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Article 82 EC: Where are we coming from and where are we going to?

*Liza Lovdahl Gormsen**

This paper considers the most appropriate way of modernising the European Commission's enforcement policy on abuse of a dominant position. It argues that a modernisation of Article 82 EC requires a clarification of the underlying objective of the 'protection of competition' as well as a change of the current methodology from 'form' to 'effects'. The first part of the paper examines the *Continental Can*, *Commercial Solvents* and *Hoffmann-La Roche* cases to show that the objective of the 'protection of competition' in these cases was understood as meaning economic freedom of other market players, inspired by the ordoliberal school of thought. The first part concludes that an appropriate modernisation of the Commission's enforcement policy would require a change of the reading of the objective of the 'protection of competition' to mean the enhancing of consumer welfare, and ensuring an efficient allocation of resources. A change from economic freedom to consumer welfare would align Article 82 EC with the Commission's enforcement policy in Article 81 EC and merger control. The second part of the paper considers more recent case law and shows that the methodology adopted is formalistic, in that it relies on assumptions instead of sound economics; this is particularly clear in the recent judgments in *Michelin* and *British Airways*. The second part concludes that a more suitable methodology would be one where the unilateral conduct of dominant undertakings is assessed on the basis of its actual or likely effects in the market.

1. INTRODUCTION

The Commission has clarified and reformed its Article 81 EC¹ and merger control² policies. In June 2003 Mario Monti, then the competition Commissioner, announced that the European Commission had started an internal review of its policy on abuse of a dominant position.³

* Doctoral Research Student, King's College London. Earlier drafts of this article has benefited from invaluable input of Richard Whish, Margaret Bloom, Jane Moffat, Chris Townley, Alison Jones, Oke Odudu and Andrew Bastow. All views expressed in this article are personal. This article is written before the publication of DG Competition discussion paper on the Application of Article 82 of the Treaty to exclusionary abuses. The title of the article owes a debt to the seminal article, EM Fox and LA Sullivan, 'Antitrust – Retrospective and Prospective: Where Are We Coming From? Where Are We Going?' (1987) 62 New York Univ LRev 936.

¹ Modernisation Regulation 2003/1; Vertical agreements Regulation 2790/99; Vertical guidelines; Leniency Notice, OJ 2002, C45/3; Horizontal cooperation agreements Regulations 2658/2000 and 2659/2000; horizontal guidelines; New Technology Transfer block exemption Regulation 772/2004, OJ 2004, L123/11 and guidelines.

² New Merger Regulation 139/2004; horizontal merger guidelines and merger best practice guidelines.

³ At the 8th EU Competition law and policy workshop in Fiesole, Florence, June 2003.

This came after growing criticism of the application of Article 82 EC, in particular, the insufficient economic rigor of the Commission's policy in this area of law. Some observers point out that the Commission and the Community courts (the CFI and the ECJ) often place too much emphasis on the legal 'form' of the conduct, and too little on the economic impact, or the 'effects' of the conduct on the market.⁴ If the criticism is justified and Article 82 EC needs to be modernised, then what is the most appropriate way of doing this? Is it only a question of methodology or do the underlying objectives also need to be reassessed?⁵

This paper answers the question affirmatively and argues that the important part of the modernisation of Article 82 EC is clarifying its underlying objectives, in particular the meaning of 'protecting competition'.⁶ One group of economic commentators has recently said that the way to avoid a confusion of the 'protection of competition' and the 'protection of competitors' is to adopt an economic approach to Article 82 EC. In this context, an economics-based approach is understood to be an approach that 'requires a careful examination of how competition works in each particular market in order to evaluate how specific company strategies affect consumer welfare'.⁷

The first part of this paper outlines some of the basic objectives pursued by the Commission and the Community courts under Article 82 EC, but focuses on the objective of protecting competition and the different conceptions of its meaning.⁸ The paper does not suggest changing this objective as the protection of competition is the backbone of undistorted competition and an overall aim of the EC Treaty.⁹ However, it does advocate a different interpretation of the objective, focusing more on consumer welfare.¹⁰ The second part of the paper focuses on the methodology adopted by the Commission and Community courts and demonstrates that there is a need to change the methodology from 'form' to 'effect'.

⁴ John Ratliff, 'Abuse of Dominant Position and Pricing Practices – A Practitioner's Viewpoint', and Derek Ridyard, 'Article 82 Price Abuses – Towards a More Economic Approach', in Ehlermann and Atanasu (eds), *European Competition Law Annual – What is an abuse of a dominant position?*, Hart, 2005; Kallaugher and Sher, 'Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82' (2004) 5 ECLR 263, p 268; Dennis Waelbroeck, 'Michelin II: A per se rule against rebates by dominant companies?' (2005) 1(1) *Journal of Competition Law & Economics* 149, p 151.

⁵ Objectives and methodology are two separate points. A changing of the methodology does not require a changing of the underlying objectives, and vice-versa. That said objectives and methodology are sometimes inter-linked.

⁶ The debate is not new and has been going on for many years, but the latest case law and the modernisation program, in force since 1 May 2004, has intensified the debate.

⁷ EAGCP Report An economic approach to Article 82 EC, July, 2005, page 2. Available at: http://europa.eu.int/comm/competition/publications/studies/eagcp_july_21_05.pdf

⁸ Other objectives of Article 82 EC are not considered, as this exercise would require another volume.

⁹ One of the purposes of the Community, set out in Article 2 EC, is 'a high degree of competitiveness and convergence of economic performance' and one of the activities for achieving Article 2 EC is to have 'a system ensuring that competition in the internal market is not distorted' Article 3(1)(g) EC.

¹⁰ This is in line with the Commission's Guidelines on the application of Article 81(3), OJ 2004, C101/08, paras 13 and 33.

A thorough discussion of Article 82 EC involves economics, politics and law. This paper is written from a legal perspective so its focus is on the case law of the Community courts in particular cases involving exclusionary abuses.¹¹

2. PART I: THE OBJECTIVES OF ARTICLE 82 EC

2.1 The Commission and the Community courts' approach

The conduct of dominant undertakings has been assessed in the light of the overall objectives of the EC Treaty,¹² in particular the creation of a single European market. Besides this well-known market integration goal,¹³ the competition rules have been applied to achieve a variety of other objectives; most importantly, the objective of protecting competition from distortion.¹⁴ The preservation of undistorted competition is necessary to promote a high degree of competitiveness; however promoting competition is not an end in itself,¹⁵ but a means to achieve the broader objectives of the Treaty.¹⁶ Whereas the promotion of the single market is peculiar to the European system and the creation of the European Union, the objective of protecting competition is shared with all systems of competition law, including that of the US. Although the protection of competition is shared in many systems there is a difference in the way in which the law is interpreted and applied to achieve this objective. In the US, the antitrust laws ultimately seek to promote consumer welfare in economic terms. In Europe, protecting competition has, in certain cases, been interpreted as meaning protecting the economic freedom of the market players. This can be seen from a line of cases where conduct that hinders the production of competitors constitutes an abuse.¹⁷

¹¹ Exclusionary abuses are conduct by dominant undertakings which are likely to have a foreclosure effect on the market. In Europe the case law under Article 82 EC is often divided into exploitative abuses and exclusionary abuses. However, this distinction is not legal, but a convenient way of describing different blocks of case law in the doctrine. Neither the Community Courts nor Article 82 EC make that distinction.

