

# Chicago School Analysis on Vertical Restraints

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## **Abstract**

*In the early 1930s, an ideological movement developed at the University of Chicago that, having started by focusing on the economy, became known as the Chicago Economic School. One of the cornerstones of this school was the renewal of competition policy to the consumer welfare (consumer welfare), understood here in a broad sense. For Bork, economic efficiency corresponds to the maximization of wealth, which is equivalent to the welfare of the consumer, since it allows lower costs, lower prices and increased production of products and services desired by the consumer. The Chicago School role in vertical restraints rehabilitation, using empirical analysis, in order to demonstrate its competitive and efficiency effects, hitherto considered anti-competitive, exerted a significant influence on US competition law and, in recent years, in European competition law, justifying the analysis of its main characteristics. The explanation found by Chicago School, which, unlike the Harvard School, was able to point to efficiency as a justification for these practices, called by Williamson nonstandard, is based on the overcoming by Chicago School of the perfect competition model advocated by price theory. The Chicago School's analysis of these restrictions also accepts the existence of market failures in the relationships between distributors and producers resulting from the transaction costs. This paper aims at demonstrating the existence of a continuity relationship between the Chicago School and the Theory of Transaction Costs, showing that the approach by the Chicago School to vertical restrictions reveal, in several aspects, the proximity to the Transaction Cost Theory and the rejection of the perfect competition model. The analysis of economic aspects of vertical restraints performed by Chicago School, forestalling the Transaction Cost Theory, assumes particular importance as it has been shaping the US and European antitrust policy towards vertical agreements, challenging the competition law approach in the 21<sup>st</sup> Century.*

**Keywords:** antitrust, vertical restraints, transaction cost theory, Chicago School.

**JEL Classification:** K23, K32

## **1. Introduction**

In the early 1930s, an ideological movement developed at the University of Chicago which, having initially focused on economics, became known as the Chicago School of Economics.

One of the cornerstones of this school was the association of competition policy to consumer welfare, here understood in a broad sense.

Economic efficiency corresponds for Bork to wealth maximisation, which is paralleled to consumer welfare, since it allows for lower costs, lower prices and increased production of goods and services desired by the consumer.

The Chicago School will play an especially important role in the rehabilitation, using empirical analysis, of the competition and efficiency effects of vertical restraints, hitherto considered anti-competitive.

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The explanation found by Chicago School, that unlike the Harvard School, was able to point to efficiency as a justification for these practices, which Williamson called *nonstandard*, rests on the overcoming by academia in Chicago of the model of perfect competition advocated by the price theory.

This is paradoxical, given that the distinctive factor of the Chicago School was the analysis of competition through the *lens of price theory*<sup>2</sup>.

Indeed, contrary to what is claimed by critics of the Chicago School, including populists, its scholars, despite defending the price theory, did not sustained dogmatically the model of perfect competition<sup>3</sup>.

This approach is only understandable, as Meese notes, with the Chicago School's abandonment of the assumptions of perfect competition, hence rejecting perfect information about the product subject to the restriction<sup>4</sup>.

The Chicago School's analysis of these restraints also assumes the existence of market failures in the relationships between distributors and producers arising from transaction costs<sup>5</sup>.

This also means that the Chicago School had as a reference the real world with differentiated products, information costs, negotiation costs and imperfect mechanisms to enforce contracts. In this real world, transaction costs are high, and parties tend to adopt complex contracts aimed at overcoming these market failures, giving rise to partial integration models that allow overcoming, in a more efficient way, market failures.

These transaction costs arising from the producer's recourse to the market to distribute its goods are not expected in the model of perfect competition and are only possible in a theory which, like the different variants of New Economic Institutionalism, namely Transaction Cost Theory, has as its object of study the real world and the functioning of the market.

## 2. Analysis of vertical restraints

The Chicago School, through the application of price theory, based on the

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<sup>2</sup> Richard A. Posner, *The Chicago School of Antitrust Analysis*, p. 928; Bork, *the antitrust paradox*, p. 116; Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, Yale L.J., Vol. 77, 1968, pp. 950 and ff, justifies the efficient use of resources through the imposition of resale prices based on the theory of price. Meese, *Price theory and vertical restraints*, p. 202, adjectives reference to the price theory of "clumsy".

