Introduction: Antitrust Economics, Policy, and Law at the Crossroads: A Reorientation

I. The Context

The body of U.S. antitrust laws and its developments and changes over nearly one hundred years have had significant influence on antitrust legislation and enforcement worldwide.¹ Developments and changes in antitrust policy have so far always been accompanied by two characteristics. On the one hand, there has been a close linkage between the improvement of price theory and the development of antitrust theory², a linkage that to some extent is being given up within the context of recent changes. On the other hand, changes in antitrust theory have always been supported by particular schools of thought.³ One of these schools of thought, the Chicago School, which in contemporary economics is mainly known within the context of monetarism (Karl Brunner, Milton Friedman, Allan Meltzer et al.), has developed a legal and economic approach to antitrust, mainly throughout the 1960s and 1970s. This approach is supported by a group of economists and lawyers (Bork, Demsetz, Director, Posner, Stigler et al.) who have gained considerable influence on contemporary U.S. antitrust policy.⁴

This is not only shown by the "turnaround" in antitrust policy announced by former Secretary of Justice William French Smith in 1981 but also by the new Merger Guidelines of 1982/1984, the Vertical Restraints Guidelines of 1985, the Antitrust Law Reform Package of 1986, and by the fact that judges

¹ This significant influence has mainly two reasons. The U.S. antitrust statutes are nearly one hundred years old and they represent the largest experience in application to date, cf. Schmidt, Ingo, Wettbewerbspolitik in den USA, in: Cox, Helmut, et al. (eds.), Handbuch des Wettbewerbs, München 1981, pp. 533-556, 535; Möschel, Wernhard, Antitrust and Economic Analysis of Law, 140 JITE (1984), pp. 156-171, 156.
on the unofficial "waiting list", to be appointed to U.S. Federal Courts, are preeminent Chicago scholars (e.g., Easterbrook, Posner): 5

Tab. 1: The U.S. Federal Supreme Court in 1987/88

<table>
<thead>
<tr>
<th>Name</th>
<th>Appointed</th>
<th>President</th>
<th>Political Opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brennan</td>
<td>1956</td>
<td>Eisenhower</td>
<td>liberal</td>
</tr>
<tr>
<td>White</td>
<td>1962</td>
<td>Kennedy</td>
<td>center-conservative</td>
</tr>
<tr>
<td>Marshall (black)</td>
<td>1967</td>
<td>Johnson</td>
<td>liberal</td>
</tr>
<tr>
<td>Blackmun</td>
<td>1970</td>
<td>Nixon</td>
<td>liberal</td>
</tr>
<tr>
<td>Rehnquist (Chief Justice)</td>
<td>1972</td>
<td>Nixon</td>
<td>conservative</td>
</tr>
<tr>
<td>Stevens</td>
<td>1975</td>
<td>Ford</td>
<td>independent</td>
</tr>
<tr>
<td>O'Connor (female)</td>
<td>1980</td>
<td>Reagan</td>
<td>conservative (Chicago)</td>
</tr>
<tr>
<td>Scalia</td>
<td>1986</td>
<td>Reagan</td>
<td>conservative (Chicago)</td>
</tr>
<tr>
<td>Kennedy'</td>
<td>1987</td>
<td>Reagan</td>
<td>center-conservative</td>
</tr>
</tbody>
</table>

* The appointment of Justice Bork was not confirmed by Congress and Justice Ginsburg resigned from the appointment made by President Reagan

** Political opinion was not confirmed yet

The controversy between the Chicago School and another school of thought - the Harvard School - which has dominated U.S. antitrust policy for nearly half a century, is of eminent relevance to competition policies in Europe, especially with regard to the European Economic Community (EEC). Furthermore, major developments in U.S. antitrust policy tend to be adopted by the German Act Against Restraints of Competition (ARC), the so-called Gesetz gegen Wettbewerbsbeschränkungen (GWB) 6 with a certain time-lag. This

5 For evidence cf. Toepke, Utz P., Antitrustspruchpraxis 1985/86, in: FIW (ed.), Schwerpunkte des Kartellrechts 1985/86, Verwaltungs- und Rechtsprechungspraxis Bundesrepublik Deutschland, EG und USA, Köln et al. 1987, pp. 175-200, 184 f. The Committee on the Judiciary and the U.S. Senate have approved the nomination of Judge Scalia but refused to appoint Robert H. Bork, one of the leading representatives of the Chicago School, as a member of the Federal Supreme Court in November 1987. The majority vote against him was based on the belief that he represented extreme conservative views not in accordance with the constitution in various legal fields.

6 The German Act Against Restraints of Competition (ARC) was passed by parliament in 1957 and was heavily influenced by the Decartelization Laws of the WW II Allies as well as U.S. antitrust philosophy after WW II. This is documented by the fact that parliament sent a commission to the United States in order to study antitrust.
Interdependence between German competition policy and U.S. antitrust policy becomes even more important under the impression that the revision of antitrust enforcement and adjudication in the United States is rather radical and could lead to a "de facto repeal" of several sections of the antitrust laws\(^7\) and, therefore, could exert strong influence on German antitrust legislation and policy, esp. in the field of mergers.\(^8\)

II. Developments in U.S. Antitrust Policy During the 1970s and 1980s

Interpretation and enforcement of the United States antitrust laws have gone through several stringent as well as lax phases over the nearly one hundred years since the Sherman Act was passed. Although it is difficult to determine at what point in time dissenting opinions which have formed current antitrust philosophy under the Reagan Administration appeared as a counterpart to mainstream antitrust, one can identify certain landmarks. These have their roots partly in the developments of the 1970s but are centred mainly in the current decade, in which the departure from mainstream antitrust theory has become more obvious.\(^1\)

The main concern of the contribution submitted is to analyze the economic basis behind the recent evolution of U.S. antitrust policy. The recent evolution of U.S. antitrust shall be presented against the background of the

---

\(^7\) Cf. Mueller, Dennis C., United States' Antitrust: At the Crossroads, in: de Jong, Henk W., and William G. Shepherd (eds.), Mainstreams in Industrial Organization - Book 2, Dordrecht et al. 1986, pp. 215-241, 215; it should be noted that if this tendency continues, it will mean that European cartel laws will be more severe than the U.S. statutes, thus reversing previous historical trends.

\(^8\) The discussion has just recently begun in the Federal Republic of Germany and has led to calls for a reorientation of German competition policy by business representatives, cf. Hölzler, Heinrich, Die Reagan-Administration hat im Kongreß ein Novellen-Paket zur Reform der Kartellgesetze eingeführt, Handelsblatt No. 72, April 15 (1986), pp. 6 f.

