its early decisions, the US Supreme Court acknowledged the inherent difficulties that antitrust authorities and courts face when required to oversee output decisions and price.<sup>114</sup> But the control of exploitative abuses is not only rejected on such pragmatic grounds. Rather, monopoly power, and monopoly pricing, is viewed as a part of the competitive process, and as an important driving force. According to the US Supreme Court’s opinion in the *Trinko* case:

“[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth”.<sup>115</sup>

The underlying assumption is that the monopoly position will be a transitory one. Absent significant barriers to entry, monopoly prices can be expected to invite new market entry which will eventually drive prices down. In those specific cases where a durable monopoly position exists it is, under US law, not for competition authorities and antitrust courts to intervene, but for Congress to establish special regulatory oversight.

The difference between Art. 82 EC and Sec. 2 Sherman Act with regard to the coverage of exploitative abuses is indeed remarkable. During the first decade of the existence of the EC it led to speculations about the fundamental role and function of Art. 82. The

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<sup>108</sup> For that claim see, for example, *Michal Gal*, Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?, 49 *Antitrust Bulletin* (2004) 343, at 363 et seq.). Also *Fox*, 61 *Notre Dame Law* 981, at 985 (1986).

<sup>109</sup> *Michal Gal*, Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?, 49 *Antitrust Bulletin* (2004) 343, at 364 et seq.

<sup>110</sup> *O’Donoghue/Padilla*, *The Law and Economics of Article 82 EC*, p. 604

<sup>111</sup> *Id.*, p. 604

<sup>112</sup> Emphasized in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-408 (2004).

<sup>113</sup> *Hovenkamp*, *Federal Antitrust Policy*, pp. 51.

<sup>114</sup> See *United States v. Trans-Missouri Freight Ass.*, 166 U.S. 290 (1897). Also: *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927): “The reasonable price of today may through economic and business changes become the unreasonable price of tomorrow”.

<sup>115</sup> *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, at 407 (2004).

view that Art. 82 EC was intended to cover exploitative abuses *only*, defended, *inter alia*, by *Joliet*,<sup>116</sup> became obsolete, however, with the ECJ's decision in *Continental Can*. The functional interpretation of Art. 82, guided by the goal to institute a system of undistorted competition and to promote the integration of formerly national markets, has led to a competition policy and jurisprudence which is focused almost exclusively on controlling exclusionary abuses. Exploitative abuses have suffered (or profited) from "benign neglect".<sup>117</sup> Throughout the years, the Commission has adopted only four formal decisions condemning excessive prices.<sup>118</sup> The ECJ has confirmed in a series of cases – mostly in preliminary rulings – that Art. 82 *can* apply to exploitative abuses, but has established a high threshold for finding a certain price level to constitute an abuse. In only one case has it actually found an abuse.<sup>119</sup> The relevant test was first established in *United Brands*. Here, the ECJ accepted that "[c]harging a price which is excessive because it has no reasonable relation to the economic value of the product supplied [is] ... an abuse".<sup>120</sup> A two-stage test must be passed, however, to determine whether a price is reasonably related to the "economic value of the product". First, the difference between the cost actually incurred and the price actually charged needs to be determined; and if this difference is excessive, it must be determined secondly "whether a price has been imposed which is either unfair in itself or when compared to competing products" (*United Brands*, at para. 252). In full realization of the practical difficulties associated with determining the costs of production,<sup>121</sup> the ECJ charged the

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<sup>116</sup> *Joliet*, Monopolization and Abuse of Dominant Position, 1970, p. 11 and p. 131: Under Art. 82, the offense lies "mainly in abusive market exploitation through unreasonably high prices or monopolistic restriction of output. As is shown by the examples listed in Article 86, the main preoccupation of the Treaty is not the maintenance of a competitive system. All the examples relate to cases of practices and policies through which a firm exploits its market dominant power. None of them concerns means by which market dominant power can be achieved or maintained. Large size is considered as an economic necessity, the basic assumption underlying Article 86 being that monopolistic structure does not lead inevitably to monopolistic performance. The monopolist's performance may be in harmony with the public interest. The EEC monopoly policy has adopted an attitude of neutrality toward market dominant power. A dominant position implies a power to fix unilaterally unfairly high prices. The Treaty assumes however that this power will not be systematically utilized. This is why monopoly power as such is not condemned. Monopoly is not in itself an evil. Only the unilateral fixing of unfair prices is in violation of the law. It is the exercise of monopoly power which can be subject to regulation". More recently *Pinar Akman*, Searching for the Long-Lost Soul of Art. 82, Working Paper 2005, p. 4 has made the claim that Art. 82 was intended to cover exploitative abuses only.

<sup>117</sup> Recognized by *O'Donoghue/Padilla*, The Law and Economics of Article 82 EC, p. 608

<sup>118</sup> Namely: EC Commission, decision of 19 Decembre 1974, [1975] OJ L 29/14 – *General Motors*; EC Commission, decision of 17 Decembre 1975, [1976] OJ L 95/1 – *United Brands*; EC Commission, decision 84/379/EEC of 2 July 1984, [1984] OJ L 207/11 – *British Leyland*; and EU Commission, decision of 25 July 2001, [2001] OJ L 331/40 paras. 159-167 – *Deutsche Post II*.

<sup>119</sup> Namely in *British Leyland Plc. v. Commission* [1986] ECR 3263. In a limited number of preliminary rulings, the ECJ has acknowledged the possibility that there could be an abuse – namely *Lucazeau et al. v. SACEM et al.*, Case C-395/87, [1989] ECR 281; *Bodson v. Pompes funèbres*, Case C-30/87, [1988] ECR 2479; *Ahmed Saeed Flugreisen et al. v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, Case C-66/86, [1989] ECR 803; *GT-Link v. DSB*, Case C-242/95 [1997] ECR I-4449.

<sup>120</sup> *United Brands Company v. Commission*, Case C-27/76, [1978] ECR 207, para. 250

<sup>121</sup> Difficulties can, *inter alia*, result from long-term investments made by the firm, from particular risks taken in developing a product, from a multi-product structure of the firm or from the fact that IPRs are involved.

Commission with the burden of proof to demonstrate the excessiveness of a price.<sup>122</sup> In the case at issue, the Commission had failed to establish that the prices charged by United Brands were unrelated to the economic value of the product, and the relevant part of the decision was hence annulled.

*Motta* and *De Streel* have demonstrated in a careful study that, based on the ECJ's case law, excessive pricing cases have been pursued successfully only in the presence of special circumstances:<sup>123</sup> either the dominant undertaking at issue enjoyed a de facto monopoly (see, for example, *SACEM*<sup>124</sup>) – in which case the ECJ has tended to lower the preconditions for finding a violation of Art. 82(a) as well as the standard of proof the Commission had to meet –<sup>125</sup> and the abuse furthermore created serious impediments to the internal market and included concerns about price discrimination and artificial barriers to parallel trade (*General Motors, British Leyland*);<sup>126</sup> or the dominant undertaking was active in markets recently opened to competition (*Deutsche Post II*,<sup>127</sup> telecommunications cases<sup>128</sup>), and any pricing abuses could have weakened the political momentum for the liberalisation program. Where such special circumstances are absent, the Commission has declared its general unwillingness to act as a price regulator for dominant firms.<sup>129</sup> The Commission's reluctance to pursue

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<sup>122</sup> “[H]owever unreliable the particulars supplied by [the dominant company] . . . , the fact remains that it is for the Commission to prove that [the dominant company] charged [excessive] prices” (*United Brands*, para. 264).

<sup>123</sup> *Motta / de Streel*, Excessive Pricing and Price Squeeze under EU Law, in: Ehlermann / Atanasiu (eds.), *European Competition Law Annual: What is an Abuse of a Dominant Position?*, 2006, p. 91, at p. 107, with further references.