¹² Case C-6-7/73 *Commercial Solvents v Commission* [1974] ECR 223, [1974] 1 CMLR 309, para 32; Case C-6/72 *Continental Can v Commission* [1973] ECR 215, [1973] CMLR 199, paras 24 and 26; Case 27/76 *United Brands Company v Commission*, [1978] ECR 207; Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [1979] 3 CMLR 211, and Case T-51/89 *Tetra Pak v Commission* [1990] ECR II 309.

¹³ *British Leyland*, *General Motors* and *United Brands* are cases where market integration considerations had a large impact on the outcome.

¹⁴ Case C-6/72 *Continental Can v Commission* [1973] ECR 215, [1973] CMLR 199. See also Thomas Eilmansberger, 'How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses' (2005) 42 CMLRev 129, page 132 ff.

¹⁵ Karl van Miert, 'Competition Policy in the 1990s' (1993) speech given on 11 May for the Royal Institute of International Affairs; Mario Monti in his foreword to the Commission's Annual Report 2003.

¹⁶ Under Article 2 EC, the Community has as its task to promote a 'harmonious balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States'. One of the means of obtaining these goals, expressed in Article 3(1)(g) EC, is 'a system ensuring that competition in the common market is not distorted'.

¹⁷ Case C-6-7/73 *Commercial Solvents v Commission* [1974] ECR 223, [1974] 1 CMLR 309, para 25; Case 53/87 *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v Régie nationale des usines Renault* [1988] (2005) 2(2) CompLRev

In addition, firms seeking to use their economic power to undermine the market's competitive structures would also fall foul of this head; this understanding of protecting competition may be viewed as protecting smaller competitors from aggregation of economic power.¹⁸

The Commission and the Community courts' understanding and interpretation of protecting competition through economic freedom is different from a consumer welfare approach.¹⁹ The challenge to Article 82 EC comes where economic freedom conflicts with the 'pure' efficiency-maximising consumer welfare goal. As between economic freedom and consumer welfare, the former has clearly received the most emphasis in Europe.²⁰ The Commission and Community courts have tended to equate an abuse with a restriction of the economic freedom, by which we mean restrictions on the rights and opportunities of market operators. This is evident in, for example, those cases where the dominant undertaking prevented firms from sourcing the relevant products from other suppliers.²¹ At the time the EC Treaty was ratified and the competition rules came into force, the market structure was oligopolistic so competition law became a tool for limitation of private power.²² Limitation of private power to safeguard economic freedom has sometimes led to a strict approach towards possessing market power. The European way of protecting competition is inspired by the Ordoliberal School of thought whose notion of competition law has had a profound influence on Community competition law.²³

ECR 6039, para 16; Case 238/87 *AB Volvo v Erik Veng (UK) Ltd* [1988] ECR 6211, para 9; C-241-242/91P *Radio Telefís Éireann (RTE) and Independent Television Publications Ltd v Commission* [1995] ECR I-743, [1995] 4 CMLR 718, para 54; Commission Decision 97/624/EC, *Irish Sugar PLC* OJ 1997, L258/1, para 134; Commission Decision 92/213/EC, *British Midland v Aer Lingus*, OJ 1992, L96/34, para 25; and Commission Decision 89/113/EC, *Decca Navigator System*, OJ 1989, L43/27, para 97 ff.

¹⁸ Giuliano Amato, *Antitrust and the Bounds of Power*, Hart Publishing, 1997, p 69 and Eleanor M Fox, 'Monopolization and Dominance in the United States and the European Community: Efficiency, opportunity, and Fairness' (1986) 61 *Notre Dame Lawyer* 981.

¹⁹ This paper discusses 'consumer welfare' and 'economic efficiency' in greater detail below.

²⁰ Case C-6/72 *Continental Can v Commission* [1973] ECR 215, [1973] CMLR 199, para 26; Case 85/76 *Hoffmann-La Roche v Commission*, [1979] ECR 461, paras 89 et seq and 125; Case T-219/99 *British Airways v Commission*, para 244; Joined Cases 40–114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, para 518; Case 322/81 *Michelin v Commission* [1983] ECR 3461, para 71; Case T-65/89 *BPB Industries v Commission* [1993] ECR II-389, para 120; Case T-54/99 *Max.mobil Telekommunikation v Commission* [2002] ECR II-313, para 52 and case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, para 232.

²¹ Case C-6-7/73 *Commercial Solvents v Commission* [1974] ECR 223, [1974] 1 CMLR 309, para 25; Cases 40-114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, para 518; Case 27/76 *United Brands Company v Commission* [1978] ECR 207, paras 193-194; Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [1979] 3 CMLR 211, para 90 and 111; Case 322/81 *Michelin v Commission* [1983] ECR 3461, para 73; Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, para 120; Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917, paras 244-45; and *Hilti AG*, OJ 1985, L65/19, para 79.

²² Giuliano Amato, *Antitrust and the Bounds of Power*, Hart Publishing, Oxford, 1997, p 113.

²³ Articles 81 and 82 EC are not a replica of ordoliberal thought, but their structure bear the imprint of ordoliberal political philosophy. See Van Miert, 'The Future of European Competition Policy' (1998) 17 September, available at: europa.eu.int/comm/-competition/speeches/; also David Gerber, *Law and Competition in the Twentieth century Europe: Protecting Prometheus*, Clarendon Press, Oxford, 1998, Ch 9.

2.2 The ordoliberal notion of competition policy

The story starts at the German Freiburg University where economists and lawyers, subsequently called the ordoliberals,²⁴ laid down some premises for competition law, linking them to the roots of liberal democracy.²⁵ Ordoliberals followed earlier conceptions of liberalism in considering that a competitive economic system was essential for a prosperous, free, and equitable society. In their so-called ordoliberal version of society, economic freedom and competition were the source not only of prosperity, but also of political freedom.²⁶ Ordoliberalism also added new legal and social dimensions to the liberal tradition.²⁷ As such, Ordoliberals viewed competition as a central element to economic progress but placed it in a wider, socio-political perspective, believing that competition within the economy would provide the basis for the society they envisioned: a free market economy. The free market economy and the competitive process should be understood as elements of an economic constitution, the object of which was to structure the relationship between government and the economy. The two core areas for ordoliberal policy concerned the guarantee of price stability and the promotion of competition.²⁸ The former was seen as essential for a

