

Regulatory Policy Institute Conference: Too busy to think?

**How well is competition law and
policy coping with its challenges?**

3 May 2017

Bill Allan

Commissioner Vestager, 1 December 2016

“[W]hat makes competition enforcement effective is its independence. It works because we take our decisions on the basis of the evidence and the law, without any aim in mind besides a competitive market with a fair deal for consumers.”

Ex-Acting Assistant General Hesse, 20 September 2016

“By and large, ... increased public interest in antitrust and competition is a good thing ... because it keeps enforcers focused on the ultimate goal of antitrust, economic fairness.”

ICN survey (2007)

Effective competitive process (32/33)	Goal and means		Goal	Means	
	EU	Hungary, Ireland, Italy, Latvia, Netherlands, Romania, Slovakia, Sweden	US	Bulgaria, Czech Rep., France, Germany	UK
Consumer welfare (30)	All except Czech Republic				
Efficiency (20)	✓	Hungary	✓	France, Germany	✓
Economic freedom (13)		Italy		All	
Level playing field for SMEs (7)				Germany	
Fairness and equality (6)				Bulgaria, Germany	
Market integration (4)	✓				

Advocate General Kokott, *British Airways*, §68 (23 February 2006)

“... [T]he ... competition rules of the Treaty [are] not designed only or primarily to protect the immediate interests of individual competitors or consumers, but **to protect the structure of the market and thus competition as such (as an institution) ...**”

Advocate General Wahl, *Intel*, §41 (22 October 2016)

“... [I]t cannot be over-emphasised that protection under EU competition rules is afforded to the competitive process as such, and not, for example, to competitors. ... **[G]iven its economic character, competition law aims, in the final analysis, to enhance efficiency.** The importance placed on efficiency is also in my view clearly reflected in the case-law of the EU Courts.”

Advocate General Kokott, *British Airways*, §68 (23 February 2006)

“... [T]he ... competition rules of the Treaty [are] not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution)”

Advocate General Wahl, *Intel*, §41 (22 October 2016)

“... [I]t cannot be over-emphasised that protection under EU competition rules is afforded to the competitive process as such, and not, for example, to competitors. ... **[G]iven its economic character, competition law aims, in the final analysis, to enhance efficiency.** The importance placed on efficiency is also in my view clearly reflected in the case-law of the EU Courts.”

Enterprise and Regulatory Reform Act 2013, s.25(3)

“The CMA must seek to promote competition, both within and outside the United Kingdom, **for the benefit of consumers.**”

Advocate General Kokott, *Post Danmark II*, §4 (21 May 2015)

“These questions are particularly important at a time when there are mounting calls for European competition law to adopt a more economic approach. It is my view that ... the Court should not allow itself to be influenced so much by current thinking (‘Zeitgeist’) or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law.”

Barry Wright v ITT Grinnell (1983) 724 F.2d 227 (Breyer J, 1st Cir.)

“While technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists’ (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. Thus, despite the theoretical possibility of finding instances in which horizontal price fixing, or vertical price fixing [now overtaken by *Leegin*] are economically justified, the courts have held them unlawful per se, concluding that the administrative virtues of simplicity outweigh the occasional "economic" loss. ... Conversely, we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.”

US Classification			Suggested EU Classification		
<i>per se</i>	absolute	prohibition without exception	object	unstructured	prohibition
	modified	prohibition subject to exceptions		structured	prohibition based on presumed effects of specified criteria
rule of reason	structured	identified screens structure assessment of pro- and anti-competitive effects	effect	structured	prohibition based on actual effects of specified criteria
	unstructured	open assessment of pro- and anti-competitive effects		unstructured	prohibition based on open assessment of effects