\(^1\) The basic ideas of Chicago antitrust reach back to pre WW II Chicago economics; Kitch, Edmund W., The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970, 26 JLE (1983), pp. 163-233, 231: "The problem with that story is that the basic truths that were being taught at Chicago ... were not really new truths. They were old truths. The principal effect ... has been to return economics to its older traditions."
dominant political and constitutional principle governing most western hemisphere states, i.e. the separation of power into three separate and largely independent sectors: the legislative, the executive, and the judicative.2

1. Antitrust Economics

Numerous and complex factors, among them a variety of political and social developments, account for the recent changes in the field of antitrust. Among these factors, however, the one that played the most prominent role was the change in thinking within the economics profession.3

An efficiency-oriented approach to antitrust law and economics has emerged from a newly developed field called "the economic analysis of law"4, which inquires into actual and potential legislative rules and their public and private enforcement under efficiency considerations.5 This approach has led to a dramatic shift in the mainstream economic tenet concerning the size of monopoly welfare losses and efficiency gains, resulting from various market structures and business practices. The approach mainly discards the former belief that increased industrial concentration causes significant losses in welfare. The new approach gives an increased weight to economic evidence, efficiency, and overall economic welfare effects.6

Antitrust law and economics became increasingly the current antitrust paradigm. It did not develop from a full-blown antitrust philosophy, but was rather the result of reflexions on specific questions raised by several antitrust cases.7 The basic features of the Chicago School of Antitrust Law and

---

2 The presentation of recent developments will be restricted to landmark changes which for practical reasons will be categorized and dealt with, according to the following sequence: economics, executive, judicative, legislative.
3 Cf. Mueller, United States' Antitrust ..., op. cit., 221.
6 Cf. Mueller, United States' Antitrust ..., op. cit., 215, 221.
Economics can be attributed to the works of Aaron Director and George J. Stigler in the 1950s and 1960s. Chicago School theory emerged from these basic works and applies neoclassic price theory to antitrust problems. The Chicago School criticizes the structural approach of the Harvard School for doing particularistic industry studies, as being untheoretical, and discarding or playing down important principles of economic theory.

What began as criticism and the rejection of the mainstream position, later crystallized into a body of new theories and an orthodox position, put forward in particular by Bork. It centres around four fields of economic research:

1. The most advanced and elaborated field of economic research that has shaped the Chicago approach to antitrust is the deregulation issue. It can be shown that under certain conditions free competition among firms is not efficient in producing socially optimal allocation of resources and a socially desirable distribution of income. This can be the case for economic (market failure) or non-economic (e.g., protection of a natural resource) reasons. The first instance, as a rule, results in a natu-

8 Cf. Director, Aaron, and Edward H. Levi, Law and the Future: Trade Regulation, 51 NWULR (1956), pp. 281-296. Director was strongly influenced by the works of Frank H. Knight, cf. Knight, Frank H., Risk, Uncertainty, and Profits, Boston, New York 1921, and idem, Some Fallacies in the Interpretation of Social Cost, 38 QJE (1924), pp. 582-606. So were his colleagues and students, such as Bork, Bowman, McGee, Telsner et al. who elaborated on Director's key ideas. For further reference cf. Posner, The Chicago School ..., supra, 926: note 2.


10 Cf. Posner, The Chicago School ..., supra, 931; we will carry out an thorough analysis of the main differences in the features of the schools, in the contribution presented.


14 For details on these reasons cf. Koch, Industrial Organization ..., op. cit., 436-440.
eral monopoly, which is characterized by increasing returns to scale along relevant demand. This constellation inevitably leads to a (natural) monopoly. In the case of a natural monopoly the public steps in, leaves the monopoly with the supplier, but regulates the monopolist's parameters of action by the promulgation and enforcement of rules constraining the monopolist's behavior.\textsuperscript{15}

From 1960 to 1975, a series of economic studies showed that regulation caused inefficiency.\textsuperscript{16} Since 1970, new insights have shown that political causes frequently motivate the regulation of particular industries.\textsuperscript{17}

These insights supported the view that changes in regulatory policy as well as regulation itself were often not economically justified but were the result of attempts by interest groups to obtain a more favorable redistribution of wealth.\textsuperscript{18} Since economic analyses showed that public regulatory policies did not operate in the traditional public interest sense (economic efficiency and equitable distribution of income), regulatory reform movement emerged.\textsuperscript{19} This deregulation movement calls for an end to the entry and price regulation of industries with basically competitive structures and precise economic impact analysis for cases in

\textsuperscript{15} Cf. Noll, Roger C., The Political Foundations of Regulatory Policy, 139 JITE (1983), pp. 377-404, 387 f.; regulation, in fact, is not restricted to single supplier markets. There can be numerous market participants, the other possibility being that the public is itself the supplier, cf. Shepherd, The Economics ..., op. cit., 349.

\textsuperscript{16} Cf., e.g., Averch, Harvey, and Leland L. Johnson, Behavior of the Firm Under Regulatory Constraint, 52 AER (1962), pp. 1052-1069.


which market failure is a more plausible explanation.20
As a result of this change in economic thinking, Congress, the Reagan Administration, as well as the regulatory agencies, have jointly deregulated airlines, railroads and trucking.21

(2) The second field of economic research centres around the transaction-cost approach.

Vertical contractual linkages, as well as vertical integration, can be seen as institutions for mediating economic activities at some cost.22 Some contractual ties such as exclusive dealings and requirements contracts used to be found illegal under Sec. 3 of the Clayton Act because of their effects on competition. 23

Recent research has focused on the costs arising from the use of different contractual linkages and has emphasized possible economic advantages of contractual ties over other linkages leading to cost savings.24

This has led to the notion among economists that vertical arrangements in general and vertical mergers in particular are efficiency-enhancing, carry little or no anticompetitive effects and, therefore, should not be per se illegal.25

20 Cf. Sullivan, Antitrust, Microeconomics, and Politics..., supra, 5; and Noll, The Political Foundations..., supra 402.
21 Cf. Keeler, Theories of Regulation..., supra, 104.
23 Cf. Mueller, United States’ Antitrust..., op. cit., 221 f.
(3) The third field of research is associated with the so-called new-learning hypothesis.

Assuming the presence of economies of scale, the traditional industrial organization approach assumed that it was necessary for firms in an industry to achieve a certain size in order to be efficient in the sense of having lower average costs.\(^{26}\) This led to the reasoning that size would cause lower costs and, therefore, bring about increased efficiency. The new-learning hypothesis reverses this causal chain, stating that it is efficiency which is responsible for size as an important component of industry structure. It is argued that firms often differ in their degree of efficiency, and that the more efficient firms grow more rapidly than their relatively inefficient competitors.\(^{27}\) Therefore, size is determined by efficiency, not vice versa. A variety of empirical studies have tried to support this hypothesis.\(^{28}\)

(4) The fourth field of research inquired into the question of how competitive behavior in setting prices was to be distinguished from predatory conduct that would eliminate competitors from the market and, therefore, was considered anticompetitive.\(^{29}\) Predatory pricing or conduct in this context can be defined as hindering competitors by price-cutting which aims at disciplining them or driving them out of the market. Such a price policy can result in the crowding out of the attacked firm and, at


the same time, in a disproportionate internal growth of the attacked firm. Nonrealized profits or losses of the first period can then be compensated by increased profits in the second period after having disciplined the other firm or after the disappearance of this firm.