²⁴ These scholars include Franz Böhm (Wettbewerb und Monopolkampf, Berlin, Heymann 1933; Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung, Kohlhammer, 1973 and 'Privatrechtsgesellschaft und Marktwirtschaft', (1966) 17 Ordo 75, Freiheit und Ordnung in der Marktwirtschaft Baden-Baden: Nomos Verlagsgesellschaft, 1980); Walter Eucken (Die Grundlagen der Nationalökonomie, 8th ed, Berlin Springer, 1965 and 'Staatliche Strukturwandlungen und die Krisis des Kapitalismus' (1997) reprint in 48 Ordo 5) and Hans Grossmann-Dorth. Other protagonists were Wilhelm Röpké (Die Lehre von der Wirtschaft, 1st ed, Vienna Springer, 1937 and Die Gesellschaftskrisis der Gegenwart, 1st ed, Erlenbach-Zürich, 1942); Alexander Rüstow ('Interessenpolitik oder Staatspolitik?' (1932) 6 Der Deutsche Volkswirt 169) and Walter Eucken's successor in Freiburg, Friedrich A Hayek (*The Constitution of Liberty*, Chicago: University of Chicago Press, 1962). Alfred Müller-Armack, (Wirtschaftsverfassung und Wirtschaftspolitik, Rombach, 1966) was not part of the ordoliberals' inner circle, his chair was at the Institute for Economic Policy at University of Cologne, but he recognised the foundation and the ideas of ordoliberalism. He referred to ordoliberalism as neo-liberalism and German neo-liberalists formed part of the Ordoliberal school of thought. Many leading German political figures were associated with the Freiburg School. Ludwig Erhard, a student of Walter Eucken, was one of the architects of German post-war economic policy in his function as Minister of Economic Affairs and, later, Chancellor. He was one of the driving forces behind the 1957 Gesetz gegen Wettbewerbsbeschränkungen (GWB). Similarly, Walter Hallstein, the first president of the European Commission, and Hans von der Groeben, one of the drafters of the Spaak Report underlying the 1957 EEC Treaty and the first Commissioner for competition policy of the European Commission, are often associated with the Freiburg School.

²⁵ The Freiburg School is also known as the 'ordoliberal' school of thought ('ordo' refers to 'order').

²⁶ Ordoliberals argued that economic freedom is essential for political freedom and vice-versa.

²⁷ For example, the scholars of the Freiburg School argued that if it is legitimate to ask whether particular governmental conduct conforms to the political constitution, it ought to be legitimate to ask whether such conduct conforms to an economic constitution. According to them, it should be possible, therefore, to have the courts overturn any government action that would not conform to constitutional economic principles. As for the social dimension, the Freiburg School argued that although the economy was the primary means for integrating society around democratic and humane principles, it could perform this role only if it had certain characteristics. In particular, the market had to function in a way that all members of society perceived as fair. This latter perspective is reflected in the term 'social market economy', which is often used to describe the economic model proposed by the Freiburg School.

²⁸ Ray Barrell and Karen Dury, 'Choosing the Regime: Macroeconomic effects of UK entry into EMU', internal draft from NIESR, Smith Square, London, p 5.

society where long-term contracts should act as the cement for civil society, whilst the latter was seen as necessary to generate economic development.

Ordoliberals expanded the lens of liberalism by acknowledging that it was not sufficient to protect the individual from the power of the government; society also needs to be protected from the misuse of private economic power. The ordoliberal theory relied on the assumption that economic competition will generate economic development; so competition must be protected to maintain a stable liberal market economy, and to guarantee individual freedom. The concept of power was important for ordoliberals, as they believed that effectively every power – whether political or economic – must be associated with checks, and constraints and countervailing forces, since economic power has a tendency to flow into political power. When it came to political and economic power, ordoliberals argued strongly for representative democracy and, respectively, against the economic power of dominant concentrations. They believed that the accumulation of power resulted from the inability of the legal system to prevent the creation and misuse of private economic power.²⁹ Therefore, a legal framework was essential to guarantee individual freedom and economic progress. German history had demonstrated that competition tended to collapse because enterprises preferred private contractual regulation of business activities rather than competition and because enterprises were frequently able to acquire such high levels of economic power that they could eliminate competition.³⁰ Competition law was viewed as a means of preventing this degeneration of the competitive process. Ordoliberals focused on the need to protect the conditions of competition, rather than on competition's direct results.

That Article 82 EC was very much a product of ordoliberal thought can be seen, for example, in *Michelin v Commission*,³¹ where the ECJ developed the special responsibility for dominant undertakings. That most probably comes from the ordoliberal theory requiring dominant undertakings to act *as if* they were faced with 'complete competition', i.e. the absence of market power of individual firms.

The ordoliberals break competition policy down into four concepts. First, competition policy is primarily orientated towards the goal of individual freedom with efficiency as its by-product, meaning that economic efficiency is the result of the freedom which competition law preserves. Second, the state retains a strong role in protecting the basic parameters of the system of competition but with strict limits on more direct intervention.³² Third, competition policy is shaped by the rule of law rather than by *ad*

²⁹ David J Gerber, 'Constitutionalizing the economy: German Neo-liberalism, Competition Law and the "New" Europe', (1994) 42 Am J Comp L 25, p 29.

³⁰ *Ibid*, p 50.

³¹ Case 322/81 *Michelin v Commission* [1983] ECR 3461, [1985] 1 CMLR 282.

³² To avoid abuse of public power. This ordoliberal point has some similarity with the 'Chicago School' view that governmental intervention should be very limited, see Richard A Posner, 'The Chicago School of Antitrust Analysis' (1979) 127 University of Pennsylvania Review 925.

hoc political decision-making.³³ Fourth, competition policy is embedded in the economic order of a free and open society.³⁴ The aim of these rules was not economic efficiency as such, but rather limitation and control of private power in the interest of a free and fair political and social order.³⁵

2.3 Early development of Community competition law

Already in the early cases in the 1970s, it became clear that the Commission and the ECJ did not interpret protecting competition as meaning economic efficiency. They saw it as a way to prevent undertakings from using their economic power to undermine the competitive structure of the market. The focus on the competitive structure concentrates on the process as accentuated by ordoliberals, who emphasised the need to protect the conditions of competition, rather than on competition's direct results.

Continental Can v Commission

In *Continental Can v Commission*³⁶ the ECJ had to consider whether a corporate acquisition (a merger) could constitute an abuse under Article 82 EC.³⁷ The Court ruled that it was contrary to Article 82 EC for a dominant undertaking to reduce or restrict competition by acquiring a significant competitor. The case is unusual in that it was decided under Article 82 EC, but at the time there were no merger control provisions in the Treaty of Rome³⁸ or any European Merger Regulation.

Continental Can argued that structural measures to *strengthen* a dominant position by way of merger did not amount to an abuse under Article 82 EC.³⁹ This was rejected by the Court, which held that Continental Can had abused its dominant position by eliminating competition in the relevant market by acquiring (through its Belgium subsidiary Europemballage) almost 80 per cent in a Netherlands metal can manufacturer – TDV. Contrary to the opinion of Advocate General Roemer,⁴⁰ the Court decided that Article 82 EC could not only be used for practices where the

³³ A distinctive quality and merit of the rule of law is that it attempts to, if not completely eliminate, then reduce as much as possible all arbitrary power in the hands of those who administer the political regime and the legal order.

³⁴ Werhard Möschel, 'Competition Policy from an Ordo Point of view', in Hans Willgerodt & Alan Peacock, *German neo-liberals and the social market economy*, Macmillan, London, 1989, chapter 7, p 142.

³⁵ David J Gerber, *Law and Competition in the Twentieth century Europe: Protecting Prometheus*, Clarendon Press, Oxford, 1998, p 244-51.

³⁶ Case C-6/72 *Continental Can v Commission* [1973] ECR 215, [1973] CMLR 199.

³⁷ *Continental Can v Commission* would not have been an Article 82 case today, but subject to the European Merger Control Regulation 139/2004 Article 2(3): '... a concentration which would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the Common Market ...'.

³⁸ Unlike the ECSC Treaty of 1951 Article 66(1)-(6), the Treaty of Rome did not have any provisions on mergers.

³⁹ Case C-6/72 *Continental Can v Commission*, para 19.