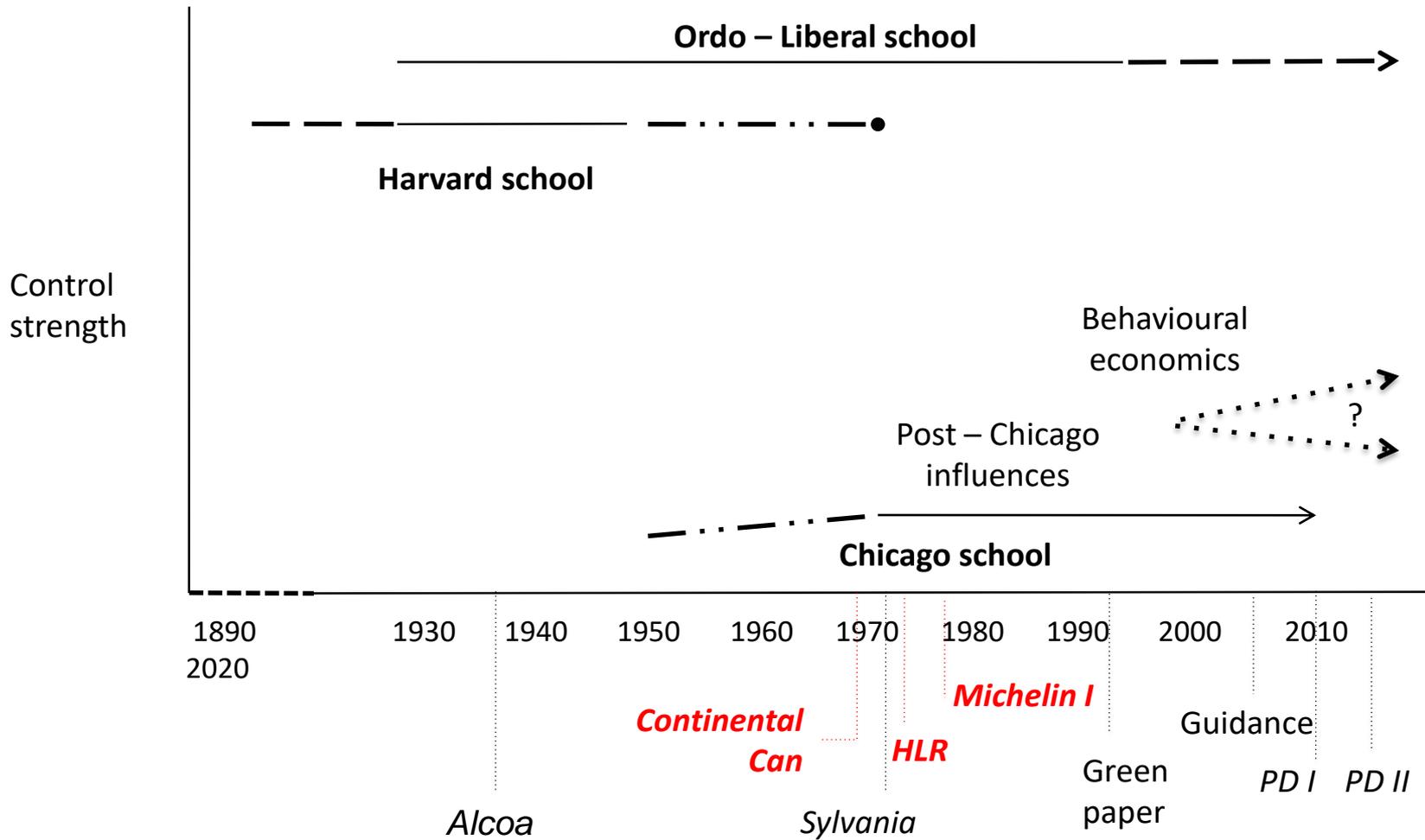
Hovenkamp, *The Antitrust Enterprise* (2005), p.161

“Given the enormous stake that antitrust has in low prices, and our extraordinary difficulties assessing predation claims, the best course is to develop predation rules that are both simple and somewhat under-deterrent. ... **Note that an under-deterrent rule may be the best option even if we all agree that there are some instances of predatory behavior that our definition does not capture.**”

Advocate General Kokott, *T-Mobile Netherlands*, §47

“Ultimately, therefore, the prohibition on ‘infringements of competition by object’ resulting from Article 81(1) EC is **comparable to the risk offences** (*Gefährungsdelikte*) known in criminal law: in most legal systems, a person who drives a vehicle when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; **whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant.**

	EU	US
Infringement (fairness express)	Art 102(a): unfair pricing/terms	Sherman §§ 1 & 2: N/A
Infringement (fairness implied)	Art 101/102: discrimination, tying	
Defences (fairness express/implied)	Art 101(3): restriction exempt where indispensable to achieve efficiency gains from which consumer derives fair share of the benefit Art 102: objective justification / Art 102(3)	



Classification	Examples	Liability standards: Operational tests Subject to defences
Unstructured object	Naked restraints Exclusive dealing (including conditional rebates) Tying	Not applicable Appreciability (<i>de minimis</i>) irrelevant
Structured object	Predatory pricing	Price < (1) < Variable cost or (2) < Total cost Exclusionary plan/sacrifice
	Mixed bundling	Incremental component price < LRAIC
	Margin squeeze	Downstream price < Upstream price of third parties - Downstream costs
	Refusal to supply	(1) Input indispensable to secondary market operation and refusal eliminates effective competition on that market. (2) In IP case, criteria in (1) - refusal precludes (a) new product or (b) technical development
Effect	Selective discounts (?) Long term supply arrangements	Not applicable