<sup>124</sup> *Lucazeau et al. v. SACEM et al.*, Case C-395/87, [1989] ECR 281. See also: *Ministere Public v. Tournier* [1989] ECR 2521. In the *SACEM* cases, the operators of French discotheques complained that SACEM, the French Copyright collecting society, was charging more for licenses of performing rights than were similar collecting societies located in other Member States. In preliminary rulings, the ECJ found that the prices charged by SACEM qualified as “unfair trading conditions” if the rates were “manifestly higher than that by identical copyright societies in other Member States.”

<sup>125</sup> For the lowering of the preconditions of finding excessive pricing in *SACEM* as compared to *United Brands*, but wrongly generalizing the *SACEM* test, see *Michal Gal*, Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?, 49 *Antitrust Bulletin* (2004) 343, at 370 et seq.).

<sup>126</sup> See *Michal Gal*, Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?, 49 *Antitrust Bulletin* (2004) 343, at 375 et seq. According to *Motta / de Streel*, Excessive Pricing and Price Squeeze under EU Law, in: Ehlermann/Atanasiu (eds.), p. 91, at p. 107, “[t]he Commission was more concerned with the freedom of circulation than with the anticompetitive exploitation of end users and the associated allocative inefficiencies.”

<sup>127</sup> EU Commission, Decision of 25 July 2001, *Deutsche Post II*, OJ L 331/40 [2001], para. 159-167.

<sup>128</sup> For the handling of excessive pricing in the telecoms sector see *EU Commission*, Notice on the application of competition rules to access agreements in the telecommunications sector, [1998] OJ C 265 paras. 105-109.

<sup>129</sup> *EU Commission*, XXIVth Report on Competition Policy (1994), para. 207: “... the existence of a dominant position is not in itself against the rules of competition. Consumers can suffer from a dominant company exploiting this position, the most likely way being through prices higher than would be found if the market were subject to effective competition. The Commission in its decision-making practice does not normally control or condemn the high level of prices as such. Rather it examines the behaviour of the dominant company designed to preserve its dominance, usually directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it”. The Commission has repeated this since – see, for example,

exploitative abuses is based on the same reasons that underlie Sec. 2 Sherman Act's abstention from addressing exploitative abuses: the fact that it is extremely difficult to establish with some predictability<sup>130</sup> when a price should be viewed as "excessive",<sup>131</sup> and the spectre of continuous price regulation that would go along with a more forceful attempt to push Art. 81(a);<sup>132</sup> as well as the fact that a serious threat that firms, once they gain significant market power, will be subject to a regime of price control would negatively affect successful companies' incentives to innovate and invest.<sup>133</sup>

Based on these findings, the US antitrust and EU competition law perspective on exploitative abuses does not appear to be far apart. There is broad consensus that competition law should not intervene where the market can be expected to self-correct exploitative practices in the short or medium term.<sup>134</sup> On the other hand, both jurisdictions accept that an economic rationale for price regulation can exist where high non-transitory barriers to entry, like government monopolies, exclude competition in the longer term.<sup>135</sup> The difference between the two systems boils down to a difference in the allocation of decision competences. In the US, it is for Congress to decide whether a regulatory scheme is necessary. In the EU, those institutions charged with the enforcement of competition law can intervene. The actual exercise of price regulation remains difficult under both regimes. Regulatory agencies may, in the end, be better placed to engage in price regulation. Against the background of the EU's limited legislative competence, competition rules may, however, be a useful safeguard and substitute. In this perspective, the coverage of exploitative abuses by EU competition

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*EU Commission, XXVIIIth Report on Competition Policy (1997), point 77. The same is true for other exploitative abuses.*

<sup>130</sup> For the relevance of the problem of legal certainty see *O'Donoghue/Padilla, The Law and Economics of Article 82 EC*, p. 622.

<sup>131</sup> See *Motta / de Streel, Excessive Pricing and Price Squeeze under EU Law*, in: Ehlermann / Atanasius (eds.), 2006, p. 91, at p. 109: "Indeed, in many situations even computing the relevant measures of costs would be a complex exercise: How does one allocate common costs to different products (long-run incremental costs, stand-alone costs)? How does one choose between different accounting methods (historic costs, current costs)? Which measure of costs should be adopted to measure profits in industries where there are important fixed costs? All these difficulties are underlined by the fact that a competition authority may not have as deep a knowledge of the sector being investigated as an industry regulator". See also *O'Donoghue/Padilla, The Law and Economics of Article 82 EC*, p. 621: "... no generally accepted criterion exists in the decisional practice and case law to determine when prices are 'excessive'. Further, even if a criterion, or series of criteria, could be agreed upon as a benchmark, determining an excessive price in practice is extremely complex and subject to a number of difficulties". *O'Donoghue/Padilla* also point to the potentially high cost of error when competition authorities or courts attempt to identify excessive prices.

<sup>132</sup> *Motta / de Streel, Excessive Pricing and Price Squeeze under EU Law*, in: Ehlermann / Atanasius (eds.), 2006, p. 91, at p. 109

<sup>133</sup> *O'Donoghue/Padilla, The Law and Economics of Article 82 EC*, p. 621: "... prices above marginal cost are common and necessary in many industries where high profits are necessary to recover large up-front capital and other fixed costs". See also: *Fox*, 61 *Notre Dame Law* 981, at 993 (1986) (especially with a view to IPRs).

<sup>134</sup> *O'Donoghue/Padilla, The Law and Economics of Article 82 EC*, p. 605

<sup>135</sup> *Id.*, p. 638 ; with a reference to the OFT Draft Competition Law Guidelines for Consultation, Assessment of Conduct, April 2004, para. 2.6. Also: *Michal Gal, Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?*, 49 *Antitrust Bulletin* (2004) 343, at 383.



law is no evidence of a fundamental divergence in “antitrust philosophy”, but reacts to different legislative capacities at the federal US or EU level respectively.

If this overall picture is true, more fascinating than the actual difference between EU and US competition law itself is the narrative that has been constructed around it. According to *O’Donoghue/Padilla*, the objectives of Art. 82(a) “lie at the core of EC competition law: to prevent the exploitation of consumers by firms with significant market power”.<sup>136</sup> *Michal Gal*, while acknowledging the lack of practical relevance of exploitative abuses in EU competition law,<sup>137</sup> claims nonetheless that their coverage reflects important “ideological goals”,<sup>138</sup> particularly a concern with social and redistributive goals and “fairness”, which are then attributed to German ordoliberal influence.<sup>139</sup>

Such allegations erect a strawman. They blame German ordoliberalism for tenets it never defended, and assume a meaning or tendency of Art. 82 EC for which there is no evidence in the case law of the last 50 years. They allege an opposition between EU and US antitrust law which does not exist. Regulatory aspirations of EU competition law and its instrumentalization for non-economic goals are claimed where none can be found. Over the years, the Commission as well as the ECJ have subscribed to all the reservations that exist against controlling exploitative abuses in US antitrust law. A revival of exploitative abuses in EU competition law beyond the narrow setting of a non-transitory (mostly state-protected) monopoly is both unlikely and undesirable.

## ***2. Predatory pricing in EU competition law and US antitrust law***

While there does not appear to be a fundamental gap between EU competition and US antitrust “philosophy” with regard to exploitative abuses, predatory pricing is one of the areas in which EU competition law and US antitrust law do diverge. There is agreement on the general description of the phenomenon: predatory pricing schemes involve low pricing strategies – typically pricing below some measure of cost<sup>140</sup> – in an effort to

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<sup>136</sup> *O’Donoghue/Padilla*, *The Law and Economics of Article 82 EC*, p. 637.

<sup>137</sup> *Michal Gal*, *Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?*, 49 *Antitrust Bulletin* (2004) 343, at 360 and 374-375.