<sup>3</sup> The populists, as noted by Meese, *Price theory and vertical restraints*, p.146, n.º 6, are a group of scholars who argued that vertical restraints should be scrutinized by competition law, not only considering their economic effects, but also their social and political effects. These authors considered that the *Sherman Act* was not intended to implement a certain economic current, but to protect economic, political and social values associated with vertical restrictions. See David Millon, *The Sherman Act and the Balance of Power*, S. Cal. L. Rev. Vol 61, 1988, pp. 1233- 34, Eleanor, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as Window*, N.Y.U. L. REV. Vol 61, 1986, p. 566, Eleanor M. Fox, Robert Pitofsky, *Airlie House Conference on the Antitrust Alternative: Introduction*, GEO. L.J., Vol. 76, 1987, p. 237, Eleanor M. Fox, Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?* N.Y.U. L. Rev, Vol. 62, 1987, p. 936, Eleanor M. Fox, *Consumer Beware Chicago*, Mich. L. Rev, Vol. 84, 1986, p. 1714. This school maintained that, regardless of the existence of anti-competitive effects, these restrictions should be condemned, because they were the result of the imposition by producers on distributors through the exercise of market power by the former. On populists, see Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, N.C. L. REV. Vol. 74, 1995, pp. 234-364.

<sup>4</sup> Meese, *Price Theory and vertical restraints*, pp. 161, 164.

<sup>5</sup> Baxter, *The Viability of Vertical Restraints Doctrine*, CAL. L. REV. Vol. 75, 1987, p. 948.

maximisation of utility by rational economic agents, sought to investigate the reasons behind the decision of firms to accept restrictions on their commercial behaviour.

This analysis is, however, limited to the conception of economic efficiency as the sole purpose of competition law<sup>6</sup>.

We will then look at the Chicago School's economic explanation of vertical restraints.

## 2.1. Tying agreements

In its critique of the leverage theory, the Chicago School first contradicted that tying contracts were a means for the monopoly producer to expand its power into the market where the tied product is located, i.e. a way for the producer of the tying good to use the competitive advantage emerging from the monopoly of that product to monopolise a second market<sup>7</sup>.

The Chicago School will dedramatize the coercion behind the compulsory purchase of a second product sustaining that was a mean of achieving efficient gains or, at least, competitively neutral, with no recognised impact on either the monopolist or the consumer<sup>8</sup>.

It should be noted that the monopolist may not improve its position through the restrictions it places on the sale or rental of the anchor product to its customers, since the connection established by the contract between the two products operates in a two-way street and the revenue from the first product may be affected by the restriction resulting from the tying product. Even in a monopoly market, the producer will have to consider whether the restriction placed on customers with the tied product, equivalent to a price increase, presents gains that compensate for the losses it may experience in the anchor product, otherwise the tying of products is pointless<sup>9</sup>.

In this sense, the scholars of this School began by pointing out that, since complementary products are involved in fixed proportions, there is only one final product and therefore only one monopoly power. Even if the monopoly of the complementary product is obtained, it is not peaceful that the monopolist gains from this, because the rise in the price of the subordinate product must be offset by the fall in the price of the anchor product. The monopolist, in this scenario, with only monopoly

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<sup>6</sup> The Chicago School challenges the position of the Harvard School, in two stages: in the first stage, it demonstrates that the practice under analysis does not produce the anti-competitive effects that are imputed to it; while in the second stage, it demonstrates the pro-competitive effects. In this sense, Bork, *The antitrust paradox*, cit., pp. 280-96 regarding *resale price maintenance* and vertical market division.

<sup>7</sup> Aaron Director/Edward H. Levi, *Law, and the Future: Trade Regulation*, op. cit., p. 291.

<sup>8</sup> The traditional version assumed that all tying agreements, regardless of their beneficial or harmful character, were the result of the exercise of market power to coerce the counterparty into accepting the tied product, making these agreements dependent on market power. See Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, U. Pa. L. Rev., Vol. 146, N.º 1, 1997, p. 13.

