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***The Future of Article 82:
Dissecting the Conflict***

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The Future of Article 82: Dissecting the Conflict
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Underlying the recurring debates over the future of Article 82 EC are competing images of what its goals are and should be. Such debates about the interpretation and application of Article 82 are not new, and they are also not likely to end, because the legal concept of “abuse” is sufficiently abstract and capacious to allow multiple conceptions of its goals.¹ Where goals become contested and controversial, however, debates can lead to confusion and uncertainty rather than progress in thinking about the issues, and this threatens to occur in the context of discussions of Article 82 and its future. Clashing images of the goals of that provision have yielded much uncertainty about the future of the law in this area. They have also distorted images of both the existing law and of newer alternatives to it. This impedes the capacity of European judges and administrators to apply the law consistently and effectively. It should be valuable, therefore, to identify and assess the lines and contours of these debates and the images of law, economics and European integration that swirl within them.

A careful look at the discussions surrounding the future of Article 82 reveals two basic conceptions of its goals. One centers on the idea of “competitive distortion”. It has been given shape and content over decades by the European Courts, by the European Commission, and by academic analysts. A competing conception was first given substance by the Commission in 2005.² It is based on the “more economic approach” to competition law that the Commission has pursued since the late 1990s, which is similar to current antitrust orthodoxy in the United States. This new version of the goals of Article 82 uses “consumer welfare”, as defined by neo-classical economics, as the standard for determining whether conduct constitutes “abuse” for purposes of Article 82.

The discussions and debates have produced valuable insights, but also potentially significant misunderstandings. Misconceptions and confusion regarding each of the two main

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¹ These debates and discussions are interwoven with the story of the development of competition law in Europe. . For an in-depth treatment of that development, see David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford University Press, 1998 (paperback 2001). . For discussion of the state of thinking about the goals of European competition law in the late 1990s, see Claus-Dieter Ehlermann and Laraine L. Laudati, eds., *European Competition Law Annual 1997: Objectives of Competition Policy*, Hart Publishing, 1998.

² The Commission’s recent thinking about the future of Article 82 is contained in *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (Dec. 2005), <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

conceptions of Article 82's goals have become a serious impediment to constructive dialogue about the future of this area of European competition law. Moreover, there has been curiously little analysis of the structure of the conflict and of the specific differences between the law as it has been developed and proposals to change it. Dissecting the conflict should thus be useful in moving the debate forward and providing a firmer basis not only for policy decisions, but also for the decisions that European decision makers, including national authorities and national judges, will have to take in individual cases in the future. Accordingly, this paper will examine several basic questions: What kinds of differences and changes are involved in this debate? How far apart are the two main conceptions that are in conflict? And how can the differences best be understood?

The paper has four main objectives. One is to analyze the debate over the goals of Article 82. There has been no lack of discussion of why one approach is better than another, but that is not the goal here. My focus here is on the debate itself, the positions and claims that appear in it, and the factors that influence the way it is framed and interpreted. A second objective is to identify the similarities and differences between the current conception of the goals of Article 82 and the new approach being considered by the Commission. As the Commission and the courts seek to develop and improve the application of Article 82, there will be a continuing tension between current and past conceptions of the provision's goals, on the one hand, and a newer conception of its goals, on the other. It is critically important, therefore, to understand just what those differences and tensions are. A third objective is to identify misconceptions and confusions that have become part of the thinking and discussions in the area. Such confusions and misconceptions can impair effective discussion and undermine the value of the policy decisions that derive from it. A fourth and more tentative objective is to identify ways in which this analysis can be beneficial for the future of thinking about this area of European competition law. The analysis leads to the following basic claims. First, the goals underlying Article 82 and pursued by European institutions are often misrepresented. Second, the failure to distinguish between two fundamentally different roles for economics leads to confusion and misconceptions regarding the reform agenda, in particular, and the use of a "more economic approach" in the application of Article 82, in general. Third, when these misunderstandings and confusions are identified, the conflict turns out to be narrower than often thought, but also perhaps more fundamental. Finally, this analysis suggests a path forward in thinking about and implementing Article 82, one that avoids the pitfalls of casting aside experience gained, but at the same time it incorporates important advantages of increasing the use of economics in the application of Article 82.

I. THE COMPETITIVE DISTORTION MODEL

The basic idea behind the abuse concept is simple. It starts with the proposition that some firms have sufficient power to distort and thereby to harm the competitive process. Given that such distortions reduce the capacity of competition to produce wealth and benefit consumers,

Article 82 should accordingly be used to deter such deleterious conduct. European institutions have built on the concept of “competitive distortion” as the basis for an entire conception of the role of Article 82. I will refer to this conception as the “competitive distortion” model.

