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The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC

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I. Introduction

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

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

The scope of divergence between US and EC law and the underlying reasons have been explored repeatedly during the 50 years of coexistence of the two regimes. In a monograph published in 1970 – i.e., at a time when no Article 82 case had yet been decided by the ECJ – René Joliet compared the wording and possible meaning of Section 2 Sherman Act and Article 82 and argued that Article 82 was restricted to the pursuit of exploitative abuses, and hence did not extend to exclusionary conduct.² He explicitly rejected the findings

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¹ Section 2 Sherman Act claims are more common in private antitrust litigation in the US.

of a similar comparative study by Ernst-Joachim Mestmäcker – an author affiliated with the ordoliberal school – who had argued that Article 82, like Section 2 Sherman Act, was primarily directed against the further restriction by dominant firms of residual competition.\footnote{See \textit{ibid.}, at 248 et seq.; and Mestmäcker, “Unternehmenszusammenschlüsse nach Artikel 86 des EWG-Vertrages”, in Ernst von Caemmerer, Hans-Jürgen Schlochauer and Ernst Steindorff, eds., \textit{Festschrift für Walter Hallstein}, 1966, pp. 322 et seq.} In 1986, and based on the first important judgments of the European Court of Justice applying Article 82, which had clearly established its applicability to exclusionary abuses, Eleanor Fox compared Article 82 and Section 2 Sherman Act conceptually and found a certain bias in the application of EC competition law which tended to protect the interests of those who deal with dominant firms, rather than protecting the freedom of action of the dominant firms themselves.\footnote{Eleanor M. Fox, “Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness”, 61 \textit{Notre Dame Law Review} 981, 1017-1018 (1986).} Giuliano Amato identified the requirement in US antitrust law that consumer welfare must be reduced in order to find an abuse as one of the main differences in comparison with EC competition law, which imposes a “special responsibility” on firms in dominant positions to protect small competitors.\footnote{Giuliano Amato, \textit{Antitrust and the Bounds of Power}, Hart Publishing, 1997, pp. 70-71.} More recent studies frequently focus on specific categories of exclusionary conduct, such as refusals to deal\footnote{See, e.g., Eleanor Fox, “Monopolization, Abuse of Dominance, and the Indeterminacy of Economics. The US/EU Divide”, 2006 \textit{Utah Law Review} 799, at 804 et seq.; Christophe Humé and Cyril Ritter, “Refusal to Deal”, College of Europe Working Paper, 6 July 2005; Alexandros Stratakis, “Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facilities Doctrine”, 27 \textit{European Competition Law Review} 434 (2006).} and predatory pricing.\footnote{See, e.g., William J. Kolasky, “What is Competition? A Comparison of U.S. and EU Perspectives”, 49 Antitrust Bulletin 29, 46 et seq. (2004); Cyril Ritter, “Does the Law of Predatory Pricing and Cross-Subsidisation Need a Radical Rethink?”, 27(4) \textit{World Competition} 613 (2004); Brian A. Facey and Roger Ware, “Predatory Pricing in Canada, the United States and Europe: Crouching Tiger or Hidden Dragon?”, 26(4) \textit{World Competition} 625 (2003). For a general comparative study, see also Reza Dibadj, “Article 82: Gestalt, Myths, Questions”, 23 \textit{Santa Clara Computer and High Tech Journal} 615 (2007).} From a quick survey of this more recent literature, a relatively standard story of the essence of the transatlantic divergence and its reasons unfolds. According to this standard narrative, which pervades current scholarly writing on Article 82, the interpretation of Section 2 Sherman Act – initially influenced by political goals, strong popular hostility towards bigness as such and by a desire to protect small and medium-sized businesses, of which the Robinson-Patman Act is evidence – has been revolutionized, and brought into line with economic theory, under the influence of Chicago school scholarship.\footnote{There is broad recognition that the modern “Harvard school” has likewise influenced the development of US antitrust law. See William E. Kovacic, “The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix”, 2007(1) \textit{Columbia Business Law Review} 1 (2007).} Article 82 – having repeated mistakes made in the “old” Section 2 jurisprudence in some respects, and having committed idiosyncratic mistakes in others, has yet to take that step.\footnote{For the proposition that the interpretation of Article 82 EC is out of line with economic theory see, \textit{inter alia}, John Temple Lang and Robert O’Donoghue, “Defining Legitimate Competition: How to Clarify Pricing Abuses Under Article 82 EC?”, 26 \textit{Fordham International Law Journal} 84, 84-85 (2002).} Like “old” Section 2 Sherman Act jurisprudence, the ECJ has allegedly interpreted Article 82 in such a way as to “protect competitors, not competition”.\footnote{Richard Whish, \textit{Competition Law}, 5th ed. 2003, Chap. 1, 2(C), pp. 19-20; Ian S. Forrester, “Article 82: Remedies in Search of Theories?”, 28 \textit{Fordham International Law Journal} 919, 920 (2005); Stratakis, \textit{supra} Schweitzer, “The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC”, in Ehlermann and Marquis, eds., \textit{European Competition Law Annual 2007: A Reformed Approach to Article 82 EC}, forthcoming 2008.}
instead of efficiency goals. In other respects, Article 82 case law allegedly displays “typically European” deficiencies, namely a regulatory or interventionist bias. The coverage of exploitative abuses and the European approach towards refusals to deal are frequently cited as evidence.

As to the underlying reasons for the aberrations of European competition law, different explanations are given. The regulatory tendencies of Article 82 are frequently traced back to its wording: instead of adopting a prohibition of monopolization analogous to Section 2 Sherman Act, the drafters of the EC Treaty opted for a mere prohibition of abuse of dominance, and thus generally approved of dominance, but established a regime controlling its exercise. There is also a notion that Europe continues to be captivated by a deeply rooted pro-regulatory philosophy which underestimates the ability of markets to self-correct, puts excessive trust in the ability of competition law enforcement institutions to correct market failures, and is concerned more with avoiding “false negatives” than with “false positives”. Another reason given for the deficiencies associated with Article 82 is the German ordoliberal influence – “an approach that has ignored the need for sound economic analysis” and which is sometimes also associated with a regulatory attitude towards competition law. The “economic freedom” paradigm, rightly attributed to ordoliberal theory, is found to have led European competition law away from the goals of consumer welfare and efficiency. The same is said about EU law’s “obsession” with the market integration goal.

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13 See, e.g., Gal, supra note 11, at 346 (with regard to exploitative abuses).

14 For far-reaching claims regarding the practical relevance of the difference in language between Article 82 and Section 2 Sherman Act, see, inter alia, Joliet, supra note 2, at 9 and 11-12.


16 Venit, cited previous footnote, at 1158. See also ibid. at 1163: “It is clear from the foregoing that the basic tenets of ordoliberal doctrine do not cite to, nor rely on, any empirical economic evidence or micro-economic theory. Instead, they appear to be based on a philosophy of political or social economy. Nor does ordoliberalism embrace the twin goals of consumer welfare and efficiency that are widely accepted as the prevailing competition law standards.”

17 Frequently with reference to David J. Gerber, Law and Competition in Twentieth Century Europe. Protecting Prometheus, 1998, p. 252, where Gerber describes the concept of “as if” competition – a concept which some members of the ordoliberal school have defended, but which was later overwhelmingly rejected even by those associated with the ordoliberal school – see infra note 79 and accompanying text.

18 Venit, supra note 15, at 1163
This paper strives to find out whether this story describes the different attitudes towards rules regarding market power and the underlying reasons adequately. The interest in capturing the “true” roots of divergence is not merely an academic one. The understanding of the reasons of divergence informs the debate on the reform of Article 82. The perceived need to bring Article 82 “in line with sound economics”, to introduce a “more economic” or an “effects-based” approach,\textsuperscript{19} as well as the widespread perception that Article 82 is in need of a re-conceptualization similar to the one that the Chicago school introduced in the 1970s and 1980s into US antitrust law are based on the understanding that the current divergence in the application of Article 82 and of Section 2 Sherman Act is due to the use of old-fashioned competition theory in the EU. Implicit is the suggestion that a rational competition policy can only be achieved once the “economic freedom” paradigm is replaced with the consumer welfare goal.

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

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

II. Section 2 Sherman Act and Article 82 in historical perspective – intellectual roots and shifts

The history of Section 2 Sherman Act is marked by changing political attitudes towards market power and corresponding shifts in how the provision is interpreted. In a radical reaction towards an antitrust jurisprudence that had become dominated by political concerns (and in particular by the preoccupation with maintaining a market structure in which small and medium-sized enterprises could survive) and had thus distanced itself from protecting the functioning of competition according to economic principles, Chicago school scholarship led to a revamp of Section 2 doctrine and jurisprudence that is completely oriented towards consumer welfare and efficiency.

The interpretation of Article 82 so far has not undergone equally distinctive shifts. Different political attitudes towards market power were present at the drafting stage; however, the final wording of Article 82 clearly reflected the “abuse” theory. It foreclosed moves in the direction of a “no fault” prohibition of monopolization along the lines of the judgment of the

Second Circuit in *Alcoa*.

The ECJ’s interpretation of Article 82 has, ever since the early judgments, been driven not by *anti-bigness* concerns, nor by “pure” efficiency concerns, but by its function within the broader system of the EC Treaty as articulated in Article 3(1)(g): Article 82 is one of the pillars of a “system ensuring that competition in the internal market is not distorted”, and from which efficiency, consumer welfare and economic progress is expected to result. Hence, the provision has been interpreted with a view to the goal of market integration with the aim of ensuring the effectiveness of the fundamental freedoms (especially the free circulation of goods and services across borders within the Community) against the exercise of private power to preclude market access or to eliminate competitors. Article 82 has been, and continues to be, indissolubly intertwined with the EC’s internal market project — a primary feature distinguishing it from Section 2 Sherman Act.

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

The evolution of Article 82 and Section 2 cannot be traced in detail here. However, a short comparative look at the antitrust history of the US and of the EU is necessary for an understanding of the different rules and attitudes. The history of Section 2 and its interpretation is well researched and will be summarized only briefly here (point 1 below). The history of Article 82, on the other hand, deserves a closer look. Strictly speaking, the drafting history of the EC Treaty is not relevant to the application of this provision. The signing of the Treaty of Rome and the establishment of the EC as a supranational entity was accompanied by a deliberate decision of the Member States to commit to a functional interpretation, and not to revert to “original intent”. It was thought that the EC should be developed dynamically with a view to the implementation of its own goals, and not with a view to the positions taken by the Member States during the negotiations. Indeed, in order to avoid interpretations based on “original intent”, the official records of the drafting process

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20 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
Faithful to this fundamental decision, the ECJ has never referred to the drafting history in interpreting the EC Treaty. Nevertheless, it is interesting to examine the drafting history with a view to testing the frequent claims being made about the fairness concerns, the regulatory tendencies, and the aim to protect competitors instead of competition allegedly enshrined in Article 82 (point 2 below). Following this backwards glance, the discussion will turn to a question that is legally more relevant, and also more telling with respect to the attitudes that underlie the rules on market power today, namely, the interpretation of Article 82 by the ECJ during the formative years of EC competition law (point 3).

1. Section 2 Sherman Act in historical perspective

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

Despite the structural focus of Section 2, the provision does not prohibit the existence of monopolies *per se*. Rather, it prohibits certain types of conduct that create or threaten to create monopoly. The early history of Section 2 jurisprudence revolves to a significant extent around the different meaning and weight given to the structural and the conduct element at different times.\(^{25}\)

As has frequently been recounted, the enactment of the Sherman Act was motivated by the economic conditions and sentiments of the times.\(^{26}\) In the words of Chief Justice White in *Standard Oil*, these were:

“The vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression

\(^{24}\) See Gerber, *supra* note 17, at 343.

