A. Jorge Padilla

LEGC Consulting – Brussels, London and Madrid

From *Fairness* To *Welfare*:
Implications for the Assessment of Unilateral Conduct under EC Competition Law

written with Christian Ahlborn, Partner at Linklaters

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From Fairness *to* Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law

Christian Ahlborn and A. Jorge Padilla[1]

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I. INTRODUCTION

U.S. antitrust policy transitioned from the pursuit of fairness to a consumer welfare standard by the time Judge Robert H. Bork published its *Antitrust Paradox* in the 1970s.[2] This transition is taking considerably more time on this side of the Atlantic, but judging from Commissioner Kroes' 2005 Fordham speech and DG Competition's *Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (the "Discussion Paper"), it is well under way.[3]

This paper explains why the move from fairness to welfare in European antitrust should be welcomed on normative grounds. Following a long philosophical tradition,[4] we take the view that legal rules and institutions should be assessed taking *exclusively* into consideration their impact on the well-being of individuals. Thus, a legal rule will be regarded as superior to another if the aggregate impact of the former on the welfare of individuals exceeds the aggregate welfare impact of the latter. Under this normative approach, therefore, a fairness-based antitrust rule will necessarily be pronounced inferior to a welfare-driven rule, unless both coincide. Furthermore, it will also be considered relatively less efficient as a matter of economics. This is because, for economists, a legal rule is "efficient" when there is

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[1] Christian Ahlborn is a Partner at Linklaters. A. Jorge Padilla is Managing Director at LECG Consulting and Research Fellow at CEMFI and CEPR. This paper was presented at the 12th Annual Competition Law and Policy Workshop held in Florence on 8-9 June 2007. It draws in part on work with David S. Evans. We wish to thank Mel Marquis for his detailed comments and suggestions. The usual caveats apply. Comments should be sent to christian.ahlborn@Linklaters.com and jpadilla@lecg.com.

[2] Robert H. Bork, *The Antitrust Paradox,* Free Press, 1978.

[3] Commissioner Neelie Kroes, "Preliminary Thoughts on Policy Review of Article 82", Speech at the Fordham Corporate Law Institute New York, 23 September 2005, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=HTML&aged=0&language=EN&guiLanguage=en. DG Comp's Discussion paper, dated December 2005, is available at: http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

[4] See the discussion of "utilitarianism" in Will Kymlicka, *Contemporary Political Philosophy,* 2nd ed., Oxford University Press, 2002, chapter 2.

Ahlborn and Padilla, "*From* Fairness *to* Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law", in Ehlermann and Marquis, eds., *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC,* forthcoming 2008.

no other legal rule with a greater positive effect on aggregate welfare. As explained by Kaplow and Shavell (2002), "invocations of efficiency should thus be understood to entail a concern for individuals' well-being rather than obeisance to some technical or accounting notion".[5]

As explained in Section II below, current Article 82 policy is characterized by a mixed normative approach where the notions of welfare and fairness are each given positive weight. Not surprisingly, European competition policy exhibits many different goals. Welfare is one of them. But others, such as the protection of small competitors, can only be understood in terms of fairness. This hybrid approach is the result of many factors, but certainly among these the influence of the Ordoliberal school of legal and economic thought features very prominently. The impact of ordoliberalism on EC competition law is explained in detail in Sections III and IV. Ordoliberal concepts, such as the notion of "complete competition", which gave rise to the key (traditional) principles of EC competition law, have lost their intellectual appeal. However, the principles that were derived from them, such as the "special responsibility of dominant firms", are still part of the backbone of European antitrust.

Our analysis in Section V shows that current Article 82 policy is inefficient, as it fails to deliver from a welfare perspective. Current Article 82 policy is likely to cause too many and too costly false positives (or "type I" errors, in the jargon of statistical decision theory). We show that these errors are particularly costly due to their nefarious impact on the incentives to innovate and thus on economic growth and prosperity. These errors are the result of a combination of factors: (i) the adoption of a vacuous standard based on ill-defined notions such as competition on the merits, normal competition and objective justification; (ii) the refusal to accept the consensus view among economists that the behaviour of the competitive fringe generally constitutes a valid benchmark by which to assess the pro-competitive or anticompetitive nature of the unilateral conduct of dominant firms; (iii) the tendency to neglect the beneficial effects of some unilateral business practices on short-term consumer welfare, while its potentially adverse effects on rivals and, it is argued, on future consumer welfare, is over-emphasized; and (iv) the *de facto* or *de iure* adoption of *per se* rules that ignore the fact that most unilateral actions have both pro-competitive and anticompetitive effects.

As noted above, EC competition policy is transitioning to a consumer welfare standard. As Commissioner Kroes recently stated, "the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources".[6] A similar statement can be found in DG Comp's Discussion Paper.[7] This transition is welcomed and will contribute to improve the efficiency of Article 82 policy. But as we argue in Section VI, it is not enough. Adopting a

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[5] Louis Kaplow and Steven Shavell, *Fairness Versus Welfare*, Harvard University Press, 2002, p. 37.
[6] Kroes, *supra* note 3.
[7] See *supra* note 3, para. 54.

consumer welfare standard is nominally a positive first step, but the implementation of a welfare standard would require abandoning the special responsibility of dominant firms, recognizing the ubiquitous role of efficiencies, and taking into consideration the actual effects of a practice when assessing the likelihood of its anticompetitive effects. Our reading of the Discussion Paper and the recent judgments in *British Airways*[8] and *Wanadoo*[9] suggests that the Community institutions may not be ready, at least not for the time being, for such a change.

While there is considerable agreement among economic and legal scholars and practitioners that the goal of competition policy should be the protection of consumer welfare, there is no consensus, or a very limited one, on how to achieve that goal. There is an intensive debate concerning the design of legal rules and tests to identify anticompetitive practices. In Sections VII and VIII we present our views on these issues. We first consider the proposal of DG Comp's Economic Advisory Group on Competition Policy (EAGCP),[10] which mirrors to a large extent the views of Professor Steven Salop in the United States.[11] In a nutshell, the EAGCP proposes to assess directly the impact of a given practice on consumer welfare through an unstructured rule of reason standard, whereby the anticompetitive and pro-competitive effects of the practice are balanced according to the facts of the case. They also propose to eliminate the dominance filter. In our view, this proposal may lead to too many false positives and may be costly to enforce and self-enforce. That is why we discuss two alternative approaches that build on Judge Easterbrook's structured rule of reason:[12] a three-pronged structured rule of reason and a qualified *per se* legality rule (according to which a practice is considered legal in all but "exceptional circumstances"). We argue that the structured rule of reason is likely to be superior to the unstructured rule of reason in error cost terms, since it limits the complex balancing of pro-competitive and anticompetitive effects to those practices that are likely to have anticompetitive effects. A qualified *per se* legality rule is cheaper to enforce and makes it easier for dominant firms to assess their own practices. Whether it is superior to the rule of reason and its variants depends on the cost of the type I and type II errors inherently associated with the assessment of unilateral business practices. Section IX concludes.

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[8] Case T-219/99, *British Airways v Commission* [2003] ECR II-5917, *upheld on appeal,* Case C-95/04, judgment of the Court of Justice of 15 March 2007, not yet reported.
[9] Commission Decision COMP/38.233, *Wanadoo Interactive*, available at: http://ec.europa.eu/comm./competition/antitrust/cases/decisions/38233/en.pdf.
[10] EAGCP, *An Economic Approach to Article 82*, July 2005, available at: http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf.
[11] Steven C. Salop, "Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard", forthcoming in the *Antitrust Law Journal,* 2007.
[12] Frank H. Easterbrook, "The Limits of Antitrust", 42 *Texas Law Review* 1 (1984).

II. EC COMPETITION LAW OBJECTIVES

The precise objectives of Article 82 have never been articulated in any formal Community document or decision. However, the Commission has made it clear that it is inconceivable to apply EC competition policy without reference to the priorities fixed by the Community and the Community Courts have consistently insisted on the broad unity of purpose between the competition provisions of the Treaty. Consequently, the basic role of Article 82 is to promote the wider objectives of the EC Treaty by restricting or conditioning the strategies of companies with substantial market power.

A. Broad range of objectives

Among the wider objectives of the EC Treaty, two in particular stand out in the context of EC competition policy: single market integration and, inevitably, the protection of competition, which, in the EU, has taken various different forms.

1. The objective of single market integration

EC competition policy has to be understood in the context of the central task (and even *raison d'être*) of the Community, namely the creation of single European market. As Gerber (1998) puts it: "This 'unification imperative' has shaped institutional structures and competences within the system, supplied much of its legitimacy and generated the conceptual framework for the development and application of its substantive norms."[13]

Concern about market integration explains the high degree of attention given to vertical restraints affecting trade across borders in EC competition law – clearly disproportionate for those trained in the Chicago tradition.[14] It also explains the Commission's policy towards any unilateral action (e.g., excessive pricing or refusals to deal) or agreement which can affect the economic viability and scope of parallel trade within the European Union.

2. The objective of protecting competition

One of the central objectives of the EC Treaty is to ensure a system of free competition. Article 4 of the EC Treaty states that the activities of the Community and its Member States should be "conducted in accordance with the principle of an open market economy with free competition". Article 98 also requires the Community and its Member States to "act in accordance with the principle of an open economy with free competition, favouring an efficient allocation of resources". Competition policy in Europe, and in particular Article 82, must serve the goal of protecting competition. Yet, as noted by Gerber (1998), there are at least four basic conceptions of what it means to protect competition in EC competition law:

[13] David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998.
[14] Aaron Director is viewed by most observers as the intellectual father of the Chicago School approach to antitrust. See Richard A. Posner, "The Chicago School of Antitrust Analysis", 127 *University of Pennsylvania Law Review* 925 (1978-1979).

(a) protecting efficiency and welfare, (b) protecting economic freedom, (c) promoting economic change, and (d) constraining economic power.

a. Protecting rivalry and the competitive process

The constraints imposed on the actions of large corporations have most often been directed at protecting and enhancing rivalry, which is regarded as the central characteristic of the competitive process. Some authors have incorrectly stated that EC competition law seeks to protect competitors rather competition. That is certainly not the case. European competition authorities do not attribute more weight to the profits of the dominant firm's competitors than to the profits of the dominant firm itself. They do not seem to value either too much. However, the Commission and the Community Courts firmly believe that there is no effective competition where there are no competitors. Decisions and judgments which seem geared to protect competitors are actually intended to protect the competitive *process* and, sometimes, to consolidate the liberalization efforts of the Commission and the Member States.

Not surprisingly, competition policy intervention and especially intervention under Article 82 in the last few years has concentrated on recently liberalized sectors (especially telecoms) as well as on sectors characterized by network effects (e.g., where the risk of self-perpetuating monopoly is high. The protection of rivalry and the competitive process also explains the position of the Commission and the Community Courts in connection with refusals to deal. EC case law has been and still is more inclined to mandating access than US antitrust law. For example, terminating an existing commercial relationship without objective justification constitutes an abuse of dominant position, even when the product to which access is granted is not indispensable to compete.

b. The protection of economic freedom and the limitation of market power

Competition has also been regarded as an instrument to prevent the creation and misuse of private economic power. The protection of competition is, according to the EC tradition, necessary to ensure economic freedom and, most importantly, to create a prosperous, free and equitable society. Article 82 has been considered a tool to curb the economic and political power of large corporations within the EU. Companies which for different reasons, both legitimate[15] and illegitimate,[16] enjoy significant prerogatives in their Member States, may have the incentive and ability to "undermine competitive (and sometime political or social) structures".[17]

Somewhat paradoxically, EC competition law is meant to protect economic freedom by constraining, in a non-discretionary fashion, the decision-making freedom of dominant firms. However, intervention is justified as follows. First, the restrictions imposed on

[15] They are too big to fail, as it were, due to the massive employment and/or financial implications for the local economy if the company downsizes of its operations.
[16] That is, plain corruption or more benign forms of regulatory capture.
[17] Gerber, *supra* note 13, p. xi.

dominant firms seek to protect and promote the "common good". Second, dominant firms are encouraged to compete vigorously provided that they compete "on the merits"; they are only prohibited from "recourse to methods different from those governing normal competition".[18] Third, the application of Article 82 is subject to the general principles of Community law: proportionality, equality, legal certainty and the rights of defence. The protection of human rights is guaranteed within the context of EC competition law.

c. Fairness

In addition, as stated by Gerber (1998: 2), "[t]he goal of protecting competition has often been interwoven with the idea of achieving social justice". The Commission and the Community Courts have indeed condemned prices and contractual practices found to be "unfair". Fairness considerations are also behind the idea that large, well-resourced firms should not unduly hamper the commercial activities of small or medium-size firms. Companies with market power must act "as if" they did not possess that power. Their actions must not deviate too far from the actions of companies that operate in competitive markets. Otherwise, their actions could be regarded as unfair and abusive even if they could prove to be welfare-enhancing.

d. Welfare and efficiency

For most economists the main, if not the only, goal of competition law should be to prevent any unilateral or collective practice that could harm consumers and reduce the efficiency of markets. Protecting competition in this sense means protecting and promoting efficiency.