What came to be called the *Areeda/Turner*-rule, placed economic efficiency gains above all other objectives. The rule treated conduct as anti-competitive if it led to prices below the short-run marginal costs of the alleged predator, whereas before the advent of the rule the courts used to compare prices to long-run average cost estimates. These proposals by *Areeda* and *Turner* have stimulated a lively discussion on the question of what criteria should be applied by the courts in order to distinguish predatory from non-predatory conduct. This change in economic thinking, which later played a key role in several private antitrust suits, had an almost immediate impact on judicial thinking.

2. Antitrust Enforcement

The enforcement of the United States antitrust laws is characterized by a dual system encompassing the *Antitrust Division* (AD) of the Department of Justice and the *Federal Trade Commission* (FTC) as enforcement agencies. Although the Federal Trade Commission has an independent legal status, its enforcement duties and general policies can be influenced by the legislative powers (budget). The AD's overall antitrust policy is framed by the Secretary of Justice who executes government policy and is responsible politically. The administration's appointments to both agencies have led to wide fluctuations in the severity and emphasis of enforcement in the past, and to broad implicit limitations of the agencies' permitted range of action.

---

30 Cf. Mueller, United States' Antitrust ..., op. cit., 218.
32 Cf. Mueller, United States' Antitrust ..., op. cit., 219; for this case made, see also the reasoning on predatory pricing in this introduction.
34 Cf. Shepherd, Public Policies ..., op. cit., 132-139, and 148 for the main steps of antitrust decisions and litigation; for the development of the agencies' resources, see Tab. 2.
After President Reagan came to office, the former heads of the enforcement agencies Baxter and Miller III announced a 'New Deal' in antitrust which was strongly supported by former U.S. Secretary of Justice William French Smith.35

This new enforcement policy of antitrust is based on the view that the mistaken concepts of the past Administration(s) have generated anticompetitive effects by not placing enough emphasis on economic efficiency, and that there is a greater need for clarity and, hence, certainty in the laws.36

Under the influence of this new direction and emphasizing this new philosophy, the antitrust authorities have increasingly concentrated their activities on prosecution for horizontal cartel agreements, whereas prosecution for strategic behavior (unilateral action), as well as stringent merger enforcement, have declined in importance.37 Furthermore, vertical arrangements of competitors are not seen as per se anti-competitive because of anticipated efficiency gains along the chain of production and distribution.38

a. The Antitrust Division of the Department of Justice

The Antitrust Division of the Department of Justice (AD) and the offices of the United States Attorneys have statutory power to enforce the antitrust laws of the United States.39

The most drastic change in antitrust policy since the depression days40 is also reflected by the policy of the AD. As has been noted supra this policy of the agencies is being influenced by staffing and funding.

The AD is being headed by civil servants that were appointed by the Reagan Administration because they were close to Chicago economics and, the-

36 Cf. Smith, supra, pp. 55,973 f.
37 Cf. Möschel, Antitrust ..., supra, 156.
38 Cf. Smith, supra, p. 55,975; for the economic reasoning cf. supra as well as Part 4 of this contribution.
Therefore, strictly followed government policy. The fiscal request by the AD for the years 1981 - 1986 shows a trend towards relaxation in enforcement.

Tab. 2: Fiscal Requests of the Antitrust Enforcement Agencies:
1982 - 1988 (million $)

<table>
<thead>
<tr>
<th>Antitrust Division of the Department of Justice</th>
<th>Federal Trade Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>1982 44,0</td>
<td>68,8</td>
</tr>
<tr>
<td>1983 46,5</td>
<td>60,0</td>
</tr>
<tr>
<td>1984 44,3</td>
<td>64,2</td>
</tr>
<tr>
<td>1985 45,6†</td>
<td>66,5</td>
</tr>
<tr>
<td>1986 43,5</td>
<td>65,5</td>
</tr>
<tr>
<td>1987 46,4</td>
<td>65,0</td>
</tr>
<tr>
<td>1988 45,6‡</td>
<td>69,9†</td>
</tr>
</tbody>
</table>

*Reflects the transfer of 20 positions from the Civil Aeronautics Board to the AD, including the corresponding budget
*In contrast, $48.5 million were authorized by the Committee of Congress
*Request fully authorized


In addition to the decrease in funds, there has been a significant re-allocation of internal resources supporting action against government maintained monopolies in order to repel the influence of regulatory commissions and foster competition in exempted industries.

This recent policy is characterized by what might be called 'bread and butter antitrust' and encompasses two general directions:

41 For the four Assistant Attorneys General Baxter, McGrath, Ginsburg, and Rule that were appointed by the Reagan Administration, cf. TRR No. 478, February 23, 1981, No. 626, December 12, 1983, No. 713, July 23, 1985, and No. 818, July 21, 1987, respectively.
42 Cf. CCH TRR No. 827, September 21, 1987, p. 3. This is not true for 1987 and 1988 since 'new policy' has been established via personnel staffing already, making restrictive funding obsolete.
44 Cf. Tollison, Antitrust in the Reagan Administration ..., supra, 216.
- non-interference in the market process (as far as possible);
- rigorous prosecution of cartels, especially in areas where the use of sealed bidding procedures by the government promotes collusion of its input suppliers (bid-rigging).

With regard to the evaluation of mergers, there is a strong trend towards taking into consideration possible efficiency effects as well as effects resulting from foreign competition.\(^\text{45}\)

As a result, the Merger Guidelines of 1984, issued by the AD, have raised the thresholds for challenging a merger in order to attain possible efficiency gains. In essence, these guidelines contain changed enforcement rules along the following lines:
- critical market shares in merger cases have been augmented;
- the boundaries of the relevant market have been enlarged;
- the efficiency-defense has been introduced;
- the failing firm defense has been extended to falling divisions of otherwise healthy firms;
- vertical mergers have to have significant horizontal effects before being challenged; and
- conglomerate mergers are being considered a non-problem.