<sup>9</sup> In this way, Ward Bowman, Jr., *Tying Arrangements and the Leverage Problem*, p. 20, following Watkins, *Public regulation of competitive practices in business enterprise*, 1940. The Chicago School points out that to impose this restriction on its customers, the firm would have to charge a price on the anchor product below the monopoly price, convincing customers to buy the second product that they did not initially want. This means that any increase in the price of the tying product is necessarily offset by a decrease in the price of the anchor product. Bork, *The antitrust paradox*, op. cit., pp. 372-74, Posner, *Antitrust law*, pp. 173, 2001, 198.

over one product, can capture the entire monopoly rent.

This theory became known as the *single monopoly profit theory* because it advocates the existence of a single monopoly power based on the impossibility theorem, i.e. a firm with market power cannot increase monopoly profits through imposed tying because there is only one monopoly profit that can be captured.<sup>10</sup> Pointing out that this monopoly profit could be intensified through competition in the complementary product.<sup>11</sup>

Although the Chicago School admits that it is possible to use monopoly power to persuade the customer to accept the tied product<sup>12</sup>, this imposition brings no gain to the monopolist, nor harm to consumers. Therefore, the coercion underlying this contractual practice is considered neutral to the consumer and the monopolist, and the *per se rule* inadequate<sup>13</sup>.

From this perspective, tying contracts are justified as a method of price discrimination, i.e. as mechanisms to propose different prices or obtain different rates of return from different consumers<sup>14</sup>.

The complementary tied product is a measure of the intensity with which the anchor product is used, such as printers and ink cartridges, photocopiers and paper, computers, and removable memories.

Thus, tying one product to the tying product may act as a form of price discrimination, because the seller may lower the price of the tying product to the cost price to promote the acceptance of product tying and raise the price of the tied product to a higher value than that obtained in the competitive market, attaining distinct rates of return from equally distinct consumers, thereby getting the more intensive buyers who value the anchor product more to pay more than the less intensive ones. In this case, by extracting the *surplus* from more intensive consumers, the monopolist will be able to increase profits<sup>15</sup>.

The starting point is that the application of a non-discriminatory price by the monopolist prevents it from capturing the monopoly rent that it could theoretically extract from its position. In effect, by discriminating the price according to the elasticity

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<sup>10</sup> Bork, *The Antitrust paradox*, *op. cit.*, pp. 229-231.

<sup>11</sup> See Aaron Director/Edward H. Levi, *Law and the Future: Trade Regulation*, pp. 290-292, Ward Bowman, Jr., *Tying Arrangements and the leverage problem*, p. 21, exemplifies with a pair of shoes for which only the price of the combination matters, the consumer not caring if the right shoe costs 20 dollars and the left shoe 5, clarifying on p. 23, that, in a fixed proportion, the monopolist would never have gains greater than those he already achieves with the monopoly on a single product, since the increase in the price of the substitute product would have to entail the decrease in the price of the anchor product.

<sup>12</sup> Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, p. 20, Posner, *Antitrust law*, 1976, pp. 174, 176. Posner, *Antitrust law*, 2001, p. 201, appears to reject the imposition of subordination, but on p. 200 retains the reference to imposition.

<sup>13</sup> As Meese notes, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, p. 24, the neutrality of the imposition of the tying contract, for the consumer and monopolist, is the great novelty that the Chicago School presents to the traditional school.

<sup>14</sup> This theory is initially advanced by Aaron Director, Edward Levi, *Law and the Future: Trade Regulation*, p. 290 and later pursued by Ward Bowman, Jr., *Tying Arrangements and the Leverage Problem*, pp. 21-23, and later accepted by Bork, *The antitrust paradox*, *cit.*, pp. 376-78, Robert H. Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, pp. 196-98, Posner, *The Chicago School of antitrust analysis*, p. 926.

<sup>15</sup> This explanation of tying as a way to overcome information costs was first advocated by Aaron Director and Edward Levi, *Law and the Future: Trade Regulation*, pp. 294-296.

of the demand curve of different consumers, the monopolist could charge a higher price to consumers with inelastic demand curves and lower prices to those with more elastic curves. However, as it is difficult to distinguish between consumers with marginal curves and those with inframarginal curves and to detect *arbitrage*, a single price is applied which does not take into account the profits that the monopolist could possibly make.