⁴⁰ The opinion of Advocate General Roemer delivered on 21 November 1972 noted that 'Article 86 [now Article 82] is not suitable for the purpose of controlling mergers'.

concerned undertaking used its market power but also for practices where the undertaking strengthened its market power. The Court clarified that the word ‘abuse’ also refers to changes in the structure of an undertaking, which led to the disturbance of competition in the Common Market.⁴¹ The Court ruled:

‘... abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one ... it can ... be regarded as an abuse if an undertaking holds a position so dominant that the objectives of the Treaty are circumvented by an alteration to the supply structure which seriously endangers the consumer’s freedom of action in the market such a case necessarily exists if practically all competition is eliminated.’⁴²

The case is important in that the ECJ concluded that Article 82 EC is not only ‘... aimed at practices which may cause damage to consumers directly, but also to practices that are detrimental to consumers through their impact on an effective competitive structure ...’. This means that not only exploitative abuses but also exclusionary abuses are covered by the prohibition. This implies that the object of the provision is not only to protect consumers from exploitation by dominant undertakings, but also to protect the competitive process itself.⁴³

The ECJ was concerned about the damage to the competitive structure of the market, as the acquiring company had market power and concluded that Continental Can had abused its dominant position by acquiring a competitor. Some may argue, like the ECJ, that by protecting the structure of the market consumers are indirectly protected, but this is not the same as consumer welfare in economic terms.⁴⁴ This is not to say that the ECJ was wrong in their decision, the Court may well have been right, but the case clearly shows that the ECJ did not interpret the protection of competition using economic efficiency principles.

Commercial Solvents v Commission

Having interpreted the objective of protecting competition as preventing an undertaking from using its economic power to undermine the competitive structures of the market in *Continental Can*, the ECJ continued on the same path in its subsequent decision in *Commercial Solvents v Commission*.⁴⁵ The ECJ concluded that Commercial

⁴¹ Ibid, para 26.

⁴² Ibid, para 12.

⁴³ The protection of the competitive process is motivated by the idea that consumers are best served if firms are forced to compete, and at the same time protected by the firms’ efforts to compete on the merits.

⁴⁴ It is worth mentioning that the benefits of efficient structure of supply – e.g. economies of scale – can either accrue to customers or shareholders. If a firm secures a substantial increase in market power it will not be under sufficient constraints to make it pass enough of the benefits to customers through lower prices. Indeed prices may well increase. The result may be an increase in total welfare but the consumers’ share of this would fall relative to the producer’s share – consumer welfare would also be likely to fall in absolute terms.

⁴⁵ Case C-6-7/73 *Commercial Solvents v Commission* [1974] ECR 223, [1974] 1 CMLR 309.

Solvents (an American corporation) had abused its dominant position by destroying the ability of a significant competitor (Zoja) to compete effectively, by refusing to supply Zoja with ethambutol – a raw material to develop an anti-TB drug. Commercial Solvents did not supply Zoja directly, but indirectly through ICI, its European 51 per cent owned subsidiary. In 1970 Commercial Solvents decided to exclusively supply ICI, which at the time decided to produce a similar anti-TB drug as the one Zoja had produced. By limiting the quantity of ethambutol to Europe and thereby cutting off the supply of ethambutol to Zoja, Commercial Solvents would improve ICI's position and thereby indirectly its own position in Europe on the downstream market. Commercial Solvents was able to leveraging its market power on the upstream market to eliminate a competitor on the downstream market where it was not dominant.⁴⁶ The ECJ held:

‘... an undertaking being in a dominant position as regards the production of raw material and therefore *able to control the supply* to manufacturers of derivatives cannot . . . act in such a way as to eliminate their competition which, in the case in question would have amounted to eliminating one of the principal manufacturers of ethambutol in the Common Market. . . . [A]n undertaking which has a dominant position in the market in raw materials . . . refuses to supply a customer risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article 86 [now Article 82].’⁴⁷

Parts of the judgement need to be highlighted. First, ICI was the only source of the raw materials in question in the Europe and the ECJ specifically rejected claims that other nascent technologies in the trial stage were substitutes for its raw materials. Therefore, it was a market with extremely low supply-side substitutability. Secondly, the refusal to supply risked ‘eliminating all competition on the part of this *customer*’. Finally, ICI had, after a period of several years, ceased to supply Zoja. The Court did not draw a conclusion generally about whether a refusal to supply a new customer could be an abuse.⁴⁸

The Court's statement that the refusal to supply would eliminate all competition on the part of Zoja clearly shows that the Court was concerned about harm to a competitor. Concern about a competitor and keeping the competitor in the market can also benefit consumer welfare (allocative efficiency) in the short term, if it increases choice, but in the long term it can potentially reduce dynamic movements towards productive efficiency as other competitors have less incentive to innovate. This is not to say that the Court was wrong in its conclusion, but the refusal to supply Zoja did not eliminate competition on the downstream market, as ICI would produce the anti-TB drug, but

⁴⁶ One must be careful not to use Commercial Solvents as authority for the proposition that Article 82 EC may be applied to an act committed by a dominant company on a market separate from the market of dominance, because the abuse – the refusal to supply raw materials – took place on the market where Commercial Solvents was dominant.

⁴⁷ Case C-6-7/73 *Commercial Solvents v Commission*, op cit n 45, para 25.

⁴⁸ However, the Court has applied the ‘refusal to supply doctrine’ in relation to a new customer in cases like C-7/82 *GVL v Commission* [1983] ECR 483, [1995] 3 CMLR 645 and C-311/84 *Centre Belger d'Etudes de Marche Telemarketing v CLT and IPB* [1985] ECR 3261, [1986] 2 CMLR 558.

eliminated a competitor. The Court ignored any consideration of the effects of Commercial Solvents' performance to replace Zoja with ICI. Zoja would have left the market, but ICI would have entered the market and perhaps be more efficient than Zoja, to the benefit of consumers. Instead, the Court focused on the process through which this result was reached, which was that ICI replaced Zoja because its parent company refused to supply Zoja.

If the Court had interpreted the protection of competition through an economic efficiency lens, it would have had to assess whether consumers would have been better or worse off without Zoja. The customers would have had the anti-TB drugs from ICI instead of Zoja and they would therefore not have had less choice than before. Consumers would likely have been better off because ICI could probably have developed the anti-TB drug much more cheaply as ICI got the raw material from its parent company Commercial Solvents. The Court ignored any consideration of the economic efficiencies that might have arisen from vertical integration and thereby neglected any consideration of the most efficient structure of supply.

Instead, the Court's objective was to protect Zoja, who was economically dependent⁴⁹ on Commercial Solvents, against unfair limitation of its commercial independence.⁵⁰ This was confirmed by Judge Pescatore, then President of the Court, in a speech where he said that the Court intended to protect a small firm, rather than free competition, for the benefit of consumers.⁵¹ This statement clearly shows that the Court did not reach its result with economic efficiency in mind. The Court's interpretation of the protection of competition seems to have been influenced by ordoliberal thinking, which was strongly against the use of power by dominant firms and in favour of protection of small and medium-sized companies, in the name of fairness – if believed that fairness required Commercial Solvents to refrain from refusing to supply Zoja as it limited Zoja's economic freedom.