A. Evolution of the Model

The evolution of the basic concept is often misunderstood. The idea originally took shape in 1920s Europe, where there was concern that economically powerful enterprises could distort the competitive process and thus prevent Europe from overcoming its severe economic problems.³ As such, the competitive distortion model was conceived as a tool for improving economic performance. In that role, it was embodied in several European national laws, and it acquired international standing at the World Economic Conference in Geneva in 1927.⁴ Economic depression and war halted its development until after the Second World War, when it began to find its way back into European law and policy.

The so-called “ordoliberal” school of law and economics contributed intellectual contours for this idea, and it played prominent roles in the early development of competition law in Europe, at both the national and Community levels.⁵ The term “ordoliberal” was originally applied to a small group of primarily German lawyers and economists who began to develop a new conception of the relationships among law, economics and economic policy. Their central claim was that law should be used to protect the competitive process from interference by both the state and private actors. Legal institutions could, in effect, support and embed market competition as a specific form of economic organization by combating interference with its operations. During the Nazi period, ordoliberals often operated underground, but during the post-War occupation many were given prominent positions in the economic administration in Germany, and this enabled them to play major roles in the development of the “social market economy” and the German “economic miracle” associated with it.⁶

Competition law was a central component in the ordoliberal program, because it was the tool that could be most directly deployed to combat interference with a competitive economy. The ordoliberal conception envisioned a normative framework that combated agreements that distorted competition as well as single-firm (or “unilateral”) conduct of dominant firms that had the same or similar effects. It foresaw an independent and highly trained administrative body that would have authority to intervene directly against conduct it considered harmful to the competitive process. Although the focus of attention was generally

³ Gerber, *supra* note 1, at 115-164.

⁴ For discussion of the conference, see Carl H. Pegg, *The Evolution of the European Idea, 1914-1932*, University of North Carolina Press, 1983, at 76-87. For its treatment of cartel problems and further references, see Gerber, *supra* note 1, at 159-162.

⁵ For detailed discussion, see David J. Gerber, “Constitutionalizing the Economy: German Neo-liberalism, Competition Law, and the ‘New Europe’”, 42 *American Journal of Comparative Law* 25 (1994).

⁶ I have described this development in detail elsewhere. See Gerber, *supra* note 1, at 257-265.

on cartel conduct, the concept of abuse of dominance was developed to apply to single-firm conduct that had these harmful effects.

These ideas combined with experience drawn from the decartelization laws enacted by the US during the occupation period and with lessons drawn from US antitrust experience to form the foundation for the German Law Against Restraints on Competition (GWB), which entered into effect in 1958 after a long and highly visible debate. The law created a comprehensive competition law that prohibited both contractual restraints on competition and the abuse of a dominant position (merger provisions were added almost two decades later). Of particular importance for our purposes is the implementation mechanism. This statute set up an independent agency, a Federal Cartel Office (FCO) that had primary and often sole responsibility for applying the national competition law provisions, and it subjected the FCO's decisions to full, substantive review by the regular courts. The regular courts thus play an important role in the system, because they review the decisions of the FCO not only for procedural defects, but also for substantive error. This requires that the FCO's decision-making process approximate judicial decision making, thereby assuring rigorous legal scrutiny of the competition law concepts that are applied under the GWB and engendering careful juridical development of those concepts.

The concept of abuse of dominance was developed and applied by the FCO and the courts using this mechanism. Accordingly, and contrary to some assertions, the abuse provision was never conceived as an authorization for the exercise of discretion by the administrative authorities. The concept had to be developed in ways that satisfied the stringent requirements of the German judiciary, and those courts assured a high level of juridical development of the concept. Moreover, this process has been accompanied by a highly developed scholarly discussion of abuse issues. The German contributions to developing the abuse concept have been highly influential throughout Europe.⁷

For our purposes here, the focus is on the development of the concept of abuse by institutions of the European Union – in particular, the Commission and the European Courts.⁸ The evolution of the concept at this level has been widely studied, and thus I underscore here only two basic points that are particularly relevant to current discussions of the law in the area. One is that the law relating to the abuse of dominance has been developed almost exclusively in cases, including the decisions of both the Commission and the European Courts. This is important, because case law development that involves relatively abstract goals tends to generate inconsistencies and uncertainties over time. For example, the development of case law under Section 2 of the Sherman Act is at least as unclear and inconsistent as is the case law under Article 82.⁹ The second point is that the development has

⁷ See *ibid.* at 306-16.

⁸ For a recent discussion of the case law under Article 82, see 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", 42 *Common Market Law Review* 129 (2005). For detailed analysis of the case law from an economics perspective, see Robert O'Donoghue and A. Jorge Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing, 2006.

⁹ See the in-depth analysis of generally analogous US antitrust law provisions in Einar Elhauge, "Defining Better Monopolization Standards", 56 *Stanford Law Review* 253 (2004).

not been based on discretionary administrative action, but on rigorous examination of concepts and their practical application produced by courts, administrators and scholars, and based on experience at both the national and European levels.