<sup>138</sup> See *Michal Gal*, *Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?*, 49 *Antitrust Bulletin* (2004) 343, at 346: “The regulation of excessive pricing encapsulates issues such as the goals and underpinnings of EC and U.S. antitrust systems; the equilibrium point which was adopted to balance between the forces of Darwinian capitalism and those of social justice; the role of government regulation; the balance between practical problems and theoretical principles; and the assumptions regarding the relative administrability of various types of regulation. Monopoly pricing regulation is thus, in many ways, a microcosm of competition policy”. Furthermore, the prohibition of excessive prices allegedly stands for an opening of EU competition policy to the wider set of EC Treaty goals set out in Art. 2 EC, namely a harmonious development of economic activities, a continuous and balanced expansion, an increasing in stability, an accelerated raising of standards of living, and a closer relation between the Member States (*Id.*, at 361-362).

<sup>139</sup> *Gal*, *Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?*, 49 *Antitrust Bulletin* (2004) 343, at 364.

<sup>140</sup> The US Supreme Court limits illicit price predation to pricing below some measure of cost (see below). In the EU, illegal exclusionary conduct has sometimes be found in cases in which prices remained above both average variable and average total cost. Economists are divided on the question

eliminate competitors or to deter entry by potential competitors. If the plan succeeds, the reduction of actual and/or potential competition will allow the predator to raise prices to a supracompetitive level in the longer run. There is, however, no transatlantic consensus on the legal test to be applied.

In the US, the law on predatory pricing has been strongly influenced by Chicago School scholarship which has, first in a highly influential article by *John S. McGee* on the predatory pricing allegations in *Standard Oil*, later in a variety of broader studies,<sup>141</sup> for a long time maintained that predatory pricing schemes are generally irrational, and therefore unlikely under all but very exceptional circumstances. According to Chicago School scholars, predatory pricing is a highly speculative scheme: a predator must incur losses now in the mere hope that he will be able to recover in the future. The prospect of actual recovery is, however, slim, since competitors can and will re-enter once the predatory pricing scheme is abandoned. As a consequence, Chicago School scholarship proposed to abolish the doctrine: “It seems unwise ... to construct rules about a phenomenon that probably does not exist or which, should it exist in very rare cases, the courts would have grave difficulty distinguishing from competitive price behaviour. It is almost certain that attempts to apply such rules would do much more harm than good”.<sup>142</sup>

The issue reached the US Supreme Court in 1993 in *Brooke Group*.<sup>143</sup> The US Supreme Court took the opportunity to distance itself from prior case law on predatory pricing, namely from *Utah Pie*,<sup>144</sup> which had, on the basis of the Robinson-Patman Act, practically inferred predation from proof of price discrimination plus exclusionary intent.<sup>145</sup> In *Brooke Group*, the US Supreme Court introduced a new and very narrow cost-based test that eliminated the criterion of anti-competitive intent and instead required proof of market effect, or dangerous probability of market effect. To substantiate a predatory pricing claim, a plaintiff now has to prove (1) that the alleged predatory prices are below an appropriate measure of the defendant’s costs;<sup>146</sup> and (2) a

whether such above-cost pricing should constitute an antitrust violation, but acknowledge that it can, under some conditions, have an exclusionary effect. See *John Temple Lang / Robert O’Donoghue*, Defining legitimate competition: how to clarify pricing abuses under Art. 82 EC, 26 Fordh. Int’l L.J. 83 (2002), at 121-122.

<sup>141</sup> See *John S. McGee*, Predatory Price Cutting: The Standard Oil (N.J.) Case, 1 J. of Law and Econ. 137 (1958), alleging that Standard Oil had never used predatory pricing discrimination to drive out competing refiners. See also: *Robert H. Bork*, The Antitrust Paradox, 1978, pp. 144 et. seq.

<sup>142</sup> *Robert H. Bork*, The Antitrust Paradox, 1978, p. 154.

<sup>143</sup> See also: *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 584 (1986)

<sup>144</sup> *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S.Ct. 1326 (1967). The case was not directly overruled in *Brooke Group*. Rather, as *Richard A. Posner* observes, “*Brooke Group* distinguishes *Utah Pie* to death” (Antitrust Law, 2<sup>nd</sup> ed., p. 223).

<sup>145</sup> *Richard A. Posner*, Antitrust Law, 2<sup>nd</sup> ed., p. 221. For the proposition that this went far into the direction of condemning hard price competition itself see *Hovenkamp*, Federal Antitrust Policy, 3<sup>rd</sup> ed. 2005, pp. 365-366

<sup>146</sup> Generally, courts apply the Areeda & Turner test which was developed in the 1970s. According to this test, prices below the average variable cost of a product are presumed to be predatory. For the broader debate surrounding this test see, inter alia, *F.M. Scherer*, Predatory Pricing and the Sherman Act: A Comment, 89 Harv. L. Rev. 869 (1976); *Phillip Areeda / Donald F. Turner*, Scherer on Predatory Pricing: A Reply, 89 Harv. L. Rev. 891 (1976); *Joseph F. Brodley / George A. Hay*, Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards, 66 Cornell L. Rev. 738 (1981).

“dangerous probability” that the defendant would be able to recoup its investment in below-cost prices,<sup>147</sup> i.e. that the defendant would eventually be able to raise price above a competitive level to an extent sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.<sup>148</sup> It is generally acknowledged that recoupment is extremely difficult to prove.<sup>149</sup> The prohibition of predatory pricing is, as a consequence, rarely enforced.<sup>150</sup> Proof of recoupment along the lines developed in *Brooke Group* and subsequent case law does not only pose practical problems of information and prediction. Rather, the requirement tends to negate the more complex strategic reasons from which predatory pricing schemes may result.<sup>151</sup> Based on the test established in *Brooke Group*, a significant number of relevant predatory pricing schemes may thus not be caught.<sup>152</sup> *Brooke Group* has, nevertheless, been fully confirmed recently in a unanimous decision by the US Supreme Court in *Weyerhaeuser*<sup>153</sup> – a predatory bidding case.

EU competition law has taken a very different approach towards predatory pricing. In *AKZO Chemie BV*<sup>154</sup> and *Tetra Pak International*,<sup>155</sup> ECJ and CFI distinguished between two relevant situations: (1) For an undertaking in a dominant position to sell at prices below average variable cost is abusive per se. Predatory intent is presumed, because “the only interest which the undertaking may have in applying such prices is that of eliminating competitors”<sup>156</sup>. (2) Prices above average variable cost, but below average total cost are abusive “if they are determined as part of a plan for eliminating a competitor”. In this case, “sound and consistent evidence”<sup>157</sup> must be provided to show

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<sup>147</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* (“*Brooke Group*”), 509 U.S. 209, at 224.

<sup>148</sup> *Brooke Group*, 509 U.S., at 225.

<sup>149</sup> For a summary of what is required to prove a dangerous likelihood of recoupment see: *Temple Lang / O’Donoghue*, 26 *Fordh. Int’l L.J.* (2002), 83, at 142. The authors acknowledge that this analysis constitutes “a considerable barrier to plaintiffs trying to establish a predatory pricing claim”. For the difficulty to prove recoupment see also: *Hovenkamp*, *Federal Antitrust Policy*, 3<sup>rd</sup> ed. 2005, p. 370.

<sup>150</sup> According to *Evans/Padilla*, there have been no successful prosecutions of predatory pricing claims in the US since *Brooke Group* – see *Evans / Padilla*, *Designing Antitrust Rules for Assessing Unilateral Practices. A Neo-Chicago Approach*, 72 *U. Chi. L. Rev.* 73, at 88 (2005).

<sup>151</sup> For example, predatory pricing in one market can be a strategy to deter entry or effective competition in other markets in which the dominant firm is engaged. Even in the absence of barriers to entry, signalling the willingness to engage in predatory pricing schemes can have important deterrence effects. See for further explanation *Richard A. Posner*, *Antitrust Law*, 2<sup>nd</sup> ed., p. 211

<sup>152</sup> *Hovenkamp*, *Federal Antitrust Policy*, 3<sup>rd</sup> ed. 2005, p. 370 emphasizes the inability of the *Brooke Group* case law to deal with oligopolistic settings. See also *Temple Lang / O’Donoghue*, 26 *Fordh. Int’l L.J.* (2002), p. 83, at 144-145, acknowledging that cases of predatory pricing in which a competitor is not forced out of the market, but decides to raise prices to approximately the price level preferred by the dominant firm for fear of retaliation in case of active price competition, will not be caught.