⁴⁹ The concept of 'economic dependency' comes from German law (Germany was the first country to develop doctrines of abuse of economic dependence as part of competition law. The GWB Section 20 controls discrimination and 'unfair hindrance' by dominant firms, associations, and cartels, which may not use their market position to demand preferential terms without objective justifications. Section 20 applies particularly to their dealings with small and medium-sized enterprises, as suppliers or purchasers, who depend upon them and lack reasonable opportunities to resort to other outlets or sources), but is found in both US law (See the US Supreme Court case *US Steel Corp v Fortner Enterprises*) and French law (Dominique Brault, *Politique et pratique du droit de la concurrence en France*, 2004) and the Competition Commission's decision *Avis de la Commission de la concurrence du 14 mars 1985 sur les super-centrales d'achat*). At the time the ECJ reached its judgment in *Commercial Solvents* the European Community only consisted of six European States. Germany and France were two of them. In an undeveloped competition law system without any precedence, which the European system was in the 1970s, the judges at the ECJ probably looked at the European States with more experience. At the time, France had Ordinance n° 45-1483 of 1945 provision 36-2 where refusals to sell between commercial entities were deemed to be per se anti-competitive and thus prohibited.

⁵⁰ Another example where the Court condemned an abuse of economic dependence is Case 22/78 *Hugin v Commission* [1979] ECR 1869. There a supplier refused to provide independent repairers with spare parts for the products it made, claiming that it had set up its own repair service. The supplier was considered to have abused its dominant position on the market for spare parts for its own products.

⁵¹ Valentine Korah, 'The interface between intellectual property rights and antitrust: the European experience' (2002) 69 *Antitrust Law Journal* 801, p 808.

Before continuing the case law analysis it may be worth distinguishing between the economic freedom approach adopted by the ECJ in *Continental Can* and *Commercial Solvents* and consumer welfare in economic terms to clarify the difference.

2.4 Economic freedom \neq consumer welfare

To reiterate an earlier point, the need to protect the conditions of competition, rather than explicitly focusing on competition's direct results is essential for ordoliberals as their main goal is the limitation of private power to guarantee individual freedom. Economic efficiency is not the actual goal of their competition policy, but an indirect and derived goal. Ordoliberals place competition law in a wider, socio-political perspective because limitation and control of private power is in the interest of a free and fair political and social order.⁵² By protecting freedom of competition, individual freedom would be guaranteed as a human right. The crucial question is whether this is the same as advancing consumer welfare in economic terms.

The answer is no. Standard economics tell us that protecting the competitor through the act of curtailing the power of the near monopolist, the consumer may benefit through increased choice and a reallocation of profits from the monopolist to alternative competitors. As these competitors will not have the ability to reap monopoly profits, we would then expect these profits to be passed back to the consumer through reduced prices. If these effects outweigh the value of any above-cost discount offered by the near monopolist, consumers could gain from overall price reductions. However, while the move to protect suppliers may increase choice and potentially improve allocative efficiency,⁵³ this is not guaranteed. Nor is it guaranteed that dynamic movements towards productive efficiency⁵⁴ will be facilitated best in this way. In some circumstances it is plausible that the protected competitors will become efficient over time. However, it is also possible that the most productive way of supplying customers will be through one single supplier, particularly when economies of scale are great. Depending on which of these effects is the greatest the consumer could then actually gain or lose from such measures.⁵⁵ Two remaining issues must be considered.

The first is the relative benefits/losses of trying to 'pick up' the extra consumer welfare. The question is whether the ordoliberal view could be tweaked to include such productive efficiencies. The answer is no as the process is the value for ordoliberals. Since the process is of intrinsic value it excludes a change of the overarching principle to protect the competitor only to the point that it is productively and allocatively efficient to do so. Perhaps this is why the ordoliberal approach cannot take this middle ground, and instead aims for short term consumer benefit plus the long term civil liberties benefits, which are far removed from consumer welfare.

⁵² David J Gerber, *Law and Competition in the Twentieth century Europe: Protecting Prometheus*, Clarendon Press, Oxford, 1998, p 244-51.

⁵³ Allocative efficiency, as used here, refers to the way in which resources are allocated to the production of the goods and services that society (consumers) most values.

⁵⁴ Productive efficiency refers to the effective use (produced at the lowest cost) of resources.

⁵⁵ Sir John Vickers, 'Abuse of Market Power' (2005) 115 *The Economic Journal* F244-261, p 256.

The second is the benefits/costs of moving away from this approach to competition law. By moving to a consumer welfare based approach you offer yourself the chance to account for these extra bits of welfare, and produce a structure more focussed on true economic gains. Such a test is, in principle, easy to understand, but needs quite a lot of knowledge about the market and consumer gains, and is likely to be less harsh on the theoretical monopolist.

Again, before returning to the case law analysis and the examination of the 1976 landmark case of *Hoffmann-La Roche v Commission*,⁵⁶ it is helpful to highlight a debate about the abuse provision in the German competition Act (GWB)⁵⁷ and some German cases decided at that time. German competition law is interesting in this context because it is partly influenced by ordoliberalism⁵⁸ and has played a key role in the development of European competition law.⁵⁹ The abuse debate, and the test developed by a German professor following that debate, influenced some German cases⁶⁰ and these seem to have influenced the ECJ in *Hoffmann-La Roche*.

2.5 The German 'abuse' debate

An amendment of the GWB in 1966 started a debate between academics. One of the main participants was Professor Peter Ulmer at the University of Heidelberg. According to Ulmer, the abuse provision in the GWB required a higher standard of conduct for dominant undertakings⁶¹ than required for non-dominant undertakings⁶² and conduct by dominant undertakings that was not based on performance constituted what he called 'non-performance competition'.⁶³ Ulmer did not clarify what was meant by 'non-performance competition' but the Berlin Appeal Court held in the *Rama-Mädchen*⁶⁴ case that fidelity rebates constituted 'non-performance competition', where they were given because of loyalty, rather than better performance.⁶⁵

⁵⁶ Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [1979] 3 CMLR 211.

⁵⁷ Gesetz gegen Wettbewerbsbeschränkungen (1957).

⁵⁸ The GWB was initiated by the 'Draft of an Act to protect competition based on performance and an Act concerning the Monopoly Office' (the so-called 'Josten draft'). Among the authors was Franz Böhm, one of the founding fathers of ordoliberalism at the Freiburg School.

⁵⁹ Manfred E Streit, 'Economic Order, Private Law and Public Policy: The Freiburg School of Law and Economics' (1992) 148 J. of Institutional and Theoretical Econ. 675. As Germany had one of the most developed competition law systems of the six founding Member States.

⁶⁰ WuW/E OLG 1767 Kombinationstarif (KG 1977) and WuW/E OLG 1983 Rama-Mädchen (KG 1978). See Peter Ulmer, *Schranken zulässigen Wettbewerbs marktbeherrschender Unternehmen* (1977).

⁶¹ This point was adopted in WUW/E OLG p. 1767 Kombinationstarif (KG 1977).

⁶² Ulmer did not use the term 'special responsibility' but the higher standard of conduct required by dominant undertakings is the same as imposing a special responsibility.

⁶³ David J Gerber, *Law and Competition in the Twentieth century Europe: Protecting Prometheus*, Clarendon Press, Oxford, 1998, p 313.

⁶⁴ WUW/E OLG p. 1983 Rama-Mädchen (KG 1978).