Although critics of current law often paint the area as hopelessly uncertain, there was no major outcry along these lines until the reform process began in the mid-1990s. To be sure, there were complaints about uncertainty in the application of Article 82, but the situation was generally viewed as a natural result of the complexities of the issues and the early stage of development of the legal principles. Concern with this uncertainty has grown dramatically since the Commission's reform project started in the mid-1990s, and much of it has come from those espousing an alternative model, which employs, as we shall see, a very different perspective (i.e., economic analysis) which until recently had had relatively little influence on competition law development in Europe.

B. Key to Analysis: Recognizing the Structure of Goals

Article 82 does not have one simple and easily defined goal, but refers to a *structure* of goals in which individual goal elements are related to the central idea of competitive distortion. This central objective gives content to each of the subsidiary concepts and relates each one to the others. Identifying this structure is thus essential for understanding what Article 82 has meant and how it has been used.

In this conception of the abuse provisions, a central tool for identifying abusive conduct is the concept of "competition on the merits".¹⁰ Where a dominant firm's conduct is not "on the merits", it is presumed to be possible only because the firm has a dominant position that allows it to operate with a degree of freedom from competitive constraints. Where such dominant firm conduct significantly alters the operation of a market by reducing the capacity of other firms to compete, the conduct is presumed to constitute an abuse of dominance. The objective is to allow the market to develop without being subject to distortions caused by a dominant firm's "non-competitive" conduct. Some critics claim that this protects the structure of the market and thus inhibits competitive adaptation to change. This misconstrues the objective that has driven this conception of the law, which is to create a legal framework within which markets *can* develop on the basis of competitive conduct. It thus protects the *conditions of operation* on the market from distortions in order to allow the market to develop competitively. Note that application of this test requires use of a time dimension in which harm to the competitive process can be effectively assessed. The breadth of the time perspective depends on the characteristics of the market as well as the potential effects of particular conduct.

¹⁰ This concept has been subject to strong criticism from economists for its lack of precision, and it is unquestionably less precise than economic concepts. See, e.g., O'Donoghue and Padilla, *supra* note 8, at 176-8. Viewed from the broader perspective that has heretofore been used in assessing European competition law, however, it has generally been seen as a practicable analytical tool, at least until recently. Differences in views of this concept provide a revealing example of the extent to which a specifically economic perspective can alter assessments of case law.

Cases under Article 82 mention other goals for the abuse provisions, and interpreting these references has been a major source of misconceptions in this area. A key factor in resolving these misconceptions is to recognize that all such other goals relate to the central objective of combating distortion of competition and that the other goals have been developed in pursuing that objective. Among the most important of these are the concepts of fairness, European integration, and economic freedom. In each case, the concept is given meaning and understood in relation to the goal of protecting the process of competition against distortion. Often, however, the cases do not clearly explain the relationship between these goals and the central goal of preventing competitive distortion, and this has meant that over time the structure of goals has become less clear even to those applying the law.

The concepts of fairness and economic freedom have been used, for example, to provide means of identifying distortions of the competitive process and assessing the extent of such distortions. If conduct causes harm to a competitor using methods that are considered “unfair” in the marketplace, this may indicate that the conduct is not “competition on the merits” and, therefore, that it could have a distorting effect on the competitive process. In this sense, the concept is not a “test” for actually determining that conduct distorts competition; it is rather an indicator of potential distortion. This function can be understood only if it is seen as part of a framework of goals as opposed to an independent goal capable of standing alone in determining whether competitive distortion has occurred. The same is true for the concept of “economic freedom”. This notion has been used to approximate the limits beyond which a dominant firm’s conduct becomes abusive. From this perspective, for example, it has been said that a dominant firm’s economic freedom cannot extend beyond the point where it impedes the effective rights of others to compete. This concept is also insufficiently precise on its own terms to identify conduct as abusive, but it can indicate situations in which further analysis must be used to determine the extent of harm which the conduct poses for the competitive process.

The goal of European integration has been developed to counteract distortions of the competitive process associated with the existence of political borders within Europe. Where legal impediments such as intellectual property rights impede competition across borders within the European Union, the abuse provision has been used to assert the unity of the European market. The capacity of a dominant firm to use its market power to prevent competition across borders is seen as a potentially serious distortion of the competitive process, especially because it involves political borders and thus may implicate the enforcement powers of the state. The main point is that this goal derives from and applies the concept of competitive distortion, but here the goal is further defined by the specific context of the process of European integration.

C. Misconceptions about Article 82's goals

The lack of clarity in the case law about the objectives of Article 82 opens the way not only for divergent interpretations of the abuse concept and lack of predictability (or “legal security”) but also for misconceptions of it. The reform controversy of recent years may tend to encourage such misconceptions by creating unconscious “confirmation biases” that can lead commentators to portray opposing conceptions negatively. I identify below four misconceptions that have been prominent in recent discussions and then apply the above discussion in responding to them.