\(^{25}\) In *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953), Judge Wyzanski distinguished three different approaches towards Section 2: (1) an enterprise has monopolized if it has acquired or maintained a power to exclude others as a result of using an unreasonable “restraint of trade” in violation of Section 1; (2) a monopolization offence is committed where an undertaking with effective market control uses this control, or plans to use it, to engage in exclusionary practices, even if these are not technically “restraints of trade”; (3) the acquisition of an overwhelming market share is a monopolization under Section 2 even if there is no showing of any exclusionary conduct. But the defendant escapes liability if it can show that he owes his monopoly power to legitimate causes (superior skill, business acumen, etc.). The Chicago school added a fourth approach, based on the assumption that “exclusionary conduct” is normally not viable.

that this power had been and would be exerted to oppress individuals and injure the public”. 27

The accumulation of wealth in the hands of a few was perceived as a threat not only to the economic order, but also to democracy. With both the political dimension and the economic implications of antitrust law in mind, courts struggled with the interpretation of Section 2, oscillating between more structure- and more conduct-oriented approaches (“abuse theories”). Bemoaning the uncertainties surrounding Section 2, Levi wrote in 1947: “We are not sure whether we are against monopolies or the abuse of monopoly … We do not know whether we are opposed to size or merely to unreasonable high prices.”28

The famous Alcoa case mentioned earlier marks an apex of the structuralist approach in the interpretation of Section 2. In this case, the Second Circuit found an offence mainly based on the fact that Alcoa held, and had managed to maintain, an overwhelming market share. Although the Alcoa judgment stopped short of establishing a per se prohibition of monopoly power, it did not require much in terms of exclusionary conduct or of specific intent to monopolize.29 The simple pursuit of normal business practices without a predatory tendency but with the effect of defending the dominant firm’s superior market position could apparently suffice for finding a violation of Section 2. Based on the assumption that the Sherman Act’s aim was “to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other”,30 and that it would be absurd to condemn price fixing contracts in Section 1 without extending this condemnation to monopolies who necessarily fix the market price when they sell, Judge Learned Hand essentially held that the active seeking of monopoly power, even if by means of perfectly legitimate business conduct, could be qualified as illegal monopolization under Section 2.31

27 Standard Oil of New Jersey v. United States, 221 U.S. 1, 50 (1911).
29 Alcoa, supra note 20, at 432: “[I]n order to fall within Section 2 the monopolist must have both the power to monopolize, and the intent to monopolize”. But to require a more specific intent would cripple the Act “for no monopolist is unconscious of what he is doing”.
30 Ibid.
31 Judge Hand does stress that, “[s]ince the [Sherman] Act makes ‘monopolization’ a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress” to include instances in which a firm has become a monopolist by force of accident. The decision also states that “the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor having been urged to compete, must not be turned upon when he wins”. On the other hand, Alcoa was found to have violated Section 2 on the following grounds: “It was not inevitable that [Alcoa] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret ‘exclusion’ as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not ‘exclusionary’. So to limit it would in our judgment emasculate the Act”. It therefore seemed that a defence according to which a monopoly was “thrust upon” a firm would be limited to cases where the achievement of power was not deliberate, but due to circumstances outside the free choice of the firm.

This far-reaching interpretation of Section 2 was critically discussed in the US antitrust community. According to a widespread opinion, it took the structural elements of the prohibition too far. It was considered that a more intense inquiry into intent and into the competitive legitimacy of the methods employed to acquire or maintain a monopoly should be required to establish illegal monopolization.\footnote{See, e.g., \textit{United Shoe Machinery}, supra note 25.} The debate about the need to distinguish legitimate from illegal practices, and thus to flesh out the features of illicit exclusionary conduct, intensified.

When Chicago school scholars undertook their comprehensive re-conceptualization of US antitrust law, the \textit{Alcoa} position towards Section 2 was thus already on a slow retreat, although it was still good law. The case became a favourite target of attack for the Chicago school. According to Robert H. Bork, \textit{Alcoa} stood for the proposition that “monopoly … is illegal unless the monopolist could not avoid it. Superior efficiency is not only no excuse, it is an ‘abuse’.\footnote{Robert H. Bork, \textit{The Antitrust Paradox: A Policy at War with Itself}, Basic Books. 1978, p. 170.}" Indeed, with \textit{Alcoa}, Section 2 jurisprudence appeared to have reached a point that left firms with monopoly power little room to compete. This, as well as the Robinson-Patman Act, which made protecting competitors an explicit goal of the law,\footnote{For a critical appraisal of the Robinson-Patman Act, see Mestmäcker, \textit{Der verwaltete Wettbewerb}, Mohr Siebeck, 1984, pp. 45-47.} were obvious targets of critique. However, the Chicago School’s reform project had more fundamental ambitions: consumer welfare was to be established as the only ultimate goal of antitrust law,\footnote{For the broad agreement in today’s US antitrust scholarship that consumer welfare is antitrust’s ultimate purpose, see Herbert Hovenkamp, \textit{The Antitrust Enterprise: Principle and Execution}, Harvard University Press, 2005, p. 31.} and price theory was to be the method by which to predict consumer welfare effects.\footnote{See \textit{ibid.}, summarizing the conclusions of Chicago School scholarship on unilateral conduct as follows: “firms cannot in general obtain or enhance monopoly power by unilateral action – unless, of course, they are irrationally willing to trade profits for position. Consequently, the focus of antitrust laws should not be on unilateral action ….”} Applied to unilateral conduct, this translated into a highly permissive approach:\footnote{See Richard A. Posner, “The Chicago School of Antitrust Analysis”, 127 \textit{University of Pennsylvania Law Review} 925, 928 (1979).} firstly, most unilateral practices would, according to Chicago school scholars, typically create efficiencies. Secondly, firms with monopoly power would lack incentives to engage in welfare-reducing practices. Most unilateral practices should therefore be lawful \textit{per se}.

Although Chicago school scholarship was never adopted into antitrust doctrines wholesale,\footnote{See Hovenkamp, supra note 35, at 37 and Kovacic, \textit{supra} note 8, both emphasizing the continuing influence of Harvard School scholarship.} it did gain significant influence in the courts, particularly during the 1970s and 1980s. The empirical claim that, due to a lack of rational incentives or of ability, instances of (successful) exclusionary conduct will be rare have led to the development of rather stringent tests for finding an infringement of Section 2. No less importantly, the claim that consumer welfare is the only goal, or at least the primary goal of antitrust law, and that it should directly...
guide the legal appraisal of single-firm conduct, has had strong resonance in the academic community as well as in the courts.

During the last decade or so, Chicago school thinking has lost some of its influence. “Post-Chicago” scholarship, while subscribing to efficiency as the ultimate objective of antitrust law, has started to challenge the overly simplifying assumptions on which Chicago school theory was based and has defined conditions under which unilateral conduct can indeed have anticompetitive effects. The opportunities and incentives for strategic behaviour and exclusionary conduct, largely denied by traditional Chicago school scholarship, are generally acknowledged today. This evolution coincides with a widespread recognition that many of the tests currently applied under Section 2 to identify illegal monopolization tend to be under-inclusive conceptually and can create a significant number of “false negatives”. Nonetheless, these tests continue to enjoy widespread support by leading scholars of various schools, including the modern Harvard school. Taking account of certain distinctive features of the US system of private antitrust enforcement such as, inter alia, treble damages and the involvement of potentially error-prone juries, these scholars argue that broader and less under-inclusive tests could create excessive incentives to sue.

2. The history of Article 82 EC

a) The drafting history

A confrontation with the diversity of ideas and projections, the utter uncertainty about the future role of competition and competition rules in the EU, and the “veil of ignorance” under which the negotiations of the Treaty of Rome took place is fascinating for anyone used to dealing with today’s so well-established system of rules. After plans for the political integration of continental Europe had failed in 1954, the creation of a common market was at the centre of the European project: the common market was to foster economic growth and stability, raise living standards, and most of all to ensure harmonious and peaceful relations between the Member States. From the outset, the negotiating parties agreed that the common market was to be based on free movement rules to prevent the Member States from impeding or distorting cross-border trade; but these free movement rules would need to be backed up by competition rules so that the state barriers to trade would not be replaced by private restraints.

39 For a summary of the criticism see Hovenkamp, supra note 35, at 34-35.
42 See, e.g., Hovenkamp, supra note 35, at 45 et seq.; Kovacic, supra note 8, at 53, 63-64 and 74 et seq.
43 For discussion, see Kovacic, supra note 8, at 51 et seq.; Hovenkamp, supra note 35, at 47.
This idea was fully developed already in the so-called Spaak Report of 1956.\footnote{See Spaak Report, Title II Chap. 1 b) – Monopolies, pp. 59-60. The Spaak Report was prepared by Paul-Henri Spaak (presiding), Carl Friedrich Ophüls (Germany), Felix Gaillard (France), Ludovico Benvenuti (Italy), Baron Snoy (Belgium), Lindhorst Homann (Netherlands) and Lambert Schaus (Luxemburg), i.e., the heads of the national delegations to the Messina conference, who were, however, in preparing this report, not bound by instructions of the Member States. A draft of the Report was prepared by Pierre Uri and Hans von der Groeben. For an insider’s perspective on the drafting of the Spaak Report, see Hans von der Groeben, Deutschland und Europa in einem unruhigen Jahrhundert, Nomos, 1995, pp. 269 et seq., and particularly pp. 276-279.} It addressed both the problem of cartels and of positions of market power in a section entitled “monopolies”. The common market, according to the Report, would create opportunities for companies to grow and realize economies of scale without endangering competition.\footnote{Ibid., p. 59-60} However, for the potential gains to be realized, the future Treaty would need to contain provisions ensuring that existing monopolies or abusive practices would not frustrate the common market goal.\footnote{Ibid.} While the Spaak Report did not propose an exact formulation of the future competition rules, it did anticipate much of their content and structure.\footnote{Apart from rules on cartels and undertakings with market power, the Spaak Report also envisaged a system of merger control. See ibid. at 60.} The competition rules were to be directly applicable in the Member States, and would enjoy primacy over national law. They should be interpreted by the Commission and be further developed over time by a European court.\footnote{Ibid.}

The Spaak Report by no means summarized a consensus, but it was the basis on which the future Member States entered into the negotiations of the Treaty of Rome.\footnote{See von der Groeben, supra note 45, at 279.} For the drafting of the competition rules it was an important reference point\footnote{For the relevance of the Spaak Report to the drafting of the EC Treaty’s competition rules, see Dokument 53, Vermerk über die Sitzung der Arbeitsgruppe “Gemeinsamer Markt” in Brüssel vom 3.9.-5.9.1956, 7.9.1956, in Reiner Schulze and Thomas Hoeren, eds., Dokumente zum Europäischen Recht, Band 3: Kartellrecht (bis 1957), Springer, 2000, pp. 163-164.} – possibly more important than the ECSC Treaty’s competition rules.\footnote{The ECSC Treaty encompassed a prohibition of cartels, an abuse control for undertakings with market power, and a system of merger control.} The design of the Treaty of Rome’s competition rules was initially controversial among the negotiating parties,\footnote{For a report on the negotiations, see von der Groeben, supra note 45, at 280-289.} as was the economic order of the future European Community in general. The German and the French position marked the two poles of the debate. The German delegation envisaged a common market based on principles constitutive of a market economy.\footnote{A number of members of the German delegation were to some extent affiliated with the ordoliberal school. As mentioned earlier (supra note 45), von der Groeben was involved in the drafting of the Spaak Report. He also presided over the “Common Market” Working Group during the negotiations of the Treaty of Rome itself. Alfred Müller-Armack – Secretary of State in the cabinet of Economics Minister Ludwig Erhard and author of the term “social market economy” – was a member of the German delegation for negotiating the Common Market rules.} The French delegation, while

\textsuperscript{45} See Spaak Report, Title II Chap. 1 b) – Monopolies, pp. 59-60. The Spaak Report was prepared by Paul-Henri Spaak (presiding), Carl Friedrich Ophüls (Germany), Felix Gaillard (France), Ludovico Benvenuti (Italy), Baron Snoy (Belgium), Lindhorst Homann (Netherlands) and Lambert Schaus (Luxemburg), i.e., the heads of the national delegations to the Messina conference, who were, however, in preparing this report, not bound by instructions of the Member States. A draft of the Report was prepared by Pierre Uri and Hans von der Groeben. For an insider’s perspective on the drafting of the Spaak Report, see Hans von der Groeben, Deutschland und Europa in einem unruhigen Jahrhundert, Nomos, 1995, pp. 269 et seq., and particularly pp. 276-279.

\textsuperscript{46} See Spaak Report, supra note 44, at 8.

\textsuperscript{47} Ibid., p. 59-60.

\textsuperscript{48} Apart from rules on cartels and undertakings with market power, the Spaak Report also envisaged a system of merger control. See ibid. at 60.

\textsuperscript{49} Ibid.

\textsuperscript{50} See von der Groeben, supra note 45, at 279.


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subscribing to the idea of a market economy of some sort, favoured a more dirigiste approach, with vaster potential for intervention and economic planning by the Member States.  