<sup>153</sup> *Weyerhaeuser*, 549 U.S. (2007), 127 S.Ct. 1069.

<sup>154</sup> *AKZO Chemie BV v. Commission*, Case C-62/86, [1991] ECR I-3359.

<sup>155</sup> *Tetra Pak International SA v. Commission*, Case T-83/91, [1994] ECR II-755; confirmed on appeal *Tetra Pak International SA v. Commission*, Case C-333/94 P [1996] ECR I-5951.

<sup>156</sup> *AKZO*, [1991] ECR I-3359, paras. 71 and 72; *France Télécom S.A. v. Commission* (“*Wanadoo*”), Case T-340/03, 30 January 2007 [not yet published in ECR], para. 195-196 and para. 224

<sup>157</sup> *Tetra Pak International SA v. Commission*, Case T-83/91, [1994] ECR II-755, para. 151; *Wanadoo*, T-340/03, para. 197

an intent and a strategy to pre-empt the market.<sup>158</sup> Contrary to the US Supreme Court, the ECJ has explicitly rejected a requirement to prove a likely market effect, i.e. a realistic chance of recouping losses.<sup>159</sup> In *Tetra Pak v. Commission* the ECJ states:<sup>160</sup>

“it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalise predatory pricing whenever there is a risk that competitors will be eliminated. [...] The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors”.

Where intent has been shown, the conduct is assumed to be liable to have the desired exclusionary effect.<sup>161</sup> And “where an undertaking in a dominant position actually implements a practice whose object is to oust a competitor, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position within the meaning of Article 82”.<sup>162</sup>

The divergence between the EU approach and the US approach is thus remarkable: Both EU and US law of predatory pricing start by looking at the differential between cost and price, but here the similarities end. US law relies fully on proof of below cost pricing and market effect, or consumer harm, and dismisses the intent criterion. EU law of predatory pricing may sometimes even extend to above cost pricing,<sup>163</sup> in which case the main criterion will be intent. A requirement to prove a likely market effect has been rejected just recently again by the CFI in the *Wanadoo* case.<sup>164</sup>

What explains such a serious divergence between EU and US law? To some extent, underlying the different legal tests may be a different appraisal of the likelihood that such strategies are applied, and of the likelihood that they succeed.<sup>165</sup> One of the reasons the US Supreme Court has given for its admittedly restrictive predatory pricing test is its acceptance of the Chicago School’s factual allegation that predatory pricing schemes are too speculative to normally be a rational business strategy, and that they will therefore rarely occur.<sup>166</sup> The EU case law, by contrast, is based on the factual

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<sup>158</sup> *Tetra Pak International SA v. Commission*, Case C-333/94 P [1996] ECR I-5951, paras. 41 et. seq.; *Wanadoo*, T-340/03, para. 196 and para. 198

<sup>159</sup> *Wanadoo*, T-340/03, para. 195; *Michelin v. Commission*, Case T-203/01 [2003] ECR II-4071, paras. 241-242

<sup>160</sup> *Tetra Pak International SA v. Commission*, Case C-333/94 P [1996] ECR I-5951, para. 44.

<sup>161</sup> *Wanadoo*, T-340/03, para. 195: “If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect”.

<sup>162</sup> *Wanadoo*, T-340/03, para. 196, with further references.

<sup>163</sup> The US Supreme Court has rejected to extend the purview of predatory pricing to such situations, because it would be “beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate” procompetitive conduct. See *Brooke Group*, 509 U.S., at 223; *Weyerhaeuser*, 549 U.S. (2007), 127 S.Ct. 1069, at 1078.

<sup>164</sup> *Wanadoo*, T-340/03, para. 195-196, with further references.

<sup>165</sup> For a very skeptical view that predatory pricing strategies are economically feasible and relevant: *Robert H. Bork*, *The Antitrust Paradox: A Policy at War with Itself* (1978), p. 145

<sup>166</sup> See *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, at 589 (1986): “predatory pricing schemes are rarely tried, and even more rarely successful”. See also *Weyerhaeuser*, 549 U.S. (2007), 127 S.Ct. 1069, at 1077: “Predatory pricing requires a firm to suffer certain losses in the short term on the chance of reaping supracompetitive profits in the future. ... A rational business will rarely make this sacrifice”.

presumption that predatory pricing can be a rational strategy for a dominant firm to eliminate competitors,<sup>167</sup> and that it is a practically relevant strategy.

It is, of course, possible that under the given market conditions in the EU and the US, predatory pricing is indeed a strategy that is more frequently, and potentially more successfully, applied in Europe than in the US. In this respect, only empirical research can ultimately provide certainty.<sup>168</sup> It is, however, unlikely that the difference in the factual setting is sufficient to explain the difference between EU and US law. Antitrust scholarship generally recognizes today that predatory pricing strategies are more plausible than early Chicago School scholarship had maintained. In the 2<sup>nd</sup> edition of his monograph on “Antitrust Law”, *Richard A. Posner* finds that “predatory pricing cannot be dismissed as *inevitably* an irrational practice, and devotes substantial attention to it.<sup>169</sup> In *US v. AMR* (2003), the US Court of Appeals (10<sup>th</sup> Cir.) observes: “Recent scholarship has challenged the notion that predatory pricing schemes are implausible and irrational. [...] Post-Chicago economists have theorized that price predation is not only plausible, but profitable, especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets. [...]”. Where predatory pricing can admittedly be a rational exclusionary strategy and constitutes a real risk, the broader EU test cannot be easily dismissed as resulting from “unsound economics”.<sup>170</sup> Renowned antitrust scholars concede that the *Brooke Group* test for predatory pricing is in significant respects underinclusive,<sup>171</sup> and that underdeterrence may be the result.<sup>172</sup>

The US Supreme Court has implicitly acknowledged the potential underinclusiveness of the *Brooke Group* test itself, but has emphasized the high costs that “false positives”

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<sup>167</sup> See also: *John Temple Lang / O’Donoghue*, 26 *Fordh. Int’l L.J.* (2002), 83, at 122: “... there is agreement that predatory pricing may be profitable and anti-competitive ...”.

<sup>168</sup> According to some scholars, the number of predatory pricing schemes that are actually implemented in the US is non-trivial. See *Richard A. Posner*, *Antitrust Law*, 2<sup>nd</sup> ed., p. 214; *Bolton / Brodley / Riordan*, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 *Georgetown Law Journal* (2000) 2239, at 2244-2247.

<sup>169</sup> *Richard A. Posner*, *Antitrust Law*, 2<sup>nd</sup> ed., p. 213.

<sup>170</sup> For the economic soundness of the EU predatory pricing law see also: *John Temple Lang / O’Donoghue*, 26 *Fordh. Int’l L. J.* 83, at 87. Interestingly, EU law on predatory pricing is not so far from *Richard A. Posner* proposal to prohibit pricing below short-run marginal cost per se (*Richard A. Posner*, *Antitrust Law*, 2<sup>nd</sup> ed., p. 215: “There is no reason consistent with an interest in efficiency for selling a good at a price lower than the cost that the seller incurs by the sale”) and to prohibit selling below long-run marginal cost where an intent to exclude a competitor can be shown (*Id.*, pp. 215-216).

<sup>171</sup> See *Evans/Padilla*, 72 *U. Chi. L. Rev.* 73, at 87 (2005), who nonetheless recommend the *Brooke Group* test: “This test fails to identify all possible price predation practices but follows from the view that it is better to err by allowing some predatory pricing than to condemn some competitive pricing. The Supreme Court has properly moved to a stricter standard for showing predation because (a) setting prices low is a hallmark of competition (so that the cost of falsely condemning legitimate price cutting is high) and (b) successful predation is rare (so that the likelihood of false acquittals is low)”.