Economists have long debated whether the goal of competition law should be the protection of consumer welfare or aggregate welfare (i.e., the sum of consumer welfare and industry profits). They have disagreed on whether competition law should focus on short-term consumer welfare or whether instead it should also take into account the impact of certain commercial practices on future generations of consumers. And they have also disputed whether competition policy should concentrate on allocative efficiency (i.e., on prices, quality and output) or whether dynamic efficiency (i.e., innovation) should be considered the main goal of an economically sound antitrust law. But there is a generalized consensus amongst economists, at least those who regard themselves as orthodox or mainstream, that companies' actions should be regarded illegitimate only when their impact on welfare is adverse. EC competition law, in general, and Article 82, in particular, also seeks to protect and enhance consumer welfare and market efficiency.

3. Types of goals and consistency

In a debate about the goals that should guide competition policy, it is important to distinguish between *direct goals* and *indirect goals*. Almost everyone would agree that the ultimate goal of competition policy is to increase economic welfare: the question, however, is whether it should be a *direct* goal, i.e. a goal which ultimately affects and guides competition policy. A

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[18] Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, para. 6.

comparison may help to make this distinction clear: for ordoliberals, the direct goal of competition policy was the protection of economic freedom and the preservation of "complete" competition. The underlying assumption was that the preservation of economic freedom would ultimately lead to the maximization of economic welfare, but it was an assumption which was not tested. This contrasts, for example, with the Chicago school approach, which focuses on economic welfare as the only direct goal. Here, economic welfare is not an untested assumption but the benchmark against which competition policy is measured.

In the remainder of this paper, we will class the various competition policy goals into three categories:

- **Fairness goals**: which include fairness, the protection of economic freedom, the protection of rivalry and the competitive process and the protection of small and medium-size firms.
- **Welfare and efficiency goals**: which cover both of the principally discussed welfare objectives, i.e., the goal of consumer welfare and that of total welfare.
- **Market integration goals**: which deal with the goal of a single European market and the reduction of obstacles to cross-border trade.

While the goals within each category may lead to somewhat differing policies, they are broadly consistent: for example, the protection of economic freedom will go hand in hand with the control of dominant firms and the protection of small and medium-size firms, and fairness considerations will quite naturally come into play. Again, the consumer welfare and total welfare goals may lead to somewhat different rules, but these differences are unlikely to be significant, at least in practice. By contrast, *across* the three categories, it is less likely that the goals encompassed by each will be consistent.

B. The dynamics of EC competition law goals

Competition law objectives change over time. Sometimes this shift is fairly obvious, sometimes it is slow and gradual. In the US, exponents of the Chicago school, such as Robert Bork or Richard Posner, triggered a debate about the goals of antitrust in the 1960s and 1970s, at a time when the US authorities pursued a range of different goals not unlike the current fairness goals in EC competition policy, including the preservation of rivalry and the protection of small firms. The Chicago School advocated a single objective of economic welfare on the basis that a policy which followed a number of inconsistent objectives could not be predictable. In the US, the Chicago school has clearly won this debate and the US enforcement authorities look most frequently at what is best for consumers. The Chicago school victory was described recently by Ken Heyer as follows:

> "Over the past several decades, there has emerged a rough consensus among professional antitrust practitioners … that the "competition" referred to in [the US] antitrust statutes is not to be interpreted simply as pre-merger rivalry among entities. Rather it is best viewed as a process, the outcome of which is welfare, with welfare - not rivalry – being [the] object of interest."[19]

In the EU, the development has been markedly different. There has been no debate about the goals of competition policy comparable to that in the US, and the various objectives under EC competition policy have been, and continue to be, co-existent. Arguably, however, there has been a shift of emphasis: fairness goals and integration goals seem to have lost some of their previous importance and economic welfare seems to have gained greater prominence.

1. Market integration and economic welfare

As a result of the Community objective of market integration, competition law has consistently intervened where private measures were being used as barriers to cross-border trade. The Commission was clearly concerned that state barriers would be replaced by business measures to partition national markets.

This has led to an almost *per se* prohibition on absolute territorial protection, independently of any efficiency considerations. In other words, the market integration objective trumped the efficiency consideration. The Commission generally avoided addressing any conflict on the basis of the assumption that competition and market integration both serve the ends of consumer welfare since the creation and preservation of an open single market promotes an efficient allocation of resources. More recently, however, the Court of First Instance seems to have reversed the order of the market integration and welfare objective, removing the *per se* illegality of territorial protections.[20]

2. Fairness goals and economic welfare

The shift from fairness goals to economic welfare has been more gradual and has generally occurred at times when a particular area of competition law was "modernized" (as happened, for example, with the assessment of vertical restraints between 1999 and 2001). Nevertheless, many cases even today still show a strong emphasis on fairness considerations and equality ("equal opportunity competition"). This is particularly true for Article 82.

In parallel with a greater reliance on economic welfare objectives in "modernized" areas of competition law, there has also been a noticeable emphasis on economic welfare

[19] Ken Heyer, "Welfare Standards and Merger Analysis: Why Not the Best?", Economic Analysis Group Discussion Paper, EAG 06-8, March 2006, available at:
http://www.abanet.org/antitrust/at-source/pdf/references/heyer-ken-06-8.pdf. A version of this paper is available in 2(2) *Competition Policy International* (2006).

[20] See Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, *on appeal:* Cases 501/06, 513/06, 515/06 and 519/06.

objectives in statements by Commission officials, whereas previous statements had often highlighted fairness objectives. For example, in the 1980s the Commission considered that "[e]ffective competition preserves the freedom and right of initiative of the individual economic operators and fosters the spirit of enterprise".[21]

Where reference was made to the consumer welfare objective, as for example in the Commission's Guidelines on Vertical Restraints,[22] care was taken to emphasize that fairness goals and market integration goals were generally consistent with the consumer welfare objective.

It is only recently that Commission officials have unequivocally been backing a single, or at least an overriding consumer welfare objective for EC competition policy. As Commissioner Neelie Kroes has stated: "Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition as a means of enhancing consumer welfare and ensuring an efficient allocation of resources."[23]

III. THE ORIGINS OF FAIRNESS IN EC COMPETITION POLICY: ORDOLIBERALISM

The "fairness goals" were imported into EC competition law (via German competition law and German officials) from ordoliberalism. This is not to say that, without ordoliberalism, EC competition law would not have formulated "fairness goals" (indeed, as we have seen, US antitrust in the 1950s and 1960s were driven by very similar policy considerations without having been exposed to ordoliberal ideas). But without an understanding of ordoliberalism, it is hard to grasp how "fairness goals" shaped EC competition policy.

A. Competition as an instable equilibrium

Ordoliberalism, which was developed in Germany in the 1930s and 1940s, saw itself as the "third way" between the centrally planned economy and the unregulated market by *laissez-faire* liberalism. From the experience of the Weimar Republic, the Great Depression, and the ascendance of totalitarianism, ordoliberals drew two fundamental conclusions. First, the centrally planned economy and the market economy (or "transaction economy") were fundamentally incompatible. Second, ordoliberals regarded the competitive process of the market economy as inherently fragile, threatened both internally and externally.

[21] Commission, *Fifteenth Annual Report on Competition Policy* (1986), p. 11.
[22] Commission Notice, Guidelines on Vertical Restraints, 2000 OJ C291/1, para. 7 ("The protection of competition is the primary objective of EC competition policy, *as this enhances consumer welfare and creates an efficient allocation of resources*.") (emphasis added).
[23] Neelie Kroes, "European Competition Policy – Delivering Better Markets and Better Choices", SPEECH 05/512, London, 15 September 2005.

1. Direct instability

Internally, the ordoliberals saw the competitive process endangered by an inherent, self-destructive aspect, which Walter Eucken described as follows:

> "The supplier and the customer always - wherever possible - seek to avoid competition and to acquire or assert monopolistic positions. There is an omnipresent, strong and irrepressible urge to eliminate competition and to acquire a monopolistic position. Everyone espies possibilities of becoming a monopolist. Why should three bakers in a 13th century town compete with one another? They could simply come to an agreement and create a monopoly. This was the situation then and the same applies today."[24]

In particular, according to Eucken, once a market becomes concentrated (i.e. when it moves away from a polyopoly), "this oligopoly - or part oligopoly - situation often passes by rapidly, and soon leads to the creation of a cartel, i.e., to a collective monopoly or an individual monopoly, by overpowering the opponent", although sometimes "this unstable condition of the oligopoly or part oligopoly exists for many years or decades".[25]

2. Indirect instability

Of equal if not greater concern is what may be termed "indirect instability", namely that the creation of economic power enables firms to influence decision makers, which in turn allows them to restrict competition through political intervention (for example through the creation of barriers to entry).

Competition, to Eucken and other ordoliberals, thus has not only an economic but also a very important political dimension: "Competition is by no means only an incentive mechanism but, first of all an instrument for the deprivation of power (*Entmachtungsinstrument*)…. The most magnificent and most ingenious instrument of deprivation of power in history."

B. The Ordoliberal answer

For the ordoliberals, the answer to the problem of the inherent instability of the competitive process was twofold: the competitive order of "complete competition" as the guiding principle; and strong protective measures in accordance with what ordoliberals call "*Ordnungspolitik*".

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[24] Walter Eucken, "The Competitive Order and its Implementation", 1949, reprinted in 2(2) *Competition Policy International* 222 (2006).

[25] Eucken, cited previous footnote, at p. 244

1. The competitive order of "complete competition"

For ordoliberals it was clear that the market economy was the key to a prosperous and humane society. Competition and only competition would achieve sustained economic development. However, according to ordoliberalism, not every form of competition could be expected to produce this beneficial outcome, but only the form of "complete competition".

Complete competition is competition in a market where no firm has the power to coerce conduct of other firms. Complete competition can be identified by two indicators. First, "[t]he price is not forced upon the market by way of a market strategy but is taken from the market",[26] in other words, all market participants are price takers. The second indicator is the absence of "certain measures [which would] clearly indicate that competition does not exist because these measures cannot be implemented under complete competition: for example, obstructions to purchasers or suppliers that have dealings with competitors, or loyalty rebates or predatory pricing or dumping or destruction of stocks".[27] In other words, complete competition is the market form which ensures "performance competition" (*Leistungswettbewerb*).

Despite the fact that the ordoliberals do not link complete competition to a particular market structure (and despite the ordoliberals' criticism of the neoclassical model of perfect competition), the concept of complete competition does have an underlying structural assumption of a polyopoly and can best be understood as the adaptation of the model of perfect competition to the real world.

In summary, ordoliberals see a virtuous circle perpetuated by, on the one hand, a de-concentrated market structure where players have no (significant) market power, and competition on the merits on the other. De-concentrated markets prevent "hindrance competition" and ensure that competition takes place on the merits, and competition on the merits in turn preserves de-concentrated markets.

2. Protective measures of "*Ordnungspolitik*"

Ordoliberalism saw the need of strong protection through a political and legal framework which would safeguard the efficient functioning of competition and which would protect it from any self-destructive tendencies. Here, ordoliberals foresaw a clear separation of roles for the state and the private sector:

> "The policy of competitive order does not leave the choice of the market forms and monetary systems to the economy itself because the experience of the laissez-faire policy speaks for itself. The development of the framework in which business and households can plan and act freely is governed by the economic policy under which the framework is supervised. Business are free to choose what they produce, what

[26] Eucken, *supra* note 24, at p. 230
[27] *Ibid.*

> technology they use, what raw materials they purchase and what markets they wish to sell on […] Freedom of the consumer exists, but not the freedom to choose how to define the rules of the game or the forms which the economic process takes. This particularly falls within the field of Ordnungspolitik (order-based policy)."[28]

For ordoliberals, every measure of economic policy was ultimately competition policy, in the sense that it was intended to safeguard and enhance complete competition. It included the primacy of monetary policy (against the experience of hyper-inflation in the Weimar Republic), the protection of open markets against state measures and private measures, consistency and predictability of economic policy, private ownership and competition policy (in the strict sense).