These positions were reflected in the delegations’ propositions for how to frame and enforce the Treaty’s competition rules. The French proposal\(^{56}\) started out with a broad and non-specific prohibition of discrimination: all firms should be required to treat competing buyers or sellers equally with regard to both price and conditions of trade.\(^{57}\) Secondly, it featured a general prohibition of cartels, monopolies, and abusive practices directed towards, or potentially resulting in, an impediment to competition. Examples listed included price fixing, the restriction or control of production, technological development or investment, the partitioning of markets, and the enabling of a total or partial domination of markets for certain products by a firm or a group of firms. No less general than the prohibition was the exception foreseen: it took the form of a broad efficiency defence. Practices should be exempted from the prohibition where they contributed to the improvement of production or distribution or to fostering technological and economic progress. These rules were not meant to be directly applicable, but were to be implemented by the Member States. Where trade between two or more Member States was affected, Member States could request the involvement of the Commission in a consultation procedure. Ultimately, the Council would decide. According to this proposal, state monopolies and services publics should not be subject to these general rules, but rather should be governed by special rules which the proposal did not specify.\(^{58}\) A Belgian-Dutch proposal was similar to the French proposal in that it treated anticompetitive agreements and dominant positions under one single rule, but it was envisaged that both would be subject to an abuse control, no more. On the other hand, the Commission – and not the Member States – should be in charge of this control.\(^{59}\) The German proposal differed significantly: it contained separate rules for anticompetitive agreements and market dominance. Cartel agreements should generally be prohibited, subject to a narrow exception. With regard to monopolies and oligopolies, the German delegation proposed to prohibit merely the abuse of dominance. According to the proposal, this prohibition should be applicable to private and state undertakings and state monopolies alike.\(^{60}\) No rules on the enforcement of the EC competition rules were proposed. Such rules were to be established in a separate Treaty to be concluded between the Member States within a period of 2 years. If no


\(^{57}\) See *ibid.*, p. 157, Article X: “Innerhalb des gemeinsamen Marktes sind verboten: Preiserhöhungen und –senkungen, sowie Änderungen von Verkaufsbedingungen für vergleichbare Geschäfte gegenüber Käufern oder Verkäufern, die miteinander im Wettbewerb stehen.” The German delegation proposed to abandon this general non-discrimination principle and to include a more limited prohibition in the rules on abuse of dominant positions. See Dokument 53, in Schulze and Hoeren, *supra* note 51, at 163.


\(^{60}\) See Document 57, in Schulze and Hoeren, *supra* note 51, at 172.
agreement were reached within this time period, the Commission should enact an enforcement regulation with the approval of 2/3 of the Council. The controversial question of whether primary responsibility for enforcement of the competition rules should reside with the Commission or with the Member States, as well as the question of direct applicability, was thus to be decided at a later point of time.

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

The broad non-discrimination principle was highly controversial. For the French delegation, it was an essential pre-condition to the implementation of the competition rules. This idea was a variation on a more general notion in France that the competition rules should apply only subject to the prior establishment of a “level playing field”, where all “distortions” of competition, such as different working conditions, wages, social burdens, tax systems, etc., had previously been equalized. This notion had in fact already been discussed and rejected in the Spaak Report. In the negotiations leading to the Treaty of Rome, the idea of a broadly construed prohibition of discrimination as part of the competition rules was most strongly opposed by the German delegation. Alfred Müller-Armack stressed the important function of price discrimination in competition and warned against incorporating regulatory tendencies into the future competition rules. Ultimately, the idea of a general non-discrimination principle was highly controversial. For the French delegation, it was an essential pre-condition to the implementation of the competition rules. The Italian delegation favoured a Community competence. See ibid. at 170 and 173.

61 The German and the French delegations generally favoured a competence of the Member States for the enforcement of the competition rules. The Italian delegation favoured a Community competence. See ibid. at 170 and 173.


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

principle was abandoned. Instead, a general prohibition of discrimination on the basis of nationality was made part of the introductory Treaty norms. This left open the question whether it would apply only to Member States or also to private firms.

A compromise was also found on the question of whether the competition rules should apply to private undertakings only, or whether they should also apply to state undertakings and “services publics”: the competition rules were formulated in a broad and general way. Article 86(1) EC (Article 90(1) EEC) clarified that they would apply to state undertakings as well. However, Article 86(2) EC (Article 90(2) EEC) provided for a possible exception where an undertaking has been entrusted by public authorities with “services of general economic interest” – an exception the scope of which was anything but clear at the time of the signing of the Treaty of Rome.

On the last question, i.e., whether to have a single, comprehensive prohibition for cartels and abuses of dominant positions with a generally applicable exception to both or rather two separate rules, the German delegation ultimately prevailed. In fact, the competition rules as ultimately drafted, and particularly Article 82 EC (Article 86 EEC), came closest to the original German proposals, although those proposals by no means survived unchanged. The German influence on the shape of the EC competition rules likely resulted from the particular importance which the German delegation attached to them – not only, and maybe not even primarily with a view to the impact they would have in shaping the future common market, but rather against the background of a parallel, internal German debate on a national competition law (the GWB) which was finally adopted in July of 1957, several months after the Treaty of Rome was signed.66 Throughout the negotiations on the Treaty, Ludwig Erhard, the German Minister of Economic Affairs, was concerned that if the European competition rules deviated too much from the German competition rules he intended to enact, they would torpedo his attempt to secure the adoption of an effective German competition law against the intense opposition of German industry. No other delegation appears to have given similar weight to the exact shape of the EC competition rules – particularly since the question of their enforcement was left open. Against the background of a generally prevailing pro-competition attitude67 in the Working Group for the Common Market, which was entrusted with the drafting of the competition rules, the proposal ultimately presented by the group’s chairman von der Groeben,68 was ultimately approved.

verbundene unterschiedliche Behandlung von Käufern oder Lieferanten durch Kartelle oder marktbeherrschende Unternehmen.”

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66 For the relevance of this internal German debate for the negotiations in Brussels, see Documents 62 and 66 in Schulze and Hoeren, supra note 51, at 195 and 204-205.
67 The French delegation was somewhat divided, but important members of the delegation, namely (future Commissioner) Robert Marlolin, Jacques Donnedieu de Vabres and Jean-François Deniau, were generally favourable to strengthening competition as a means to increase the performance of French industry. Similarly, leading economic circles in Italy at the time favoured a liberal market regime with strong competition rules at EC level and saw the Treaty as an opportunity to create a level competitive playing field in Europe. See Küsters, supra note 55, at 364-366.
There were, however, a number of points on which the German delegation did not prevail. Article 81(3) EC (Article 85(3) EEC) provided for much broader exceptions to the general prohibition of cartels than the German side had proposed. According to Müller-Armack, this turned Article 81 into a hybrid between a prohibition principle and an abuse principle.  

Also, the EC Treaty did not contain rules on merger control – an important component of a full-fledged system of competition rules in the eyes of proponents of the ordoliberal school.

Does the German influence on the drafting of the competition rules, and particularly on Article 82 EC, support the claim that Article 82 EC is a creature of ordoliberal theory? In fact, the degree of congruence between Article 82 EC and ordoliberal positions is difficult to determine. No fully developed ordoliberal position on the treatment of market dominance existed at the time the EC Treaty was negotiated. Against the background of a heavily cartelized German industry, the main concern of German ordoliberals had been on how to deal with cartels. Some thought had been given to the problem of dominance, of course. In the context of the German competition law debate, economist Walter Eucken had proposed that, wherever possible, monopolies should be prohibited per se. Those monopolies that were technologically or economically unavoidable, i.e., natural monopolies, were to be placed under regulatory supervision and required to act “as if” there were competition in the market., Eucken thus adopted this (in)famous concept of “as if” competition for the narrow case of

Schulze and Hoeren, supra note 51, at 168 et seq. The draft still contained a separate prohibition of discrimination of buyers or sellers which are in competition with one another based on their nationality (see Article 42 of the draft). However, the cartel prohibition (Article 42a) and the prohibition of abuses of a dominant position (Article 42b) come close to the final version that was finally adopted in the Treaty.

The German delegation, and in particular Müller-Armack, was of the opinion that an excessive number of exceptions had been integrated into Article 81(3) (Article 40(2) of the draft), and that this in effect led to a mixing of the “prohibition” principle and the “abuse” system. See Document 73 in Schulze and Hoeren, supra note 51, at 228.

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

regulating infrastructure monopolies, borrowing the concept from Leonard Miksch, who advocated its application on a broader scale. Yet “as if” competition, which many today associate with ordoliberalism generally, was not a proposition uniformly accepted by ordoliberals. It was one of the concepts discussed in ordoliberal circles after the 2nd World War, and it did appear in the “Josten” draft of 1949, which launched a long legislative procedure leading ultimately to the GWB (see above). But ”as if” competition was already abandoned in a draft of the GWB that was presented to the German Parliament by Franz Böhm and others in 1953. This draft proposed to place dominant firms under “supervision” however, contrary to first impression, the draft did not envisage a full-fledged regulatory scheme but rather a selective control of specific abuses of dominant positions. Although the 1953 draft addressed exploitative abuses, the focus was clearly on preventing exclusionary abuses. Tying practices, predatory pricing, abusive discrimination and refusals to deal in essential facility settings were specifically addressed. Like the 1953 draft, the official draft for a GWB presented by the government also distanced itself explicitly from the concept of “as if” competition. In the competition policy debate, it continued for a while to be advocated by some. However, certain scholars associated with the ordoliberal school, and in particular Ernst-Joachim Mestmäcker, were among the most outspoken critics of the concept of “as if” competition, and they were influential in ensuring that it never became part of German competition law.

All in all, the question of how best to deal with positions of market power was generally an open one as the negotiations on the Treaty of Rome took place. There were no hard and fast answers, and no clear “role model”. The debate which preceded and accompanied the drafting of Article 82 during the negotiation of the Treaty of Rome is

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73 See, e.g., Gerber, supra note 17, pp. 252-253.
74 Section 22 “Josten-Entwurf” (“Verhalten im Markt”): “Inhaber wirtschaftlicher Macht sollen sich im Geschäftskreisverkehr so verhalten, wie sie sich verhalten würden, wenn sie einem wirksamen Wettbewerb ausgesetzt wären.” However, as pointed out above (supra note 70), those who had achieved a position of dominance by competition on the merits were exempted from this regulatory scheme.
75 Antrag der Abgeordneten Dr. Böhm, Dr. Dresbach, Ruf und Genossen: Entwurf eines Gesetzes gegen Wettbewerbsbeschränkungen, BT-Drs. II/1269.
76 Unlike Article 82, the 1953 draft did not entail a general prohibition of abuses of dominance, but merely placed dominant firms under the supervision of the cartel authority. The idea of a per se prohibition of dominance had been abandoned. Böhm and others acknowledged the important incentive function that competition for a superior market position can have. Also, the idea of breaking up dominant positions was politically unacceptable in Germany at the time, and perceived to be a continuation of Siegerjustiz (“victor’s justice”).
77 Section 11, No. 2 of the draft.

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evidence of this general uncertainty. The negotiating parties were certainly aware of the existence of Section 2 Sherman Act, but a prohibition of monopolization analogous to the US model was not explicitly discussed as a potential option for the EC Treaty. The possibility of a per se prohibition of monopoly positions appeared in the Spaak Report and was – subject to broad exceptions – taken up by the French delegation; but it was unacceptable to the German delegation. The general perception in Germany was that market dominance could legitimately be obtained by competition on the merits, that competition for a superior market position could have important incentive effects, and that dominant positions should therefore not be generally outlawed or dismantled. The Spaak Report had already suggested the idea that, if firms were kept from abusing their power, the opening up of national markets would dismantle monopoly positions while at the same time allowing firms to grow. It was probably against this background that the German proposal of a prohibition of the abuse of market dominance was able to gather support. A further, unspoken reason for the German opposition to a per se prohibition of dominance may have been the political unacceptability of a competition law that would threaten to break up leading German companies.