The tying of complementary products, in which the tied product is used in variable proportion to one unit of the anchor product overcome information barriers. Since the connection between the two is positively related to the demand for the anchor product, the monopolist is able, by reducing the price of the anchor product and increasing the price of the product, to obtain a higher rate of return from intensive consumers, producing an effect similar to that which would be obtained by applying a price on the anchor product which discriminates between consumers with inframarginal demand curves and those with marginal demand curves<sup>16</sup>. However, this does not mean that a new monopoly is created over the tying product, but only that the maximum monopoly rent is being extracted on the already monopolised product<sup>17</sup>.

This price discrimination allows for an increase in output and improves allocative efficiency since, by charging different prices, the monopolist has the *marginal revenue curve* coexisting with the *demand curve*, which induces him to increase output and produce as much as he would produce in a competitive market<sup>18</sup>.

The Chicago School was thus able to assert that this practice, far from harming consumer welfare, improved production and increased allocative efficiency<sup>19</sup>.

The identification of this practice with price discrimination has sparked some debate, with Posner conceding that the association of tying with price discrimination does not automatically make it lawful<sup>20</sup>. However, in the absence of a generalised prohibition of price discrimination and given the incipient understanding of the competitive effects of tying, Posner argues that prohibition *per se* would be a very costly method of dealing with discrimination, because it fails to consider the difference between those combinations with harmless effects and those with potentially harmful consequences for competition<sup>21</sup>.

The Chicago School also justifies this practice by the protection of *goodwill*, stating that, in some cases, the tying of products is dictated by technological reasons, i.e. the producer fears that the substitutable products of the tied product do not meet the

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<sup>16</sup> Ward Bowman, *Tying Arrangements and the Leverage Problem*, pp. 23-24, mentions, as an example, the buttons for the machine for fixing buttons on shoes, perforated cards for computers, ink for mimeographs. Posner, *The antitrust law*, 1976, cit., pp. 173-74, analyzing the IBM decision and the tying between computers and punched cards, Hovenkamp, *Tying arrangements*, p. 928, referring to ink and printers.

<sup>17</sup> Ward Bowman, *Tying Arrangements and the Leverage Problem*, *op. cit.*, pp. 25-26, admits that monopoly power in a subordinated contract, under these conditions, can, in fact, serve as a leverage for the constitution of a monopoly on the tying product.

<sup>18</sup> Bork, *The antitrust paradox*, pp. 396-97, reflecting the influence of Robinson, *The economics of imperfect competition*, (1933) in arguing that monopolistic production is superior when there is price discrimination.

<sup>19</sup> Bork, *The antitrust paradox*, pp. 396-98, Posner, *The Chicago School of Antitrust Analysis*, pp. 926, 928.

<sup>20</sup> *The antitrust law*, p. 176.

<sup>21</sup> See Posner, *Antitrust law*, 1976, p. 180, considering in 2001, p. 205, an *unwise policy*. Some authors defended that price discrimination was forbidden by the Robinson-Patman Act. Kaplow, *Extension of Monopoly Power Through Leverage*, COLUM. L.R. Vol. 85, pp. 522. However the *Robinson-Patman Act*, 15 U.S.C. § 13 (1994), does not prohibit price discrimination, but only discrimination that "*substantially to lessen competition*." See Tyler Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, VA. L. Rev. Vol. 66, 1980, p. 1259.

technical specifications necessary for the proper functioning of the tying product, thus damaging the *goodwill of the producer*<sup>22</sup>.

In this situation, the literature rejects coercion in the imposition of the tying contract, because there is a rational interest in technological efficiency and the purchaser or lessee is unlikely to object to a tying contract dictated by technological reasons<sup>23</sup>.

Other authors point out that it is necessary to compare the cost savings from a tying contract that protects the *goodwill* of the producer with the costs of excluding some independent producers from the tying product, deciding in favour of the former, since exclusion following tying will have little impact on competition<sup>24</sup>.