This objective is furthermore attained by bringing less enforcement actions to the courts and transforming merger antitrust practice into an "agency negotiation policy" by working with merging parties to achieve relief by consent. This can be viewed as an application of relatively permissive "shadow guidelines" reserving the stricter guidelines for litigation. However, this does not change the opinion of many courts obviously since there seems to be a rather strict application of merger standards by the courts even after the issuance of the 1984 Merger Guidelines.\(^\text{46}\)

Pure conglomerates are seen as a non-problem\(^\text{47}\) and the essence of the new policy towards vertical restraints\(^\text{48}\) is that they are considered procompetitive and efficiency enhancing. They should be treated according to a "rule of

\(^{45}\) Cf. OECD-Länderbericht 1983/84 ..., op. cit. 30.
\(^{47}\) Cf. Möschel, Antitrust ..., supra, 156.
\(^{48}\) Cf. Vertical Restraints Enforcement Guidelines, Issued by the Department of Justice, TRR. No. 687, Part II.
and only be subject to legal action if they lead to negative horizontal effects in a particular market. In cases of tying arrangements and resale price maintenance, the AD has tried to change existing per se rules of illegality by friend-of-the-court briefs (amicus curiae-procedure) into rules of reason, in order to take into consideration possible efficiency effects. However, a bill designed to codify the per se rule against resale price fixing and to overturn the ruling from the Monsanto case (rule of reason judgment) was brought in and approved by Congress. With regard to monopolization, the Justice Department has dropped its legal action against IBM because the company's market position was considered a result of its superior efficiency.

The monopolizing case against AT & T was settled by consent decree, urging the company to divest its unprofitable local telephone companies.

In order to change the antitrust laws, the AD has prepared two reform packages that were presented in 1983 and 1986. They are intended to increase the efficiency and the productivity of the American industry as well as its international competitiveness.


50 Cf. CCH TRR No. 831, Oct. 19, 1987, p. 6, and No. 848, Febr. 17, 1988, p. 1. An amicus-curiae- or friend-of-the-court brief is a petition that might be submitted to court in a proceeding by a participating party "with strong interest in or views on the subject of an action ..., ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views.", Black's Law Dictionary, 5th ed., St. Paul, Minn. 1979, p. 75.

51 Cf. Tollison, Antitrust in the Reagan Administration ..., supra, 216, as well as Weston, Neue Entwicklungen ..., supra, 128.

52 "Agreement by defendant to cease activities asserted as illegal by government (...). Upon approval of such agreement by the court the government's action against the defendant is dropped.", Black's Law Dictionary, op. cit., 370. Consent decrees can be regarded as material compromises between parties involved in a court proceeding about the issue in question. The agreement has to be filed with the court and needs the judge's approval, cf. Shepherd, Public Policies ..., op. cit., 145.

53 Currently, consent decrees are used by the AD to help companies to restructure their mergers in a way that eliminates antitrust problems, cf. Weston, Neue Entwicklungen ..., supra, 129.

b. The Federal Trade Commission

The second authority or agency to enforce the antitrust laws of the United States is the Federal Trade Commission. The agency was established in 1914, is headed by five commissioners, one of whom is appointed chairman, enforces antitrust and consumer protection statutes and has developed rule-making power.

As has been noted in the case of the Antitrust Division with regard to its heads, all the chairpersons and commissioners that have been appointed to the FTC by the Reagan Administration, have been and are close to government policy and, therefore, to Chicago economics. After assuming duties as FTC Chairman, James C. Miller III proposed a cut in the FTC's budget of 12% for the fiscal year of 1982, holding that, accompanied by cutbacks in programs, management improvements and program refinements, this would enhance the agency's efficiency.

55 For a survey on the agency cf. Sullivan, Handbook ..., op. cit., 752-754; for the development of the agency's resources, see Tab. 2; for the main steps in the agency's prosecution action, see Shepherd, Public Policies ..., op. cit., 151.
57 The ability to issue rules ("Trade Regulation Rules") that govern all members of an industry instead of carrying out precedents, was formally enacted by Congress through the Magnuson-Moss Act in 1975, cf. Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 4 CCH TRRer, § 25,515-25,528, at pp. 30,331-30,340, esp. § 25,525, at p. 30,337.; cf. Shepherd, Public Policies ..., op. cit., 152; the attempt to veto these rules was declared unconstitutional by the Federal Supreme Court.
58 For evidence cf. Weston, Neue Entwicklungen ..., supra, 129; for the realignment of staff positions and new appointments of bureau directors cf. TRR No. 511, October 12, 1981, pp. 3 f., and the realignment of policy, cf. TRR No. 518, November 30, 1981, p. 3; evidence is also provided by the fact that commissioners that stated dissenting opinions in FTC cases either resigned voluntarily or their term of office ceased, which lead to decisions in favor of the new policy, cf. TRR No. 560, September 20, 1982, p. 10, and No. 616, October 3, 1983, p. 5.
59 Cf. TRR No. 510, October 5, 1981, p. 10; Senator Arlen Specter (R-Penn) pointed towards the aspect that lower funding could be an indirect way of phasing out the FTC's antitrust function at all, cf. ibid., 6.
60 The long-term perspective has been a 25% cut, partly due to the closing down of regional FTC offices, cf. Weston, Neue Entwicklungen ..., supra, 129.
61 Cf. TRR No. 532, March 8, 1982, p. 3.
As in the case of the Antitrust Division, there has been a sharp increase in the emphasis on economic efficiency as general policy and there has been a reallocation of internal resources in order to fight government maintained monopolies and the exemption of free professions from antitrust. Consumer protection issues as well as pro-competitive effects of unilateral action, such as resale price maintenance, are being emphasized.

Critics state that an all time low in proceedings started by the FTC has been reached. Due to the new philosophy, the divestiture proceedings partly pending for more than ten years against Exxon Corp., Kellogg et al., and IBM have been dropped; the case against AT & T has been settled by consent decree.

There have been two additional policy changes that have contributed to the low number of proceedings started by the FTC. On the one hand, there have been strong attempts to help merging firms to restructure potential mergers in order to file consent decrees and not to issue complaints or orders and on the other hand, there is now a strong tendency to consider other rele-

62 As has been pointed out by former Chairman Miller in remarks prepared for delivery before the Antitrust Section of the American Bar Association in Washington, D.C., cf. TRR No. 540, May 3, 1982, p. 6 f.
64 Cf. TRR No. 540, supra, 7.
65 Cf. Weston, Neue Entwicklungen ..., supra, 130. One has to notice a turnaround to some extent, however. The FTC has been notably successful recently in winning cases in the courts of appeals, cf. Briggs/Calkins, Antitrust 1986-87 ... (Part 1), supra, 322.
vant factors in merger cases, in addition to the market share criterion which in fact makes merger policy more lenient.\textsuperscript{68} Furthermore, the FTC has stopped or cancelled several programs that collected relevant economic data on American industry for the purpose of government filing and legislative control (e.g., Statistical Report on Mergers and Acquisitions, and FTC Line of Business Reporting Program).\textsuperscript{69}