<sup>172</sup> See *William E. Kovacic*, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *Colum. Bus. L. Rev.* 1, at 51 and 53. See also: *Antitrust Modernization Commission*, *Report and Recommendations*, April 2007, p. 87: “Particularly in the context of Section 2 predatory pricing enforcement – where overdeterrence may deprive consumers of the benefits of aggressive competition – courts have been increasingly willing to adopt potentially underinclusive, but simple and objective cost-based legal rules”.

could potentially have:<sup>173</sup> “The mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition”. Once a broader test were applied, firms might start to fear predatory pricing allegations, and might become reluctant to cut prices aggressively, to the detriment of consumers.<sup>174</sup> “[M]istaken findings of liability would chill the very conduct the antitrust laws are designed to protect”.<sup>175</sup> With a view to the importance of price competition, the US Supreme Court thus expresses a clear preference for underdeterrence as compared to a broader test that might have overdetering effects. Some have submitted that the broader approach towards predatory pricing in EU law stands for a different view of the comparative costs of type I vs. type II errors, i.e. of “false positives” vs. “false negatives”.<sup>176</sup> Despite the much broader test for predatory pricing in EU competition law, it would be difficult to argue, however, that this test is likely to severely chill price competition or to overdeter. The number of cases in which Community courts have actually found predatory pricing schemes is small.<sup>177</sup> This does not mean, however, that the same broad tests on predatory pricing, when implemented into US antitrust law, would work similarly. In assessing the risk and costs of overdeterrence, the institutional setting of antitrust enforcement must be taken into account. Indeed, US antitrust scholars have recently defended the narrow and underinclusive predatory pricing test with a view to the deterrence effects of private enforcement in the US. Where a violation of Sec. 2 leads to treble damages, where juries are to decide on intent and where even a threat to sue may, due to the costs of litigation, may have a deterrence effect, the pressure for a narrow approach to predatory pricing may be strong.<sup>178</sup> The enforcement environment in the EU differs significantly. Despite efforts to strengthen private enforcement, incidents of independent private enforcement are still comparatively rare. Public enforcement dominates. Where private enforcement takes place, no juries are involved, and courts do not impose treble damages. Furthermore, a losing party will ultimately bear the costs of litigation, which diminishes the incentives to sue.

While the difference in enforcement conditions goes some way in explaining the difference between the EU and the US, it may not exhaust the reasons for diverging attitudes in the field of predatory pricing. The fact that the US requires proof of actual or likely consumer harm whereas under EU law a showing of intent to eliminate a competitor will suffice is insufficiently explained by different necessities in the US and in the EU to lower or raise the hurdles to sue. More fundamentally, it reveals different views of the structure and purpose of competition law. The US predatory pricing test faithfully reflects the view that the protection of consumer welfare is the ultimate and

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<sup>173</sup> *Brooke Group*, 509 U.S. 209, 226 (1993).

<sup>174</sup> See *Weyerhaeuser*, 549 U.S. (2007), 127 S.Ct. 1069, at 1074: A broader test of predatory pricing, namely one that would include cases of above-cost price cutting, “could, perversely, chill legitimate price cutting, which directly benefits consumers”.

<sup>175</sup> *Weyerhaeuser*, 549 U.S. (2007), 127 S.Ct. 1069, at 1075, with reference to *Brooke Group*, 509 U.S. 209, at 226 (1993).

<sup>176</sup> See *Fox*, 2006 Utah Law Rev. 799, at 803.

<sup>177</sup> See *Temple Lang / O’Donoghue*, 26 Fordh. Int’l L.J. (2002), p. 83, at 125 – at that time, the authors counted 3 cases only (*AKZO*; *Tetra Pak II*; and *Deutsche Post*).

<sup>178</sup> *William E. Kovacic*, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 1, at 53-54.

only relevant goal. Where a competitor is harmed by below-cost-pricing scheme, even if driven by anticompetitive intent, but the objective likelihood of recoupment and thus of consumer harm appears to be small, the competitor will enjoy no protection.<sup>179</sup> EU competition law takes a fundamentally different stance. It focuses not on the protection of a particular market outcome, but on the protection of the competitive process and of the competitors who participate in it. The latter are protected against exclusions that result not from competition on the merits, but from the unilateral exercise of power by a dominant firm.<sup>180</sup> Such protection of competitors is not in opposition to protection of competition, as the much-cited slogan “protecting competitors vs. protecting competition” suggests. However, it reflects the understanding that competition is a process that results from the exercise of individual rights. Competitors, in their exercise of economic freedom, engage in a process in which they may lose and possibly perish. Competition law shall, however, ensure that the fate of each competitor will depend on skill, business acumen and luck, and not on the exclusionary exercise of unilateral market power by a dominant firm.<sup>181</sup> The efficiency effects of such a concept of competition law will sometimes differ from the effects of a concept that looks directly to consumer welfare effects, like US antitrust law tends to do. The concept is, however, not necessarily less rational economically. It may somewhat weaken the incentives of firms to compete for dominance; but it will strengthen the incentives to enter markets and compete. The focus on market entry is implicit in the system of the EC Treaty and, with a view to the actual market environment in Europe, sufficiently justified.

Having sketched some “good” reasons for the differences between the US and the EU approach, it remains to refute others: The US and the EU do not diverge in their concern for protecting price competition; EU competition law does not strive to protect inefficient competitors; and US and EU law generally rely on the same economic theories in their attempt to distinguish illicit exclusion from legitimate competition. Differences can be observed with respect to the translation of economic insights into legal rules. The process of translation is not a technicality. It has to take into account the relevant market conditions which may determine the likelihood that predatory pricing schemes may occur; the institutional framework of antitrust enforcement which may be relevant for assessing the risk of false positives and false negatives; but also the normative structure of the law.

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<sup>179</sup> See *Weyerhaeuser*, 549 U.S. (2007), 127 S.Ct. 1069, at 1077, with reference to *Brooke Group*, 509 U.S. 209, at 224 (1993): Without successful recoupment, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced”.

<sup>180</sup> See EU Commission, Decision 97/624/EC [1997] OJ L 258/1, para. 134 – *Irish Sugar plc.*: “The maintenance of a system of effective competition does, however, require that competition from undertakings ... be protected against behaviour by the dominant undertaking designed to exclude them from the market not by virtue of greater efficiency or superior performance but by an abuse of market power”. See also *Eilmansberger*, CMLRev. 2005, 129, 133: The purpose of Art. 82 is “to ensure that the exercise of market power does not *impair competitors’ possibilities* to succeed or prevail on the market on the basis of superior business performance”.

<sup>181</sup> See *Mestmäcker*, Die Interdependenz von Recht und Ökonomie in der Wettbewerbspolitik, in: Monopolkommission (ed.), Zukunftsperspektiven der Wettbewerbspolitik, Baden-Baden 2005, p. 19, at pp. 34-35.