C. Key principles of Ordoliberal competition policy

Ordoliberal competition policy is characterized by the following four fundamental principles:

1. Complete competition as the predominant market form

According to the ordoliberals, competition policy, and in particular the control of monopolies, would ultimately fail, not least for political reasons, if large parts of the industry were highly concentrated. By contrast, the situation would be different where the legal and political framework of *Ordnungspolitik* operate to ensure de-concentrated markets and complete competition: "The creation of companies with monopolistic power is prevented. Not only by prohibitions of cartels but also - and far more importantly - by an economic and legal policy which breaks through the strong forces of competition, as exists in a modern economy…"[29] Thus, under ordoliberal economic policy, complete competition would be the predominant form of competition: monopolies and oligopolies would be exceptions.

2. Regulation of monopolies

In an ordoliberal system, competition policy would be in the hands of an independent competition authority (monopoly office) whose task would be to break up "avoidable monopolies" and to regulate "unavoidable monopolies". The basic principle for the regulation of monopolies was the principle of "behaviour analogous to competition", reflected in the "as if" approach: "The aim of monopoly legislation and monopoly supervision is to ensure that the bearers of economic power behave as if complete competition prevailed. The behaviour of

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[28] Eucken, *supra* note 24, at p. 227. See further Eli F. Heksch er, *Der Merkantilismus,* volume 1, Gustav Fischer, 1932, p .448 *et seq.* With respect to the economic liberalism in England in the early 19th Century, as opposed to mercantilism, Heckscher writes: "The old method would have been an attempt to create a barrier to fundamental changes (*Umwälzungen*). The new victorious method allowed them to take a free course. Therefore, they were enforced with power unparalleled in mankind's ancient economic history. The third alternative would have been neither to intervene in the course of events nor to regulate its course but to direct it in ordered ways. This concept has never been tried."

[29] Eucken, *supra* note 24, at p. 239.

the monopolists should be 'analogous to competition'."[30] Eucken described the practicalities of this approach as follows:

> "Every form of impediment competition by embargoes, loyalty rebates, predatory pricing etc is prohibited […] This creates a condition which would automatically arise in a situation of complete competition, where impediment competition would be pointless. Admittedly, in order to achieve a result analogous to competition, it is necessary to introduce an obligation to contract, as here coercion is necessary to achieve the same result as would automatically arise under complete competition.
>
> As is generally known, under complete competition the same prices will become established for the same goods and services. Supply monopolies for example, whilst striving for the highest profit, have a tendency to demand differentiated prices for the same goods or services from individual segments of demand. Price differentiation should be prohibited under the competitive order.
>
> What is most difficult is to implement the fundamental principle within the scope of determining price levels. The price is to be fixed in such a way that supply and demand are in equilibrium at this price and, at the same time, the marginal costs are just covered."[31]

3. Competition policy towards oligopolies

Ordoliberals regarded oligopolies as a transient market form: "This situation of oligopoly - or part oligopoly - often passes by rapidly, and soon leads to the creation of a cartel, i.e. to a collective monopoly or an individual monopoly, by overpowering the opponent".[32] However, given that sometimes "the unstable condition of the oligopoly or part oligopoly exists for many years or decades",[33] ordoliberals still saw the need to address the issue. There were two conflicting views among ordoliberals. Some of them proposed a special regulatory regime for oligopolies under state supervision. Others regarded this as too burdensome and, for the following reasons, unnecessary:

> "With a decisive monopoly supervision, the oligopolists have no reason to destroy each other by aggressive means or to attain a position of monopoly of their own. This is because [the last survivor] comes up against a rigorous monopoly control. Furthermore, the oligopolists themselves will attempt to behave as if complete competition prevailed, as they will otherwise come to the individual attention of the monopoly office."[34]

[30] *Ibid.*, at p. 241.
[31] .*Ibid.*, at p. 243.
[32] *Ibid.*, at p. 244.
[33] *Ibid.*, at p. 244.
[34] *Ibid.*, at p. 245.

4. Limited discretion of the competition authority

According to ordoliberals, it is within the exclusive sphere of the state to define the "rules of the game": "Freedom of the consumer exists, but not the freedom to choose how to define the rules of the game or the forms which the economic process takes. This particularly falls within the field of *Ordnungspolitik* (order-based policy)".[35]

Economic policy, and in particular competition policy in accordance with the *Ordnungspolitik,* is subject to guiding principles which tightly limit the discretion of the policy maker. There is first and foremost the principle of complete competition as the guiding star. However, Eucken pointed out that this is not sufficient for economic policy, and he highlighted the need for "symptoms" and rules of thumbs to make competition policy workable:

> "Economic policy needs indications, symptoms, by which to implement an economic policy of competitive order. It needs a rule of thumb. Does such a thing exist? The answer is yes. Two methods exist.
>
> The most direct method is to find out from companies themselves whether or not plans developed under competition. […]
>
> [A second,] less direct, method would be as follows: certain measures exist from the outside, for example from the opposite end of the market, [which] clearly indicate that complete competition does not exist because these measures cannot be implemented under complete competition: for example, restraints to purchasers or suppliers that have dealing with competitors, or loyalty rebates or predatory pricing or dumping [or] destruction of stocks."[36]

IV. ARTICLE 82 EC: THE ORDOLIBERAL HERITAGE

Ordoliberalism had a huge impact on EC competition policy during the formative years (and still continues to influence German competition policy). As a result, many of the ordoliberal concepts have been hard-wired into the EC system, even when at times (or indeed frequently) the link to ordoliberalism has been obscured or forgotten.

Nowhere can this be demonstrated more clearly than in the context of Article 82, where EC competition policy has remained virtually unchanged for the last 30-odd years: for example, the approach of the Commission in *Michelin II* (2001) is arguably indistinguishable from that in *Michelin I* (1981) and can be traced back to cases of the 1970s. In other words, much of today's policy on the control of unilateral conduct by dominant firms operates within

[35] *Ibid.,* at p. 227.
[36] *Ibid.,* at p. 230

an intellectual framework shaped by ordoliberalism and pursues policy goals of fairness, such as the protection of rivalry and economic freedom, with an emphasis on SMEs.

During the modernization debate in relation to Article 82, many of the ordoliberal concepts which are still today at the heart of EC dominance policy have proved to be in conflict with the increasingly prevailing consumer welfare approach and have frequently been the focus of the debate. Examples of this conflict are in particular:

- The dominance threshold;
- The "special responsibility" of dominant firms;
- The formalistic approach towards many types of unilateral behaviour; and
- A wide range of "fairness abuses".

A. The dominance screen

According to the standard definition established by the Court of Justice in *United Brands,* dominance "relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers".[37] This test was cited with approval in *Hoffmann-La Roche*, although the Court of Justice added the caveat that "such a position does not preclude some competition … but enables the undertaking … if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment".[38]

In practice, the Commission has relied heavily on market shares as an important element in the assessment of dominance. This is by no means unusual. What distinguishes the EC approach from that of some of the other regimes, however, is the intervention threshold. Under EC competition law, and in particular in accordance with *AKZO,* the (rebuttable) presumption of dominance – save in "exceptional circumstances" – kicks in where market shares are in excess of 50 percent.[39] This contrasts with the assessment of market power under US law, where a market share of 70 to 75 percent for at least five years is required to lead to a presumption of monopoly power.[40]

The relatively low threshold and the absence, in the *AKZO* standard, of reliance on persistence of market shares, can be traced directly back to ordoliberalism with its ideal of complete competition (i.e., as explained above, a market where all participants are price

[37] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, para. 65.
[38] *Supra* note 18, para. 39. See also *United Brands,* cited previous footnote, para. 113.
[39] Case C-62/86, *AKZO v Commission* [1991] ECR I-3359, para 60.
[40] Phillip E. Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law*, Aspen Publishing, 2003.

takers) and its wariness of even short-term market power. From an ordoliberal perspective, a market share with 10 suppliers of 10 percent each seems to be inherently better (both from an economic and political perspective) than a market in which one player has 40 percent of the market and 9 players each have 6 or 7 percent. This view seems to be reflected in the *British Airways* case, where the Commission stated:

> "Despite the exclusionary commission schemes, competitors of BA have been able to gain market share from BA since the liberalisation of the United Kingdom air transport markets. This cannot indicate that these schemes have had no effect. It can only be assumed that competitors would have had more success in the absence of these abusive commission schemes."[41]

B. The special responsibility of dominant firms

Article 82 does not condemn the mere possession of a dominant position; it does not condemn the *creation* of a dominant position either. Under EC competition law, the statement that it is not an offence for a firm to have a dominant position comes invariably with the qualification that the law does impose on such firms "a special responsibility not to allow its conduct to impair undistorted competition on the common market".[42]

The scope of this special responsibility is not entirely clear. In a narrow sense, it can be interpreted as saying no more than that Article 82 EC imposes obligations on dominant firms which are not imposed on non-dominant firms.

In *AKZO*, the Commission made clear that a dominant firm is entitled to compete "on the merits".[43] The Commission added that aggressive, legitimate competition was to be encouraged and that it did not suggest that "large producers should be under an obligation to refrain from competing vigorously with smaller competitors or new entrants".[44] However, certain types conduct that raise no issues when carried out by firms that are not dominant may be abusive under Article 82 when carried out by a dominant firm.[45] This is because, it is argued, in the absence of market power such conduct is either irrational or unlikely to have a sufficient adverse effect on competition to justify intervention.

A wider interpretation would suggest that a dominant firm must refrain from any action which would increase its market power and harm competitors, even where the behaviour is efficiency-based. The origin of the "special responsibility" doctrine can be traced back to the ordoliberal "as if" principle, according to which firms which are not price takers, i.e., which posses (significant) market power have not only have a negative obligation (i.e.,

[41] Case IV/D-2/34.780, *Virgin/British Airways,* [2000] OJ L30/1, para 107.
[42] Case 322/81, *Michelin v Commission* [1983] ECR 3461, para. 57.
[43] *ECS/AKZO,* 1985 OJ L374/1, para. 81, *upheld on appeal* in *AKZO, supra* note 399.
[44] *Ibid.*
[45] See Joined Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Lines AB and Others v Commission* [2003] ECR II-3275, para. 1460.

not to commit certain harmful acts) but also a positive obligation (i.e., to behave as if they do not have any market power).

C. The notion of abuse – hindrance competition v. competition on the merits

A dominant firm infringes Article 82 when it does not compete "on the merits". That is, when the dominant firm, "through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, [adopts behaviour that] has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[46] An abuse is therefore a commercial practice pursued by a dominant firm which cannot be regarded as normal competition based on quality and price and which has the effect of restricting competition. Or, according to the formulation put forward in *Michelin II* by the CFI, an abuse may consist of exclusionary conduct that lacks "objective economic justification".[47]

The assessment of abuse under EC competition law has equally been shaped by ordoliberalism. As described above, for Eucken and other ordoliberals, certain types of unilateral behaviour, such as price discrimination, loyalty rebates and tying, were inherently abusive. From an ordoliberal point of view, these would be clear examples of impediment competition with no redeeming features.

The view that certain types of unilateral behaviour are *per se* harmful and therefore do not require any effects analysis has been reiterated by the Community Courts at regular intervals, most recently in *Michelin II*[48] and *British Airways*.[49] In *Michelin II,* the CFI took the view that, in order to establish abuse, it was sufficient for the Commission to show that the conduct "tends to restrict competition", i.e., that it "is capable of having, or likely to have, such an effect".[50] In *British Airways*, the CFI further stated that, "where an undertaking in a dominant position actually puts into operation a practice generating the effect of ousting its competitors, the fact that this hoped-for result is not achieved is not sufficient to prevent a finding of abuse".[51]

D. "Fairness" abuses

A number of types of abuse have a particular focus on fairness considerations, in particular: discriminatory abuses, exploitative abuses and abuses which protect existing commercial relationships. These are discussed below.

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[46] *Hoffmann-La Roche, supra* note 38, at para. 91.
[47] Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission* [2003] ECR II-4071, paras. 107 and 110.
[48] *Ibid.*
[49] *British Airways, supra* note 8.
[50] *Michelin II, supra* note 47.
[51] *British Airways, supra* note 8, para. 297. As noted earlier, the judgment of the CFI was later upheld by the ECJ.