3. Antitrust Adjudication

During the past fifteen years, economic efficiency considerations have increasingly been introduced into the findings on antitrust cases in United States' courts.\textsuperscript{70}

The increasing shift in antitrust cases away from possible anticompetitive effects to possible pro-efficiency effects that led courts\textsuperscript{71} away from extra-economic interpretation of the antitrust statutes, was first initiated by the dissenting opinions put forward by Justices Harlan and Stewart in the Von's Grocery case\textsuperscript{72}, they demanded the Supreme Court to confine its analysis to

\textsuperscript{68} Cf., e.g., FTC v. Schlumberger Ltd., CCH TRRer TB: FTC Complaints and Orders 1979–1983, § 21, 989, and FTC v. Echlin Manufacturing Co., 3 CCH TRRer, § 22, 268; although a manufacturer of automotive carburetor kits with almost 38\% of the market purchased the third largest competitor with 10\% of the market, the acquisition would not lessen competition substantially because of low barriers to that market, according to the ruling of an administrative law judge of the FTC in the Echlin case, cf. TRR No. 669, September 26, 1984, p. 3.

\textsuperscript{69} Cf. TRR No. 545, June 7, 1982, p. 6, and TRR No. 645, April 17, 1984, p. 1.

\textsuperscript{70} Cf. Blechman, Neue Entwicklungen ..., supra, 180; though we will confine our observations to landmark changes in the adjudication of the Supreme Court, it can be noted that the emphasis on efficiency as a dominant social value has been even more noticeable in lower court cases (i.e., Courts of Appeals and District Courts), cf. Sullivan, Antitrust, Microeconomics, and Politics ..., supra, 2 and 4; for a survey on procedures, sanctions and the relationship of public and private suits, cf. Areeda, Phillip, Antitrust Analysis: Problems, Text, Cases, 2nd ed., Boston, Toronto 1974, pp. 49–62, 68–90, and Schmidt, Ingo, US-amerikanische und deutsche Wettbewerbspolitik gegenüber Marktmacht, Berlin 1973, pp. 101–103.

\textsuperscript{71} Comparing the reasonings in antitrust cases by former Warren and present Burger Courts, named after the Chief Justices heading them, this transition seems remarkably distinct, cf. Sullivan, Antitrust, Microeconomics, and Politics ..., supra, 4, as well as Blechman, Neue Entwicklungen ..., supra, 176 f.

\textsuperscript{72} Cf. U.S. v. Von's Grocery, 1966 CCH Trade Cases, § 71,780, pp. 82,596–82,609, 82,601–82,609; the merger of the third and sixth ranking retail grocery chains in the Los Angeles area was declared unlawful for violating Sec. 7 of the Clayton Act, although they only had a joint market share of nine percent.
the probable effect of the merger on competition in the relevant market and, in doing so, pleading for an economic analysis. The efficiency emphasis became even more important at the point when it was ruled that a monopolist might use power in one market to gain advantage in another, if this was accompanied by a yield in efficiencies.

The effect of certain trends in economic thinking on legal proceedings was most clearly demonstrated by the adoption of what came to be called the Areeda/Turner rule, which established marginal costs as a criterion for legal action against predatory pricing. The rule, emphasizing efficiency, was almost immediately adopted by the courts and in 90% of such cases led to a verdict in favor of the defendant.

Efficiency has also been the predominant underlying value in judging further unilateral action, such as tying arrangements, exclusionary practices, and the like. This tendency was initiated by a rule of reason approach judging territorial restrictions in dealer contracts. Whereas such restrictions had in the past been condemned as per se illegal, courts now came to consi-

73 In later cases, the Supreme Court has stated that market shares are relevant in the sense of a prima facie proof, but have to be supplemented by additional features of the market structure, cf. Brown, David, Neue Entwicklungen in der amerikanischen Wettbewerbspolitik, 32 WuW (1982), pp. 180-188, 185, and for the case, cf. U.S. v. General Dynamics Corp., 1974-1 CCH Trade Cases, § 74,967.


75 The rule played a key role in several of the private antitrust suits against IBM; cf., e.g., California Computer Products v. IBM Corp., 1971-1 CCH Trade Cases, § 62,713.

76 Cf. Mueller, United States' Antitrust ..., op. cit., 218.

der them positively in the light of efficiency gains. This reasoning was affirmed by a number of court decisions.\textsuperscript{78}

Certainly such restrictions continue to be regarded intrinsically illegal in the case of tying arrangements\textsuperscript{79} and resale price maintenance\textsuperscript{80} Thus far the doctrine of per se illegality has been retained.\textsuperscript{81} Nevertheless, efficiency evaluations have been introduced into the proceedings even here.\textsuperscript{82}

Following the reasoning that the inhibition of intra-enterprise conspiracies yielded economic inefficiencies, the Supreme Court overruled the intra-enterprise conspiracy doctrine\textsuperscript{83} which held that common ownership and


\textsuperscript{79} Cf. Jefferson Parish Hospital District No.2 v. Edwin G. Hyde, 1984-1 CCH Trade Cases, § 65,908, reversing and remanding a Court of Appeals decision, cf. idem, 1982-2 Trade Cases, § 64,945.

\textsuperscript{80} Although the arrangements are seen as per se violating Sec. 1 Sherman Act, a Supreme Court ruling has shown that the per se rule in resale price maintenance cases, introduced in Dr. Miles Medical Co. v. John D. Park & Sons in 1911, is seen as having lost its intellectual basis; for this evaluation cf. Toepke, Utz P., Antitrustspruchpraxis 1983/84, in: FIW (ed.), Schwerpunkte des Kartellrechts 1983/84, Verwaltungs- und Rechtssprechungspraxis Bundesrepublik Deutschland, EG und USA, Köln et al. 1985, pp. 89-119, 92 and for the ruling cf. Monsanto Co. v. Spray Rite Service Corp., 1984-1 CCH Trade Cases, § 65,906; the attempt to abolish the per se rule was supported by a friend-of-the-court brief of the Antitrust Division of the Department of Justice. It has been stopped by Congress through the means of budgetary regulations which prevent the Department of Justice from using its resources to try to abolish the per se rule for resale price maintenance, cf. TRR No. 767, July 28, 1986, at p. 4.

\textsuperscript{81} Cf. Toepke, Antitrustspruchpraxis 1983/84 ..., op. cit., 91.