There is no evidence in the documents regarding the negotiations that the drafters, by framing the provision as a prohibition of abuse, envisaged a regulatory scheme. Members of the German delegation, particularly Müller-Armack, on various occasions strongly warned against introducing any regulatory tendencies into the competition rules. The prohibition of abuses simply appeared to be the only clear-cut alternative to a per se prohibition of dominance at that time. The fact that the list of examples of possible abuses included exploitative abuses (see Art. 82(a)) is no evidence to the contrary. Indeed, the idea of implementing competition rules which would cover exploitative abuses may even be seen as a “deregulatory” move. Previously, price controls had been an accepted (but utterly ineffective) instrument to fight inflation which had repeatedly hit European economies hard in the recent past, to the point of threatening political and economic stability. In the period in which the EC Treaty was drafted, price levels were still an important concern. The concept of exploitative abuses preserved an instrument of intervention, but – and this was new – linked it to the concepts of competition policy. The way in which this new concept would work in practice was neither much discussed nor clearly foreseen. However, the change from anti-inflationary state price controls to controlling excessive pricing policies by dominant firms in the framework of a competition law regime implied a rejection of the idea of ongoing price controls. Only clear excesses should be controlled. In its utter vagueness, the concept of exploitative abuses was apparently immediately acceptable to all delegations. No debate ensued between the more liberal delegates and those that tended more towards a planning approach. Even to the liberal, market-oriented delegates, a limited control of excessive pricing or other exploitative abuses may have appeared acceptable in a market environment in which many of the dominant firms had achieved their position of dominance with the help of governments, e.g., through government privilege and protection, as was characteristic of the post-War period.
It should also be emphasized that the fact that the examples in Article 82 clearly cover exploitative abuses does not imply that the drafters were concerned only with exploitative abuses. The drafters were aware of the relevance of exclusionary abuses and of the need to prevent the acquisition of positions of dominance by means other than competition on the merits. Again, the available documentation of the negotiations in the Common Market Working Group does not give evidence of much debate. It is obvious, however, that the examples in Article 82 are intended to represent both exploitative and exclusionary abuses. Even Article 82(a), which prohibits “unfair prices”, was directed against not only unfairly high prices but also unfairly low prices, i.e., predatory pricing schemes. The parallel debate in Germany concerning abuses of dominant positions under German competition law was clearly focused on exclusionary abuses— not on exploitative abuses— an important fact shedding light on the intent of the drafters of Article 82, given the German influence. The list of examples in Article 82 was not meant to be comprehensive. Rather, the examples stand for those types of conduct which were perceived to present the most pressing problems at the initial stage of the common market. Especially Müller-Armack cautioned against an attempt to provide a full list of possible abuses, advocating instead a more open approach that would leave room for evolution in the light of growing experience.

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

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80 In Germany, the main concern was with boycotts and similar exclusionary techniques – the most pervasive types of abuses during the 1920s. Contrary to exploitative abuses, which were merely placed under the supervision of the German Cartel Authority, such exclusionary behaviour was generally prohibited by the GWB (specifically by § 26(2) of the statute), and this prohibition was made directly applicable.
All in all, the discussions in the Working Group for the Common Market give the impression that the negotiating parties strived to create a system of competition rules that would allow the common market to become reality. This was the clear and primary concern. As for the enforcement regime within which the competition rules were to operate, the drafting history provides only limited insight into its design. It is important to recall that, when the competition rules entered into force in 1958, they were a mere potentiality whose actual functioning was not predictable. The Treaty of Rome left open the all-important question of how and by whom the competition rules should eventually be enforced after an initial period in which enforcement would be left to the Member States. This fundamental question was decided only later with the adoption of Regulation 17/62.\(^\text{81}\) The direct applicability of the competition rules in the Treaty was not foreseen at the time the EC Treaty entered into force. Müller-Armack had stressed on various occasions that the competition rules at EC level should state general principles and guidelines, no more.\(^\text{82}\) Whether these rules would gain practical relevance, and to what extent, was completely unclear. When the first Commission took up work and divided competences among its members, neither France nor any other Member State was particularly interested in the idea of a designated Commissioner responsible for the free movement and competition rules. Ultimately, however, competence over these policy areas was assigned to a somewhat disappointed von der Groeben – the last one to choose.\(^\text{83}\)

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

The Treaty of Rome entered into force in 1958. For the first decade of the Treaty’s existence, Article 82 was not applied. The first case that reached the ECJ was *Continental Can*.\(^\text{84}\) The Court’s judgment in this case continues to be of fundamental importance for the understanding and interpretation of Article 82.

Before *Continental Can*, commentators’ ideas about the meaning and relevance of Article 82 sharply diverged. Representative of the uncertainties surrounding Article 82 is the monograph by René Joliet on monopolization and abuse of dominance, published in 1970.\(^\text{85}\) Contrasting Article 82 with the (at that time) strongly structural approach towards monopoly power under Section 2 Sherman Act, Joliet hypothesized that Article 82 lacked any structural component and took a purely behavioural stance. According to Joliet, the application of Article 82 was limited to controlling exploitative abuses, and would not extent to exclusionary

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81 1962 OJ 13, p. 204/62, as subsequently amended. Regulation 17/62 has of course been repealed and replaced by Regulation 1/2003, 2003 OJ L1/1.
84 Cited *supra* note 21.
85 *Supra* note 2.
abuses. In concentrating on exploitation, the Treaty of Rome exhibited a purely regulatory character:

“The EEC Treaty […] tends to curb only the abuses of power and thus to regulate the market behavior of dominant firms. The approach taken by Article 86 [Article 82 EC] is based upon an attitude of neutrality toward the existence of market dominant positions. It does not try to break up monopolistic positions, but instead, is confined to supervising the conduct and performance of dominant firms. Remedies are thus behavioral rather than structural. In cases of abuses, the enforcement agency could go as far as to set prices at which dominant firms can sell or to fix the quantities which they must produce. The EEC approach amounts to a kind of public utility regulation”. 87

Joliet concluded that the main preoccupation of the Treaty of Rome was not the maintenance of a competitive system. Rather, “the major objective of Article 86 is to ensure that dominant firms do not use their power to the detriment of utilizers and consumers”. 88

Mestmäcker – at that time special advisor to DG IV (now DG Competition) and an influential voice in the development of EC competition law – took a radically different view. In preparing the Commission’s position in the Continental Can case, he started with the assertion that Article 82 had to be interpreted with a view to the overriding purpose of the competition rules, i.e., the aim of protecting a system of undistorted competition in the common market against distortions. 89 Actions of dominant firms that are objectively incompatible with a system of undistorted competition must therefore be prohibited by Article 82. However, abuses of dominance cannot be defined based on the effects of a dominant firm’s actions on third parties alone. Article 82 prohibits a certain type of market conduct, not a certain type of market structure as such. 90 Yet an abuse of a dominant position can lie in the restriction of (residual) competition, in defending a dominant position against current or potential competition, especially by hampering market entry, or in expanding a dominant position into adjacent markets. The fact that Article 82 does not oppose the formation of dominant firms does not preclude a finding of abuse in the case of a further strengthening of market dominance. Rather, by covering the maintenance and strengthening of dominance (other than by means of performance), Article 82 covers the most widespread, typical and dangerous exclusionary acts. Mestmäcker went on to establish certain guiding principles for the interpretation of Article 82. First of all, he stressed the close links between competition policy and the protection of open markets within the Community. The competition which the competition rules protect results from the opening up of the markets of the Member States.

86 See ibid. at 131.
87 Ibid. at 127-128
88 Ibid., at 131.
90 Ibid. at 604.
EC competition law must hence take particular care to ensure that dominant firms will not use their power to impede the entry into markets which the elimination of state barriers to trade has made possible.\(^91\) Secondly, he proposed the following criterion for determining whether an abuse has been committed under Article 82: third parties must be protected against harm which they would not risk to suffer in the presence of effective competition. The dominant firm must not engage in acts which it could not carry out in a competitive environment.\(^92\)

Thirdly, he stressed that the finding of an abuse should not depend on a finding that the elimination of a competitor has had a negative market effect. Competition law does not merely protect a certain degree of market efficiency, but it protects individual liberties against types of conduct that endanger competition if generalized. The protection of individual liberties is, at the same time, closely linked to the protection of competition as an institution, and to competition law’s economic rationale: Article 82 must, in the medium and long term, protect the possibility that positions of dominance will be corrected by the market. This presupposes the protection of those elements of competition that still persist.\(^93\)

In *Continental Can*, the ECJ followed the principal lines of Mestmäcker’s arguments. In interpreting Article 82, the Court relied heavily on a functional approach. The general objective of establishing a system of undistorted competition in the common market, as articulated in Article 3(1)(g) of the Treaty,\(^94\) was found to be directly relevant for the interpretation of Article 82.\(^95\) The non-exhaustive list of abusive practices in Article 82 clearly covered both exploitative and exclusionary abuses, i.e., “practices which may cause damage to consumers directly, but also […] those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Art. 3(f) [now Article 3(1)(g) EC] of the Treaty” (para. 26). In light of the Treaty’s fundamental decision to establish a common market with real or potential competition, and to effectively protect residual competition – a concept taken from Article 81(3)(b) – the ECJ concluded that the prohibition of abuse of dominance in Article 82 extends to a merger that would lead to a significant strengthening of dominance.\(^96\) Beyond *Continental Can*’s importance for the development of merger control (culminating finally with the Merger Regulation in 1989), two enduring messages flow from the Court’s judgment. Firstly, the goal of Article 82 is to protect a competitive market structure, i.e., one that does not render any serious chance of competition practically impossible (para. 25); and secondly, although Article 82 does not prohibit dominance, it does protect residual competition, i.e., the competition that remains in spite of existing dominance (*Restwettbewerb*). These far-reaching determinations have clarified that the main focus of Article 82 is not on exploitative, but on exclusionary abuses.

\(^{91}\) Ibid. at 606.

\(^{92}\) Ibid. at 607-608.

\(^{93}\) Ibid. at 608.

\(^{94}\) At that time, the provision was Article 3(f) EEC.

\(^{95}\) The ECJ rejected the applicant’s allegation that Article 3(1)(g) merely outlined a general programme, devoid of legal effect. See *Continental Can*, supra note 21, para. 23.

\(^{96}\) Ibid., para. 26. More recently, see Case C-95/04 P, *British Airways plc v Commission*, judgment of the ECJ of 15 March 2007, not yet reported, para. 57 (with further references).

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

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

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

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

Methods of competition which are, in principle, legitimate, can lead to the maintenance and extension of market power when they are applied by dominant firms.

While this is not the place to attempt a comprehensive summary of the ECJ’s Article 82 jurisprudence, some of the important features which distinguish it from the current Section 2 Sherman Act jurisprudence in the US will be highlighted here.

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97 Case C-85/76, *Hoffmann-La Roche v Commission* [1979] ECR 461, para. 91. See also *British Airways*, cited previous footnote, at para. 66.
100 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: “special responsibility means only that a dominant undertaking may be prohibited from conduct which is legitimate where it is carried out by non-dominant undertakings”.
101 See Mestmäcker, *Das Marktberechtigte Unternehmen im Recht der Wettbewerbsbeschränkungen*, Tübingen, 1959, p. 6: “… die rechtliche Behandlung von Marktmacht ist vor allem deshalb so schwierig, weil Inhaber von Macht befähigt sind, die Institute des Privatrechts und die unter den Voraussetzungen freier Konkurrenz legitimen Mittel des Wettbewerbs in den Dienst der Marktberechtigungsrechtsdung zu stellen”.

First of all, Article 82 is “not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article [3(1)(g) EC]”. While this phrase was originally used by the ECJ to confirm the applicability of Article 82 not only to exploitative, but also to exclusionary abuses, it has today come to stand for the more far-reaching claim that the EC competition rules protect the competitive process, the degree of residual competition that persists in the market as such, and that they do not require a finding of direct consumer harm. The protection of consumer interests is mediated through the protection of competition – from which consumer welfare is generally thought to result. This approach is based on the assumption that competition will typically result in more innovation and efficiency than monopoly. It is preferable to let the market enforce efficiency and innovation, rather than relying on the announced efficiency goals of private monopolists, and rather than relying on appraisals of likely efficiencies by competition authorities and courts.

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

Thirdly, and in parallel with the foregoing remark, the ECJ’s jurisprudence has maintained its fundamental understanding that Article 82 is not only about protecting outcome efficiency, but also aims to protect the individual rights of competitors. According to some, this demonstrates that EC competition law is about protecting competitors instead of competition. However, this is an “empty slogan”. The challenge, in both EC and US antitrust law, is to distinguish those acts with exclusionary effect that result from legitimate competition on the merits from other exclusionary acts which cannot be justified as normal acts of competition but which, to the contrary, exploits the special power that a dominant firm possesses so as to entrench the firm’s position in the marketplace. The difference between the EC and the US approach is that EC competition law, based on this distinction, assumes an

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102 Continental Can, supra note 21, para. 26. For a recent confirmation, see British Airways, supra note 97, para. 106.
103 See British Airways, supra note 97, para. 107.
104 Ibid., para. 67.
105 Ibid., para. 69.
106 Ibid., para. 86.
individual right of each competitor not to be excluded by illegal acts, whether or not the exclusion results in a verifiable overall decrease of competition or efficiency in the marketplace. Antitrust law in the US, on the other hand, which takes consumer welfare to be the only goal of antitrust, tends to require a showing of verifiable effect in the marketplace, and thus negates the notion that the competition which is protected by competition law is constituted by the exercise of individual liberties.