1. Abusive exploitation

The control of exploitative abuses reflects the ordoliberal principle of forcing dominant firms to behave "as if" they were subject to complete competition.[52] Indeed, the wording of Article 82 ("Such an abuse may, in particular, consist in: …(a) directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions…") echoes Eucken's list of prohibited monopoly practices in his chapter on the "monopoly problem in the competitive order":[53] general terms and conditions in the contract to the disadvantage of the trading partner of the dominant firm,[54] and prices which are in excess of the equilibrium price, i.e., prices in excess of marginal costs.[55]

In an attempt to make Eucken's "as if" principle operational, methodologies for determining excessive prices were developed in the early years of German and EC competition policy, for example, in *United Brands,* which compared actual costs and prices and the prices of the dominant firm with that of its competitors.[56]

The practical problems of price control which Eucken recognized (but arguably nevertheless underestimated) were reflected in the fact that only a small number of exploitative abuses were pursued under German and EC law.[57] However, EC and German law do contrast the US policy under Section 2 of the Sherman Act: in the US, firms which have lawfully acquired monopoly power are *entitled* to exploit it; the concept of exploitative abuses does not exist.

2. Harm to existing commercial relationships

The Commission has treated refusal to supply an existing customer more severely than the refusal to supply a company with whom the supplier has no relationship. This is reflected in DG Comp's Discussion Paper, according to which the termination of an existing supply relationship by a dominant firm is presumed to be abusive whenever it has a negative effect on competition (subject only to an objective justification), whereas refusal to supply in the absence of a pre-existing relationship is subject to the stringent *Bronner* (or *IMS Health*) test,

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[52] See Alexandre de Streel and Massimo Motta, "Excessive Pricing and Price Squeeze under EU Law", in Claus-Dieter Ehlermann and Isabela Atanasiu, eds., *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?,* Hart Publishing, 2006, pp. 91 *et seq.*; David Evans and Jorge Padilla, "Excessive Prices: From Economic Theory to Administrable Rules", 1 *Journal of Competition Law and Economics* 97 (2005).
[53] Eucken, *supra* note 24, at pp. 240 *et seq.*
[54] *Ibid.*
[55] *Ibid.*, at p. 241.
[56] Robert O'Donoghue and A. Jorge Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, 2006, chapter 11.
[57] The most prominent cases under EC law are: Case 27/76, *United Brands,* [1978] ECR 207; Case 26/75, *General Motors,* [1976] ECR 1367; Case 226/84, *British Leyland,* [1986] ECR 3263. See also Case COMP/36.568, *Scandlines Sverige v Port of Helsingborg,* available at:
http://ec.europa.eu/comm/competition/antitrust/cases/decisions/ 36568/ reject_en.pdf.

which requires that the product or service to which access is demanded be "indispensable" to compete.[58]

The Commission seeks to justify this differential treatment within the context of its consumer welfare approach by arguing that the existence of an ongoing relationship allows the presumption that such a relationship is efficient, and points out further that the customer of the dominant firm may have invested in such a relationship. Neither argument is particularly convincing: in any sector, commercial relationships are constantly re-created and terminated, reflecting the changing market conditions and changing circumstances of the parties. Termination of an existing relationship therefore does not justify a (rebuttable) presumption of anticompetitive behaviour. As far as investments of the customer which are based on the ongoing relationship are concerned, such investments must be relationship-specific for customers to be locked. More to the point, it is also not clear why the customer in such circumstances would not have been able to obtain contractual protection and why competition policy should offer the protection that the customer itself could have procured for itself through, for example, contractual means.

A more plausible explanation for the different treatment of the termination of existing relationships (compared to the refusal to enter into new ones) lies in fairness considerations: competition policy is used to achieve an "equitable" sharing of risks between the dominant firm, on the one hand, and its contractual partner on the other.

V. WHAT'S WRONG WITH A FAIRNESS-BASED ARTICLE 82?

Although there have been relatively few Article 82 cases since the adoption of the Treaty of Rome and although those cases have concerned only a few dominant companies,[59] there seems to be a wide consensus among practitioners, academics and some competition officials in the EU (with the exception of Germany) that current Article 82 policy may be chilling aggressive competition to the ultimate detriment of consumers.[60] Numerous commentators have criticized recent Commission decisions and judgments of the Community Courts in Article 82 matters on the grounds that perfectly legitimate behaviour was condemned as abusive. These voices maintain that such errors are due to the *per se* or *quasi-per se* approach to Article 82 adopted by the Commission and the Community Courts – an approach which, following the ordoliberal tradition in competition policy, neglects the potential efficiencies resulting from the adoption of certain practices when undertaken by dominant companies (dominant firms have a special responsibility to maintain and promote competition) and sets a very low and mainly formalistic bar for authorities or claimants to show likely

[58] See Discussion Paper, *supra* note 3, at paras. 228 *et seq.*
[59] Robert O'Donoghue and A. Jorge Padilla, *supra* note 56.
[60] This emerges clearly from the *Comments on the public consultation on discussion paper on the application of Article 82 to exclusionary abuses*, March 2006. These comments are available at: http://ec.europa.eu/comm/competition/antitrust/art82/contributions.html.

anticompetitive effects (any behaviour that deviates too far from the benchmark of competition on the merits under complete competition is taken to distort competition, irrespective of its actual effects). The critical voices mentioned above have repeatedly asked the Commission for a reform of the criteria determining the application of Article 82. As explained in this Section, their demands are, in our view, justified.

A. Assessing fairness through the lenses of social welfare

Following Kaplow and Shavell (2002), we submit that "legal rules should be selected entirely with respect to their effects on the well-being of individuals in society and that notions of fairness … should receive no independent weight in the assessment of legal rules".[61] Under this approach to the assessment of rules, a concept of fairness, such as the protection of small and medium-size firms, is only a proxy to help guide the design of antitrust rules that foster the well-being of individuals; fairness cannot become a goal in itself. Antitrust rules which seek the pursuit of fairness will be regarded as optimal only when they coincide with rules that take into consideration the consequences that their implementation produces on individuals' well-being.

Consider, for example, a policy which makes every consumer worse off because it redistributes output from efficient, low-priced competitors towards inefficient, high priced ones. Could such a policy be justified because it redistributes market shares from large companies to small companies? Likewise, consider a policy that forces innovators to give away the results of their efforts in order to level the playing field with their competitors. Such a policy may eliminate the incentives to innovate and, hence, hurt consumers. Could it be justified because it leads to increased rivalry? These questions have a simple answer: no. The social value of policies aimed at preserving rivalry and ensuring a competitive level playing field is given by the impact of such policies on aggregate social welfare. Protecting rivalry is not an end in itself: it only makes sense if it helps to increase consumer welfare. Or, in other words, social welfare is the meta-objective that justifies objectives such as the promotion of competition and the protection of the competitive process.

It follows that any rule that is non-consequentialist or, which being consequentialist, does not focus exclusively on the consequences that bear on individuals' welfare will be automatically regarded as undesirable. As noted in Section III above, the rules advocated by the ordoliberals of the 20th Century were clearly consequentialist and welfaristic: they argued in favour of fairness as a means to protect and foster long-term welfare. However, as shown in what follows, the *per se* rules emerging from the case law that was inspired by ordoliberal principles are not consequentialist: they emphasize form and neglect effect. The case law appears to regard fairness as a goal in itself and not just an instrument in the pursuit of well-being. Not surprisingly, we will conclude that these are inappropriate because they are inefficient, i.e., welfare-reducing.

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[61] Kaplow and Shavell, *supra* note 5.

B. An error-cost framework for the assessment of legal rules

Under a welfare standard, antitrust rules should determine the conditions under which unilateral business practices undertaken by dominant firms are likely to be found welfare-reducing. Unfortunately, given the vagaries of any judicial or administrative process and the absence of proper economic guidance, there will always be mistakes.[62] Distinguishing pro-competitive from anticompetitive actions with certainty is impossible. In some cases the practice will be considered abusive when it is not, while in others it will be regarded as legitimate when it should have been considered abusive. The assessment of any set of rules must take into account the risk and cost of those mistakes.

Socially desirable antitrust rules – i.e., those promoting welfare-enhancing behaviour and deterring anticompetitive actions – minimize the expected cost of error, while maintaining a degree of predictability for businesses (legal certainty) and administrative ease for courts (administrability). Table 1 shows the standard error matrix, with the shaded boxes reflecting the two possible errors that enforcement agencies and the judicial system can make: falsely condemning competitive practices ("false convictions", or type I errors) and falsely absolving anticompetitive practices ("false acquittals", or type II errors).[63] The likelihood of type I errors is given by the percentage of cases falsely condemning legitimate practices (the dark shadow box), while the likelihood or incidence of type II errors is given by the percentage of cases falsely absolving legitimate practices (the light shadow box).

Table 1. Possible Errors in the Antitrust Assessment of Business Practices

	Illegal	**Legal**
Harmful to competition	Percent of cases correctly condemning anticompetitive practices	Percent of cases falsely absolving legitimate practices
Not harmful to competition	Percent of cases falsely condemning legitimate practices	Percent of cases correctly absolving legitimate practices

The expected costs of those two kinds of errors are a function of their welfare implications and the likelihood with which they occur. The latter depends, in turn, on a number of factors, including most importantly the legal rule itself. A weaker rule or standard makes it easier to establish that a practice is anticompetitive and therefore reduces the likelihood of type II errors (false acquittals) while increasing the probability of the type I errors (false convictions). That is, type I errors will tend to be most frequent under a *per se*

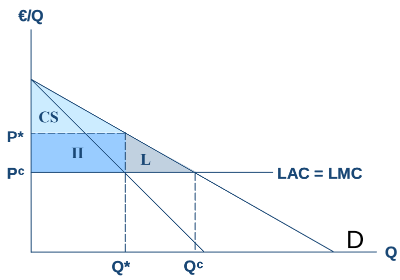
[62] See David Evans and Jorge Padilla, "Designing Antitrust Rules for the Assessment of Unilateral Practices: A Neo-Chicago Approach", 72 *University of Chicago Law Review* 73, 80-81 (2005).
[63] *Ibid.*

illegality rule and least frequent under a *per se* legality approach; the opposite will hold true for type II errors.

The cost of a type I error when assessing unilateral practices is typically given by a reduction in the firms' incentives to invest and innovate. This is because a tight antitrust policy regarding the practices undertaken by firms with market power is akin to introducing an upper bound on profits. Evidence of false convictions is bound to reduce the incentives to invest by reducing the expected rate of return on successful innovations. In welfare terms, therefore, the cost of a type I error is equal to the loss in welfare resulting from the lack of introduction of valuable goods and services for which there is potential demand. (That is given by area CS + Π in Figure 1.)

The cost of a type II error is typically equal to the sum of (1) the loss of consumer welfare that results from supra-competitive prices resulting either from direct exploitation or from the market power acquired by exclusion, and (2) the potential reduction in consumer welfare resulting from the fact that some new products and services may not see the light of day if the dominant firm succeeds in excluding rivals. The first term, in turn, is given by two effects: (a) some consumers pay more than in an otherwise competitive market to obtain the good or service they wish (area Π in Figure 1), and (b) other consumers see themselves excluded from consumption despite their relatively high valuations (area L).

Figure 1: Consumer Welfare, Profits and the Dead weight loss of Monopoly



The competitive equilibrium is at (Pc,Qc). The monopoly outcome results in a higher price and lower quantity given by (P*,Q*). The result is a deadweight loss of welfare to society given by L, commonly known as the monopoly-loss triangle. Π is the monopoly profit and CS is consumer surplus. The negative impact of monopoly power on consumer's welfare is equal to the sum of the supra-competitive profits Π and the deadweight loss L.

C. Too many and too costly false positives

Current Article 82 policy is likely to cause too many and too costly type I errors. There may be type II errors as well but those are likely to be much less likely, as we explain below. This is problematic. We expect the costs of type I errors in antitrust decisions involving unilateral practices to be significantly larger than those of type II errors. First, as noted by Judge Easterbrook, "the economic system corrects monopoly more readily than it corrects judicial errors. There is no automatic way to expunge mistaken decisions of the Supreme Court. A practice once condemned is likely to stay condemned, no matter its benefits. A monopolistic practice wrongly excused will eventually yield to competition though, as the monopolist's higher prices attract rivalry."[64] That is, if an anticompetitive business practice is mistakenly permitted, the monopoly profits flowing from that practice attract aggressive competition and new entrants. Market forces play no such general corrective role for pro-competitive business practices found anticompetitive.[65] Second, as shown by Evans and Padilla (2005)[66] and Ahlborn, Evans and Padilla (2005),[67] area CS in Figure 1 is likely to be larger than area L. In other words, the welfare cost of a reduction in the incentives to innovate is likely to outweigh the increase in welfare caused by more short-term competition.