One misconception claims that Article 82 contains a *mélange* of unrelated goals and that it cannot, therefore, provide a basis for effective decision making. If an observer looks only at selected cases, this may appear to be an accurate description of the goals of Article 82, because, as noted, the body of cases as a whole contains references to several goals, and the decisions do not always or even often explain how those goals relate to each other.

Where the goal references in cases are viewed in the context discussed above, however, they no longer appear random. Recognizing the structure of goals allows the analyst to see how seemingly disparate and unrelated goals relate to each other and to the underlying concept of competitive distortion. The lack of attention to the structure of goals in competition law decisions is unfortunate, but it is not surprising, given that the task of those who make such decisions is to decide a specific case and explain the reasons for it, rather than to clarify the development of the law in the area. There are, however, ways of improving the situation. For example, guidelines could be used to clarify the underlying goal structure and provide more accessible and integrated guidance for decision makers. This has been done in other areas of EC competition law, but very little effort has been made to do this in the context of Article 82, at least since the early years of its development. As we shall see, the first serious attempt to create such guidelines is very recent, and it has been shaped by a different conception of the goals of Article 82.

A second misconception claims that existing law under Article 82 does not seek to improve economic outcomes but is concerned with issues – such as fairness and European integration – which do not contribute to improving economic performance. This claim is then a basis for the conclusion that the law in the area should be changed, because competition law should pursue only economic goals. Given the importance attached in Europe to the goal of increasing European competitiveness, this argument takes on particular importance and calls for special attention.¹¹ If it were true, it would be a serious criticism of Article 82's goals.

The claim turns out, however, to be inaccurate and potentially harmful. The abuse concept has always been propelled by the idea that reducing distortions of the competitive process will improve economic outcomes. It was developed under circumstances in which improved economic performance was the highest priority for all economic policy making. In the early years of the development of the abuse concept, European competitiveness,

¹¹ See, e.g., the Community's ambitious “Lisbon Program”, which was launched in 2000 and which has sought dramatic improvements in competitiveness within the EU.

particularly in relation to the US, was seen as a major *raison d'être* for the process of European integration,¹² and this objective has been made even more explicit since the mid-1990s. The goal of reducing competitive distortion was specifically intended to improve the capacity of the competitive process to generate economic benefits, and the abuse concept has been a significant part of this economic policy thrust. Throughout its history, it has been developed by institutions whose central concern has been the improvement of economic performance in Europe. As noted above, the goals of fairness and European integration have supported this goal.

Third on our brief list of misconceptions is the much overused and vacuous claim that Article 82 is about “protecting competitors rather than consumers”. As other commentators have pointed out,¹³ this slogan has no analytical meaning. It may be well-suited for serving rhetorical purposes, but it sheds little, if any, light on the issues involved, and is more likely to confuse than to clarify the issues. The competitive distortion concept has been developed in order to protect the competitive process and thereby ultimately to benefit consumers. Discouraging distortions of the competitive process has been understood as a means of improving the effectiveness of markets, and consumers are the most direct beneficiaries of such improved effectiveness. In applying Article 82, the long-run goal of protecting consumers may also provide incidental and temporary benefits to particular market participants, but this does not alter the goal itself.

Finally, there is a claim that usually takes the following form: “European integration and fairness are separate political goals that are unrelated to the economic issues of competition law and thus should be disregarded.” Here the claim relates not to the confusion of goals mentioned above, but to the specific goals themselves. It is an important claim, because if it were accurate that these two goals are merely political, then there would be much to the argument that political circumstances have changed and that they are therefore no longer relevant and should be eliminated.

However, the claim is misleading. As noted above, both goals have been conceived and applied in the service of protecting the process of competition from distortion, a conception of the role of competition law that is anchored in the Treaty of Rome.¹⁴ Both derive their roles and their legitimacy from that central objective. When viewed in this context, they are therefore not political but economic goals. Again, the importance of analyzing the goals in the context of their overall structure is critical to understanding them.

This brief review of some of the more important misconceptions in the descriptions of the current understanding of Article 82's goals indicates just how badly deformed discussion of this issue has become. Eliminating these types of confusion and misconceptions from

¹² For discussion of the goals of European competition law in the context of the broader goals of European integration, see Gerber, *supra* note 1, at 334-371.

¹³ See, e.g., Edward T. Swaine, “‘Competition, Not Competitors,’ Nor Canards: Ways of Criticizing the Commission”, 23 *University of Pennsylvania Journal of International Economic Law* 597 (2002).

¹⁴ According to the current Article 3(g) of the EC Treaty, one of the goals of the EC is to achieve “a system assuring that competition in the internal market is not distorted”.

discussions of the current goal model should be of significant value in improving the value of the scientific and policy debates in this area.