### 3. *Refusal to deal and the essential facilities doctrine*

Another relevant example for the divergence between Art. 82 and Sec. 2 Sherman Act is the case law on refusals to deal, and particularly the so-called essential facilities doctrine. *Ian Forrester* has recently emphasized the contrast between a “more liberal or minimalist approach” in the US and a “more formalistic or maximalist approach” of the Commission. According to him, “[t]he Commission attributes comparatively lower weight to a dominant player’s freedom to run its own business, and comparatively more weight to the protection of competitors than U.S. courts”.<sup>182</sup> Indeed, the Commission has, when faced with market access concerns, sometimes pro-actively pursued open-access policies. The Draft Discussion Paper on Art. 82 proposes a general balancing approach towards refusal to deal cases, which cannot be described as formalistic, but would certainly give the Commission significant discretion to implement rather broad open-access policies in innovative industries. The ECJ’s case law, on the other hand, does not confirm sweeping claims about a maximalist approach of EU competition law towards duties to deal.<sup>183</sup>

The limits of the “refusals to deal” doctrine under Art. 82 EC have been set out in the *Bronner* case.<sup>184</sup> In *Bronner*, the ECJ was confronted with questions presented by the Higher Regional Court of Vienna regarding the legality of a press undertaking’s refusal to grant Oscar Bronner, the publisher of rival newspapers, access to its nationwide newspaper home-delivery scheme – the only nationwide home-delivery scheme that existed in Austria at the time. The press undertaking – Mediaprint – held a very large share of the daily newspaper market in Austria, while the rival newspapers had a small circulation, and were for that reason unable to put into place a competing home-delivery scheme. Nonetheless, the ECJ rejected an abuse. In order to find that a dominant company’s refusal to deal constitutes an abuse, a number of narrow preconditions must be fulfilled: access to the input must be indispensable to carrying on the rival’s business, i.e. there must not be any actual or potential substitute; a duplication of the facility must be practically impossible; the refusal to deal must be likely to eliminate all competition on the part of the undertaking requesting the service (para. 38); and the refusal to deal must be incapable of being objectively justified (para. 41). In *Bronner*, these preconditions were not met: even if there was only one nationwide home-delivery scheme, newspapers could be distributed by other means, even if less advantageous ones (para. 44). Furthermore, there were no technical, legal or economic obstacles to establishing a rival home-delivery scheme, and access to the facility was therefore not indispensable. In order to show that access to a facility is indispensable, it was not enough to argue that the establishment of a rival home-delivery scheme was economically not viable due to the small size of the rival newspaper (para. 45). Rather, for access to a facility to be regarded as indispensable it would be necessary “at the very least” to establish that it would not be economically viable to duplicate the facility for a competitor of equal size (para. 46). In other words, the fact that a dominant firm benefits

<sup>182</sup> *Ian S. Forrester*, Article 82: Remedies in Search of Theories?, 28 Fordham Int’l L.J. 919, at 920.

<sup>183</sup> As *Ian Forrester*, with a view to the *Bronner* decision, readily admits – see *Ian S. Forrester*, Article 82: Remedies in Search of Theories?, 28 Fordham Int’l L.J. 919, at 920.

<sup>184</sup> *Oscar Bronner GmbH & Co. v. Mediaprint*, Case C-7/97, [1998] ECR I-7791.



from economies of scale in creating its own facilities is in itself no justification for obliging it to open such facilities to competitors.

With this decision, the ECJ effectively curbed expansionary tendencies which had previously been latent in the ECJ's case law<sup>185</sup> and in the Commission's decision practice. *AG Jacobs* has explicated the underlying rationale: Firstly, the "right to choose one's trading partners and freely to dispose of one's property" is of fundamental and even constitutional value in the Member States (para. 56). Secondly, allowing a company to retain its facilities for its own use will generally be pro-competitive. If dominant undertakings were required to share their facilities with competitors too light-handedly, their incentive to invest in efficient facilities would be reduced, and no incentives would exist for competitors to develop competing facilities (para. 57). Thirdly, the purpose of Art. 82 is "to prevent distortions of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors". It would therefore be unsatisfactory to decide refusal to deal cases only by looking at the dominant firm's market power in the upstream market and to conclude that reserving the downstream market to itself is automatically an abuse: "Such conduct will not have an adverse impact on consumers unless the dominant undertaking's final product is sufficiently insulated from competition to give it market power" (para. 58).

Taking the *Bronner* case as an authoritative expression of modern European refusal to deal-doctrine, the intellectual rift between EU and US law on this issue is not wide. The fundamental competition law principles and concerns expressed in *Bronner* are identical to the principles governing US antitrust law. These principles were summarized by the US Supreme Court in the much-debated *Trinko* decision in 2004.<sup>186</sup> *Trinko* confirmed the so-called *Colgate*-doctrine according to which the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal".<sup>187</sup> Duties to share are in "some tension with the underlying purpose of antitrust law", since they may "lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion".<sup>188</sup> It follows from there that antitrust limitations on the right to refuse to deal must be narrowly construed. The Supreme Court determined *Aspen Skiing*<sup>189</sup> to be the leading case on refusals to deal, found it to lie "at or near the outer boundary of § 2 liability" and interpreted it narrowly:<sup>190</sup> according to its reading of *Aspen Skiing*, § 2 liability will only lie where a voluntary – and thus presumably profitable – course of

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<sup>185</sup> See *Fox*, 2006 Utah Law Rev. 799, at 801: "E.U. law took on the tradition of a number of continental European countries of condemning refusals to deal with traditional customers, absent justification".

<sup>186</sup> *Verizon Communications, Inc. v. Law Offices of Curties V. Trinko, LLP* ("*Trinko*"), 540 U.S. 398 (2004).

<sup>187</sup> *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

<sup>188</sup> *Trinko*, 540 U.S. 398, at 407-408 (2004).

<sup>189</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)

<sup>190</sup> *Trinko*, 540 U.S. 398, at 408-410 (2004).

dealing is terminated unilaterally under circumstances that suggest a willingness to forsake short-term profits to achieve an anti-competitive end.<sup>191</sup> In cases that fall outside the unilateral termination of a voluntary course of dealing scenario, Sec. 2-liability could be established only based on the “essential facilities doctrine”. In *Trinko*, the Supreme Court found it unnecessary to either recognize or repudiate the “essential facilities”-doctrine, since it would not have been applicable in any case.<sup>192</sup> The tone of the judgment suggests, however, a sceptical attitude. With regard to any extension of Sec. 2 liability beyond the *Aspen Skiing* precedent, the Supreme Court underlines the need to perform a cost-benefit analysis: “Against the ... benefits of antitrust intervention ..., we must weigh a realistic assessment of its costs”. The costs, the Supreme Court finds, will be significant: in applying Sec. 2 Sherman Act, courts confront significant difficulties, because “the means of illicit exclusion, like the means of legitimate competition, are myriad”.<sup>193</sup> Any mistaken inferences and the resulting false condemnations “are especially costly, because they chill the very conduct the antitrust laws are designed to protect”.<sup>194</sup> Remediating refusal to deal-situations may require a continuous supervision by courts, a task which – depending on the concrete case – may be beyond the practical ability of a court.<sup>195</sup> These high costs, so the Supreme Court, argue against any “undue” expansion of Sec. 2-liability.

The comparison between *Bronner* and *Trinko* shows the many similarities between the EU and the US approach – and some differences. An obvious difference relates to the acceptance of an “essential facilities doctrine”: Whereas *Trinko* has left open the question whether Sec. 2-liability for refusals to deal may exist in cases where no prior voluntary course of dealing can be established, the possibility of such liability is well-accepted in the case law on Art. 82. Indeed, this doctrine has played a formidable role in liberalizing European state monopolies. The EU competition law’s greater concern with state monopolies may be one of the reasons why the essential facilities doctrine has resonated more strongly in Europe, although it is technically a legal import from US antitrust law.

Other differences are more subtle. Both *Bronner* and *Trinko* emphasize the importance of protecting the freedom to deal or not to deal with a view to the negative effects any duty to share will have on long-term incentives to innovate and invest, and thus on incentives to compete. While *AG Jacobs*, in his conclusions on *Bronner*, also emphasizes the constitutional importance of “the right to choose one’s trading partner”,

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<sup>191</sup> *Trinko*, 540 U.S. 398, at 409 (2004). In *Aspen Skiing*, the defendant had been unwilling to renew a joint skiing ticket cooperation, even if compensated at retail price. This indicated anticompetitive intent.

<sup>192</sup> See *Trinko*, 540 U.S. 398, at 410-411 (2004), citing *Areeda/Hovenkamp*, *Antitrust Law*, p. 150 # 773e (2003 Supp.): “essential facility claims should ... be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms”.

<sup>193</sup> *Trinko*, 540 U.S. 398, at 414 (2004), citing *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (CA DC 2001) (en banc).