The legality of tying imposed to protect *goodwill* is thus justified, because the pro-competitive effects clearly outweigh any anti-competitive effects<sup>25</sup>.

In addition to this explanation, the existence of economies of scale was also pointed out. In this sense, in cases where the combination of products is dictated by the fact that production and commercialisation together have lower costs than production and commercialisation separately, a possible imposition of tying is ruled out, since the decrease in costs necessarily has the effect of decreasing the price<sup>26</sup>.

Based on these arguments, this economic stream advocated that the courts should consider subordination *per se* legal or at least subject it to the *Rule of Reason*<sup>27</sup>.

The Harvard School, represented here by Kaysen and Turner, argued that this practice constituted a barrier to entry since it considered that the link established between the two products obliged the potential rival wishing to enter the market to produce both

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<sup>22</sup> As Ward Bowman, *Tying Arrangements and the Leverage Problem*, pp. 27-28, notes, this was the argument used to replace ink cartridges in the marketing of mimeographs and punch cards and IBM computers. See, in the same sense, Bork, *The antitrust paradox*, pp. 379-380, Posner, *Antitrust law*, 1976, pp. 175-176, 2001, pp. 200-201. More recently, the subordination of rolls to the purchase of Kodak camera, of the film projector to the projection of certain films or of Lexmark ink cartridges to printers.

<sup>23</sup> Ward Bowman, *Tying Arrangements and the Leverage Problem*, p. 28, states that, since there is no conflict between the producer and the buyer, subordination might not be necessary. However, Bork, *The antitrust paradox*, p. 380, raises the issue, arguing that it is not uncontested that agreeing with the buyer to purchase the most suitable product or to describe the technical specifications so that the buyer can purchase from an independent producer is less costly and efficient than tying. Posner also states that if alternative means to defend *goodwill* were equally efficient, the parties would have adopted them. Posner, *Antitrust law*, 1976, p. 175 and 2001, p. 201.

<sup>24</sup> Posner, *Antitrust law*, cit., 1976, pp. 174-176, which he maintains in 2001, pp. 201-202, stressing that tying contracts for this purpose have an exclusionary effect that does not exist in contracts that pursue price discrimination. Posner defends the legality of tying imposed to protect *goodwill* by arguing that the pro-competitive effects outweigh the anticompetitive effects.

<sup>25</sup> This is the analysis, based on price theory, oriented towards partial *equilibrium welfare economics*, which Williamson called the *basic partial equilibrium welfare economics model*. See Oliver E. Williamson, *Economics as an Antitrust Defense: The Welfare Tradeoffs*, p. 20

<sup>26</sup> In this sense, Ward Bowman, *Tying Arrangements and the Leverage Problem*, pp. 25-26. The author also exemplifies with the case of the publication of advertisements in newspapers, in which, given the costs associated with formatting and reprinting, the same price is charged for publication in one edition or in both editions of the day, with the disadvantage for the competitor who only has one edition.

<sup>27</sup> Bork, *The Antitrust Paradox*, pp. 380-81, adding that this treatment extended to bilateral negotiating exclusivity, that is, companies transact goods, provided they only buy goods from each other. See Tyler A. Baker, *The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, op. cit., p. 1237 and Keith K. Wollenberg, Note, *An Economic Analysis of Tie-in Sales: Re-examining the Leverage Theory*, STAN. L. REV. Vol. 39, 1987, p. 756.

products<sup>28</sup>. However, since the justification lies in price discrimination it is not necessary for the producer of the tying product to take control over the production of the tied product, being sufficient for this new rival to act as an intermediary between the producer and the consumer so that it can charge a price in accordance with the desired price discrimination scheme. This new rival can have access to the tied products on the same terms as the competitor already present on the market<sup>29</sup>.

Tying agreements are often associated with the franchise agreement, because of the obligations imposed by the franchisor on the franchisee as regards the exclusive acquisition of certain products used in the business. However, strictly speaking, some obligations contained in the franchise agreement, namely the single-branding obligation, correspond to the business exclusivity imposed by the franchisor on the franchisee, being tying agreements strategically invoked on account of the prohibition *per se*<sup>30</sup>.

