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**Schools of Thought and Competition Law:**

**Focus on Abuse of Dominance**

*Presented by:*

*Mr. Ioannis Lianos  
Hellenic Competition Commission*

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# Schools of thought and competition law

## Focus on Abuse of Dominance

*Ioannis Lianos*

*Personal views, these do not engage the HCC*



# Schools of competition analysis and abuse of a dominant position

- **An EU oddity? Ordoliberalism (the Freiburg school)**
  - Economic freedom as a prerequisite for political freedom
  - The idea of economic constitution
  - For ordo-liberal writers, the objective of competition law, is to promote the competitive process, perceived as an institution (*Institutionsschutztheorie*), and not to protect individuals or specific groups (*Individualschutztheorie*), such as consumers or the competitors of the dominant firm
    - The concept of “complete competition” (*vollständige Konkurrenz*) and the concept of “as if competition”/performance-based competition (*Leistungswettbewerb*)
    - The distinction between “impediment competition” and “performance competition”
    - Ordoliberalism and “well being”/welfare

# Structure-Conduct Performance



Joe S. Bain

- **The Structure-Conduct-Performance paradigm**
  - Edward Mason & Joe Bain (Harvard University)
  - Neo-classical price theory with an empirical touch
  - Structure ► Conduct ► Performance
  - The brain child of the Harvard school of thought and popularized during 1940-60 with its empirical work involving the identification of correlations between industry structure and performance
    - Joe S. Bain, Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936–1940, 65 Quarterly Journal of Economics 293 (1951) ; H. Michael Mann, *Seller Concentration, Barriers to Entry and Rates of Return in Thirty Industries*, 48 Rev Econ & Statistics 296 (1966).
    - Positive relationship between firm profits and market structure
    - Empirically observed in various industries
  - The concern over concentration
  - A broad definition of barriers to entry (according to Joe Bain) ► barriers to entry are widespread
  - An active competition policy//no consideration of efficiency justifications for practices that increase concentration at the market
  - Leveraging and traditional foreclosure theory

# The Chicago school



Robert Bork

- Robert Bork, George Stigler, Richard Posner, Frank Easterbrook
- Neo-classical price theory: deduction versus induction...
  - Efficiency (allocative, productive) should be the only objective of competition law – no distributive justice concerns – a narrow definition of consumer welfare (wealth transfers from consumers to producers are not included in the definition of efficiency)
  - Efficiency justifications for firm's conduct
  - Efficiency structure hypothesis states that performance of the firm is positively related to its efficiency. Market concentration emerges from competition where firms with low cost structure increase profits by reducing prices and expanding market share. A positive relationship between firm profits and market structure is attributed to the gains made in market share by more efficient firms. In turn these gains lead to increased market concentration
- Monopoly is self-correcting – the monopolist's higher profits attract entry
- A narrow definition of barriers to entry//George Stigler
- Recoupment in predatory pricing
- Rationality and profit-maximization

# Post-Chicago school.

Steven C. Salop



- Modern game theory: undermines our confidence that the market is always as efficient as traditional Chicago economics implied
  - Fundamental assumption of unilateral action on the part of each firm
  - Market structure is linked to market performance, but now for the subset of markets that **follow** the unilateral game-theoretic equilibrium structure
  - Oligopolistic Game-theoretical models raise a broader set of market power concerns
  - Possibility of strategic behaviour that can facilitate non-competitive results
  - Standard analytical approach to model market outcomes is “Nash-Bertrand equilibria”
  - Empirical evidence is not clearcut: Timothy Bresnahan and Peter Reiss, *Entry and Competition in Concentrated Markets*, 99 J Pol Econ 977 (1991).

See also,  
Raising  
Rivals' Costs  
(T.  
Krattenmaker  
& S.C. Salop)  
and lock in  
effects  
theories -  
customers in  
after-markets

# New-Brandeis School

- Normative foundations in the Anti-Bigness narrative of Louis Brandeis
    - ***Antimonopoly is a key tool and philosophical underpinning for structuring society on a democratic foundation***
    - Antimonopoly aims to create a system of checks and balances in the commercial and economic spheres. Antitrust law is just one tool in the antimonopoly toolbox.
    - ***Antimonopoly does not mean 'big is bad.'*** The New Brandeisians—like Justice Brandeis—recognise that certain industries tend naturally towards monopoly – Design a system of public regulation that prevents the executives who manage this monopoly from exploiting their power
    - ***Antimonopoly must focus on structures and processes of competition, not outcomes***
    - ***There are no such things as market 'forces.'*** Brandeisians do not recognise any form of organisation or any type of power as inevitable
  - Tensions between Economic Liberty and Democracy (Walter Lippmann)
  - Democratic distribution of power and Economic Opportunity to Compete
- See, L. Khan, **The New Brandeis Movement: America's Antimonopoly Debate**, [New Brandeis Movement: America's Antimonopoly Debate | Journal of European Competition Law & Practice | Oxford Academic \(oup.com\)](#)



Lina Khan



Tim Wu

# Competition Law in a Complex Economy

- Complex systems: 'intricate systems of interdependent feedback loops connecting micro-behaviours, interaction patterns and global (as opposed to just local) regularities' (Tesfatsion, 2005)



- Dynamic systems of interacting agents
    - **Nonlinear**: Small changes in inputs or parameters may produce large changes in behavior
    - Populated by a collection of **heterogeneous agents** whose state influenced and is influenced by the state of others (feedback loops), and
    - Characterised by **constant adaptive learning**
  - Some concepts:
    - Increasing returns
    - Leverage points
    - Tipping points
    - Path dependence...
- Competition law does not engage with the **dynamic complexity** of the economy, with the **computational complexity** of the actors/decision-makers and with the **connective complexity** of these interactions
  - New forms of competition, new fields/spaces of competition. Need for a new conceptual framework for competition law
    - The concept of **ecosystem** as an illustration of this shift of paradigm
    - Heterogeneous Actors: Agent-Based modelling



# Polycentric competition and complex economics

- Goals' pluralism: complex equality, sustainable development, integration of constitutional values in competition law enforcement
  - Competition Law as a Form of Social Regulation
  - E.g. right to food, right to health etc.
- Understanding the value capture and value generation processes: Financialisation, Futurity, Personalisation of production, From markets to cybernetics, Performativity
- Pluralism of disciplinary sources
  - Law and Political Economy movement
  - Economic Sociology
  - Legal Institutionalism
- Methodological pluralism
  - Beyond Neoclassical Price Theory – a multi-dimensional concept of power
  - Application of new methods offering a more holistic understanding: agent-based modelling
  - The tech turn in competition law: Computational competition law and economics

# Some recent musings on the topic

- I. Lianos, Competition Law for a Complex Economy, [Competition Law for a Complex Economy | SpringerLink](#)
- I. Lianos, Polycentric Competition Law, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3257296](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257296)
- I. Lianos, Competition Law as a Form of Social Regulation, [Competition Law as a Form of Social Regulation - Ioannis Lianos, 2020 \(sagepub.com\)](#)
- I. Lianos & A. McLean, Lianos, Ioannis and McLean, Andrew, Competition Law, Big Tech and Financialisation: The Dark Side of the Moon (September 15, 2021). Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3930565](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930565)
- HCC, Computational Competition Law and Economics (an Inception Report), [Computational Competition Law and Economics \(epant.gr\)](#)