III. Exploitative and exclusionary abuses: regulatory tendencies in Article 82?

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

1. Exploitation of monopoly power under Section 2 Sherman Act and Article 82 EC

One difference between Section 2 Sherman Act and Article 82 that is frequently held out to be indicative of fundamentally different attitudes towards rules regarding market power is the fact that only Article 82 addresses exploitative abuses. Pursuing exploitative abuses implies making judgments about a dominant firm’s price and output decisions, and this necessarily comes into the vicinity of regulatory supervision. The fact that Article 82 covers exploitative abuses is thus taken as proof of the regulatory approach embraced by EC competition law, and as proof of an overriding concern with fairness rather than efficiency. Frequently, the decision to address exploitative abuses is traced back to the alleged ordoliberal influence on the formulation and interpretation of Article 82, and particularly to the supposedly ordoliberal “as if” competition approach. According to this view, competition authorities are, under Article 82(a) and (b), required to ensure that dominant firms set output and price as if they operated in competitive markets.

Section 2, on the other hand, does not control the exercise of monopoly power, but only its acquisition or maintenance. It protects the openness and competitive structure of the market to which the determination of price and output level are then left. The decade before the enactment of the Sherman Act had been one of rapid economic growth and declining prices, even in those industries dominated by trusts. Congress was therefore not concerned

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108 See, e.g., Eleanor Fox, supra note 4, at 993-994.
109 Joliet, supra note 2, at 127-128 and 131. See also Fox, supra note 4, at 992-994.
110 For that claim see, e.g., Gal, supra note 11, at 363 et seq. See also Fox, supra note 4, at 985.
111 See Gal, supra note 11, at 364 et seq.
112 O'Donoghue and Padilla, supra note 98, at 604
113 Ibid.
with implementing controls against excessive prices. Price and output controls would furthermore have contravened the dominant “freedom of contract” philosophy of the times. In one of its early decisions, the US Supreme Court acknowledged the inherent difficulties that antitrust authorities and courts face when required to oversee output and price decisions.\textsuperscript{116} But the control of exploitative abuses is not only rejected on these pragmatic grounds. As a matter of principle, monopoly power and monopoly pricing are viewed as a part of the competitive process and as an important driving force. According to the US Supreme Court’s opinion in the *Trinko* case:

“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”\textsuperscript{117}

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

The difference between Article 82 and Section 2 with regard to the coverage of exploitative abuses is indeed remarkable. In this regard, during the first decade of the Community’s existence there was significant speculation as to the fundamental role and function of Article 82. However, the view that Article 82 was intended to cover only exploitative abuses, defended, *inter alia*, by Joliet,\textsuperscript{118} became obsolete with the ECJ’s decision in *Continental Can*. The functional interpretation of Article 82, guided by the goal of establishing a system of undistorted competition and of promoting the integration of formerly national markets, has led to a competition policy and jurisprudence which is focused almost

\textsuperscript{116} See *United States v. Trans-Missouri Freight Ass.*., 166 U.S. 290 (1897). See also *United States v. Trenton Potteries Co.*., 273 U.S. 392 (1927): “The reasonable price of today may through economic and business changes become the unreasonable price of tomorrow.”

\textsuperscript{117} *Trinko* supra note 114, at 407.

\textsuperscript{118} Joliet, supra note 2, pp. 11 and 131. Under Article 82, the offence lies “mainly in abusive market exploitation through unreasonably high prices or monopolistic restriction of output. As is shown by the examples listed in Article [82], the main preoccupation of the Treaty is not the maintenance of a competitive system. All the examples relate to cases of practices and policies through which a firm exploits its market dominant power. None of them concerns means by which market dominant power can be achieved or maintained. Large size is considered as an economic necessity, the basic assumption underlying Article [82] being that monopolistic structure does not lead inevitably to monopolistic performance. The monopolist’s performance may be in harmony with the public interest. The EEC monopoly policy has adopted an attitude of neutrality toward market dominant power. A dominant position implies a power to fix unilaterally unfairly high prices. The Treaty assumes however that this power will not be systematically utilized. This is why monopoly power as such is not condemned. Monopoly is not in itself an evil. Only the unilateral fixing of unfair prices is in violation of the law. It is the exercise of monopoly power which can be subject to regulation.” More recently, Pinar Akman has claimed that Article 82 was intended to cover exploitative abuses only. See *supra* note 15, at 4 and 37-38.

exclusively on controlling exclusionary abuses. Exploitative abuses have suffered (or profited) from “benign neglect”. Throughout the years, the Commission has adopted only four formal decisions condemning excessive prices. In a series of cases, the ECJ has confirmed – mostly in preliminary rulings – that Article 82 can apply to exploitative abuses; but the Court has established a high threshold for finding that a certain price level is excessive. In only one case has it actually found an abuse. The relevant test was first established in United Brands. Here, the ECJ accepted that “[c]harging a price which is excessive because it has no reasonable relation to the economic value of the product supplied [is] ... an abuse”. A two-stage test must be applied, however, to determine whether a price is reasonably related to the “economic value of the product”. Firstly, the difference between the cost actually incurred and the price actually charged needs to be determined; and if this difference is excessive, it must further be determined “whether a price has been imposed which is either unfair in itself or when compared to competing products” (United Brands, at para. 252). In full realization of the practical difficulties associated with determining the costs of production, the ECJ charged the Commission with the burden of proving the excessiveness of a price. In the case at issue, the Commission had failed to establish that the prices charged by United Brands were unrelated to the economic value of the product, and the Court therefore annulled the relevant part of the Commission’s Decision.

Motta and de Streel have demonstrated in a careful study that, based on the ECJ’s case law, excessive pricing cases have been pursued successfully only in the presence of special circumstances. In these rare cases, either: (i) the dominant undertaking at issue enjoyed a de facto monopoly (see, for example, SACEM), in which case the ECJ has tended to lower

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119 This is recognized by O’Donoghue and Padilla, supra note 98, at 608.
123 Difficulties in quantifying costs can result, inter alia, if the firm: has made long-term investments; has taken particular risks taken in developing a product; or has intellectual property rights.
124 “[H]owever unreliable the particulars supplied by [the dominant company] ... the fact remains that it is for the Commission to prove that [the dominant company] charged [excessive] prices” (United Brands, para. 264).
126 Lucazeau v SACEM, supra note 121. See also Case 395/87, Ministère Public v Tournier [1989] ECR 2521. In the SACEM cases, the operators of French discotheques complained that SACEM, the French Copyright collecting society, was charging higher fees for licenses of performing rights than those charged by similar collecting societies located in other Member States. In preliminary rulings, the ECJ found that the fees charged by SACEM qualified as “unfair trading conditions” if the rates were manifestly higher than those applied by identical copyright societies in other Member States.
the preconditions for finding a violation of Article 82(a) as well as the standard of proof the Commission had to meet, and the abuse furthermore created serious impediments to the internal market and included concerns about price discrimination and artificial barriers to parallel trade (General Motors, British Leyland), or (ii) the dominant undertaking was active in markets recently opened to competition (Deutsche Post II, telecommunications cases), and any pricing abuses could have weakened the political momentum for the liberalization programme. Where such special circumstances are absent, the Commission has declared its general unwillingness to act as a price regulator vis-à-vis dominant firms. The Commission’s reluctance to pursue exploitative abuses is based on the same reasons underlying the inapplicability of Section 2 Sherman Act to exploitative abuses: the fact that it is extremely difficult to establish conditions that provide predictability as to when a price should be viewed as “excessive”, the spectre of continuous price regulation that would go along with a more forceful attempt to push Article 82(a) any further, and the fact that if there were a serious threat that gaining significant market power would expose firms to a regime of price control, this would negatively affect successful companies’ incentives to innovate and invest.

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127 On the lowering of the preconditions for finding excessive pricing in SACEM as compared to United Brands, but wrongly generalizing the SACEM test, see Gal, supra note 11, at 370 et seq.
128 See ibid. at 375 et seq. According to Motta and de Streel, “[t]he Commission was more concerned with the freedom of circulation than with the anticompetitive exploitation of end users and the associated allocative inefficiencies”. Supra note 125, at 107.
129 Deutsche Post II, supra note 120, paras. 159-167.
130 On the handling of excessive pricing in the telecoms sector, see Commission, Notice on the application of competition rules to access agreements in the telecommunications sector, 1998 OJ C265/2, paras. 105-109.
131 Commission, XXVIIth Report on Competition Policy (1994), para. 207: “… the existence of a dominant position is not in itself against the rules of competition. Consumers can suffer from a dominant company exploiting this position, the most likely way being through prices higher than would be found if the market were subject to effective competition. The Commission in its decision-making practice does not normally control or condemn the high level of prices as such. Rather it examines the behaviour of the dominant company designed to preserve its dominance, usually directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it.” This policy approach is reaffirmed in, e.g., Commission, XXVIIth Report on Competition Policy (1997), point 77. The same is true for other exploitative abuses.
132 For the relevance of the problem of legal certainty see O’Donoghue and Padilla, supra note 98, at 622.
133 See Motta and de Streel, supra note 125, at 109: “Indeed, in many situations even computing the relevant measures of costs would be a complex exercise: How does one allocate common costs to different products (long-run incremental costs, stand-alone costs)? How does one choose between different accounting methods (historic costs, current costs)? Which measure of costs should be adopted to measure profits in industries where there are important fixed costs? All these difficulties are underlined by the fact that a competition authority may not have as deep a knowledge of the sector being investigated as an industry regulator”. See also O’Donoghue and Padilla, supra note 98, at 621: “… no generally accepted criterion exists in the decisional practice and case law to determine when prices are ‘excessive’. Further, even if a criterion, or series of criteria, could be agreed upon as a benchmark, determining an excessive price in practice is extremely complex and subject to a number of difficulties.” O’Donoghue and Padilla also point to the potentially high cost of error when competition authorities or courts attempt to identify excessive prices.
134 Motta and de Streel, supra note 125, at 109.
135 O’Donoghue and Padilla, supra note 98, at 621: “… prices above marginal cost are common and necessary in many industries where high profits are necessary to recover large up-front capital and other fixed costs”. See also Fox, supra note 4, at 993 (noting the relevance of investments made in securing IPRs).
Based on these findings, the US antitrust and EU competition law perspectives on exploitative abuses do not appear to be far apart. There is broad consensus that competition law should not intervene where the market can be expected to self-correct exploitative practices in the short or medium term.\footnote{O’Donoghue and Padilla, \textit{supra} note 98, at 605} On the other hand, both jurisdictions accept that an economic rationale for price regulation can exist where high non-transitory barriers to entry, like government monopolies, exclude competition in the longer term.\footnote{\textit{Ibid.} at 638 (referring to the OFT Draft Competition Law Guidelines for Consultation, Assessment of Conduct, April 2004, para. 2.6). See also Gal, \textit{supra} note 11, at 383.} The difference between the two systems boils down to a difference in the allocation of decision competences. In the US, it is for Congress to decide whether a regulatory scheme is necessary. In the EU, while regulatory instruments are employed to some extent in certain sectors, competition law authorities can also intervene. The actual exercise of price regulation remains difficult under both regimes. Regulatory agencies may, in the end, be better placed to engage in price regulation. Against the background of the EU’s limited legislative competence, competition rules may, however, be a useful safeguard and substitute. In this perspective, the coverage of exploitative abuses by EC competition law is no evidence of a fundamental divergence in “antitrust philosophy”, but reacts to different legislative capacities at the federal US or EU level respectively.