\textsuperscript{82} Cf., e.g., CCH TRR No. 786, December 1986, p. 1: "Resale Price Maintenance: Airline's Discount Ticket Advertising Restriction not Per Se Illegal." There is a current tendency in adjudication to apply the per se rule only to cases of market power, whereas other cases are to be judged under a rule of reason, cf. NCAA v. Bd. of Regents of the University of Oklahoma, 1984-2 CCH Trade Cases, § 66,139, affirming the Court of Appeals ruling, cf. idem, 1983-1 CCH Trade Cases, § 66,366; and Northwest Wholesale Stationers v. Pacific Stationary & Printing Co., 1985-1 CCH Trade Cases § 66,640, p. 66,174.

control of various corporate executives are unable to liberate the alleged conspiracy from the impact of the Sherman Act.\textsuperscript{84}

Rather important for the attempt to foster competition in areas that were thus far exempted from the antitrust laws was the Supreme Court's decision that communities' actions ("state-action immunity doctrine")\textsuperscript{85} would no longer enjoy immunity from antitrust liability.\textsuperscript{86}

Furthermore, the current Supreme Court seems to have followed the reasoning that not every arrangement over prices must necessarily be seen as a conspiracy and, therefore, as \textit{eo ipso} illegal.\textsuperscript{87}

4. Antitrust Legislation

The antitrust policy of the present government of the United States has only transient character because statutory law is not dominant in the legal system and, therefore, law is shaped mainly by the courts. Hence, the current administration is trying to change legislation according to its general policies in order to overcome this transient character.\textsuperscript{88}

Before the efforts to change the existing statutes were started, however,


\textsuperscript{85} First ruled in Parker v. Brown, 1940–1943 CCH Trade Cases, § 56,250; the doctrine held that state action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under the Constitution of the United States.

\textsuperscript{86} For the case cf. Community Communications Co. v. City of Boulder, 1982–1 CCH Trade Cases, § 64,448, and for an earlier case cf. City of Lafayette v. Louisiana Power and Light Co., 1978–1 CCH Trade Cases, § 61,936.

\textsuperscript{87} Cf. Blechman, \textit{Neue Entwicklungen} ..., supra, 178, and for the case, cf. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 1980–2 CCH Trade Cases, § 63,289, cert. and reh. before the Supreme Court denied; the court pointed out that the crucial question was not, whether the licence agreed upon was to be seen as a price conspiracy, but, whether it unanimously had anticompetitive effects in order to justify per se illegality.

\textsuperscript{88} The most recent and comprehensive attempt, has been the Administration's Antitrust Law Reform Package of 1986, which we will take up again in the following; cf. TRR No. 744, supra, Part II.
prior efforts at the legislative level that were aimed at tightening the anti-
trust laws had been definitely abandoned.\(^89\)

Based on an allegedly growing consensus that public regulation of private
economic activity is likely to do more harm than good\(^90\), there are strong
legislative efforts to put an end to entry and price regulations of industries
that basically dispose of competitive structures have so far been exempt
from the full application of the antitrust laws.\(^91\)

Three major material changes or supplements to antitrust legislation that
emphasize current policy can be discerned:

(1) The **Export Trading Company Act of 1982**\(^92\), that is supposed to streng-
then the international competitiveness of U.S. firms, limits the appli-
cation of the antitrust laws to export commerce.\(^93\) The formation of ex-
port trading companies is promoted by reducing restrictions on trade
financing and by modifying the application of the antitrust laws to cer-
tain export trades.\(^94\)

(2) The **National Cooperative Research Act of 1984**\(^95\), that is aimed at relax-
ing the antitrust laws insofar as they affect joint research and deve-
lopment ventures. The Act provides for the introduction of the rule of
reason for the judging of such ventures and for limitation of recovery in

\(^{89}\) Cf. Möschel, Antitrust ..., supra, 156; these efforts encompassed legislative
proposals for the possibility of deconcentration of industries as well as
various no-fault monopolization proposals to protect small business, cf.
also idem, Entflechtungen im Recht der Wettbewerbsbeschränkungen, Tü-
bingen 1979, pp. 89-91.

\(^{90}\) Cf. Sullivan, Antitrust, Microeconomics, and Politics ..., supra, 5.

\(^{91}\) Congress has deregulated airlines, railroads, and trucking, and the poli-
tical momentum for deregulation of other industries is growing, cf. ibid.,
5, and Möschel, Antitrust ..., supra, 157. In the case of the deregulation
of the airline industry, the remaining tasks have been transferred to the
Department of Transportation by the Civil Aeronautics Board Sunset Act

\(^{92}\) Cf. TRR No. 554, August 9, 1982, Part II, being the first part of the An-
titrust Improvement Act of 1982.

\(^{93}\) Cf. Toepke, Utz P., Antitrustspruchpraxis 1982/83, in: FIW (ed.), Schwer-
punkte des Kartellrechts 1982/83. Verwaltungs- und Rechtsprechungs-
praxis Bundesrepublik Deutschland, EG und USA, Köln et al. 1984, pp. 61-
85, 64.

\(^{94}\) Cf. Export Trading Company Act of 1982, 4 CCH TRRer § 27,000.

\(^{95}\) Cf. TRR No. 649, May 16, 1984, Part II: National Cooperative Research Act
of 1984, 4 CCH TRRer § 27,080, which was originally presented as National
Productivity and Innovation Act of 1983, cf, TRR No. 614, September 19,
1983, Part II.
antitrust cases to actual damage.\textsuperscript{96}

(3) The \textbf{Local Government Antitrust Act of 1984}\textsuperscript{97}, that is supposed to limit the antitrust liability of communities resulting from the change of the state-action immunity doctrine by the Supreme Court.\textsuperscript{96}

The \textbf{Antitrust Law Reform Package} that has been elaborated on by the Presidential Commission on Industrial Competitiveness\textsuperscript{99} and presented as proposed legislation, consists of five legislative proposals, amending the Sherman and Clayton Acts and the Trade Act of 1974. In essence, these proposals weaken the standards for determining whether mergers are anticompetitive; they also provide for an antimerger relief for U.S. industries injured by foreign competition, and lower treble damages to the actual damage sustained by a competitor.\textsuperscript{100} With regard to mergers, the bill contains two significant aspects in its proposed \textbf{Merger Modernization Act}:\textsuperscript{101}

- the attempt to substitute the \textit{incipiency doctrine} by a \textit{significant probability doctrine}; and

- the attempt to substitute the \textit{substantially lessening of competition} as the criterion of intervention by the ability to \textit{exert market power in the long run}, measured by price-quantity relationships.

The proposals are pending for the time being, not having a significant probability of being passed because of changed majority relationships in Congress after the 1986 elections.\textsuperscript{102}

\textsuperscript{96} Cf. Toepke, Schwerpunkte des Kartellrechts 1983/84 ..., op. cit., 93.

\textsuperscript{97} Cf. 4 CCH TRRer, § 27,104.


\textsuperscript{99} Cf. TRR No. 691, February 19, 1985, at p. 4.

\textsuperscript{100} Cf. TRR No. 744, supra, at p. 3. For a detailed survey cf. Toepke, Schwerpunkte des Kartellrechts 1985/86 ..., op. cit., 176-183.