⁶⁵ Rebates are 'good for' consumers and are used in everyday business relationships, but where the rebates are given in order to bind the receiver to the dominant undertaking it is no longer cost justified and constitutes 'non-performance competition'.

Ulmer proposed a two-prong test for analysing abusive conduct. First, the conduct must constitute ‘non-performance competition’ and secondly, the conduct must restrict the remaining competition in the dominated market.⁶⁶ The key to the application of Ulmer’s test was whether or not the conduct could be linked to the undertaking’s performance.⁶⁷ Conduct such as lower prices, better quality and other forms of consumer benefits were not automatically outside the ‘non-performance competition’ category; the consumer benefits had to be linked to the undertaking’s performance. If the German Court found that a certain conduct was based on ‘non-performance competition’, and therefore distorted competition in the market, it was necessary to consider whether the conduct restricted the remaining competition in the dominated market (residual competition). The latter is important as Ulmer maintained that only conduct based on ‘non-performance competition’ could be condemned if the market structure were further worsened by the conduct, such that it profoundly restricted or eliminated the remaining competition on the dominated market.⁶⁸ Ulmer’s focus on the process as a value in itself seems to have been inspired by the ordoliberal orthodoxy.⁶⁹

Hoffmann-La Roche v Commission

The ECJ’s judgment in *Hoffmann-La Roche* came just after the Berlin Court of Appeal⁷⁰ had decided the *Kombinationstarif* case.⁷¹ The latter stated that an abuse might be presumed if the conduct of the dominant undertaking is not within the boundaries of competition on the merits and if the market structure is further worsened by the undertaking profoundly restricting or even eliminating the competition remaining on the market where the undertaking holds a dominant position. The Berlin Court of Appeal’s reasoning seems to be based on Ulmer’s ordoliberal-inspired ‘performance competition’ test. The test adopted by the ECJ in *Hoffmann-La Roche* is also similar to Ulmer’s ‘performance competition’ test.⁷²

The ECJ held that Hoffmann-La Roche – a pharmaceutical company that among other things supplies vitamins - had abused its dominant position by entering into exclusive purchasing agreements with its customers and by giving loyalty rebates to its largest

⁶⁶ Peter Ulmer, *Schranken zulässigen Wettbewerbs marktbeherrschender Unternehmen*, Nomos-Verlagsgesellschaft, 1977.

⁶⁷ John Kallaugher and Brian Sher, ‘Rebates revisited: Anti-competitive effects and exclusionary abuse under Article 82’ (2004) 5 ECLR 263, p 271.

⁶⁸ WUW/E OLG p. 1767 *Kombinationstarif* (KG 1977).

⁶⁹ First, the concept of competition on the basis of performance was central for ordoliberals especially Franz Böhm that many decades before Ulmer had provided a theory based on performance competition for applying the abuse provision (*Wettbewerb und Monopolkampf*, Berlin, Heymann, 1933). Examples of the latter were predatory pricing, boycotts and loyalty rebates, also the examples presented by Ulmer. Secondly, performance competition derives from rules based on ‘unfair competition’ meaning that competition is unrelated to the economic performance of a market participant. Fairness played an important part for ordoliberals who believed that ‘performance competition’ described fair competitive conduct.

⁷⁰ Kammergericht Berlin.

⁷¹ WUW/E OLG p. 1767 *Kombinationstarif* (KG 1977).

⁷² This is clearer from the authentic German version of *Hoffmann-La Roche* than the English version, this is further explained in n 74.

customers. The ECJ condemned a rebate that was provided when a customer agreed to obtain all or a specified significant percentage of its requirements from Hoffmann-La Roche by stating:

‘... obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because ... they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.’⁷³

This seems to be an adoption of the first prong of the test suggested by Ulmer that, in order to be abusive, the conduct must constitute ‘non-performance competition’ and distort competition. The Court reached that conclusion without examining whether the rebates had any adverse effects on the market, but concluded that the conduct constituted ‘non-performance competition’ as the rebates were linked to fidelity purchases as such. The ECJ seems to have assumed that these rebates would drive other competitors out of the market and provide Hoffmann-La Roche with the possibility of raising prices to the disadvantages of consumers; but, as shown above in section 2.4, this is not guaranteed. Furthermore, the Court held in paragraph 91:

‘... the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of the market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of commercial operators has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition.’⁷⁴

Two main things can be said about this statement. First, the Court talked about residual competition, which seems to be an adoption of the second prong of the test advocated by Ulmer – that the conduct must restrict the remaining competition in the dominated market. Once a dominant position arises in the market the structures will change and

⁷³ Ibid, para 90.

⁷⁴ The text speaks of competition ‘on the basis of commercial operators’ which is a poor translation of the authentic German version where the Court used the term ‘leistungswettbewerbs auf der grundlage der leistungen der marktburger abweichen’ where ‘leistungswettbewerb’ is the legal concept of ‘competition on the basis of performance’. A better translation would therefore have been ‘competition on the basis of performance’. In case C-62/86 *AKZO v Commission* [1991] ECR-I 3359, para 70 the text speaks of ‘competition on the basis of quality’ whereas in the French version the Court uses the term ‘concurrence par les mérites’ therefore a better translation would have been ‘competition on the merits’. Besides the semantic difference between ‘competition on the basis of performance’ and ‘competition on the merits’ the Court seems to mean the same in substance.

the effectiveness of competition as a market regulator will be lost.⁷⁵ Secondly, the Court was condemning the conduct because it hindered the production of competitors, not because of adverse effects on the market.⁷⁶ Like in previous cases, the ECJ's conception of protecting competition was not based on consumer welfare.

2.6 Interim conclusion

As argued in the introduction, a modernisation of Article 82 EC needs to reassess both the underlying objectives and the methodology. The first part of this paper examined the interpretation of the 'protection of competition' objective in the early cases and concludes that the Commission and Community courts were not focused on consumer welfare, but on the protection of the economic freedom of the market players as well as preventing firms from using their economic power to undermine competitive structures. This conception of the protection of competition is in line with the ordoliberal principles of economic freedom – especially for small and medium-sized undertakings – which resulted in a dislike of restraints, in particular exclusivity and practices that have analogous effects such as loyalty-inducing effects. This ideology suited the Commission and the ECJ as undistorted competition played an important role in achieving a common market without boundaries and free movement of goods, which would not otherwise be achieved if private, economically powerful, firms were allowed to manipulate the flow of trade.

The early cases are of particular interest in this area of law because they form the DNA of Article 82 EC and because the Commission and the Community courts decisions still refer and rely on the early cases from the 1970s. To be fair to the Community courts, they have moved away from this competitors-orientated view in some later cases, for example, in *Oscar Bronner*⁷⁷ where the ECJ held that it is not enough to show that the use of Mediaprint's home delivery scheme would be desirable, it must be necessary for the downstream activity.⁷⁸

3. PART II: METHODOLOGY

Part I of this paper has dealt with several of the fundamental cases under Article 82 EC to show how the objective of protecting competition has been interpreted; a selection

⁷⁵ Samkalden and Druker, 'Legal problems relating to Article 86 of the Rome Treaty' (1965) 2 CMLRev 167.

⁷⁶ As the Court did not examine the adverse effect of the performance on the market.

⁷⁷ C-97/77 *Oscar Bronner v Mediaprint* [1998] ECR I-7791.