The reasons that explain why the ordoliberal approach to Article 82 is likely to produce many false positives in both absolute and relative terms are as follows.

1. A vacuous standard: "competition on the merits"

Under current Article 82 policy, a dominant firm abuses its market position when it does not compete on the merits. (See Section IV.) But nowhere is "competition on the merits" defined. Economists would generally agree that the behaviour of companies without market power should be taken as an indication of what competition on the merits is. However, the case law makes it clear that the behaviour of the competitive fringe does not necessarily constitute a valid benchmark of pro-competitive behaviour: sometimes it is, but sometimes it is not, and there is no way to know *a priori* which case is which. Firms with market power are supposed to behave almost "as if" they did not have market power, but the behaviour of firms without market power is not always regarded as a valid benchmark. This leads to circular and conclusory tests: competition on the merits is every practice that the Community institutions find to be legitimate competition.

Some authors have argued that current Article 82 policy is not vacuous. The goal, according to these commentators, is unambiguous: the protection of rivals. This is incorrect. There are business practices, such as investing in superior quality, which the Commission would regard as competition on the merits despite its adverse effect on competitors' welfare. So, even though the protection of rivalry constitutes the cornerstone of the system, some practices which may lead to increased concentration and market power may still be regarded as legitimate. When? When the Commission and the Community Courts acknowledge that the practice in question is objectively justified or when they conclude that the practice represents

[64] Easterbrook, *supra* note 12, p. 15.
[65] Firms will likely be reluctant to implement alternative businesses practices that replicate the one found to be anticompetitive, as such practices are likely to also be found anticompetitive.
[66] Evans and Padilla, *supra* note 62.
[67] Christian Ahlborn, David Evans and Jorge Padilla, "The Logic and Limits of the 'Exceptional Circumstances' Test in Magill and IMS Health", 28 *Fordham International Law Journal* 1109 (2005).

aggressive competition. Again, competition on the merits is every unilateral practice that the Community institutions find to be legitimate. This is a vacuous standard.

2. The link between the protection of rivalry and long-term welfare

The ordoliberal approach to Article 82 is intellectually grounded on the assumption that there is a clear-cut link between rivalry and long-term welfare. As explained in Section II above, protecting rivalry is seen as a necessary condition for long-term economic freedom and thus for long-term welfare. If rivalry disappears, or is seriously weakened, mutually-reinforcing economic and political monopolies will emerge. Democracy will be overturned and the market will no longer ensure the efficient allocation of resources. The rents unfairly extracted from consumers will be used to consolidate a totalitarian regime, which will further entrench the monopolies' grip on the economy. (See Section III.)

This doomsday theory is speculative and incorrect. The triumph of the totalitarian regimes in the first half of the 20th Century had more to do with the inability of some states to cope with unemployment and poverty than with the existence of a flamboyant plutocracy. Furthermore, what matters for long-term welfare is not the number of competitors currently operating in the market, but rather the extent to which the economy is able to grow dynamically.[68] In modern economies the rate of growth is largely determined by the ability to innovate by introducing new, more efficient processes and new, more desirable products. In contrast to what is often stated, as a matter of economics, there is no unambiguous relationship between innovation and the number of actual competitors at any point in time. As recently stated by Katz and Shelanski (2007), "enforcement authorities cannot confidently presume as a matter of economic theory or experience that more competitors are beneficial or that market power is detrimental for R&D, except in the limited case of merger to monopoly where the evidence supports a moderate presumption of harm".[69]

The impact of the ordoliberal doomsday theory has been, on the one hand, the neglect of beneficial effects arising from certain unilateral business practices on short-term consumer welfare and, on the other hand, an overemphasis on the potentially adverse effects of such practices on rivals. The tradeoff between the certain, positive effects on short-term consumer welfare of a given practice and its negative though (highly) uncertain adverse effects on long-term welfare has typically been resolved in favour of the latter. In most Article 82 cases, the consequences of the alleged abuse for short-term consumer welfare was neglected and the protection of rivalry acquired, *de facto,* the status of ultimate goal.

[68] See, e.g., Benjamin H. Friedman, *The Moral Consequences of Economic Growth*, Knopf, 2005; William J. Baumol, *The Free-Market Innovation Machine: Analyzing the Growth Miracle of Capitalism,* Princeton University Press, 2004.
[69] Michael Katz and Howard Shelanski, "Mergers and Innovation", 74 *Antitrust Law Journal* 1 (2007).

3. *Per se* rules and type I errors

The case law on Article 82 has given rise to a series of *per se* or *quasi-per se* rules which seek to operationalize in practice vacuous notions such as competition on the merits, normal competition and objective justification.[70] Some business practices are considered abusive because they (a) cannot be characterized as competition on the merits, (b) are likely to produce anticompetitive effects (i.e., to harm rivalry and hence long-term welfare), and (c) lack objective justification (even when similar practices are commonly undertaken by companies without market power). However, other practices, which produce similar effects on rivals and consumers and which are no more ubiquitous, are accepted as competition on the merits and are therefore outside the scope of Article 82 (or *per se* legal). In short, unilateral business practices are classified as *per se* illegal or *per se* legal based on formal criteria rather than on case-by-case analyses of effects or likely effects.

Consider, for example, the following two scenarios. In the first scenario, a dominant company decides to increase the length of its product portfolio by adding a new product for which there is positive consumer demand and for which there are no current substitutes in the market. Suppose further that consumers prefer to concentrate their purchases on a single supplier (one-stop shopping). Due to these shopping costs, the introduction of the new product by the dominant company will increase its sales of other products in its portfolio. Consumers of other products will switch to the dominant firm to save the costs of shopping around. Competitors will be harmed and some may even be forced to leave the market. Consumer welfare is unambiguously increased in the short-term (consumers have one more product to enjoy), but the effect on long-term welfare is ambiguous if competitors are forced to exit. Yet we would expect that the introduction of a new product for which there are no substitutes but for which there is consumer demand to be regarded as competition on the merits.

In the second scenario, a dominant firm decides to integrate two previously existing products into a single product. Suppose further that the company decides not to sell the components of the integrated product as stand-alone products. Consumers are willing to pay for the integrated product more than what they were willing to pay for the existing products because the new product is easier to use and produces more satisfaction than the previous combination. As a matter of economics, the welfare evaluation of this second practice is practically identical to the welfare evaluation of the practice described in the first scenario. Indeed, both practices are isomorphic when the cost of shopping around in the first scenario is sufficiently high. When that is the case, the only way of buying the new product in the first scenario is to buy the existing products from the same supplier. So the new product is *de facto* integrated with the existing ones. And yet, the integration of two existing products into one by a dominant firm and its refusal to sell the components separately is very likely to be regarded

[70] These are "*quasi-per se* rules" because, unlike the *per se* rules under Section 2 of the Sherman Act, market power must be established prior to any finding of an infringement under Article 82.

as abusive because it allegedly: (a) limits the number of options available to consumers, (b) hurts competitors selling only one or the other component, and (c) cannot be defended on efficiency grounds because if the integrated product is really superior its impact on the structure of the market will be extensive – rivals will be forced out of the market and long-term welfare will be negatively affected as a result of the monopolization of the market.

Most economists would treat the two practices in the same way. However, according to the case law, one is likely to be considered *per se* legal and the other *per se* illegal. In principle, under a *per se* illegality standard there are type I errors but no type II errors, since the practice would always be considered abusive. The opposite is true under a *per se* legality standard: no type I errors but possibly a large number of type II errors. However, a careful review of the existing case law indicates that while those practices that have been regarded as *per se* legal under EC competition law (such as above cost pricing and the investment in superior quality) are likely to be welfare-increasing in most circumstances, some of the practices that have been considered *per se* illegal (such as some individualized rebates) are unlikely to be welfare-reducing in many circumstances. In other words, the *per se* legal rules in the case law involve no, or only limited, type II errors, whereas the *per se* illegal rules do cause type I errors. So the case law is characterized by more type I errors, which are likely to be, for the reasons explained above, more costly. Once again, the reason for this asymmetry is found in the ordoliberal tradition and, in particular, in the so-called "special responsibility" of dominant firms, which in practice justifies the neglect of legitimate efficiency arguments.

4. Lack of legal certainty

Current Article 82 policy is likely to chill innovative business practices that have a positive effect on individuals' welfare. Companies with market power will refrain from adopting new business practices for fear that they may not be regarded as competition on the merits or objectively justified and, as a result, that they may be found *per se* illegal. This entails great social costs. Antitrust rules are more a system of deterrence than a system of regulation. They should be designed so that they deter conduct that is anticompetitive and welfare-reducing without discouraging pro-competitive, welfare-enhancing competition. And their outcomes should be predictable, because otherwise they may fail to deter the business practices that harm social welfare while at the same time chilling socially desirable business practices. In other words, a well-functioning system of deterrence requires legal certainty.

A vacuous standard implemented through a series of *per se* rules may appear to involve a high degree of legal certainty. But that is a false impression. Existing Article 82 *per se* rules yield predictable outcomes only when the business practice under scrutiny fits seamlessly into the rule. But more often than not, the facts of the case will not match the rule, and then the company will have to anticipate what *per se* rule will apply in its particular case: legality or illegality. And to do so it will have to consider whether the practice in question constitutes "competition on the merits" and (no less challenging) whether it is "objectively justified". It will also have to anticipate whether or not competitors may be marginalized and the impact of all that in terms of long-term consumer welfare. But since the notions of "competition on the merits" and "objective justification" are empty, and since assessing the effect of a given practice on long-term consumer welfare is exceedingly difficult, commercial decisions will have to be adopted in the midst of an impenetrable regulatory fog. Some of these practices may be regarded as *per se* legal *ex post,* i.e., when the practice has been implemented, but that can by no means be anticipated *ex ante*, i.e., when the strategic decision is made. Fear of a finding of infringement under Article 82 will do the rest, and consumers will suffer the cost of inaction.

VI. THE CONSUMER WELFARE RATIONALIZATION OF THE "MODERNIZED" ENFORCEMENT POLICY UNDER ARTICLE 82

Unlike in the case of mergers or Article 81, the Commission has not yet suffered a major court setback in connection with Article 82.[71] The Commission faces no pressure from the Community Courts to "modernize" current Article 82 policy; on the contrary, its policy has been endorsed by the Courts time and again. The pressure this time comes from the public. The Commission has been severely criticized for its decisions in *Michelin II*, *British Airways*, *Wanadoo* and *Microsoft*, even though the first three decisions have been upheld by the Courts.[72] The Commission's reaction to these criticisms has been to open an internal and external debate about its policy towards unilateral business practices. The first output of this evaluation exercise was the publication in December 2005 of the Discussion Paper.

A. DG Comp's Discussion Paper

The Discussion Paper lays out "possible principles for the Commission's application of Article 82 of the Treaty to exclusionary abuses"[73] and describes "the analytical approach that could be used by the Commission"[74] in assessing unilateral business practices. Most importantly for our current purposes, recital 54 of the Discussion Paper states that "[t]he essential objective of Article 82 when analysing exclusionary conduct is the protection of competition on the market as a means to enhancing consumer welfare and of ensuring an efficient allocation of resources". The emphasis on the "protection of competition on the market" reflects the traditional ordoliberal view that competitive rivalry should be protected.[75] However, the Discussion Paper clarifies that the protection of the competitive process is not an end in itself but rather is meant to enhance consumer welfare, which is traditionally served by low prices, quality and innovation.

71 See Damien Neven, "Competition economics and antitrust in Europe", 48 *Economic Policy* 741 (2006).
72 As of this writing, the judgment of the CFI in *Microsoft* is still pending.
73 Discussion Paper, *supra* note 3, para. 1.
74 *Ibid.,* para. 2.
75 See generally Gerber, *supra* note 13.

This seems positive: a clear move from fairness to welfare. However, a careful reading of the Discussion Paper suggests that the ordoliberal tradition still exerts a strong influence on the Commission's views about Article 82 and that the move to a consumer welfare standard is not complete. We identify below three problems with the Discussion Paper's framework for the analysis of Article 82.