Two final legislative issues that have been of some importance, concerned legislative vetoes over enforcement agencies' rules \(^{103}\), and the rejection of the Vertical Restraints Guidelines (VRG) by the Senate and the House of Representatives.\(^{104}\)

In the first issue, congressional veto over agency rules was declared unconstitutional by the Supreme Court\(^{105}\) because it violated the separation-of-powers principle. The vetoes were used by the legislature to control the enforcement agencies' action and, therefore, partly government policy.

Regarding the second issue, the Judiciary Committee of the House of Representatives approved a resolution that the VRG of the Department of Justice "do not have the force of law, do not accurately state current antitrust law, and should not be considered by the Federal Courts as binding or persuasive".\(^{106}\) The House as well as the Senate is trying to impose budget restrictions that are supposed to reflect the resolution.\(^{107}\)

Furthermore, the National Association of Attorneys General (NAAG) adopted Merger Guidelines of its own which are strikingly different from the ones issued by the Department of Justice, although not differing markedly in results except concerning market definition.\(^{108}\)

Regarding formal or procedural changes, the abandonment of treble damages has been part of the Antitrust Improvements Act of 1982, the Foreign Sovereign Recoveries Act\(^{109}\), as well as the National Cooperative Research Act of 1984.\(^{110}\)

\(^{103}\) Cf. TRR No. 602, June 27, 1983, and No. 604, July 11, 1983.

\(^{104}\) The Guidelines were issued by the Antitrust Division, cf. FIW (ed.), Vertikale Verträge - US Guidelines 1985 und EG-Kartellrecht, FIW-Dokumentation Heft 7, Köln et al. 1986, p. 4.


\(^{106}\) TRR No. 731, November 25, 1985, at p. 2.

\(^{107}\) Cf. FIW, Vertikale Verträge ..., op. cit., 5; and CCH TRR No. 767, July 28, 1986, p. 4.

\(^{108}\) Cf. CCH TRR No. 800, March 16, 1987, p. 1; and as well, Briggs/Calkins, Antitrust 1986-87 ... (Part 1), supra, 316-319.

\(^{109}\) Cf. TRR No. 575, January 3, 1983.

\(^{110}\) Cf. Toepke, Antitrustspruchpraxis 1984/85 ..., op. cit., 109. Restricting the claim in antitrust cases to the actual damage that has occurred, is supposed to deter plaintiffs which sue for 'tactical reasons'.
III. The Source of Reorientation: The Chicago School of Antitrust Analysis

1. The Foundations

The question of whether there is a distinctive Chicago approach to (anti-trust) economics\(^1\) and how this approach can be characterized, has to be answered from the viewpoint of the historical context.\(^2\)

The roots of the Chicago style of antitrust economics, have on the one hand to be seen within the legal realism movement that arose in American law schools in the 1920s and that tried to study the operation of law in relation to social reality, i.e., how law would affect (economic) behavior in society.\(^3\)

The practical need to teach economics at the law schools emerged from this movement and led to the appointments of various economists to law schools, such as Frank H. Knight, Jacob Viner, and later Aaron Director and Henry C. Simons, who were Knight's students.\(^4\) The basic features of Chicago antitrust economics are attributable to these scholars.

At first, it was mainly through the personal impact of Knight who generated highly idiosyncratic ideas on a few influential students (Director, Simons) that the subsequent course of Chicago economics was determined.

What all these early Chicago scholars had in common, however, was their sceptical view towards empirical work in the social sciences that set them apart from the main body of Chicago economists.\(^5\) The small group of Knight's students built a loosely coupled group to jointly advance their common ideas.

It was just around this time when Oscar Lange, a Polish born economist, became assistant professor at Chicago (1938) and tried to constitute a distinct

---

\(^1\) Diehard Chicagoans promote such a distinctive approach, whereas others, that are willing to refine the original ideas, perceive a certain convergence of the antitrust schools of thought, cf. Posner, The Chicago School ..., supra, 925.


\(^3\) Cf. Kitch, The Fire of Truth ..., supra, 164.


\(^5\) Cf. Reder, Chicago Economics ..., supra, 6.
alternative to the earlier view of Chicago economists. This, in fact, can be viewed as a further root of the development of Chicago economics.

Lange was to be associated with the so-called "institutional school" which was in opposition to the standard theoretical tradition of price theory. This led to ideological tensions.

When Lange withdrew from Chicago to become Polish Minister for Economic Affairs after World War II and the Cowles Commission came to Chicago, this tension was emphasized and led to an ideological battle between Knight and his former students on the one hand, and the Cowles Commission and its adherents on the other hand, about topics such as research methodology, political ideology, and faculty appointments.

Although the original ideas were jointly advanced by colleagues and students of Knight, Director, and Simons, there was a lack of coordination. This coordination, that brought together single efforts, was finally cemented by a conference on the topic of industrial concentration that was held by the Columbia Law Faculty and by a later and direct confrontation with the Harvard School (Bain, Caves, Mason, D. Mueller, Scherer, Shepherd, Sullivan et al.) through a symposium held at the University of Pennsylvania.

6 Cf. Lange, Oscar, Price Flexibility and Employment, Bloomington 1944.
7 Institutionalism was to be associated with interventionism, i.e., public policy was strongly used to reach predefined economic goals; Kitch, The Fire of Truth ..., supra, 178: "It was an environment in which the general intellectual atmosphere was strongly prosocialist. It was strongly in favor of government going all the way to take over the whole economy."
8 For details, cf. Reder, Chicago Economics ..., supra, 10.
9 Cf. Reder, Chicago Economics ..., supra, 10.
2. Chicago Antitrust Philosophy

In the following, the system of values and beliefs that characterize the Chicago approach to (antitrust) economics will be stated.\footnote{It has to be noted that this is a statement of contemporary Chicago antitrust philosophy, since this position is viewed as a misinterpretation of the traditional Chicago view by some authors, cf. Martin, David D., Industrial Organization and Reorganization, in: Samuels, Warren J. (ed.), The Chicago School of Political Economy, East Lansing (1976), pp. 295-310, esp. 296 and 311; Samuels, Warren J., The Chicago School of Political Economy: A Constructive Critique, in: Samuels, The Chicago School ..., op. cit., 1-18.}

Regarding overall contemporary Chicago economics, the system of values and beliefs adhered to, is best described by Milton Friedman:\footnote{Friedman, Milton, Schools at Chicago, University of Chicago Magazine (1974), pp. 11-16, 11, quoted after Mishan, Ezra J., The Folklore of the Market: An Inquiry into the Economic Doctrines of the Chicago School, in: Samuels, The Chicago School ..., op. cit., 95-166, 95.}

"... 'Chicago' stands for the belief in the efficiency of the free market as a means of organizing resources, for scepticism about government intervention into economic affairs, and for emphasis on the quantity of money as a key factor in producing inflation."