If this overall picture is true, more fascinating than the actual difference between EU and US competition law itself is the narrative that has been constructed around it. According to O’Donoghue and Padilla, the objectives of Article 82(a) “lie at the core of EC competition law: to prevent the exploitation of consumers by firms with significant market power”.\footnote{O’Donoghue and Padilla, \textit{supra} note 98, at 637.} Michal Gal, while acknowledging the lack of practical relevance of exploitative abuses in EC competition law,\footnote{Gal, \textit{supra} note 11, at 360 and 374-375.} claims nonetheless that their coverage reflects important “ideological goals”,\footnote{See \textit{ibid.} at 346: “The regulation of excessive pricing encapsulates issues such as the goals and underpinnings of EC and U.S. antitrust systems; the equilibrium point which was adopted to balance between the forces of Darwinian capitalism and those of social justice; the role of government regulation; the balance between practical problems and theoretical principles; and the assumptions regarding the relative administrability of various types of regulation. Monopoly pricing regulation is thus, in many ways, a microcosm of competition policy.” Furthermore, the prohibition of excessive prices allegedly stands for an opening of EC competition policy to the wider set of EC Treaty goals set out in Article 2 EC, namely a harmonious development of economic activities, a continuous and balanced expansion, an increasing in stability, an accelerated raising of standards of living, and a closer relation between the Member States. \textit{Ibid.} at 361-362.} particularly a concern with social and redistributive goals and “fairness”, which are then attributed to German ordoliberal influence.\footnote{\textit{Ibid.} at 364.}

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

2. Predatory pricing in EC competition law and US antitrust law

While there does not appear to be a fundamental gap between EC competition and US antitrust “philosophy” with regard to exploitative abuses, predatory pricing is one of the areas in which the two jurisdictions do diverge. There is agreement on the general description of the phenomenon: predatory pricing schemes involve low pricing strategies – typically pricing below some measure of cost – in an effort to eliminate competitors or to deter entry by potential competitors. If the plan succeeds, the reduction of actual and/or potential competition will allow the predator to raise prices to a supra-competitive level in the longer run. However, there is no transatlantic consensus on the legal test to be applied.

In the US, the law on predatory pricing has been strongly influenced by the Chicago school. In an early and highly influential article by John S. McGee on the predatory pricing allegations in Standard Oil, and later in a variety or broader studies, Chicago scholars have long maintained that predatory pricing schemes are generally irrational, and therefore unlikely under all but very exceptional circumstances. According to these scholars, predatory pricing is a highly speculative scheme: a predator must incur losses now in the mere hope that he will be able to recover them in the future. The prospect of actual recovery is furthermore slim, since competitors can and will re-enter once the predatory pricing scheme is abandoned. As a consequence, Chicago scholars proposed to abolish the doctrine: "It seems unwise … to construct rules about a phenomenon that probably does not exist or which, should it exist in very rare cases, the courts would have grave difficulty distinguishing from competitive price behaviour. It is almost certain that attempts to apply such rules would do much more harm than good."[144]

The issue reached the US Supreme Court in 1993 in Brooke Group. The US Supreme Court took the opportunity to distance itself from prior case law on predatory pricing.

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[142] The US Supreme Court limits illicit price predation to pricing below some measure of cost (see below). In the EU, illegal exclusionary conduct has sometimes been found in cases in which prices remained above both average variable and average total cost. Economists are divided on the question of whether such above-cost pricing should constitute an antitrust violation, but they acknowledge that it can, under some conditions, have an exclusionary effect. See Temple Lang and O’Donoghue, supra note 9, at 121-122.


pricing, namely from *Utah Pie*,\textsuperscript{146} which had, on the basis of the Robinson-Patman Act, practically inferred predation from proof of price discrimination plus exclusionary intent.\textsuperscript{147} In *Brooke Group*, the US Supreme Court introduced a new and very narrow cost-based test that eliminated the criterion of anticompetitive intent and instead required proof of market effect, or dangerous probability of market effect. To substantiate a predatory pricing claim, a plaintiff now has to prove that: (i) the alleged predatory prices are below an appropriate measure of the defendant’s costs;\textsuperscript{148} and (ii) there is a “dangerous probability” that the defendant would be able to recoup its investment in below-cost prices,\textsuperscript{149} i.e., that the defendant would eventually be able to raise price above a competitive level to an extent sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.\textsuperscript{150} It is generally acknowledged that recoupment is extremely difficult to prove.\textsuperscript{151} The prohibition of predatory pricing is, as a consequence, rarely enforced.\textsuperscript{152} Proof of recoupment along the lines developed in *Brooke Group* and subsequent case law not only poses practical problems of information and prediction. Rather, the requirement tends to negate the more complex strategic reasons for which predatory pricing schemes may result.\textsuperscript{153} Based on the test established in *Brooke Group*, a significant number of relevant predatory pricing schemes may thus not be caught.\textsuperscript{154} *Brooke Group* has, nevertheless, been fully confirmed recently in a unanimous decision by the US Supreme Court in *Weyerhaeuser*\textsuperscript{155} – a predatory bidding case.

\textsuperscript{146} *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). The case was not directly overruled in *Brooke Group*. Rather, as Richard Posner observes, “*Brooke Group* distinguishes *Utah Pie* to death”. Posner, supra note 41, at 223.

\textsuperscript{147} Posner, supra note 41, at 221. For the proposition that *Utah Pie* went far in the direction of condemning hard price competition itself, see Hovenkamp, supra note 115, at 365-366.


\textsuperscript{149} *Brooke Group*, supra note 145, at 224.

\textsuperscript{150} Ibid. at 225.

\textsuperscript{151} For a summary of what is required to prove a dangerous likelihood of recoupment, see Temple Lang and O’Donoghue, supra note 9, at 142. The authors acknowledge that this analysis constitutes “a considerable barrier to plaintiffs trying to establish a predatory pricing claim”. For the difficulty of proving recoupment, see also Hovenkamp, supra note 115, at 370.

\textsuperscript{152} According to Evans and Padilla, there have been no successful prosecutions of predatory pricing claims in the US since *Brooke Group*. Evans and Padilla, supra note 22, at 88 (2005).

\textsuperscript{153} For example, predatory pricing in one market can be a strategy to deter entry or effective competition in other markets in which the dominant firm is engaged. Even in the absence of barriers to entry, signalling the willingness to engage in predatory pricing schemes can have important deterrence effects. For further explanation, see Posner, supra note 41, at 211.

\textsuperscript{154} Hovenkamp emphasizes the inability of the *Brooke Group* case law to deal with oligopolistic settings. See supra note 115, at 370. See also Temple Lang and O’Donoghue, supra note 9, at 144-145, acknowledging that cases of predatory pricing where a competitor is not forced out of the market, but where it decides to raise prices to approximately the price level preferred by the dominant firm for fear of retaliation in case of active price competition, will not be caught.

Community competition law has taken a very different approach towards predatory pricing. In *AKZO Chemie BV*¹⁵⁶ and *Tetra Pak International*,¹⁵⁷ ECJ and CFI distinguished between two relevant situations. First, the courts made clear that it is abusive *per se* for an undertaking in a dominant position to sell at prices below average variable cost. Predatory intent is presumed, because “the only interest which the undertaking may have in applying such prices is that of eliminating competitors”.¹⁵⁸ Second, prices above average variable cost but below average total cost are abusive “if they are determined as part of a plan for eliminating a competitor”. In this case, “sound and consistent evidence”¹⁵⁹ must be provided to show an intent and a strategy to pre-empt the market.¹⁶⁰ In contrast to the US Supreme Court, the ECJ has explicitly rejected a requirement to prove a likely market effect in a predatory pricing case, i.e., a requirement to show that the dominant firm had a realistic chance of recouping losses.¹⁶¹ In *Tetra Pak v. Commission*, the ECJ states:¹⁶²

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

Where intent has been shown, the conduct is assumed to be liable to have the desired exclusionary effect.¹⁶³ And “where an undertaking in a dominant position actually implements a practice whose object is to oust a competitor, the fact that the result hoped for is not achieved is not sufficient to prevent that being an abuse of a dominant position within the meaning of Article 82”.¹⁶⁴

The divergence between the EU approach and the US approach to predatory pricing is thus remarkable. Both jurisdictions start by looking at the differential between cost and price, but here the similarities end. In the US, the law relies fully on proof of below-cost pricing and market effect, or consumer harm, and dismisses the intent criterion. In the EU, the prohibition

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¹⁶³ *Wanadoo*, supra note 158, para. 195: “If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to restrict competition, that conduct will also be liable to have such an effect.”
¹⁶⁴ *Ibid.*, para. 196, with further references.

against predatory pricing may sometimes even extend to above-cost pricing,\textsuperscript{165} in which case intent will be the main criterion. A requirement to prove a likely market effect has been rejected just recently again by the CFI in the \textit{Wanadoo} case.\textsuperscript{166}

What explains such a serious divergence in this context between the EU and the US? To some extent, there may be, underlying the different legal tests, a different appraisal of the likelihood that such strategies will in fact be pursued, and of the likelihood that they will succeed.\textsuperscript{167} One of the reasons the US Supreme Court has given for its admittedly restrictive predatory pricing test is its acceptance of the Chicago school’s factual allegation that predatory pricing schemes are normally too speculative to be a rational business strategy, and that they will therefore rarely occur.\textsuperscript{168} The EC case law, by contrast, is based on the factual presumption that predatory pricing can indeed be a rational strategy for a dominant firm to eliminate competitors,\textsuperscript{169} and that it actually occurs in practice.

It is of course possible that under the given market conditions in the EU and the US, predatory pricing is indeed a strategy that is more frequently, and potentially more successfully, applied on this side of the ocean. In this respect, only empirical research can ultimately provide certainty.\textsuperscript{170} However, it is unlikely that the difference in the factual setting is sufficient to explain the difference between the two legal regimes. Antitrust scholarship today generally recognizes that predatory pricing strategies are more plausible than early Chicago scholarship had maintained. In the 2\textsuperscript{nd} edition of his monograph on “Antitrust Law”, Judge Posner finds that “predatory pricing cannot be dismissed as inevitably an irrational practice”, and he devotes substantial attention to it.\textsuperscript{171} Likewise, in \textit{US v. AMR} (2003), the Tenth Circuit observes: “Recent scholarship has challenged the notion that predatory pricing schemes are implausible and irrational. […] Post-Chicago economists have theorized that price predation is not only plausible, but profitable, especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets.” Where predatory pricing can admittedly be a rational exclusionary strategy and constitutes a real risk, the broader test under EC law cannot be easily dismissed as resulting from “unsound

\textsuperscript{165} The US Supreme Court has refused to extend the purview of predatory pricing to such situations because it would be “beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate” pro-competitive conduct. See \textit{Brooke Group}, supra note 145, at 223; \textit{Weyerhaeuser}, supra note 155, 127 S.Ct. at 1078.

\textsuperscript{166} \textit{Wanadoo}, supra note 158, paras. 195-196, with further references.

\textsuperscript{167} For a very sceptical view that predatory pricing strategies are economically feasible and relevant, see Bork, supra note 33, at 145

\textsuperscript{168} See \textit{Matsushita}, supra note 145, at 589: “predatory pricing schemes are rarely tried, and even more rarely successful”. See also \textit{Weyerhaeuser}, supra note 155, 127 S.Ct. at 1077: “Predatory pricing requires a firm to suffer certain losses in the short term on the chance of reaping supracompetitive profits in the future. … A rational business will rarely make this sacrifice.”

\textsuperscript{169} See also Temple Lang and O’Donoghue, supra note 9, at 122: “… there is agreement that predatory pricing may be profitable and anticompetitive …”.

\textsuperscript{170} According to some scholars, the number of predatory pricing schemes that are actually implemented in the US is non-trivial. See Posner, supra note 41, at 214; Patrick Bolton, Joseph Brodley and Michael Riordan, “Predatory Pricing: Strategic Theory and Legal Policy”, 88 \textit{Georgetown Law Journal} 2239, 2244-2247 (2000).

\textsuperscript{171} Posner, supra note 41, at 213.
economics”.

Renowned antitrust scholars concede that the *Brooke Group* test for predatory pricing is in significant respects underinclusive, and that underdeterrence may be the result.

The US Supreme Court itself has implicitly acknowledged the potential underinclusiveness of the *Brooke Group* test, but it has emphasized the high costs that “false positives” could potentially have. “The mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition”. If a broader test were applied, firms might start to fear predatory pricing allegations and might become reluctant to cut prices aggressively, to the detriment of consumers.

With a view to the importance of price competition, the US Supreme Court thus expresses a clear preference for underdeterrence as compared to a broader test that might have overdeterrent effects. Some have submitted that the broader approach towards predatory pricing in EC law stands for a different view of the comparative costs of type I versus type II errors, i.e., the costs of “false positives” versus “false negatives”. Despite the much broader test for predatory pricing under EC law, it would be difficult to argue that this test is likely to severely chill price competition or to overdeter. The number of cases in which the Community Courts have actually found predatory pricing schemes is small. However, this does not mean that the same broad tests on predatory pricing, if transposed into US antitrust law, would work similarly. In assessing the risk and costs of overdeterrence, the institutional setting of antitrust enforcement must be taken into account. Indeed, US antitrust scholars have recently defended the narrow and underinclusive predatory pricing test by reference the deterrence effects of private enforcement in the US. Given that a violation of Section 2 leads

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172 For the economic soundness of predatory pricing law under EC law, see also Temple Lang and O’Donoghue, supra note 9, at 87. Interestingly, EC law on predatory pricing is not so far from Posner’s proposal to prohibit pricing below short-run marginal cost *per se* (see Posner, supra note 41, at 215, stating that “[t]here is no reason consistent with an interest in efficiency for selling a good at a price lower than the cost that the seller incurs by the sale”) and to prohibit selling below long-run marginal cost where an intent to exclude a competitor can be shown (*ibid.*, pp. 215-216).