1. Excessive emphasis on allocative efficiency

The Discussion Paper adopts a "static view" of consumer welfare: the objective of Article 82 is to ensure "an efficient allocation of resources". Economic theory shows that, under fairly general conditions, increased rivalry tends to improve the allocation of resources. Industry fragmentation brings prices closer to (incremental) costs and enhances short-term consumer welfare. However, in the long term, consumer welfare is not only influenced by the relative efficiency with which the scarce resources of an economy are allocated; it is also positively affected by the emergence of new products, technologies and services. In industries where firms compete by launching new products and developing new technologies, having numerous firms with no market power, and hence low prices, is not necessarily ideal. In fact, the opposite may well be true: the prospect of lower prices may reduce the incentives to invest and innovate. As noted above, there is no support in economic theory or evidence for the oft-stated proposition that product market fragmentation promotes innovation.[76]

2. A broad notion of anticompetitive effects

The Discussion Paper states at paragraph 55 that "Article 82 prohibits exclusionary conduct which produces actual or likely anticompetitive effects in the market and which can harm consumers in a direct or indirect way". This paragraph is problematic both for what it says and for what it fails to say. Unilateral actions by dominant firms may be found abusive even if there is no evidence of "actual" effect if they could "likely" have an adverse effect on consumer welfare. However, it is not clear how likely those adverse effects would have to be for the practice to qualify as abusive. Nor is it clear how significant the effect on competition should be for unilateral conduct to be regarded abusive. The Discussion Paper does not clarify what is the standard of proof in Article 82 cases. Is it a function of: the degree of market power of the dominant company, the existence of countervailing efficiencies, or the degree of certainty of its potential anticompetitive effects? This is a matter of concern because an excessively broad or abstract interpretation of the notion of anticompetitive effects in specific cases could lead to the prohibition of conduct that is beneficial to consumer welfare.

The Discussion Paper states at paragraph 58 that "[f]oreclosure thus can be found even if the foreclosed rivals are not forced to exit the market: it is sufficient that the rivals are disadvantaged and consequently led to compete less aggressively … Foreclosure is said to be market distorting if it likely hinders the maintenance of the degree of competition still existing in the market or the growth of that competition and [it] thus [will] have as a likely effect that

[76] See *supra* note 69 and accompanying text.

prices will increase or remain at the supra-competitive level." This notion of foreclosure is excessively broad. Competitors may be foreclosed, according to the definition in the Discussion Paper, even if they are not forced to exit or cornered into a market niche. All that the Commission will have to show under this standard is that the actions of the dominant firm constrained the growth of its competitors by placing them at a competitive disadvantage.[77] This makes any claim of market foreclosure very hard, if not impossible, to rebut. If foreclosure means exit, then showing no exit is a rebuttal. If it means marginalization, then showing that rivals are experiencing growth is a rebuttal. However, if foreclosure means a reduction in the rate of growth of competitors, there is no possible rebuttal, since there is no counterfactual available. What would be the rate of growth of competitors absent the alleged abuse? This is precisely the problem experienced by Michelin, British Airways, France Telecom and more recently Telefónica when defending their practices. The fact that they had lost market share at the expense of their allegedly foreclosed competitors was considered irrelevant by the Commission and by the Community Courts.

3. Impossible defences

The second step in the analytical framework proposed in the Discussion Paper requires a consideration of the possible objective justifications and/or efficiency defences. Paragraph 77 states: "Exclusionary conduct may escape the prohibition of Article 82 [if] the dominant undertaking can provide an objective justification for its behaviour or [if] it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition". Paragraph 84 stipulates that, in order for this "efficiency defence" to be accepted, "the dominant company must demonstrate that the following conditions are fulfilled: (i) that efficiencies are realised or likely to be realised as a result of the conduct concerned; (ii) that the conduct concerned is indispensable to realise these efficiencies; (iii) that the efficiencies benefit consumers; (iv) that competition in respect of a substantial part of the products concerned is not eliminated".

While the Commission's acceptance of an efficiency defence is a step forward, the conditions that need to be fulfilled to accept efficiency as a defence are very strict and difficult to prove. The fourth condition has an unambiguous ordoliberal flavour. As stated in paragraph 91: "Ultimately the protection of rivalry and the competitive process is given priority over possible pro-competitive efficiency gains." Ordoliberals understood that increased concentration could be efficient due to economies of scale and scope but were concerned that those efficiencies would be exploited to monopolize markets and dominate society. However, from a welfare standpoint, the absolute priority given to the protection of rivalry over possible pro-competitive efficiency gains could lead to the maintenance of inefficient market structures.

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[77] In *Michelin II,* the CFI upheld the Commission's conclusion that Michelin's declining market share did not constitute proof of lack of effect. The Commission argued, and the court accepted, that competitors would have done better if Michelin had behaved differently.

A dominant company seeking to justify its business practices on efficiency grounds will have to demonstrate that the pro-competitive effects of those practices more than offset its potential anticompetitive effects. The burden of proof in this complex balancing exercise is placed on the defendant. This is in contrast with the way these analyses are conducted across the Atlantic. In the US, if the monopolist asserts a pro-competitive justification that stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the pro-competitive benefits.[78] The allocation of the burden of proof is likely to have a determinant role in Article 82 cases. While the likely anticompetitive effects of a given practice, if any, may be easy to measure, its pro-competitive effects, while certainly important, will be difficult to measure with precision. Thus, the balancing test will be hard to carry out and the party with the burden of proof is likely to lose the case.[79]

B. *Nihil novum sub sole*

The tone and content of the Discussion Paper indicate that the Commission sees no reason to turn its current Article 82 enforcement policy upside down. While the Discussion Paper suggests some limited reforms in areas such as the treatment of efficiencies and the adoption of an as-efficient competitor test, its main proposition is that the case law on Article 82 is fully consistent with the consumer welfare standard. According to the Discussion Paper, the case law emphasis on the protection of rivalry, or more euphemistically the "competitive process", can be justified within the consumer welfare standard: protecting rivalry is the means to ensure that market outcomes maximize long-term consumer welfare.

However, the Commission's rationalization of its current policy in terms of welfare does not resolve any of the problems discussed above in Section IV. What constitutes competition on the merits according to the Commission? We are told that behaviour that is unlikely to foreclose competitors and is objectively justified constitutes competition on the merits. But given how broadly foreclosure is defined and the hurdles imposed on any efficiency defence, such advice does not clarify much.

Are dominant firms still bound by the special responsibility principle? Though the Discussion Paper makes no explicit reference to this principle, only the application of this principle can explain the wide notion of foreclosure adopted in the text – one that requires dominant players to consider the impact of their actions on the rate of growth of their rivals. Many passages suggest that we have not moved much. Some of the recent cases in which we have been involved, most importantly *Microsoft*, confirm that suspicion. The application of Article 82 is still likely to produce too many type I errors and, if anything, the degree of legal certainty in Europe is for the time being as low as ever.

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[78] See *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001), at 95-97.

[79] See Damien Geradin, "Limiting the scope of the Article 82 EC: What can the EU learn from the U.S. Supreme Court's judgment in *Trinko* in the wake of *Microsoft, IMS,* and *Deutsche Telekom*?", in 41 *Common Market Law Review*, 1519, 1542 (2004).

What will happen next? Recent court decisions in *British Airways* and *Wanadoo* may reinforce the position of those who think that change is unnecessary. On the other hand, the growing importance of economics and economists within the Commission may lead to a more radical reform. Apparently, all options remain open. It remains to be seen which side will prevail. We certainly do not have the knowledge required to predict with a minimum degree of rigour how a complex administrative and political body such as the Commission is likely to move. But we can discuss the normative question: what should happen next? Several proposals have been advanced. We discuss them in turn.

VII. A RADICAL CONSUMER WELFARE APPROACH TO ARTICLE 82

The shortcomings of the ordoliberal approach have led some economists, mostly academics, to propose a radical reform of Article 82. This proposal can be found in the report written by DG Comp's Economic Advisory Group on Competition Policy (EAGCP) and published in July of 2005.[80] According to the key features of this proposal: (a) the goal of competition policy should exclusively be the protection of long-term consumer welfare, (b) the dominance hurdle should be removed, and (c) unilateral conduct should be assessed according to the so-called "unstructured" rule of reason. We support (a). In what follows, we discuss (b) and (c) in some detail.

A. Down with dominance

According to the EAGCP, "there is no need to establish a preliminary and separate assessment of dominance".[81] First, such an evidentiary hurdle is not needed. Competition authorities and courts using an economic approach to Article 82 should consider directly whether a given practice is abusive given the facts of the case. Given that firms can only commit an abuse if the firm has a dominant position, "no further separate demonstration of dominance is needed".[82] Furthermore, traditional methods for the assessment of dominance are rather imperfect and often unable to properly identify actual situations of market power.

B. The unstructured rule of reason

The EAGCP considers that the assessment of unilateral conduct is likely to produce both false convictions and false acquittals, and it therefore advocates the application of a unstructured rule of reason under Article 82. Under this rule, courts and agencies would balance the costs and benefits of intervention given the specific facts of the case and would intervene only when the benefits outweigh the costs of intervention. This balancing exercise would be conducted on a case-by-case basis. First, a theory of harm must be specified. Then, if there are alternative interpretations of the effects of the conduct in question, and if the conduct can be

[80] EAGCP, *supra* note 10.
[81] *Ibid.,* p. 4.
[82] *Ibid.,* p. 14.

regarded as legitimate under one or more of those theories, the facts of the case must be thoroughly scrutinized to discriminate among the competing interpretations.

The rule of reason proposed by the EAGCP is unstructured because it introduces no filter prior to the balancing of pro-competitive and anticompetitive effects, other than the identification of those effects. Nonetheless, the EAGCP's proposal demands that a full-fledged theory of harm be specified. It also suggests that both "the standard and the process adopted" should reflect the fact that one type of error may be more costly than the other. Thus, for example, "if the cost of false negatives is expected to be higher, then the balance should be tilted towards plaintiffs and against dominant firms".[83] We are not sure how this recommendation would be implemented in practice.

C. Is this the end of Article 82 "history"?

This question has a simple answer: no. Both limbs of the EAGCP proposal have problems. On *dominance*, we believe that market power is a fundamental screen. A dominance threshold simplifies administration and self-assessment. Enforcement can be better targeted and the risk of over-deterrence is minimized with a clearly-specified dominance threshold. If anything, in our view, optimality would require a higher, less ambiguous dominance threshold. Judging from the responses given during the public consultation to the Discussion Paper, we do not walk alone in this regard.[84]

As regards the *unstructured rule of reason*, we have argued elsewhere that this is also problematic.[85] In short, we believe that an unstructured rule of reason standard is likely to underestimate the expected costs of the false convictions (type I errors) and hence will tend to over-enforce. We base this conclusion on several reasons.

First, firms generally engage in unilateral practices because it is efficient for them to do so. This is true whether they enjoy market power or not. However, it is widely recognized that economists do not understand these sources of efficiencies well and that in any event they are difficult to document, let alone quantify, persuasively.[86] It is also conventional wisdom that businesspeople have difficulty documenting and sometimes even articulating these efficiencies. Consequently, unless competition authorities and courts show some deference to efficiency explanations offered for unilateral practices, especially those that are common in competitive markets, efficiency rationales will be wrongly disregarded, which will cause many legitimate practices to be mistakenly regarded abusive. An unstructured rule of reason standard shows no such deference; instead, it treats each candidate explanation as equally likely.

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[83] *Ibid.,* p. 7.
[84] See *supra* note 60.
[85] See, e.g., Christian Ahlborn, David Evans and Jorge Padilla, "The Antitrust Economics of Tying: A Farewell to Per Se Illegality", 49 *Antitrust Bulletin* 287 (2003).
[86] David S. Evans and Michael A. Salinger, "Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law", 22 *Yale Journal on Regulation,* 37 (2005).

Second, an unstructured rule of reason test ignores that the principal implication of several decades of economic investigation of the competitive effects of unilateral practices is that there should be *no* presumption that these practices are anticompetitive, even when undertaken by firms with monopoly power.[87] Firms with the *ability* to cause consumer harm do not often have an *incentive* to do so, and firms with the *incentive* to act anticompetitively do not often have the *ability* to do so. Unilateral practices may be proven anticompetitive in particular cases, but no unilateral practice should be regarded as anticompetitive *per se*.