This philosophy encompasses the premises of methodological individualism that is historically associated with John Stuart Mill and Adam Smith. It contains a strong belief that all social phenomena should be traced back to their foundation in individual behavior.\footnote{Cf. Paqué, Karl-Heinz, How Far Is Vienna from Chicago? An Essay on the Methodology of Two Schools of Dogmatic Liberalism, 38 Kyklos (1985), pp. 412-434, 413.}

Regarding antitrust, this philosophy finds its correspondence in the theoretical model of competition since there is the belief that it "can be utilized to provide empirical proof that laissez-faire capitalism maximizes both personal freedom and economic welfare.\footnote{Wilber, Charles K., and Jon D. Wisman, The Chicago School: Positivism or Ideal Type, in: Samuels, The Chicago School ..., op. cit., 79-93, 79.}

This view led to a distinct change in - or rather, renewal - of intellectual climate among economists. There was a shift not only away from mainstream economics,\footnote{Cf. Martin, Industrial Organization, op. cit., 302; this strongly resembles the anti-institutionalist stance of the founding fathers of antitrust Chicago style, cf. supra.} but also to the view that government itself is undesirable.\footnote{Cf. Paqué, How Far ..., supra, 412.}
In addition to this view, a strong analogy between a free market system and the *Darwinian* theory of natural selection and evolution is drawn\(^\footnote{19}\) by Chicago antitrusts:\(^\footnote{20}\)

"The environment to which the business firm must adapt is defined, ultimately, by social wants and the social costs of meeting them. The firm that adapts to the environment better than its rivals tends to expand. The less successful firm tends to contract - perhaps, eventually, to become extinct."

As has been shown supra, Chicago antitrust did not emerge from a full-blown philosophy, but was rather a product of specific questions raised by antitrust cases against the background of a system of values and beliefs that can be summarized as follows:\(^\footnote{21}\)

- The market process is observed with regard to the "survival of the fittest" in a long-run perspective.
- Without government interference, a Pareto-optimal state is reached by the market process (so-called *tight prior equilibrium*).
- Governmental or public influence has to be repelled and restricted to the setting of a minimal legal framework.
- The analysis of the market process is carried out by using the concepts of monopoly and perfect competition as standards of reference.
- Economics is also applied to other socio-political fields (e.g. 'economics of marriage', 'economics of crime').

---


With regard to other schools of thought within the field of antitrust theory, there seems to be a certain similarity between the Chicago School and the (Neo-) Austrian School (v. Mises, v. Hayek, Kirzner et al.) as far as the transaction cost approach is concerned. Both approaches are quite different in terms of their theoretical notion but they show a considerable amount of similarity with respect to policy implications and, therefore, are often compared with each other, cf. Paqué, *How Far ...*, supra, 412-434.
IV. Definition of the Field of Research and Course of Inquiry

For the adherents of theory underlying current antitrust policy associated with the Chicago School the only performance criterion by which business conduct is to be evaluated is the criterion of consumer welfare respectively economic efficiency. Whereas the traditional tenet was characterized by a close relationship between the structure of a particular industry, the resulting conduct of the industry's competitors, and the quality of performance flowing from that conduct, the current tenet emphasizes that performance is solely determined by the conduct of the competitors, regardless of how the structure of that particular industry looks like.

Traditional theory held that in addition to some other influential factors, the degree and development of an industry's concentration can be ascribed to a large extent to the number and size distribution of the industry's sellers and buyers, the conditions of entry to that particular industry, the scale economies to be realized, and the stage in the industry's maturity. Hence, the main purpose of the contribution submitted, is to evaluate critically the position towards industrial concentration taken by the Chicago School with regard to the importance of the structural factors in particular industries and to draw possible conclusions and consequences for the competition policy of the Federal Republic of Germany. Since the emphasis of our inquiry will be on external industrial concentration our conclusions are aimed at merger policy primarily.

After having dealt with recent changes in U.S. antitrust economics, executive, adjudication, and legislation in the Introduction and summarized landmark changes in the direction of antitrust in the United States, we will propose an analytical framework for the evaluation of restraints of competition by industrial concentration in Part 1 as a standard of reference. Although we will mention various approaches to antitrust shortly, our preference will be with a modification of the so-called effective competition approach, assuming the validity the structure-, conduct-, performance-paradigm and a

1 A critical discussion of the differences between various Chicago scholars would be an overwhelming undertaking; therefore, we will restrict ourselves to statements of preeminent Chicago scholars who are fairly orthodox representatives of this school; we will deal with deviant positions as far as necessary.

2 This will be done with special reference to antitrust legislation.
structural predominance within the paradigm. This shall serve as a working hypothesis only since evidence for the paradigm's validity will be tested primarily in Parts 2 and 3 of the contribution submitted.

In Part 2 we will inquire into the main elements of the theoretical edifice of the current tenet associated with the Chicago School. This will in essence be an evaluation of several premises, assumptions, and hypotheses which are crucial for the current attitude towards industrial concentration. This part will comprise three sections. In the first section we will determine whether or not efficiency considerations were and are the exclusive concern of antitrust policy in the United States, comparing the results to the concerns and goals of the cartel law (ARC) of the Federal Republic of Germany. Section two will comprise an analysis of the adequacy and usefulness of neoclassical price theory and the static partial equilibrium trade-off model used by adherents of current theory for antitrust analysis. Section three will treat the conditions of entry to a particular industry, trying to extract impediments to new competition and determine their importance for an industry's concentration process and the resulting performance.

Parts 3 and 4 will encompass the evaluation of horizontal and vertical mergers as the most common forms of external industrial concentration; this will be done with special reference to the so-called concentration-collusion doctrine concerning horizontal mergers and the importance of transaction-cost efficiencies concerning vertical mergers. We will present the traditional as well as the current approaches underlying public policy towards horizontal and vertical mergers, critically evaluate the Chicago view against the background of empirical findings, and finally draw policy conclusions.

The Résumée will finally emphasize the question of whether the German Act against Restraints of Competition (ARC) needs a reform along the lines of the Chicago School as a result of the conclusions from Parts 2, 3 and 4 of this contribution. If a need for a reform is confirmed on the basis of these results, we have to answer the question of how such a reform should look like and whether it should contain elements of currently discussed theory.

Special reference is paid to the importance of the role that structural elements, such as level of concentration, market share, market barriers, and
the like play. There will not be a thorough evaluation of antitrust institutions and sanctions. However, we will refer to them in as much detail as necessary at relevant points in the argument. The same applies to premises and assumptions, not closely connected to the view of current theory on industrial concentration.