<sup>194</sup> *Trinko*, 540 U.S. 398, at 414 (2004), citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

<sup>195</sup> *Trinko*, 540 U.S. 398, at 414 (2004), citing *Areeda*, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *Antitrust L.J.*, at 853: “No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency”.

such reference to freedom of contract is absent in *Trinko*. Instead, the Supreme Court stresses and elaborates the high costs of “false positives” – as it did in the predatory pricing cases – but, like in those case, fails to specify the potential costs of “false negatives”.

A significant divergence between the EU and the US exists with regard to the application of Art. 82 EC / Sec. 2 Sherman Act to IP rights. In Europe, *Magill* and *IMS Health* stand for an “essential facilities approach” which has never been accepted in IP cases by US courts. Both in the EU and in the US, the relevant case law on access to IP rights is currently highly controversial. On both sides of the Atlantic, it remains an evolving area of law.<sup>196</sup>

Finally, it must be pointed out that the approach towards refusal to deal-cases proposed in the EU Commission’s Draft Discussion Paper on Art. 82 deviates substantially from existing ECJ case law. The general balancing test recommended in the Discussion Paper would give broad discretion to the Commission to establish open-access policies under Art. 82. It would generalize the test applied by the EU Commission in the *Microsoft* case.<sup>197</sup> New insights on the degree of convergence or divergence in this area of law may therefore follow from the CFI’s *Microsoft* decision which is expected this fall.

In summary, the picture regarding the convergence and divergence in the EU and US attitudes on refusals to deal is mixed. The ECJ and the US Supreme Court entertain similar reservations against finding antitrust liability in such cases; but the ECJ has nonetheless been somewhat more pro-active than the US Supreme Court. The EU Commission has frequently tended towards an even broader “open-access”-approach, at least in those industries in which a market-access-problem had previously been identified. While this, as well as the application of Art. 82 to IP cases, can certainly be criticized, the more general and harsh criticism which EU competition law’s refusal to deal case law has at times faced appears to be unfounded with a view to the current state of law: EU refusal to deal doctrine does not stand for a general concern with fairness instead of efficiency, it does not tend to protect competitors instead of competition, and it is well aware of the regulatory dangers involved in the imposition of broad duties to deal.

#### **IV. Conclusions: Comparative insights**

A comparative look at the history and current application of Sec. 2 Sherman Act and Art. 82 EC thus reveals important commonalities, but also important differences in the attitudes towards rules on market power. The picture that emerges is much more nuanced than the standard story suggests. In fact, the standard story is in many respects wrong or at least misleading.

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<sup>196</sup> For a more detailed analysis see *Heike Schweitzer*, Controlling the unilateral exercise of intellectual property rights: a multitude of approaches but no way ahead?, Working Paper 2007.

<sup>197</sup> *EU Commission*, Decision of 24 March 2004, Case COMP/C-3/37.792 *Microsoft*, available at [http://ec.europa.eu/comm/competition/index\\_en.html](http://ec.europa.eu/comm/competition/index_en.html).

Firstly, the difference in language to which the divergence between EU and US antitrust rules is sometimes attributed appears to be less relevant for practical purposes than is often claimed. By contrast to Art. 82 EC, Sec. 2 Sherman Act prohibits incidents of monopolization or attempted monopolization by a firm irrespective of its current market position – but incidences of monopolization without a prior position of market power are rare; contrary to Sec. 2 Sherman Act, Art. 82 EC covers exploitative abuses, but the prohibition is seldom applied. In practice, both provisions are mainly applied to exclusionary abuses by firms in a position of dominance.

Secondly, EU competition rules, and particularly Art. 82, are not driven by fairness concerns different from the goal to protect competition. Like US law, EU law respects a dominant firm's right to forcefully compete on the merits. It does not strive to insulate inefficient competitors from competition. Like US antitrust law, EU law struggles with formulating an adequate test for distinguishing between pro-competitive conduct, or "competition on the merits", on the one hand and anti-competitive, exclusionary conduct on the other.<sup>198</sup> It is by its nature a difficult task, since the methods of exclusion and competition on the merits will frequently be the same;<sup>199</sup> the perfectly legitimate and pro-competitive intent to outperform, and thereby damage or even eliminate competitors may be difficult to distinguish from an intention to exclude by anti-competitive means,<sup>200</sup> and assessing a dominant firm's conduct therefore requires a thorough inquiry into a firm's conduct and its appraisal based both on intent and likely effect, where both can be uncertain in practice. The current reform initiatives both in the EU<sup>201</sup> and the US<sup>202</sup> stand for another attempt to get the distinction between "competition on the merits" and anti-competitive exclusionary conduct right. Like their brethren in the US, EU competition policy makers acknowledges the relevance of economic theory in this task. In translating these economic insights into legal rules, EU policy makers face, however, a somewhat different legal framework: Art. 82 EC protects the "institution" of competition, the competitive process itself, instead of making consumer harm the ultimate reference point. This concept is enshrined in the EC Treaty itself: it follows from Art. 3(1)(g) EC which makes a "system ensuring that

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<sup>198</sup> For the difficulty to formulate such a test, see, for example: *Hovenkamp*, *The Antitrust Enterprise*, 2005, p. 24; *Antitrust Modernization Commission*, Report and Recommendations, April 2007, p. 81. Also *Evans / Padilla*, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. Chi. L. Rev. 73: "... the welfare effects of unilateral practices are inherently difficult to assess".

<sup>199</sup> Examples are low pricing or refusals to deal. See for the more general claim: *Böhm*, *Wettbewerb und Monopolkampf*, Berlin 1933, pp. 9-10; *Mestmäcker*, *Das Marktbeherrschende Unternehmen im Recht der Wettbewerbsbeschränkungen*, Tübingen 1959, p. 6: "... die rechtliche Behandlung von Marktmacht ist vor allem deshalb so schwierig, weil Inhaber von Macht befähigt sind, die Institute des Privatrechts und die unter den Voraussetzungen freier Konkurrenz legitimen Mittel des Wettbewerbs in den Dienst der Marktbeherrschung zu stellen."

<sup>200</sup> *Antitrust Modernization Commission*, Report and Recommendations, April 2007, p. 81: "... companies routinely attempt to "exclude" competitors from the market simply by producing the best quality product at the lowest price. Accordingly, an observation that a particular firm's conduct 'excludes' its competitor does not answer whether the conduct is harmful to competition or just to the firm's competitor".

<sup>201</sup> See *DG Competition*, Discussion paper on the application of Art. 82 EC to exclusionary abuses (December 2005), available at [http://ec.europa.eu/comm/competition/index\\_en.html](http://ec.europa.eu/comm/competition/index_en.html) (Discussion Paper).

<sup>202</sup> See the Hearings on single-firm conduct currently conducted by the FTC.

competition in the internal market is not distorted” one of the fundamental Treaty goals.<sup>203</sup> It is a particular normative underpinning of EU competition law, and not a policy choice that competition lawyers or the Commission would be free to change. This does not imply that EU competition law is insensitive to the concept of efficiency. It is rather grounded in the conviction that the undistorted competitive process will generally tend to maximize wealth and consumer welfare, at least in the medium term.<sup>204</sup> *Richard A. Posner* appears to be an unsuspecting witness for the rationality of the EU’s policy choice. Efficiency, he says, “is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further”.<sup>205</sup>

A further aspect in which EU competition law markedly differs from the US is its understanding that the process of competition flows from the exercise of individual rights. It is an additional reason why EU law cannot make consumer harm the ultimate test of anticompetitive conduct, as US antitrust tends to do. The EU approach has been linked to Kantian philosophy.<sup>206</sup> Legally, it flows from the EC Treaty’s fundamental conception itself: EU competition law protects the opportunities to compete on the merits that result from the realization of the free movement rules. In doing so, it protects the individual rights of those who compete. This does not imply, however, that Art. 82 EC protect competitors *instead of* competition. Rather, it protects competitors as a part of the competitive process, and only against those harms which are not part of normal “competition on the merits”, but result from exclusionary, non-merit-based acts. The objection that this, and the accompanying focus not on consumer harm, but on harm to competition, prepones liability, will curb the dominant firm’s incentives to compete and therefore chill competition can be countered by the observation 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. This may be particularly valuable in a market environment where the barriers to enter foreign markets frequently remain significant.