Third, comparing the efficiency effects and the anticompetitive effects of a unilateral practice is necessarily an extremely complex exercise. As noted by Geradin, "balancing ex ante vs. ex post efficiencies is obviously a very difficult process, which even the most sophisticated economists may find daunting".[88] The risk of mistaken decisions is therefore high. On the one hand, as we have just mentioned, measuring the benefits of that practice may prove difficult. In addition, the game-theoretic models that show the possibility of anticompetitive effects do not provide necessary and sufficient conditions susceptible of empirical testing that could be used in a rule of reason inquiry.[89] Due to this complexity, the outcome of an unstructured rule of reason is bound to be highly unpredictable, which is highly undesirable given that, as noted above, Article 82 creates mainly a system of deterrence, and effective deterrence requires dominant firms to be able to carry out meaningful self-assessment. One of the problems with the unstructured rule of reason is that, due to its complexity, it will lead to very high levels of error for firms self-assessing their behaviour.

Fourth, a recent study by Nalebuff and Majerus (2003) provides some insights into the relative likelihood of type I and type II errors in the assessment of unilateral practices. These authors reviewed 11 tying cases in the US and Europe and assessed whether the reviewing reached the right judgment.[90] Table 2 summarizes our understanding of their conclusions. There are no instances in which the courts and administrative agencies erroneously found that a tying practice considered by the authors to be anticompetitive was legal – that is, there were no false acquittals. By contrast, in three of the 11 cases the decision bodies wrongly found that a tying arrangement considered by the authors to be pro-competitive was illegal. The rate

[87] See, *inter alia*, Michael D. Whinston, "Exclusivity and Tying in U.S. v. Microsoft: What We Know and What We Don't Know", 15 *Journal of Economic Perspective* 63 (2001); Patrick Rey, Paul Seabright, and Jean Tirole, "The Activities of a Monopoly Firm in Adjacent Competitive Markets: Economic Consequences and Implications for Competition Policy", IDEI mimeo, 2001, http://idei.fr/doc/wp/2001/activities_abs.pdf.

[88] Damien Geradin, "Limiting the Scope of Article 82 of the EC Treaty: what can the EU learn from the US Supreme Court's Judgment in *Trinko,* in the wake of *Microsoft, IMS,* and *Deutsche Telekom*?", mimeo, Global Competition Law Centre, College of Europe, Bruges, at p. 19.

[89] See Dennis Carlton and Michael Waldman, "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries", 33 *RAND Journal of Economics* 194, 215 (2002).

[90] Barry Nalebuff and David Majerus, "Bundling, Tying and Portfolio Effects: Part 2-Case Studies", DTI Economics Paper, February 2003. While the report nominally contains thirteen separate cases, two are about different aspects of the *GE/Honeywell* merger. Also, since one of the cases had not been decided when the report was completed, we exclude it, leaving 11 cases. See also David S. Evans, A. Jorge Padilla and Michael A. Salinger, "A Pragmatic Approach to Identifying and Analyzing Legitimate Tying Cases", in Ehlermann and Atanasiu, *supra* note 52, at pp. 557 *et seq*.

of false convictions was therefore 27 percent. In other words, Nalebuff and Majerus found no evidence of type II errors but they did find a relatively high percentage of type I errors.

Table 2. A Decision-Theoretic Perspective on Nalebuff and Majerus (2003)

	Illegal	Legal
Harmful to competition	***Four (36%)***	***None (0%)***
Not harmful to competition	***Three (27%)***	***Four (36%)***

Fifth, an unstructured rule of reason may yield absurd outcomes. Consider again the case of a dominant company which decides to enlarge its product portfolio by adding a new product for which there is positive consumer demand and for which there are no current substitutes in the market in an industry where consumers prefer to concentrate their purchases on a single supplier (one-stop shopping). This decision is likely to increase short-term welfare but, with some probability, it may lower long-term welfare by throwing some competitors out of the market. Is this a business practice that should be subject to the costly rule of reason or, would it be preferable to treat it as *per se* legal? We believe that *per se* legality is unambiguously preferable in this case.

Sixth, an unstructured rule of reason is also likely to make it difficult for appeals courts to effectively perform their role as an error correction mechanism. Balancing pro-competitive and anticompetitive effects requires detailed knowledge of facts but, very often, it also requires the use of complex economic reasoning and the application of sophisticated quantitative techniques. Appeals courts may be ill-equipped to deal with those tools and theories. Even if they did have the necessary capacity, they may be subject to legal rules requiring them to show deference to the economic analysis conducted by the competition agencies or lower courts.

Seventh, but not least importantly, the fact that the Commission acts both as prosecutor and judge in competition policy matters implies a risk of "prosecutorial bias" – i.e., officials may tend to concentrate on evidence that confirms their own judgment.[91] Prosecutors operating in an inquisitorial system like the European antitrust enforcement system have an incentive to focus on one side of the argument. They are afraid that, by looking for evidence on both sides, their evidence will not be conclusive.[92] As concluded by Neven (2006):

[91] Kai-Uwe Kühn, "Reforming European merger review: targeting problem areas in policy outcomes", 2(4) *Journal of Industry, Competition and Trade* 311 (2002); Wouter W. Wils, "The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: a legal and economic analysis", 27 *World Competition* 201 (2004).
[92] Mathias Dewatripont and Jean Tirole, "Advocates", 99 *Journal of Political Economy* 1 (1999).

"Overall, it would thus appear that the self-confirming biases that may be induced by the prosecutorial role that the Commission assumes cannot be dismissed as insignificant."[93] It is our firm belief that the risk of prosecutorial bias is enhanced under legal rules which leave a broad margin of discretion to prosecutors, and that it is minimized when the hands of prosecutors are tied by clear-cut rules. This is one additional reason of concern regarding the unstructured rule of reason. As Benjamin Franklin once said, "[s]o convenient a thing is to be a reasonable creature since it enables one to find or make a reason for everything one has a mind to do".[94]

VIII. A THIRD WAY

There is a middle ground between the ordoliberal approach and the unstructured rule of reason. On the one hand, this "third way" takes consumer welfare seriously. No ambiguous concepts such as competition on the merits, objective justification, or the competitive process are adopted. The number of competitors, especially the number of small competitors, means nothing *per se* under this approach. On the other hand, this approach recognizes that "administrability" and "legal certainty" are key desirable characteristics in competition law. So this approach minimizes the extent of discretion.

The antitrust rules advocated under this approach seek to maximize long-term consumer welfare, taking into account (i) the risk and cost of both type I and type II errors, and (ii) the transaction costs of carrying out a full-fledged balancing exercise. The rules that emerge from this constrained maximization exercise are described below.

1. A *structured* rule of reason

Under this rule, a unilateral practice is considered legal unless it can be shown to survive a sequence of screens aimed at establishing the likelihood of anticompetitive effects; in which case courts and agencies still have to balance its anticompetitive and pro-competitive effects in a final stage prior to concluding that the practice is anticompetitive overall.

While the game-theoretic models developed by industrial organization economists over the last few decades do not provide a universally valid set of conditions that could be used by competition authorities and courts to distinguish between pro-competitive and anticompetitive practices with certainty, these models do provide a series of screens for determining which practices antitrust authorities should investigate and ultimately condemn as abusive.

First, economic theory shows that a unilateral business practice can plausibly have anticompetitive effects only when certain *structural conditions* are met. For example, in the case of tying, a review of the economic literature by Ahlborn, Evans and Padilla (2003) leads

[93] Neven, *supra* note 71, at p. 773.
[94] Benjamin Franklin, *Writings,* Library of America, 1987.

these authors to identify the following structural conditions for tying to be anticompetitive: (1) market power in the tying market; (2) imperfect competition in the tied market; (3) significant economies of scale and scope; (4) barriers to entry and re-entry into the tying and the tied markets; and (5) absence of buyer power. These structural conditions are not too difficult to analyze empirically. Unilateral business practices taking place in markets where these structural conditions are met would then need to be subjected to a second screen – a further analysis to determine whether the practices at issue are likely to have anticompetitive effects.[95]

Second, economic theory provides models that can be used to develop a *theory of harm*. We agree with the EAGCP that every Article 82 case should rely on a well-specified theory of harm with a clear link to established economic theory. One does not need to have a fully specified mathematical theory published in an economic journal. But one needs to have a theory that can be confirmed or falsified by testing it against facts prior to finding an abuse. Only when those assumptions hold true given the facts of the case can one conclude that the practice is likely to produce anticompetitive effects. Practices that are likely to have anticompetitive effects (i.e., practices that survive these two screens) would finally need to be subjected to a third screen to determine whether there are offsetting efficiencies.

Third, this final screen requires a determination of whether the business practice under scrutiny generates efficiencies that can only be achieved through that practice, and whether these efficiencies are greater than its potentially anticompetitive effects. In conducting this analysis one would need to consider dynamics and uncertainty. The anticompetitive effects need time to materialize – market foreclosure leads to exit, which then leads to higher prices. Those effects need to be discounted to reflect the fact that they occur in the future and are uncertain. As noted above when discussing the appropriateness of the unstructured rule of reason, this balancing exercise is an empirically demanding task. As Carlton and Waldman (2002) have recently explained: "We would like to caution that trying to turn the theoretical possibility for harm … into a prescriptive theory of antitrust enforcement is a difficult task. For example, the courts would have to weigh any potential efficiencies from the tie with possible losses due to foreclosure, which by itself is challenging due to the difficulty of measuring both the relevant efficiencies and the relevant losses."[96]

The structured rule of reason is likely to be superior in error cost terms to the unstructured rule of reason because it limits the complex balancing of pro-competitive and anticompetitive effects to those practices that are likely to have anticompetitive effects. Indeed, a proper inquiry into efficiencies can be time-consuming, and accordingly it best done only for those practices that pass through the earlier screens. For example, if a defendant lacks significant market power, economic theory says that it lacks the ability to exclude competitors and cause consumer harm, so we should end the inquiry there. Compared to an evaluation of

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[95] Ahlborn, Evans and Padilla, *supra* note 85.
[96] Carlton and Waldman, *supra* note 89, p. 212.

efficiencies, analyzing market power is much more amenable to the standard tools available to economists. Both the structured and unstructured rule of reason may produce non-trivial type I and type II errors in those cases where the business practice in question is likely to produce anticompetitive effects as well as significant efficiencies.

2. Qualified *per se* legality

Under this rule, a unilateral practice is presumed legal unless one or more well-defined, and empirically testable conditions are met – i.e., the practice is considered legal but for "exceptional circumstances".

A qualified *per se* legality rule will produce less type II errors but possibly more type I errors than a pure *per se* legality rule. Likewise, it will produce less type I errors but possibly more type II errors than a pure *per se* illegality rule. From an error cost perspective, Given that false convictions involve a greater expected cost, it appears that a qualified *per se* legality rule should outperform a *per se* illegality rule in welfare terms, as the former minimizes the incidence of the type of error that is most costly. Furthermore, a qualified *per se* legality rule should necessarily be superior to a *per se* legality rule, provided that the set of exceptional circumstances which triggers intervention is properly designed.

Ahlborn, Evans and Padilla (2005) illustrate how to construct an exceptional circumstances test (i.e., a qualified *per se* legality rule) in the case of refusals to license intellectual property (IP).[97] They show that unless the refusal to license IP prevents the introduction of new products for which there is substantial demand, the cost of a type I error in those cases is greater than the cost of a type II error. The optimal legal standard for the antitrust assessment of refusals to license IP by dominant companies takes the form of a modified *per se* legality rule, whereby compulsory licensing is required only when: (a) the requested IP is indispensable to compete; (b) the refusal to license causes the exclusion of all competition from the downstream market; (c) the refusal prevents the emergence of markets for new products for which there is substantial demand; and (d) the products to be developed by the licensees are sufficiently differentiated from those of the IPR holder, e.g., because they satisfy needs that the existing products fail to address.

In their article, Ahlborn, Evans and Padilla rely on economic theory and experience to identify the circumstances where: (1) the pro-competitive effects (or *ex post* efficiencies) of compulsory licensing are greatest, and (2) the disincentive effects (or *ex ante* inefficiencies) of the obligation to license are minimal or non-existent. Conditions (a) and (b) in the foregoing paragraph ensure that the short-term welfare loss resulting from a refusal to license is maximal. Condition (c) implies that the refusal has a long-run cost as well as a short-term cost. And condition (d) aims to ensure that the long-run cost of compulsory licensing – the reduction in the incentives to innovate – is low. This method thus restricts intervention to scenarios where it is certain to create more benefits than costs.