⁷⁸ On the 'duty to supply' Advocate General Jacobs said, in his opinion delivered 28 May 1998, para 58: '... it is important not to lose sight of the fact that the primary purpose of Article 86 [now Article 82 EC] is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than to protect the position of particular competitors. It may therefore, for example, be unsatisfactory, in a case in which a competitor demands access to a raw material in order to be able to compete with the dominant undertaking on a downstream market in a final product, to focus solely on the latter's market power on the upstream market and conclude that its conduct in reserving to itself the downstream market is automatically an abuse. Such conduct will not have an adverse impact on consumers unless the dominant undertaking's final product is sufficiently insulated from competition to give it market power.'

of more recent cases under Article 82 EC will be subject to analysis below in the second part of the paper which deals with methodology.

3.1 The Commission and the Community courts' approach

The Commission and the Community courts have often been accused of following a *per se* methodology in their prohibition decisions concerning pricing abuses.⁷⁹ This paper does not follow that accusation, but states that there seem to be some terminological confusion. It is accepted that some cases decided under Article 82 EC are described as *per se* because of their nature, but the real problem is not *per se* rules,⁸⁰ but that often these decisions are based on assumptions and not on solid economics. The Commission and Community courts focus on the legal 'form' of the conduct, and too little on the economic impact, or the 'effects' of the conduct on the market. By concentrating on the 'form' of the conduct the focus is on the process through which the dominant undertaking has reached the result. Verifying whether certain conduct is anticompetitive, and therefore harms competition, is not meaningful without also looking at the possible effects of the performance on the market.

3.2 Case law analysis

In *Hoffmann-La Roche*⁸¹ most customers had subscribed to a non-compete obligation committing themselves to buy all or a large part of their vitamins requirements from Hoffmann-La Roche and in return receive a rebate. The rebate, which was an 'across-the-board', was based on the aggregate turnover for all the vitamins offered by Hoffmann-La Roche. The ECJ upheld the Commission's decision that the rebate scheme infringed Article 82 EC because it distorted competition and was not based on an economic transaction.⁸² The Court applied a teleological methodology, which allowed it to reach its decision without a well-defined conceptual reasoning.⁸³ But more importantly, how could the Court know whether the rebate scheme was not based on an economic transaction since it failed to apply any economic reasoning of its own to the effects of the rebates on the market. It did not carry out an analysis of the aggregate relationship of pricing to cost, with respect either to the dominant undertaking or to its competitors, and no explanation was provided about why competitors may have been

⁷⁹ Luc Gyselen, 'Rebates: Competition on the merits or exclusionary practice', and Derek Ridyard, 'Article 82 Price Abuses – Towards a More Economic Approach' in Ehlermann and Atanasiu (eds), *European Competition Law Annual – What is an abuse of a dominant position?* Hart Publishing, Oxford, 2005.

⁸⁰ This is not to say that there should be *per se* rules against pricing practices. According to Frank Easterbrook, for example, *per se* rules are sometimes useful: 'The *per se* method responds to the high costs of information and litigation. Courts try to identify categories of practices so rarely beneficial that it makes sense to prohibit the whole category even with knowledge that this will condemn some beneficial instances'. Frank H Easterbrook, 'The limits of antitrust' (1984) 63 *Texas Law Review* 1, pp 9-10.

⁸¹ The facts of the case are set out above in part I of the paper.

⁸² Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [1979] 3 CMLR 211, para 90.

⁸³ However, a teleological methodology is also desirable as it allows the court to move away from previous decisions and develop its reasoning.

less efficient than the dominant undertaking. The case failed to explain why fidelity rebates were impermissible, unless tied to efficiencies.

The ECJ adopted a similar formalistic approach in *Michelin v Commission* (Michelin I).⁸⁴ Michelin had placed an annual sales target for each specific customer and granted a variable discount conditional upon the customer's reaching its annual sales targets for truck, van and car tyres. Unlike in *Hoffmann-La Roche*, Michelin did not require its dealers to purchase all or most of their requirements from Michelin. The Court held that the rebate scheme offered by Michelin,⁸⁵ who held a dominant position in the market for heavy vehicle new replacement tyres, constituted an abuse and thereby infringed Article 82 EC. The Court stated that '... the discounts tend to remove or restrict the buyer's freedom to choose his sources of supply, [and] to bar competition from access to the market'.⁸⁶ Furthermore, the ECJ held:

'... any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount ...'⁸⁷

This meant that the discount system put the dealers under considerable pressure, especially towards the end of the year, to attain Michelin's sales targets, or else lose the discount. Competitors would not easily be able to make offers that would compensate for this loss of discount, which '... limit[ed] the dealers' choice of supplier and [made] access to the market more difficult for competitors ...'. The Court held that '... neither the wish to sell more nor the wish to spread production more evenly can justify such a restriction of the customer's freedom of choice and independence ...'.⁸⁸

A similar reasoning was given by the CFI in *BPB Industries v Commission*.⁸⁹ British Gypsum granted its English and Irish customers a rebate conditional upon buying all their requirements of plasterboard from British Gypsum rather than importing plasterboards from France and Spain. Here, the CFI held in paragraph 120 that the prevention of another market player from obtaining supplies from its competitors was an abuse where the purpose⁹⁰ was to further weaken already fragile competition:

⁸⁴ Case C-322/81 *Michelin v Commission* [1983] ECR 3461.

⁸⁵ Michelin offered a discount linked to an annual sales target that was fixed for each dealer by Michelin at the beginning of each year. The discount was geared to turnover and to the proportion of Michelin tyres sold by that dealer. The aim was to ensure that the dealer sold more Michelin tyres than in the year before, although sometimes the target was equal to the previous year's sales. Towards the end of each sales-year, Michelin would urge the dealer to place an order big enough to obtain the full discount.

⁸⁶ *Ibid*, para 73.

⁸⁷ *Ibid*, para 81.

⁸⁸ *Ibid*, paras 84-86.

⁸⁹ Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389.

⁹⁰ The relevance of intent is explained in Thomas Eilmansberger, 'How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses' (2005) 42 CMLRev 129.

‘... the application by a supplier who is in a dominant position, and upon whom as a result the customer is more or less dependent, of any form of loyalty rebate through which the supplier endeavours, by means of financial advantages, to prevent its customers from obtaining supplies from competitors constitutes an abuse within the meaning of Article 86 of the Treaty.’

The CFI did not base its decision on solid economics, but merely confirmed the Commission’s approach that the rebates were conditional upon exclusivity and therefore unlawful.

In a later decision, *Irish Sugar v Commission*,⁹¹ the CFI held that the Irish Sugar company had committed an abuse by operating a system of sugar export rebates, granted on the sales of industrial sugar to companies exporting to other Member States. Similar to the approach taken in *Hoffmann-La Roche*, the CFI referred to the abusive nature of loyalty rebates and stated:

‘... a rebate granted by an undertaking in a dominant position ... without that rebate being capable or being regarded as a normal quantity discount ... constitutes an abuse of that dominant position, since such a practice can only be intended to tie the customers to which it is granted and place competitors in an unfavourable competitive position.’⁹²

Again, the Court did not base its decision on economics, but upheld the Commission’s decision that a rebate intended to tie the customers to which it was granted and place competitors in an unfavourable competitive position constitute an abuse.

Standard of proof

As shown above, the methodology adopted by the Commission and the Community courts is rather formalistic in that they base their decisions merely on the ‘form’ of the conduct more than on sound economics. In some recent cases, the Commission and the CFI have been explicit about the standard of proof required in rebate cases.