II. ECONOMIC SCIENCE AND THE CONSUMER WELFARE MODEL

The Commission has recently moved toward a different conception of the objectives of Article 82. In it, the central idea is that dominant firm conduct is only harmful when and to the extent that it reduces “consumer welfare”, as defined by mainstream economic science – i.e., neoclassical economics.¹⁵ According to this standard, the basic issue in applying Article 82 is whether the conduct of a dominant firm leads to an increase of price above a competitive price.¹⁶ If it does, it is designated as harm to consumers, and this makes the conduct “anticompetitive” for purposes of the law.

This conception of the goals of Article 82 is scientific.¹⁷ It rests squarely on economic science and absorbs its terminology, and it depends on economic concepts to give meaning to the abuse provision. In it, “abuse” takes on a conceptually more precise and definable form. This scientific approach also means that the analysis must rest on quantitative methods. The degree of harm can be quantified, and it is subject to formal (i.e., mathematical) economic modeling techniques. An economist can analyze market data by reference to a market model that has been accepted in the economics literature or she can develop a model specifically for the situation at hand. Such models can be evaluated by other economists according to accepted standards within the economics profession. Ideally, therefore, the process of assessing conduct is rigorous, scientific and objective. At the conceptual level, therefore, it is a much simpler and clearer conception of the goals of Article 82.

Application of this methodology has many implications for the analysis of unilateral conduct under Article 82.¹⁸ For example, it calls for (or at least privileges) the use of a shorter time frame in assessing harm to competition. Economic analysis of price effects is most effectively used at a specific point in time. The longer the time frame, the less confidence

¹⁵ In the context of competition law, the neoclassical model of economics remains the central and often the sole reference point. Newer developments in economic theory that deviate from that model have so far found little traction. For general discussion of many of the recent trends, see, e.g., Diane Coyle, *The Soulful Science: What Economists Do and Why it Matters*, Princeton University Press, 2007.

¹⁶ This description is, of course, an oversimplification. There are many controversies among economists about the exact measure to be used. For our purposes here, however, the point is that whatever the exact standard, it must be precisely articulated in economic terms, defensible according to the conventional standards of the economics profession, and quantifiable. For further discussion, see Massimo Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, 2004, at 17-26.

¹⁷ For full treatment by a group of leading economists advising the Commission, see Report of the EAGCP (Economics Advisory Group on Competition Policy), “An Economic Approach to Article 82”, at: http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf.

¹⁸ For discussion of the embeddedness of economics in the institutions of European competition policy, see David J. Gerber, “Competition Law and the Institutional Embeddedness of Economics”, in Josef Drexler, Laurence Idot and Joël Monéger, eds., *The Crisis in Competition Law: A Comparative Perspective* (approximate title), forthcoming 2007.

economists are likely to have in the assessment of specific price effects.¹⁹ Game-theoretic modifications can extend the time frame, but this reduces the clarity of the analysis and may undermine confidence in its predictive capacities. The focus therefore remains on a narrow analytical time frame.

In promoting this conception of the goals of Article 82, the Commission is applying to Article 82 an analytical framework that it has recently begun to apply in other areas of competition law. It is sometimes called the “US antitrust model”, because it was developed in the United States and is most closely associated with the US antitrust system.²⁰ In the late 1970s it began to take hold in the US courts and enforcement agencies, and by the end of the 1980s it had achieved orthodoxy. It was given impetus in Europe by experience in the UK, where economic analysis began to be pursued with much success around the turn of the new century. The Commission began moving toward this model in the late 1990s, and by 2004 it had established its “more economic approach” in many areas of competition law.²¹ Article 82 represents the one area of competition law where its success has been limited.

A. Misunderstanding the Consumer Welfare Model

Unfortunately, there has also been significant misunderstanding of this conception of the goals of Article 82. One source of misunderstanding is the terminology that is often used to refer to it. The term “more economic approach” has become the code word for this conception of European competition law, and it is frequently used in referring to the Commission’s proposals under Article 82. Although in some areas of competition law, the use and meaning of the term have caused little difficulty, its application to Article 82 has proven more problematic.

An underlying problem is that the term “more economic approach” is ambiguous and in this context potentially misleading. For some, it implies that the new approach involves nothing more than a change of emphasis within an existing “approach”. In this interpretation, it merely represents more use of economics in ways that economics has previously been used, but not fundamental changes in the content of the law. For others, however, the term “more economic approach” refers to a *new approach*, one that is defined by new uses of economics. It thus involves much more significant changes in the law under Article 82. In its Discussion Paper on the reform of Article 82 (cited above), the Commission referred to both continuity and change, but it did not clarify the nature and extent of each. In exploring new directions, it

¹⁹ Measurement is not limited to short-term effects, but this is the central reference point. It is the point at which the economic modeling that is central to the economic approach can best be performed, and it is the point, therefore, where economists can have the most confidence in its predictions. For discussion, see, e.g., Lawrence A. Boland, *The Methodology of Economic Model Building*, Routledge, 1989.