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[97] Ahlborn, Evans and Padilla, *supra* note 67.

3. Comparing alternative structured antitrust rules

Our choice of legal standard boils down to choosing between the structured rule of reason standard and the qualified *per se* legality rule. One important factor in choosing between a rule of reason standard and a *per se* rule is the administrative and enforcement costs of implementing the legal standard. A qualified *per se* rule is arguably easier and cheaper to administer and enforce.[98]

But the key fact in this comparison is obviously the assessment of the likelihood and cost of error under each of the two approaches. Both rules may produce false acquittals and false convictions. And none of these two rules is *a priori* superior to the other in error terms because the expected cost of error of each of these two results will depend on their fine details: the set of "exceptional circumstances" that define the qualified *per se* legality and the sequence of screens that characterizes the structured rule of reason. One might expect, however, that the qualified *per se* legality rule would result in relatively more false acquittals, while the structured rule of reason might cause relatively more false convictions. The structured rule of reason would also involve the additional administrative costs of having to proceed through a series of complex screens.

4. Sacrifice test, no economic sense test, and as-efficient competitor test

Some other rules have been proposed in the last few years, in particular the sacrifice test, the no economic sense test and the as-efficient competitor test.[99] What all of these rules have in common is that, although their ultimate goal is consumer welfare, they do not regard just *any* practice that harms consumers as being anticompetitive, but only those which do so by distorting the competitive process. For example, the as-efficient competitor test marks a practice as abusive only when it eliminates a competitor whose efficiency is equal to or greater than that of the dominant company. The no economic sense test identifies a unilateral practice undertaken by a dominant company as abusive when the only possible explanation for that practice is the exclusion of competitors, i.e., the practice in question does not make economic sense *but for* the exclusion of competitors. In our opinion, these rules are best treated as potential filters within a structured rule of reason analysis, rather than as autonomous antitrust rules. Otherwise, as shown by Vickers (2005)[100] and Salop (2007),[101] they are likely to produce both type I and type II errors from a consumer welfare viewpoint.

[98] See Keith N. Hylton, *Antitrust Law, Economic Theory and Common Law Evolution,* Cambridge University Press, 2003.
[99] See John Vickers, "Abuse of Market Power", 15 *Economic Journal* 244 (2005), and references therein.
[100] *Ibid.*
[101] *Supra* note 11.

IX. WHITHER ARTICLE 82?

The debate about Article 82 and its reform has lasted for several years now. As far as we can recall, the idea of clarifying the Commission's policy on Article 82 was first launched by Commissioner Mario Monti at the 8th Annual EU Competition Law and Policy Workshop organized by Claus-Dieter Ehlermann and Isabela Atanasiu in Florence in June 2003.[102] That was approximately four years ago. Since then, Commissioner Kroes delivered her celebrated Fordham 2005 speech,[103] DG Comp published its Discussion Paper on exclusionary abuses,[104] and many scholars and practitioners have published contributions on the subject. This debate appears to have led to what we shall denote as the "Brussels consensus".

This consensus involves two key propositions. First, the goal of Article 82 – or more generally, the goal of EC competition law – should be aggregate consumer welfare. Second, the existing form-based approach to Article 82 needs to be replaced by an effects-based or economics-based approach to the assessment of unilateral conduct. The consensus we have just described is based on the following observations:

- A policy which reduces aggregate welfare, i.e., a policy with an adverse impact on individual welfare, cannot be legitimately justified by reference to vague notions of fairness. As noted by Professors Kaplow and Shavell in their remarkable book *Fairness versus Welfare*,[105] deontological and/or non-consequentialist rules, like those which characterize the ordoliberal approach to Article 82, cannot be justified unless they produce the same effects on consumer welfare that would obtain under an effects-based or consequentialist approach, which has consumer welfare as its only goal.
- Competition policy should not be concerned with distributional issues. First, those issues can be addressed by other means. Second, as recently argued by Professors Alesina and Tabellini, income distribution is not the sort of policy that should be left to bureaucracies and/or independent agencies.[106]
- Unilateral conduct that is harmful to competitors may generate efficiencies and may have a net positive effect on aggregate welfare. Distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it, is very difficult. Courts and competition regulators using a simplistic form-based approach are bound to make mistakes: some practices will be found legal when they are welfare-reducing and vice versa. This is because two practices or transactions which share the same form – e.g., two exclusive dealing contracts – can have very different

[102] Mario Monti, "Introductory Statement", in Ehlermann and Atanasiu, *supra* note 52, at pp. 3 *et seq.*
[103] *Supra* note 3.
[104] *Supra,* note 3. As noted earlier, the comments in response to the Discussion Paper were also made public. See *supra* note 60.
[105] Kaplow and Shavell, *supra* note 5.
[106] Alberto Alesina and Guido Tabellini, "Bureaucrats or Politicians? A Single Policy Task, Part I", 97 *American Economic Review* 169 (2007).

welfare effects depending on the structure of the market, while two practices which appear to be different from a formalistic point of view may have the same adverse effects on consumer welfare.

- Existing form-based rules are likely to cause too many type I errors (false positives) because they are not properly grounded on economic theory and experience, and because they largely neglect the potential efficiencies generated by conduct which under purely formalistic criteria superficially appears to be anticompetitive.

Consensus does not mean unanimity, however. Some disagree with the two commandments of the Brussels consensus (i.e., aggregate consumer welfare and an effect-based approach). Some are still attached to the ordoliberal principles that underlie customary Article 82 policy. In their opinion, there is no evidence that existing policy has produced inefficient outcomes – i.e., that it has chilled competition. They further note that the traditional policy has been endorsed time and again by the Community Courts. At the other extreme, some other scholars and practitioners, mainly from the other side of the Atlantic, maintain that competition policy is not a very useful tool, especially as regards the assessment of unilateral conduct. These *laissez-faire* advocates consider that society would be better off without Article 82. Needless to say, we do not share the views of either the ordoliberal "originalists" or the non-interventionist libertarians. Instead, we want to briefly discuss the fundamental issue on which there is still disagreement among those that endorse the Brussels consensus. What is that fundamental issue? It is the degree of discretion that society should allow courts and competition agencies for purposes of balancing the pro-competitive and anticompetitive effects of unilateral conduct.

For that matter, the Brussels consensus on Article 82 remains incomplete. There is still disagreement as regards: (i) the weight to be given to evidence (or lack thereof) of actual effects as opposed to likely effects; (ii) the allocation of the legal burden of proof (as opposed to the evidentiary burden of proof); (iii) the role to be given to economic and econometric analysis in all of this; and (iv), as illustrated in the preceding sections, the optimal design of antitrust rules.

The "rules versus discretion" controversy is a debate about objectives as well as about implementation. Is the objective of Article 82 consumer welfare *ex post* or is it instead long-term consumer welfare *ex ante*, i.e., taking into account the likelihood and cost of error? Or, in other words, is Article 82 a system of enforcement or a system of optimal deterrence?

On one side of the debating table, those that favour rules over discretion argue that balancing pro-competitive and anticompetitive effects is hard to do and that economists, lawyers and courts are all fallible. The outcomes of unconstrained balancing exercises – in other words, the outcomes resulting from an unstructured application of the rule of reason – will be uncertain *ex ante* (at the time strategic decisions need to be made) and often incorrect *ex post* (when commercial behaviour is assessed). Companies will not be able to predict the outcome of exercises of such complexity when taking their day-to-day commercial decisions (*ex ante*). And competition authorities and courts may (with *bona fide* intentions) condemn practices that are legitimate and vice versa after those practices have been implemented (*ex post*). Both shortcomings should be a matter of concern, but the first problem – uncertainty *ex ante* or, in other words, the lack of legal certainty – is likely to be the more costly of the two. This is because, as noted before, Article 82 establishes a system of deterrence can only work properly if companies can self-assess their practices, which in turn requires legal certainty. This is why uncertainty in the context of Article 82 may lead to over-deterrence and may have a chilling effect on competition. And this problem would be particularly severe if companies perceived that the policy is not only uncertain but also tends to produce too many false positives through *ex post* enforcement.

As noted by Director General Philip Lowe, "[c]lear and simple rules provide not only enforcers but also companies with legal certainty. They sign where to draw the line between legal and illegal behaviour. They also have greater deterrent effect and generate lower enforcement costs". [107] As Greg Werden, an economist from the DOJ said recently, "[a]lthough legal uncertainty cannot be eliminated in any practical manner, it can be mitigated significantly, and the simplest way to do so is through the adoption of clear and simple rules limiting the domain of section 2 and Article 82".[108] We fully agree.

There are at least two different ways to structure such rules: the structured rule of reason and the qualified *per se* legality rule. Relying on available economic theory and evidence, a number of papers have shown that these rules maximize, "on average", long-term consumer welfare. They do so by minimizing the expected cost of error in the application of Article 82. (See Section VIII.) Both rules are superior to the unstructured rule of reason because: (i) they limit the complex balancing of pro-competitive and anticompetitive effects to those practices that are likely to have serious anticompetitive effects, and to situations where market power (dominance, if you like) is real and not just marginal; (ii) paraphrasing Professor Hovenkamp, they operate with "tolerable accuracy, in particular without excessive … errors";[109] and (iii) they are easier to administer. Regarding administrability, we are convinced that these structured rules will facilitate judicial review and that they will be more robust against manipulation or, if you will, against the so-called "prosecutorial bias".

On the other side of the debate, you have those that consider that there is no reason why courts and competition regulators should not be "free to ramble through the wilds of

[107] Philip Lowe, "Enforcement authorities", in Barry Hawk, ed., *International Antitrust Law & Policy: Fordham Competition Law 2005*, Juris Publishing, 2006, p. 44.

[108] Gregory J. Werden, "Identifying single-firm exclusionary conduct: from vague concepts to administrable rules" in Barry Hawk, ed., *International Antitrust Law & Policy: Fordham Competition Law 2005*, Juris Publishing, 2006, p. 601.

[109] Herbert J. Hovenkamp, *The Antitrust Enterprise: Principle and Execution*, Harvard University Press, 2006.

economic theory in order to administer a flexible approach" – to use the language of *U.S. v. Topco*.[110]

We strongly believe that economics may be more useful in designing "workable rules" than in balancing efficiencies against anticompetitive effects on a case-by-case basis. In our opinion, for an unstructured rule of reason to perform satisfactorily, our courts and competition authorities would have to be populated by enlightened economists born and bred in the arcane business of balancing pro- and anticompetitive effects – a sort of philosopher King, like those whom Plato would have ruling his Republic. We do not believe in such utopias. Since our goal is the welfare of individuals, and since that is in our view a treasure too precious to play with, we prefer a more pragmatic approach to economic policy in general and to competition policy in particular. The structured rule of reason and the qualified *per se* legality rule are pragmatic approaches with desirable welfare properties. We concur with these observations of Professor Vickers:

> "To say that the law on abuse of dominance should develop a stronger economic foundation is not to say that rules of law should be replaced by discretionary decision making based on whatever is thought to be desirable in economic terms case by case. There must be rules of law in this area of competition policy, not least for reasons of predictability and accountability. So the issue is not rules versus discretion, but how well the rules are grounded in economics. To that end there is great scope for economic analysis and research to contribute to the development of the law on abuse of dominance. To be effective, however, economics must contribute in a way that competition agencies, and ultimately the courts, find practicable in deciding cases."[111]

Though we are very confident that the legal and economic pragmatism of Hovenkamp, Vickers, Werden and others will prevail, we are concerned about the most recent developments. DG Comp's Article 82 initiative appears to be stalled. The Discussion Paper has not led to Draft Guidelines or any other public document. This is problematic. It creates a vacuum that reactionary forces will fill. It is important for DG Comp not to lose interest in its Discussion Paper, and a revised paper is needed in the near future. The availability of guidelines would be extremely useful not only for practitioners and companies, but most importantly for its own internal use. That would increase consistency and would show commitment to what we have called the Brussels consensus. A delay in providing the necessary guidance may produce too many casualties (i.e., false convictions) and in legal matters the weight given to precedent makes the corpses of today the zombies of tomorrow, and we all know that killing zombies is not easy.

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[110] *United States v. Topco Associates,* 405 U.S. 596, 610 (1972).

[111] Vickers, *supra* note 99.