## 2.2. Exclusivity (single branding obligation)

The Chicago School will also demonstrate the pro-competitive effects of negotiating exclusivity<sup>31</sup>.

Exclusivity clauses inserted in distribution contracts, whether unilateral or bilateral (*requirement contracts*), deserved for a long time the same treatment by the courts as vertical mergers, since they were considered a form of vertical integration that could jeopardise the opportunities of the producer's rivals, who would ultimately have no customers to sell their products to, as a result of the exclusivity and, on the other hand, prevent the buyer from concluding deals under better conditions with the seller's rivals.

Bilateral exclusivity was accompanied by the risk that the buyer would absorb all the producer's production, preventing him from competing in the market.

The Chicago School began by showing that the producer who wants to demand exclusivity from the buyer must give the buyer a corresponding, which is usually a lower price<sup>32</sup>. Now, for the producer to be able to lower the price, it is because the contract in which the exclusivity clause is inserted produces efficiencies. However, the producer, instead of lowering the price, may offer other compensatory measures, namely exclusive supply and the elimination of purchase and selling costs. The exclusive purchase of the

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<sup>28</sup> Areeda, Turner, *Antitrust law: an analysis of antitrust principles and their application*, 1978, 347a, b § 347, p. 251, welcome the Chicago School's criticism of the leverage theory, accepting that the firm with market power over the tying product may charge an above-market price on the tied price if it reduces, by a corresponding amount, the price of the tying product, failing which the rational consumer will not buy the product.

<sup>29</sup> See Posner, *The Chicago school of antitrust*, p. 934.

<sup>30</sup> Hovenkamp, *The antitrust enterprise*, p. 200.

<sup>31</sup> The exclusivity at issue in this analysis is the exclusivity required by the producer from the distributor so that the distributor would not distribute rivals' products, as well as the *requirements contracts* corresponding to the agreement between supplier and buyer that the supplier would satisfy all the requirements of the product and that the buyer would purchase the products from the supplier for a certain period of time. Exclusivity is distinct from other forms of distribution restraints, because it does not have to limit competition between distributors of a particular brand, unlike territorial exclusivity and resale price maintenance which have been held to protect distributors from *Interbrand competition*. A producer may require exclusivity and at the same time refuse to restrict the number of distributors and their pricing policies. See Howard P. Marvel, *Exclusive Dealing*, J.L. & ECON., Vol. 25, 1982, p. 1 and Klein, Lester F. Saft, *The Law and Economics of Franchise Tying Contracts*, J.L. & ECON. Vol. 28, 1985, p. 345.

<sup>32</sup> Howard P. Marvel, *Exclusive Dealing*, *op. cit.*, p. 5, Bork, *The Antitrust Paradox*, *op. cit.*, p. 309.

products under the *requirement contracts* is thus compensated by consideration which benefits the buyer. In that sense, Bork concluded that these practices create efficiencies, do not decrease output, and there is no evidence that they harm competition and should therefore be considered lawful<sup>33</sup>.

They were seen as inefficient means to increase market power, likely to be overtaken by rivals if the latter decided to offer the same or better conditions to distributors<sup>34</sup>.

Exclusivity, like the other restrictions, will be justified on the basis of pro-competitive effects, namely as a means of protecting against *free riding* by other producers on the producer's investments in the distributor, notably in point of sale and staff training<sup>35</sup>.

### 2.3. Resale price maintenance and territorial exclusivity

*Resale price maintenance* and territorial exclusivity, as vertical restraints, will benefit from Chicago's favourable position on these integration mechanisms, and were carefully analysed to justify their pro-competitive effects, in order to sustain their legality and subjection to the *rule of reason*, whenever doubts were raised as to possible anti-competitive effects<sup>36</sup>.

*Resale price maintenance* is the regulation by the producer or supplier of the

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<sup>33</sup> Robert Bork, *The Antitrust Paradox*, cit., p. 303, 309. Posner, *Antitrust law, op. cit.*, pp. 202-205, 2001, pp. 229-234, points out that this practice can hardly be a more effective means than vertical merger to obtain monopoly, arguing that it is unlikely that a profit-maximizing firm would employ this practice to exclude rivals. On the other hand, he stresses the delicate position in which the exclusive distributor finds itself if the producer obtains a monopoly position and the contract does not safeguard the distributor's position, admitting, however, that in such a scenario there is little for the producer to gain by foreclosing rivals.