²⁰ For discussions of this “model” in comparative perspective, see David J. Gerber, “Competition Law”, in Peter Cane and Mark Tushnet, eds., *Oxford Handbook of Legal Studies*, Oxford University Press, 2004, at 510; David J. Gerber, “Comparative Antitrust Law”, in Mathias Reimann and Reinhard Zimmermann, eds., *Oxford Handbook of Comparative Law*, Oxford University Press, 2007, at 1193.

²¹ For discussion of the more economic approach and its development, see, e.g., Lars-Hendrik Röller, “Economic Analysis and Competition Policy Enforcement in Europe”, in Peter A.G. van Bergeijk and Erik Kloosterhuis, *Modeling European Mergers: Theory, Competition Policy and Case Studies*, Edward Elgar, 2005, pp. 11 *et seq.*

recognized that it is legally bound to follow interpretations by the European Courts, but it sought to integrate existing case law interpretations with its proposed new directions. This led to uncertainty about what the Commission actually intended to achieve in its new program and the extent of the changes it sought make, especially insofar as such changes might deviate from existing bases of authority. This uncertainty and skepticism may have further nourished misunderstandings and encouraged both intellectual and political resistance to the changes.

B. The Analytical Key: Distinguishing Two Roles of Economics

In order to reduce misunderstanding of the consumer welfare model, it is important, therefore, to analyze the precise roles that economic science is intended to play in the “more economic approach” under Article 82. Analysis of the debates over the future of Article 82 reveals that they frequently conflate two distinct roles for economics. Distinguishing these two roles provides a key to analyzing the debate and to understanding the confusion and misunderstandings that have attended it.

One role uses economics to improve the capacity of enforcement agencies and courts to ascertain the facts – i.e., to understand what has happened or is likely to happen. More precisely, economics in this sense is used to identify correlations and potentially causal relationships between certain kinds of conduct of dominant firms and changes in market conditions that reduce “consumer welfare”. I call this the “fact-interpretive” role of economics. Competition law norms refer to the effects of particular conduct, and economic science can be used to assess such effects more precisely, more effectively and with greater methodological stability than is otherwise possible.

The value of increasing the use of economics to improve factual analysis is well established. Important decisions of the European Courts that have triggered dissatisfaction with existing law refer primarily or exclusively to this role.²² It takes on particular importance in the context of unilateral conduct because the effects on competition of single-firm conduct are highly contextual. Whereas the harmful consequences to consumers from cartel conduct are well established and largely uncontroverted, the difficulties of distinguishing the pro-competitive and anticompetitive effects of unilateral conduct are much greater. This heightens the need for more extensive economic analysis of the factual contexts in which those effects must be assessed.

There is, however, a second role for economics imbedded in the discussions. Here the role of economics is normative, which is to say that economic science *provides the norms of conduct* under Article 82. In much of the recent literature on the reform of Article 82, there is an implicit assumption that the issue of whether there has been a violation of Article 82 is to be measured by whether the relevant conduct reduces “consumer welfare” (as defined by neoclassical economics) or can reasonably be expected to lead to such a reduction. In this

²² For further discussion of the important merger cases that have made this reference, see David J. Gerber, “Courts as Experts in European Merger Law”, in Barry Hawk, ed., *Fordham Corporate Law Institute 2003: International Antitrust Law and Policy*, Juris Publishing, 2004, at 475 *et seq.*

literature, it is simply assumed that economic science itself provides the relevant criterion for assessing the legality of dominant firm conduct. From this perspective, prior decisions by courts or administrative authorities have little direct relevance for determining the norms of conduct. Economics provides the norms and dictates the analysis of whether particular conduct violates the norms.

This assumption raises significant policy issues. Economics is a “positive” science – i.e., it seeks to describe or explain events or conditions. Its role is to answer “what” questions – for example, “what happened in the past or what can be expected to happen in the future?” In this capacity, it cannot in and of itself answer “should” (or “normative”) questions. It can be assigned normative tasks, whereby, for example, it maps the concept of consumer welfare onto the concept “anticompetitive”; but this requires a decision authorized by the legal-political system. If such an assignment is made, it necessarily alters the framework within which economists work as well as the roles they perform, and it may introduce elements into economic analysis that would normally not be present when the analysis is performed within the community of economists for their descriptive-analytical purposes.

Distinguishing these two roles helps to clarify and perhaps recast the issues. It becomes clear that a key issue should be whether the norm-setting organs of the EU – the Courts and the Commission – should assign specific normative roles to economics and, if they do, what those normative roles should be. Lack of transparency on this issue may underlie many of the concerns expressed about the reform process.