In *Michelin v Commission* (*Michelin II*),⁹³ the CFI reiterated the position taken by the ECJ in *Michelin I*.⁹⁴ The CFI confirmed existing case law and held where abuse has been defined in case law as conduct having the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition, effect does not necessarily relate to actual effect. To establish an infringement, it is enough to show that conduct of the dominant undertakings tends to restrict competition, or is capable of having that effect.⁹⁵ In other words, for the purposes of Article 82 EC, anti-competitive object and anti-competitive effect is one and the same

⁹¹ Case T-228/97 *Irish Sugar v Commission* [1999] 5 CMLR 1300.

⁹² *Ibid*, para 213.

⁹³ Case T-203/01 *Michelin v Commission* [2003] ECR II-4071.

⁹⁴ *Ibid*, para 240.

⁹⁵ *Ibid*, para 239.

thing.⁹⁶ If it is shown that the object pursued by conduct of a dominant undertaking is to limit competition that conduct will also be liable to have such effects.

The CFI's approach seems to be that loyalty rebates will have an anti-competitive object if they are capable of inducing loyalty to customers⁹⁷ or foreclosing the market to competitors. For this purpose, it is not necessary to consider the actual effects on customers or competitors, or even foreseeable effects on customers or competitors, but only that the rebates should be capable of having these effects on any potential customer or competitor.

The standard of proof adopted by the CFI in *Michelin II* is as low as capable of harming competition. A change of methodology from 'form' to 'effect' is not arguing that actual harm to competition must be shown, as it is acknowledged that abusive behaviour does not always have immediate effect. However, the standard of proof should at least be that the conduct is likely to have a harmful effect as that would require an examination of the effects of dominant undertaking's conduct on the market.⁹⁸

Few months later in *British Airways v Commission*,⁹⁹ the court referred to earlier case law¹⁰⁰ and explained that fidelity rebates have the effect, through the granting of financial advantages, of preventing customers from obtaining supplies from rival producers.¹⁰¹ The CFI found that British Airways' (BA) rewards scheme¹⁰² was likely to have a restrictive effect on competition, and that such an effect had been demonstrated. However, neither the Commission nor the court seem to have examined effect in any great detail, but merely referred to the fact that 85 per cent of air ticket sales were through travel agents, and concluded that BA's rewards scheme, therefore, could not avoid having an exclusionary effect on competing airlines. The CFI did not accept BA's argument that there was '... no analysis of the air transport markets or empirical proof of the damage' caused by the scheme. The court also dismissed BA's arguments as to its decreasing market share, and the increasing market share of its competitors by noting that competitors' market shares would have been able to grow more significantly

⁹⁶ Ibid, para 241.

⁹⁷ Ibid, para 66 where the CFI states: '... prevent them [Michelin's customers] from obtaining supplies from the applicant's [Michelin] competitors ...'.

⁹⁸ This also seems to be the opinion of DG competition according to the keynote speech given by Philip Lowe at the Second Annual Conference of the GCLC, 16 June 2005.

⁹⁹ Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917.

¹⁰⁰ Joined Cases 40-114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, para 518; Case C-85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [1979] 3 CMLR 211, paras 89-90; Case 322/81 *Michelin v Commission* [1983] ECR 3461, para 71, and Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, para 120.

¹⁰¹ Case T-219/99 *British Airways plc v Commission*, para 243. This was already established in Commission decision, *Soda Ash/Solvay*, OJ 1991, L152/21, para 41.

¹⁰² British Airways had established marketing agreements, targeted at high volume agents and providing for travel agents to receive payments in addition to the basic commission. These payments included a performance reward, payment of which was subject to travel agents increasing their sales of BA tickets in the UK from one year to the next.

in the absence of the anti-competitive practice. This is a very generous assumption and the CFI defended it by holding that the fact that an anti-competitive practice was unsuccessful does not prevent a finding of abuse. The CFI found that the Commission had demonstrated that BA's practices resulted in an exclusionary effect and observed, in paragraph 293:

‘... for the purposes of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient ... to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.’¹⁰³

In summary, these cases lack of analysis of the real competitive context in which the impugned pricing behaviour takes place and the effects of that behaviour on prices and output.

4. CONCLUSION

The first part of this paper has shown that the Commission and the ECJ in their fundamental decisions reached in the 1970s, which form the DNA of today's decisions, interpreted the objective of protecting competition as referring to the protection of the economic freedom of market actors. These important decisions were not based on economics or with consumer welfare in mind. Consequently, this paper advocates that a modernisation of Article 82 EC requires a change of the reading of the objective of protecting competition from economic freedom to consumer welfare. This would not only be in line with the approach taken to Article 81 EC and merger control but also follow other competition policies around the World.¹⁰⁴ A change to a consumer welfare approach finds support in the Commission's recent Guidelines on Article 81(3),¹⁰⁵ paragraphs 13 and 33, where the Commission states that ‘... the objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources ...’, which must be the same for Article 82 EC as Article 81 and 82 EC seek to achieve the same aim.¹⁰⁶ An adoption of a consumer welfare approach also finds support in competition Commissioner Neelie Kroes' speech at this year's Fordham conference where she held that ‘... the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources’.¹⁰⁷ Some argue that a change from economic freedom to the majoritarian goal of consumer welfare would

¹⁰³ This may not be the last word as BA/Virgin is on appeal, ECJ C-95/04P *British Airways v Commission*.

¹⁰⁴ Juan Antonio Riviere y Marti, ‘Competition enforcement and Consumers’ (2004) speech given on 29 April at Competition Day in Dublin, p. 2.

¹⁰⁵ Commission's Guidelines on the application of Article 81(3) of the Treaty, OJ 2004, C101/08.

¹⁰⁶ Case C-6/72 *Continental Can v Commission* [1973] ECR 215, [1973] CMLR 199, para 25.

¹⁰⁷ Neelie Kroes, ‘Preliminary Thoughts on Policy Review of Article 82’ (2005) speech given on 23 September at the Fordham Corporate Law Institute New York.

be a violation of the Community's constitutional order.¹⁰⁸ This paper does not discuss this issue not because it is considered irrelevant, but rather because it is a different issue.

The second part of this paper has briefly shown that the Commission, the ECJ, and later the CFI, have adopted a formalistic methodology in early, as well as in more recent cases regarding rebates. The methodology is formalistic in that it relies on assumptions instead of on solid economics. The paper has suggested a change to a methodology where actual or likely effects of the dominant firm's conduct are examined¹⁰⁹ to focus on the end result of the conduct pursued.¹¹⁰ Such a methodology would have the advantage of being based on solid economic thinking and thereby encouraging also dominant undertakings to compete while at the same time giving clear indications to those undertakings.

¹⁰⁸ Ernst J Mestmacker, 'The EC Commission's Modernisation of Competition Policy: a challenge to the Community's constitutional order' (2000) *European Business Organisation Law Review* 401.

¹⁰⁹ The analysis in Article 82 EC is not only ex post but also ex ante therefore it would be unrealistic for the courts never to intervene unless it were possible to show actual effects. Also, it is acknowledged that abusive behaviour does not always have immediate effect.

¹¹⁰ Joe Staten Bain, *Industrial Organization*, New York, Wiley, 1959, p 11.