This leads to another enduring feature of EU competition law, namely its close links with the market integration goal. The nexus between competition and market integration in EU law is increasingly criticized.<sup>207</sup> Like the EC Treaty’s concept of competition itself, it is, however, not a feature that the Commission would be free to give up. It results from the fact the EU competition law is part of primary EC Treaty law and functionally intertwined with the EC Treaty’s goals. Furthermore, the European focus on market integration cannot be condemned as mere ideology. While the successes of market integration in the EU are immense, the internal market within the EU still is a far cry from the unity of the US market. National boundaries remain a reality in the EU – a

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<sup>203</sup> See *Europemballage and Continental Can v. Commission*, Case C-6/72 [1973] ECR 215, para. 23 for the relevance of Art. 3(1)(g) for the interpretation of Art. 82 EC. Also: *Hoffmann-La Roche v. Commission* [1979] ECR 461, para. 38. See furthermore: *Eilmansberger*, CMLRev. 2005, 129, at 132.

<sup>204</sup> *Eilmansberger*, CMLRev. 2005, 129, 135.

<sup>205</sup> *Richard A. Posner*, *Antitrust Law*, 2nd ed. 2001, p. 29.

<sup>206</sup> *Mestmäcker*, *Bausteine zu einer Wirtschaftsverfassung – Franz Böhm in Jena*, in: ders., *Wirtschaft und Verfassung in der Europäischen Union*, 2 ed. 2003, pp. 116, at 123-127.

<sup>207</sup> For a different view see *Ian Forrester*, 28 *Fordham Int’l L.J.* 919, at 926 who speaks of market integration as a “civil religion” or a “cult”.

reality that Sec. 2 Sherman Act does not have to struggle with. The conviction, so strongly engrained in US antitrust law, that markets tend to be self-correcting<sup>208</sup> has never had the same appeal in the EU where frequently market boundaries still follow the national territories of Member States. This is one of the reasons why Chicago School scholarship, based on the assumption that robust, efficiently integrated markets exist and will erode any barriers that might be erected for limited periods of time, has not been perceived as relevant for EU competition law.<sup>209</sup> The different degree of market integration is certainly one of the reasons for the somewhat more pro-active attitude towards positions of market power under Art. 82 EC as compared to Sec. 2 Sherman Act. The actual risks of (successful) exclusion and, consequently, the costs of underinclusive tests may simply be significantly higher in the EU.

Another important difference between EU competition law and US antitrust law concerns the different structure of enforcement institutions on which they rely. Institutions and patterns of enforcement, sanctions and procedural rules influence the optimal design of substantive competition law. Renown US antitrust scholars have recently stressed that underinclusive rules on single-firm conduct may emerge as a reaction to an environment which provides (overly) strong incentives for private enforcement by making available treble damages and which charges juries with the task to apply the relevant tests.<sup>210</sup> Indeed, such rules, as well as high costs of litigation to be born by each party irrespective of the outcome of litigation may influence the cost-benefit analysis that underlies the design of rules. The US Supreme Court' persistent concern with rules that avoid "false positives" may well have its reasons here. In the EU, on the other hand, the conditions of competition law enforcement are very different. EU competition law has, until now, not relied on private enforcement to the same extent as the US. Risks of overdeterrence that may result from treble damages or from the alleged unreliability of juries are not a reality in the EU. The fact that the costs of

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<sup>208</sup> See, for example, *Easterbrook*, *The Limits of Antitrust*, 63 *Tex. L. Rev.* 1, at 15 (1984): While according to him, there is no automatic way to correct wrong decisions of the Supreme Court, and bad law will likely stick, "[a] monopolistic practice wrongly excused will eventually yield to competition ... as the monopolist's higher prices attract rivalry". In a somewhat weaker version, the same claim is made by *Evans / Padilla*, 72 *U. Chi. L. Rev.* 73, at 83-84.

<sup>209</sup> *Sir Leon Brittan*, *European Competition Law: Keeping the Playing-Field Level*, Brussels 1992, p. 3

<sup>210</sup> See, for example, *William E. Kovacic*, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *Colum. Bus. L. Rev.* 1, at 63-64: "... a fear that mandatory treble damages could provide excessive compensation and create overdeterrence may have induced the courts to design and apply liability standards in a manner that diminishes the private litigant's prospects for success. The Harvard-inspired forms of judicial 'equilibration' to constrain private plaintiffs – the adjustment by the courts of the malleable features of the US antitrust system to offset perceived excesses in characteristics (e.g., mandatory trebling of damages and availability of jury trials) not subject to judicial alteration – can have the far-reaching consequences well beyond the resolution of private antitrust cases. This is certainly the case where the method of equilibration is to alter liability rules. The establishment of more permissive substantive liability rules has systemwide effects. The non-intervention presumptions of liability standards that constrain the prosecution of private antitrust cases encumber public authorities alike". See also *Hovenkamp*, *The Antitrust Enterprise*, 2005, pp. 45 et seq., and for a broader critical survey of the private antitrust enforcement regime in the US pp. 57 et seq. See particularly the summary on p. 76: "Often judges respond to an overly aggressive remedies system by defining substantive violations too narrowly ... The result often gives us the worst of both worlds, a substantive system that fails to prosecute anticompetitive practices that it is capable of prosecuting, and a remedies system that strikes haphazardly while leaving other, equally serious practices undeterred".

litigation are born by the losing party reduces the extortionary potential of competition law claims. These may be valid reasons for EU competition law to formulate tests that strive to capture instances of abuse of dominance more comprehensively and systematically than this is currently the case in US antitrust law.

Stepping back and surveying the differences between Art. 82 EC and Sec. 2 Sherman Act, many of them appear to be strongly rooted in the normative structure of the rules, in different market realities and in different enforcement environments. All of these reasons are valid ones. None of them is incompatible with the effective competition of competitive markets or based on “unsound” economics. German ordoliberalism, so frequently blamed for having infected EU competition law with outdated economic theory, has certainly been influential in shaping EU competition law.<sup>211</sup> But its influence has not consisted in infusing non-economic fairness concerns or regulatory philosophy into the interpretation of Art. 82 EC. What is indeed close to German ordoliberal thought is rather the conception of the competitive process as a process resulting from the exercise of individual economic liberties. While this is contrary to US Chicago School thought, such a concept is by no means irrational or in contradiction to modern economic theory. Many outstanding economists have defended this approach.<sup>212</sup> Against this background, it is questionable whether we should uncritically follow calls for convergence of US antitrust law and EU competition law.<sup>213</sup> As long as the reasons for divergence are clearly articulated and explained, there appear to be good reasons for them to persist.

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<sup>211</sup> One of the important influences probably came in the person of *Ernst-Joachim Mestmäcker*, who was special advisor to *Hans von der Groeben*, the first Commissioner for competition, during the formative years, until 1970.

<sup>212</sup> See *Martin Hellwig*, *Effizienz oder Wettbewerbsfreiheit? Zur normativen Grundlegung der Wettbewerbspolitik*, in: Engel / Möschel (eds.), *Recht und spontane Ordnung*, FS für Ernst-Joachim Mestmäcker zum 80. Geburtstag, Baden-Baden 2006, pp. 233 et seq; *Amartya Sen*, *Rationality and Freedom*, pp. 3 et seq.

<sup>213</sup> For such calls see, inter alia: *John Temple Lang / Robert O'Donoghue*, *Defining Legitimate Competition: How to Clarify Pricing Abuses under Article 82 EC*, 26 *Fordh. Int'l L.J.* 83, at 85: differences between US and EU antitrust law “should be minimized where possible”. See also *William J. Kolasky*, *What is competition? A comparison of U.S. and European perspectives*, 49 *Antitrust Bull.* 29 (2004), at p. 53: “A divergence of policies can only breed chaos and confusion, unless there are clearly articulated reasons for the differences”.