III. IDENTIFYING THE DIFFERENCES

Distinguishing between these two roles of economics also allows us to see more clearly the similarities and differences between the current model of Article 82's goals and the conception espoused by the Commission. If we look at one of these two roles, the fact-interpretive role, the new conception does not represent significant change. If we look at the other role, the normative role, there *is* a change, and it is fundamental to the entire normative enterprise of Article 82. It involves more than just a change of emphasis within the existing “approach”. The distinction between the two roles is therefore central to the entire discussion of the future of Article 82. Without it, the discussion is likely to remain unclear and confused.

The “fact-interpretive” role of economics does not involve fundamental change. It merely calls for more and better use of the tools of economic analysis in interpreting facts. When we identify and isolate this role, there is little basis for resistance to change. Economics is used to provide more and better data for use in assessing the consequences of conduct and to improve the capacity of European competition law institutions to perform this function. In this role it can provide potentially very significant positive value for both the institutions themselves and for firms assessing the legality of their conduct.

There are, of course, limits to how extensively the tools of economics can be employed. Their use imposes costs on enforcement institutions and courts. Economists are

expensive, and unlike the situation in the US, much of the cost of increased use of economics is borne by those institutions.²³ Moreover, the potential value of increased use of economics requires firms to employ economists for the assessment of their potential competition law liabilities, and this cost can again be substantial. These costs may therefore impose some constraints on the use of economics, but they are the price that has to be paid for better analysis of causality in economic relationships. Moreover, the issue is how the costs of using economics *compare with* the costs of the system without the use of economics, and it is by no means clear in that comparison that reasonable use of economics would significantly increase costs.

The locus of differences between the competitive distortion conception of Article 82's roles and the consumer welfare approach is the second or "normative" role being assigned to economics. Here the differences *are* fundamental. Whereas the competitive distortion model examines competition *as a process* and seeks to identify conduct that impairs or might impair that process, the consumer welfare model measures certain *results produced by that process*. It assesses conduct by reference to a specific and quantifiable measure of the effects of such conduct. It does not seek to evaluate conduct by reference to the process itself – either its structure or its dynamics. The focus of inquiry is thus fundamentally different, and would represent a fundamental change in the goals of Article 82. The dimensions and implications of this central difference are numerous. I note here some of the more important ones.

a) *Dimensions of the legal inquiry*

In place of a goal structure that accommodates and relates several subsidiary or derivative goals and takes into account a variety of factors in assessing anticompetitive effects, the consumer welfare model calls for a single criterion or norm for applying the provision. If "anticompetitive" in the context of Article 82 is equated with "harm to consumer welfare" in the specific economics-based sense used here, there is no room for a decision maker explicitly to consider other issues. The conduct either does or does not meet the economic criterion applied. The inquiry ends there (economists may disagree, of course, about the application of the relevant economic theory to the conduct, but that is a different issue).

²³ In US private antitrust litigation, in contrast, the costs of using economists are borne almost exclusively by the parties themselves, because each party has the responsibility for adducing its own evidentiary material. In continental European procedure, these responsibilities and their attendant costs fall primarily on the judges rather than the parties. For discussion of these procedural differences, see David J. Gerber, "Private Antitrust Enforcement in the U.S. and Europe: A Comparative Perspective", in Thomas Möllers and Andreas Heinemann, eds., *The Enforcement of Competition Law in Europe*, Cambridge University Press, forthcoming 2007.

David J. Gerber, "The Future of Article 82: Dissecting the Conflict", in Ehlermann and Marquis, eds., *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC*, forthcoming 2008.

b) *Authority issues*

The two models also use different sources as guides for decision-making and as authority for decisions reached. Application of the competitive distortion model relies primarily for these functions on legal analysis of prior cases and on a loose set of ideas about injury to the competitive process. Case decisions by courts and administrative authorities provide the main reference points for shaping decisions about the application of Article 82's norms. Although guided in its early years by a framework of ideas propounded by a group of European legal and economic scholars,²⁴ development of the abuse concept since at least the late 1970s has relied heavily on case-based experimentation. In this context, there is no clearly-articulated theoretical framework to which an analyst can refer to justify her decisions.

In contrast, where the consumer welfare model is used as the normative basis for decisions, the decision maker does have a theoretical reference framework on which she can or, as the case may be, must rely. Legal sources (e.g., cases) that are inconsistent with that framework have little or no direct role in the decision-making process. The decision maker may refer to such cases for political reasons or for insights into factual scenarios, but if the consumer welfare model controls decision-making, she has no obligation to do so. Again, the only question is whether under appropriate application of economic science, there is harm to "consumer welfare," as determined by economics. What prior cases have said is simply not relevant. This means that there is little, if any, room for combining the two perspectives in a consistent and meaningful way. One can imagine decision-making protocols intended to bridge the conceptual gap between these two approaches, but it would remain a fundamental inconsistency.

c) *Expertise and interests*

Not surprisingly, the two conceptions of Article 82's goals also implicate different forms of expertise and the interests that are associated with those possessing the relevant forms of expertise. The competitive distortion model relies for its application on legal expertise. The central issue is how the language and reasons that are accorded status in the legal system can be applied to new factual material, and here the capacity of legal professionals to grasp, apply and also manipulate language is the primary source of expertise.