173 See Evans and Padilla, supra note 22, at 87, who nonetheless recommend the *Brooke Group* test: “This test fails to identify all possible price predation practices but follows from the view that it is better to err by allowing some predatory pricing than to condemn some competitive pricing. The Supreme Court has properly moved to a stricter standard for showing predation because (a) setting prices low is a hallmark of competition (so that the cost of falsely condemning legitimate price cutting is high) and (b) successful predation is rare (so that the likelihood of false acquittals is low)”.

174 See Kovacic, supra note 8, at 51 and 53. See also Antitrust Modernization Commission, supra note 22, at 87: “Particularly in the context of Section 2 predatory pricing enforcement – where overdeterrence may deprive consumers of the benefits of aggressive competition – courts have been increasingly willing to adopt potentially underinclusive, but simple and objective cost-based legal rules”.

175 *Brooke Group*, supra note 145, at 226.

176 See *Weyerhaeuser*, supra note 155, 127 S.Ct. at 1074, where the Supreme Court explains that a broader test of predatory pricing, namely one that would include cases of above-cost price cutting, “could, perversely, chill legitimate price cutting, which directly benefits consumers”.


178 See Fox, supra note 6, at 803.

179 See Temple Lang and O’Donoghue, supra note 9, at 125. At that time, the authors counted only three cases (*AKZO, Tetra Pak II*, and *Deutsche Post*).
to treble damages, and given that lay juries decide questions of intent and that even a threat to sue may (due to the costs of litigation) may have a deterrence effect, the pressure for a narrow approach to predatory pricing may be strong.\textsuperscript{180} From that perspective, the current enforcement environment in the EU differs significantly. Despite efforts to strengthen private enforcement, incidents of independent private enforcement are still comparatively rare. Public enforcement dominates. Where private enforcement takes place, no juries are involved, and courts do not impose treble damages. Furthermore, a losing party will ultimately bear the costs of litigation, which diminishes the incentives to sue.

While the difference in enforcement conditions goes some way toward explaining the difference between the EU and the US, it may not exhaust the reasons for diverging attitudes in the field of predatory pricing. The fact that the US requires proof of actual or likely consumer harm whereas under EU law a showing of intent to eliminate a competitor will suffice is insufficiently explained by different needs in the US and in the EU to lower or raise the hurdles faced by potential plaintiffs. More fundamentally, it reveals different views of the structure and purpose of competition law. The US predatory pricing test faithfully reflects the view that the protection of consumer welfare is the ultimate and only relevant goal. Where a competitor is harmed by below-cost pricing by a dominant firm (and even if driven by anticompetitive intent) but the objective likelihood of recoupment and thus of consumer harm appears to be small, the competitor will enjoy no protection.\textsuperscript{181} Community competition law takes a fundamentally different stance. It focuses not on the protection of a particular market outcome, but on the protection of the competitive process and of the competitors who participate in it. The latter are protected against exclusions that result not from competition on the merits, but from the unilateral exercise of power by a dominant firm.\textsuperscript{182} Such protection of competitors is not in opposition to protection of competition, as the much-cited slogan “protecting competitors versus protecting competition” suggests. But it reflects the understanding that competition is a process that results from the exercise of individual rights. Competitors, in their exercise of economic freedom, engage in a process in which they may lose and possibly perish. However, competition law will ensure that the fate of each competitor will depend on skill, business acumen and luck, and not on the exclusionary exercise of market power by a dominant firm.\textsuperscript{183} The efficiency effects of such a concept of competition law will sometimes differ from the effects of a concept that looks directly to

\textsuperscript{180} Kovacic, supra note 8, at 53-54.

\textsuperscript{181} See Weyerhaeuser, supra note 155, at 1077 (citing Brooke Group, supra note 145, at 224). According to the Supreme Court, without successful recoupment, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced”.

\textsuperscript{182} See Commission Decision 97/624/EC, 1997 OJ L258/1 – Irish Sugar plc, para. 34: “The maintenance of a system of effective competition does, however, require that competition from undertakings … be protected against behaviour by the dominant undertaking designed to exclude them from the market not by virtue of greater efficiency or superior performance but by an abuse of market power.” See also Eilmansberger, supra note 21, at 133, who explains that the purpose of Article 82 is “to ensure that the exercise of market power does not impair competitors’ possibilities to succeed or prevail on the market on the basis of superior business performance”.

consumer welfare effects, as US antitrust law tends to do. Still, the concept is not necessarily less rational economically. It may somewhat weaken the incentives of firms to compete for dominance; but it will strengthen the incentives to enter markets and compete. The focus on market entry is implicit in the system of the EC Treaty and, in view of the actual market environment in Europe, it is sufficiently justified.

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

3. Refusal to deal and the essential facilities doctrine

Another relevant example for the divergence between Article 82 and Section 2 Sherman Act is the case law on refusals to deal, and particularly the so-called “essential facilities” doctrine. Ian Forrester has recently emphasized the contrast between a “more liberal or minimalist approach” in the US and a “more formalistic or maximalist approach” taken by the Commission. According to Forrester, “[t]he Commission attributes comparatively lower weight to a dominant player’s freedom to run its own business, and comparatively more weight to the protection of competitors than U.S. courts”.

Indeed, the Commission has, when faced with market access concerns, sometimes pro-actively pursued open-access policies. The Draft Discussion Paper on Article 82 proposes a general balancing approach towards refusal to deal cases, which cannot be described as formalistic, but would certainly give the Commission significant discretion to implement rather broad open-access policies in innovative industries. The ECJ’s case law, on the other hand, does not confirm sweeping claims about a maximalist approach towards duties to deal.

The limits of the “refusal to deal” doctrine under Article 82 have been set out in the Bronner case. In Bronner, the ECJ was confronted with questions presented by the Higher Regional Court of Vienna regarding the legality of a press undertaking’s refusal to grant Oscar Bronner, the publisher of rival newspapers, access to its nationwide newspaper home-

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184 Forrester, supra note 10, at 920.
186 This is readily admitted, in light of Bronner (cited next footnote), by Forrester, supra note 10, at 920.
delivery scheme – the only nationwide home-delivery scheme that existed in Austria at the time. The press undertaking – Mediaprint – held a very large share of the daily newspaper market in Austria, while rival newspapers had a small circulation and were for that reason unable to put into place a competing home-delivery scheme. Nonetheless, the ECJ rejected claims of an abuse. According to the Court’s judgment, in order to for a dominant company’s refusal to deal to constitute an abuse, a number of narrow preconditions must be fulfilled: access to the facility must be indispensable to carrying on the rival’s business, i.e., there must not be any actual or potential substitute for it; a duplication of the facility must be practically impossible; the refusal to deal must be likely to eliminate all competition on the part of the undertaking requesting the service (para. 38); and the refusal to deal must be incapable of being objectively justified (para. 41). In Bronner, these preconditions were not met: although there was only one nationwide home-delivery scheme, newspapers could be distributed by other means, even if they were less advantageous ones (para. 44). Furthermore, there were no technical, legal or economic obstacles to establishing a rival home-delivery scheme, and access to the facility was therefore not indispensable. In attempting to show that access to the facility was indispensable, it was not enough to argue that the establishment of a rival home-delivery scheme was not economically viable due to the small size of the rival newspaper (para. 45). Rather, for access to a facility to be regarded as indispensable it would be necessary “at the very least” to establish that it would not be economically viable for a competitor of equal size to duplicate the facility (para. 46). In other words, the fact that a dominant firm benefits from economies of scale in creating its own facilities is in itself no justification for obliging it to open such facilities to competitors.

With this judgment, the ECJ effectively curbed certain expansionary tendencies which had previously been latent in the ECJ’s case law and in the Commission’s decision practice. Advocate General Jacobs has explained the underlying rationale for establishing a rigorous legal test. Firstly, the “right to choose one’s trading partners and freely to dispose of one’s property” is of fundamental and even constitutional value in the Member States (para. 56). Secondly, allowing a company to retain its facilities for its own use will generally be pro-competitive. If dominant undertakings could too easily be required to share their facilities with competitors, their incentive to invest in efficient facilities would be reduced, and competitors would have no incentives for competitors to develop competing facilities (para. 57). Thirdly, the purpose of Article 82 is “to prevent distortions of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors” (para. 58). It would therefore be unsatisfactory to decide refusal to deal cases only by looking at the dominant firm’s market power in the upstream market and to conclude that it is automatically an abuse for the dominant firm to reserve to itself a downstream market: “Such conduct will not have an adverse impact on consumers unless the dominant undertaking’s final product is sufficiently insulated from competition to give it market power.” (ibid.)
Taking the *Bronner* case as an authoritative expression of modern European refusal to deal doctrine, the intellectual “rift” between EC and US law on this issue is not wide. The fundamental competition law principles and concerns expressed in *Bronner* are identical to the principles governing US antitrust law. These principles were summarized by the US Supreme Court in the much-debated *Trinko* decision in 2004. *Trinko* confirmed the so-called *Colgate* doctrine according to which the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal”.* Duties to share are in “some tension with the underlying purpose of antitrust law”, since they may “lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.”* It follows that antitrust limitations on the right to refuse to deal must be narrowly construed. The Supreme Court took *Aspen Skiing* to be the leading US case on refusals to deal, found it to lie “at or near the outer boundary of § 2 liability” and interpreted it narrowly. According to the Court’s reading of *Aspen Skiing*, Section 2 liability will only lie where a voluntary – and thus presumably profitable – course of dealing is terminated unilaterally under circumstances that suggest a willingness to forsake short-term profits to achieve an anticompetitive end. In cases that fall outside the unilateral termination of a voluntary course of dealing scenario, Section 2 liability could be established only based on the essential facilities doctrine. In *Trinko*, the Supreme Court found it unnecessary to either recognize or repudiate the “essential facilities” doctrine, since it would not have been applicable in any case. However, the tone of the judgment suggests a sceptical attitude. With regard to any extension of Section 2 liability beyond the *Aspen Skiing* precedent, the Supreme Court underlines the need to perform a cost-benefit analysis: “Against the … benefits of antitrust intervention …, we must weigh a realistic assessment of its costs”. The costs, the Supreme Court finds, will be significant: in applying Section 2, courts confront significant difficulties because “the means of illicit exclusion, like the means of legitimate competition, are myriad”. Any mistaken inferences and the resulting false condemnations “are especially costly, because they chill the very conduct the antitrust laws are designed to protect”. Furthermore, remedying refusals to deal may require continuous supervision by courts, a task which – depending on the concrete case – may be beyond their

188 Supra note 114.
190 *Trinko*, supra note 114, at 407-408.
193 *Ibid.* at 409. In *Aspen Skiing*, the defendant had been unwilling to renew a joint skiing ticket cooperation, even if compensated at retail price. This indicated anticompetitive intent.
194 See *Trinko*, supra note 114, at 410-411 (citing Phillip Areeda and Herbert Hovenkamp, *Antitrust Law*, Aspen Publishing, p. 150 # 773e (2003 Supp.): “essential facility claims should … be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms”).
195 *Ibid.* at 414 (citing United States v. *Microsoft Corp.*, 253 F.3d 34, 58 (CADC 2001) (en banc)).
practical ability. These high costs, according to the Court, militate against any “undue” expansion of Section 2 liability.

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

Other differences are more subtle. Both Bronner and Trinko emphasize the importance of protecting the freedom to deal or not to deal with a view to the negative effects any duty to share will have on long-term incentives to innovate and invest, and thus on incentives to compete. While Advocate General Jacobs, in his conclusions on Bronner, also emphasizes the constitutional importance of “the right to choose one’s trading partner”, such a reference to freedom of contract is absent in Trinko. Instead, the Supreme Court stresses and elaborates the high costs of “false positives” – as it did in the predatory pricing cases. But as in those case, it fails to specify the potential costs of “false negatives”.