Where the consumer welfare model is used, legal language has significantly less importance. In applying this model, economists and their professional expertise play the central role. Economists alone will in most cases have the necessary tools to apply the model in any kind of rigorous way. They may be able to provide heuristics or other forms of guidance to legal decision makers that allow them in some cases to approximate outcomes that would be obtained through a more complete economic analysis. Administrative officials and judges might then perform some of the tasks of applying the consumer welfare model, and it may be possible to develop "rules" or "principles" for using the consumer welfare

²⁴ For discussion, see Gerber, *supra* note 1, at 356-358.

standard that can effectively guide them in taking some kinds of decisions without the aid of economists, but economists remain the ultimate source of authority.

d) *Time frames*

Finally, the two models use different time frames. The competitive distortion model uses a temporal perspective that is necessarily developmental and may vary significantly, depending on the type of harm being evaluated. The characteristics of the particular type of restraint involved will have differing temporal horizons, and the analyst can apply whatever time frame seems appropriate for assessing those effects. The consumer welfare model, on the other hand, relies primarily on price-output calculations, often as expressed in mathematical models. These are, as noted above, typically framed within a much narrower time span, because confidence in the models diminishes rapidly where longer time periods are used.

These comparisons highlight differences between the two models and thus reveal some of the implications of moving from the current conception of Article 82's goals to one in which an economic science model provides the content for Article 82. The two models shape analysis in fundamentally different ways, and they may lead to different outcomes. Identifying the differences and recognizing some of their implications clarifies the dimensions of choice about the future of Article 82. Resistance to the Commission's vision of the future of Article 82 may stem, in part at least, from the perception that the process of reform of Article 82 has not adequately identified the nature of the changes and the legal and political basis for those changes, and thus clarifying those factors may help to prepare the way for more constructive discussion of these issues.

IV. CONCLUDING COMMENTS

Misconceptions, misrepresentations and distortions have clouded debates and discussions regarding the future of Article 82. Such misconceptions relate to both the existing conception of Article 82's goals and the conception that has been advanced to replace it. Misconceptions relating to the current conception of goals often arise from insufficient awareness of the objectives that have been pursued in developing the law in this area and inadequate appreciation of the relationships among the goals that are articulated in individual decisional contexts – i.e., inadequate awareness of the structure of goals. Misunderstandings relating to the proposed alternative often result from confusion of the goals that might be played by economists and the science of economics in this alternative conception. In particular, we have seen that reform discussions typically fail to distinguish between two distinct roles for economics, and thus drawing that distinction and focusing specific attention on the normative role of economic science in Article 82 and on its potential implications can contribute to a clearer understanding of those discussions. This makes visible the nature and degree of the changes being proposed, and highlights the points on which debate can usefully focus.

These misconceptions and confusions have potentially harmful effects, because they increase the probability that important policy decisions will be based on an unnecessarily confused framing of the issues. Moreover, when these misconceptions and distortions enter the discussion, they tend to replicate themselves and to become durable components of thinking about the issues involved. This makes it all the more important to be wary of the potential for such distortions and to regularly revisit and re-examine the discussions in order to identify and minimize them. If we reduce or eliminate these two sets of misunderstandings, the conflict turns out to be narrower than sometimes thought, but also more fundamental

When the potential for such distortions and misconceptions is kept in mind and when the very distinct roles played by economics in a competition law system are kept in focus, we can begin to discern opportunities for fashioning a more firmly grounded pathway for developing the law relating to unilateral conduct. In this vision, the experience gained from applying the competitive distortion model could serve as the presumptive base for further development of Article 82, but normative uses of economics could be continually tested in individual contexts and case decisions. Where norms based on economics generate outcomes that are more convincing for legal decision makers than the competitive distortion model, those decision makers could either apply the economics-based norm, where they have authority to do so, or seek authority to do so where they do not have it. This opens a way of moving forward over time, but this scenario is very different from moving immediately to an economic science model as the controlling source of norms for all decision-making under Article 82. When Jon Vickers refers to “economics-based rules”,²⁵ he appears to envision a pathway at least somewhat similar to this, and, in my view, it holds great promise.

²⁵ See, e.g., Jon Vickers, “Abuse of Market Power”, 115 *Economic Journal* 244 (2005). I am grateful to Professor Vickers for sharing his insights into these issues with me.