A significant divergence between the EU and the US may be seen with regard to the application of Article 82 and Section 2 to intellectual property rights. In Europe, Magill and IMS Health stand for an essential facilities approach which has never been accepted in IP cases by US courts. Both in the EU and in the US, the relevant case law on access to IP rights is currently highly controversial. On both sides of the Atlantic, it remains an evolving area of law.

Finally, it must be pointed out that the approach towards refusal to deal cases proposed in the Commission’s Discussion Paper on Article 82 deviates substantially from existing ECJ case law. The general balancing test recommended in the Discussion Paper would give broad discretion to the Commission to establish open-access policies under Article 82. It would generalize the test applied by the Commission in the Microsoft case. New insights

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197 Ibid. (citing Phillip Areeda, “Essential Facilities: An Epithet in Need of Limiting Principles”, 58 Antitrust Law Journal 841, 853 (1989) (“No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irredeemably by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.”)).


200 Supra note 185.

on the degree of convergence or divergence in this area of law may therefore follow from the CFI’s Microsoft decision which is expected this fall.

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

IV. Conclusions: Comparative insights

As can be seen from the foregoing discussion, a comparative look at the history and current application of Section 2 Sherman Act and Article 82 reveals important commonalities, but also important differences in the attitudes towards rules on market power. The picture that emerges is much more nuanced than the standard story suggests. In fact, the standard story is in many respects wrong or at least misleading.

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

Secondly, the EC competition rules, and particularly Article 82, are not driven by fairness concerns that may be distinguished from the goal of protecting competition. Like US law, EC law respects a dominant firm’s right to forcefully compete on the merits. It does not strive to insulate inefficient competitors from competition. Like US antitrust law, EC law struggles with formulating an adequate test for distinguishing between pro-competitive conduct, or “competition on the merits”, on the one hand, and anticompetitive, exclusionary conduct on the other. For the difficulty of formulating such a test, see, e.g., Hovenkamp, supra note 35, at 24; Antitrust Modernization Commission, supra note 22, at 81. See also Evans and Padilla, supra note 22, at 73: “… the welfare effects of unilateral practices are inherently difficult to assess”.

exclusion and competition on the merits will frequently be the same;\textsuperscript{203} the perfectly legitimate and pro-competitive intent to outperform, and thereby damage or even eliminate competitors may be difficult to distinguish from an intention to exclude by anticompetitive means;\textsuperscript{204} and assessing a dominant firm’s conduct therefore requires a thorough inquiry into a firm’s conduct and an appraisal thereof based both on intent and likely effect, where both can be uncertain in practice. The current reform initiatives, both in the EU\textsuperscript{205} and the US,\textsuperscript{206} stand for another attempt to get the distinction between “competition on the merits” and anticompetitive exclusionary conduct right. Like their brethren in the US, competition policy makers in the EU acknowledge the relevance of economic theory in pursuing this task. However, in translating these economic insights into legal rules, EU policy makers face a somewhat different legal framework: Article 82 protects the “institution” of competition, the competitive process itself, instead of making consumer harm the ultimate reference point. This concept is enshrined in the EC Treaty itself: it follows from Article 3(1)(g) EC, which makes a “system ensuring that competition in the internal market is not distorted” one of the fundamental Treaty goals.\textsuperscript{207} It is a particular normative underpinning of EC competition law, and not a policy choice that competition lawyers or the Commission would be free to change. This does not imply that EC competition law is insensitive to the concept of efficiency. Rather, it is grounded in the conviction that the undistorted competitive process will generally tend to maximize wealth and consumer welfare, at least in the medium term.\textsuperscript{208} Judge Posner appears to be an unsuspicious witness for the rationality of the EU’s policy choice. Efficiency, he says, “is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further”.\textsuperscript{209}

A further aspect in which EC competition law markedly differs from the US is its understanding that the process of competition flows from the exercise of individual rights. This is an additional reason why EC law cannot make consumer harm the ultimate test of anticompetitive conduct, as US antitrust tends to do. The EC law approach has been linked to Kantian philosophy.\textsuperscript{210} Legally, it flows from the EC Treaty’s fundamental purpose: EC competition law protects the opportunities to compete on the merits that result from the

\textsuperscript{203} Examples are low pricing or refusals to deal. For the more general claim, see Franz Böhm, \textit{Wettbewerb und Monopolkampf}, Berlin 1933, pp. 9-10; Mestmäcker, supra note 101, at 6: “... die rechtliche Behandlung von Marktmacht ist vor allem deshalb so schwierig, weil Inhaber von Macht befähigt sind, die Institute des Privatrechts und die unter den Voraussetzungen freier Konkurrenz legitemen Mittel des Wettbewerbs in den Dienst der Marktbereinhung zu stellen.”

\textsuperscript{204} Antitrust Modernization Commission, supra note 22, at 81: “... companies routinely attempt to ‘exclude’ competitors from the market simply by producing the best quality product at the lowest price. Accordingly, an observation that a particular firm’s conduct ‘excludes’ its competitor does not answer whether the conduct is harmful to competition or just to the firm’s competitor.”

\textsuperscript{205} See Discussion Paper, supra note 185.

\textsuperscript{206} See in particular the transcripts from the hearings on single-firm conduct currently conducted by the FTC, available at: http://www.ftc.gov/os/sectiontwohearings/index.shtm.

\textsuperscript{207} For the relevance of Article 3(1)(g) for the interpretation of Article 82, See Continental Can, supra note 21, para. 23. See also Hoffmann-La Roche, supra note 97, para. 38; Elmansberger, supra note 21, at 132.

\textsuperscript{208} Elmansberger, supra note 21, at 135.

\textsuperscript{209} Posner, supra note 41, at 29.

realization of the free movement rules. In doing so, it protects the individual rights of those who compete. This does not imply, however, that Article 82 protect competitors instead of competition. Rather, it protects competitors as a part of the competitive process, and only against those harms which are not part of normal “competition on the merits” but result from exclusionary, non-merit-based acts. The objection that this, and the accompanying focus not on consumer harm but on harm to competition, will lower the threshold of liability, curbing the dominant firm’s incentives to compete and hence chilling competition, can be countered by the observation that an effective protection of competitors against exclusionary acts will increase the incentives of non-dominant market players and potential newcomers to invest and compete. This may be particularly valuable in a market environment where the barriers to enter foreign markets frequently remain significant.

This leads to another enduring feature of EC competition law, namely its close links with the market integration goal. The nexus between competition principles and market integration in EC law is increasingly criticized.\(^{211}\) However, as with the concept of competition embedded within the Treaty itself, integration objective not a feature of the law that the Commission would be free to give up: EC competition law is part of primary Treaty law and is functionally intertwined with the Treaty’s goals. Furthermore, the European focus on market integration cannot be Condensed as mere ideology. While the successes of market integration in the EU are immense, the state of the internal market is still a far cry from the unity of the market in the US. National boundaries remain a reality in the EU – a reality that the Sherman Act does not have to struggle with. The conviction, so strongly engrained in US antitrust law, that markets tend to be self-correcting,\(^{212}\) has never had the same appeal in the EU, where market boundaries frequently still follow the national territories of Member States. This is one of the reasons why Chicago school thinking, based on the assumption that robust, efficiently integrated markets exist and will erode any barriers that might be erected for limited periods of time, has not been perceived as relevant in the context of EC competition law.\(^{213}\) The different degree of market integration is certainly one of the reasons for the somewhat more proactive attitude towards positions of market power under Article 82 as compared to Section 2 Sherman Act. The actual risks of (successful) exclusion, and consequently the costs of underinclusive tests, may simply be significantly higher in the EU.

Another important difference between EC competition law and US antitrust law concerns the different structure of enforcement institutions on which they rely. Institutions and patterns of enforcement, sanctions and procedural rules influence the optimal design of substantive competition law. As seen earlier, renowned US antitrust scholars have stressed

\(^{211}\) For a telling view, see Forrester, *supra* note 10, at 926 who speaks of market integration as a “civil religion” or a “cult”.

\(^{212}\) See, e.g., Frank Easterbrook, “The Limits of Antitrust”, 63 Texas Law Review 1, 15 (1984). According to Judge Easterbrook, while there is no automatic way to correct wrong decisions of the Supreme Court, and while bad law is thus likely to stick, “[a] monopolistic practice wrongly excused will eventually yield to competition … as the monopolist’s higher prices attract rivalry”. In a somewhat weaker version, the same claim is made by Evans and Padilla, *supra* note 22, at 83-84.

\(^{213}\) Sir Leon Brittan, *European Competition Law: Keeping the Playing-Field Level*, Brassey’s, 1992, p. 3.
that underinclusive rules on single-firm conduct may in fact emerge as a reaction to an environment which provides (overly) strong incentives for private enforcement by making treble damages available and which charges lay juries with the task of applying the relevant tests.\textsuperscript{214} Indeed, such rules, as well as the high costs of litigation borne by each party irrespective of the outcome of litigation, may influence the cost-benefit analysis that underlies the design of the applicable rules. From that perspective, the US Supreme Court’s persistent concern with rules that avoid “false positives” may well have its reasons. In the EU, on the other hand, the conditions of competition law enforcement are very different. Competition law in Europe thus far has not relied on private enforcement even remotely to the same extent as in the US. Here in the EU, risks of overdeterrence that may result from treble damages or from the alleged unreliability of juries are not a reality. The fact that the costs of litigation are borne by the losing party reduces the extortionary potential of competition law claims. In the absence of a litigation-based rationale for underinclusive rules, there may be good reason for EC competition law to formulate tests that strive to capture instances of abuse of dominance more comprehensively and systematically than is currently the case in US antitrust law.

Stepping back and surveying the differences between Article 82 and Section 2 Sherman Act, many of them appear to be strongly rooted in the normative structure of the rules that apply in different market realities and in different enforcement environments. All of these reasons are valid ones. None of them is incompatible with the effective competition of competitive markets or based on “unsound” economics. German ordoliberalism, so frequently blamed for having infected the Community’s approach to competition with outdated economic theory, has certainly been influential in shaping the law.\textsuperscript{215} But its influence has not consisted of infusing non-economic fairness concerns or regulatory philosophy into the interpretation of Article 82. What is indeed close to German ordoliberal thought, rather, is the conception of the competitive process as a process resulting from the exercise of individual economic liberties. While this is contrary to US Chicago school thought, such a concept is by no means irrational or in contradiction with modern economic theory. Many outstanding

\textsuperscript{214} See, e.g., Kovacic, supra note 8, at 63-64: “… a fear that mandatory treble damages could provide excessive compensation and create over-deterrence may have induced the courts to design and apply liability standards in a manner that diminishes the private litigant’s prospects for success. The Harvard-inspired forms of judicial ‘equilibration’ to constrain private plaintiffs – the adjustment by the courts of the malleable features of the US antitrust system to offset perceived excesses in characteristics (e.g., mandatory trebling of damages and availability of jury trials) not subject to judicial alteration – can have the far-reaching consequences well beyond the resolution of private antitrust cases. This is certainly the case where the method of equilibration is to alter liability rules. The establishment of more permissive substantive liability rules has systemwide effects. The non-intervention presumptions of liability standards that constrain the prosecution of private antitrust cases encumber public authorities alike”. See also Hovenkamp, supra note 35, at 45 et seq., and for a broader critical survey of the private antitrust enforcement regime in the US, see ibid. at 57 et seq. Of particular relevance is Hovenkamp’s summary at p. 76: “Often judges respond to an overly aggressive remedies system by defining substantive violations too narrowly … The result often gives us the worst of both worlds, a substantive system that fails to prosecute anticompetitive practices that it is capable of prosecuting, and a remedies system that strikes haphazardly while leaving other, equally serious practices undeterred.”

\textsuperscript{215} One of the important influences probably came in the person of Ernst-Joachim Mestmäcker, who was special advisor (sonderberater) to Hans von der Groeben, the first Commissioner for competition, during the formative years and until 1970.
economists have defended this approach. Against this background, it is questionable whether we should uncritically follow calls for convergence between US antitrust law and EC competition law. As long as the reasons for divergence are clearly articulated and explained, there appear to be good reasons for them to persist.


217 For such calls see, *inter alia*, Temple Lang and O’Donoghue, *supra* note 9, at 85. In their view, differences between US and EC antitrust law “should be minimized where possible”. See also William J. Kolasky, “What is competition? A comparison of U.S. and European perspectives”, 49 Antitrust Bulletin 29, 53 (2004), according to whom “[a] divergence of policies can only breed chaos and confusion, unless there are clearly articulated reasons for the differences”.