<sup>34</sup> Bork, *The antitrust paradox*, p. 309, pointed out as one of the main means to persuade the distributor to accept exclusivity the lowering of the price, which, in a competitive market, could also be practiced by rivals, jeopardizing the exclusivity agreement entered into with predatory intent. Bork, *the antitrust paradox, op. cit.*, pp.156-157, although he considers the pursuit of predatory purposes through exclusivity to be unlikely and the production of positive effects on efficiency to be much more plausible, admits that the possibility of predation by a dominant company, with around 80% market share, which uses this practice to destroy the distribution pattern of rivals should not be ruled out at all in theoretical terms.

<sup>35</sup> In this sense, Lester G. Telser, *Why Should Manufacturers Want Fair Trade?* J.L. & ECON. Vol. 3, 1960, pp. 86 and ff, Howard P. Marvel, *Exclusive Dealing*, pp. 1 and ff. Posner, *Antitrust law*, 1976, p. 204, 2001, p. 232, it also emphasizes the prevention of the hitch-hiking effect. Later, Benjamin Klein, Joshua D. Wright, *The Economics of Slotting Contracts*, J.L. & Econ, Vol. 50, N.º 3, 2007, pp. 421-454, also defend the role of exclusivity as a means of preventing *free riding*. In the same sense, Benjamin Klein, Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free Riding and Creates Undivided Loyalty*, Antitrust L.J., Vol. 74, 2007, pp. 473 and ff.

<sup>36</sup> In favor of the legality of vertical restraints, Bork, *The antitrust paradox: a policy at war with itself*, pp. 227-31, *idem*, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, pp. 429-65. Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, p. 8, defends the legality *per se* of Interbrand restrictions on distribution. In favor of subjecting vertical restraints to the *rule of reason*, William F. Baxter, *The Viability of Vertical Restraints Doctrine*, pp. 948-49, Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason, op. cit.*, p. 169, although he admits that the experience may come to suggest the legality *per se*. Frank H. Easterbrook, *Maximum Price Fixing*, U. Chi. L. Rev., Vol 48. 1981, p. 886, argues that *resale price maintenance*, whether as maximum or minimum price fixing, should be examined under the *Rule of Reason*. As we will see, these restrictions will be considered as a means of remedying market failures in distribution services, without causing any harm to the consumer.

price at which independent distributors resell the products<sup>37</sup>.

The need to protect *free riding* among distributors is one of the main justifications for this restriction, in the form of minimum pricing<sup>38</sup>.

In this sense, the literature in particular Telser with the work, *Why Should Manufacturers Want Fair Trade?*, firstly emphasised that some products require the distributor to provide specific services in the sale, such as, for example, demonstrating the product in the pre-sale phase<sup>39</sup>. However, in the absence of *resale price maintenance*, some distributors may prefer not to provide these services and instead lower the price. In this scenario, there would be distributors selling at a lower price and not providing the services necessary to market the product, while others would provide those services, selling at a higher price, given the costs derived from them. Although it is the distributors who provide these services that lead the consumer to purchase the product, those who benefit are the distributors who, by not providing these special services, charge a lower price, marketing the products on the back of the distributors who bear the cost of the services<sup>40</sup>.

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<sup>37</sup> Ross, *Principles of antitrust law*, p. 224, Frank H. Easterbrook, *Maximum Price Fixing*, pp. 886 and ff. The designation adopted by the literature regarding these mechanisms translates the positive or negative judgment in competition terms, being for its defenders, among which Telser, *Why Should Manufacturers Want Fair Trade?*, p. 86, referred to as "*fair trade*," and for its detractors, such as William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, Harv. L. Rev., Vol. 98, 1985, p. 983 and Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price fixing*, 71 GEO. L.J. Vol. 71, 1983, p. 1487, for the pejorative term *vertical price-fixing*. Underlying the imposition of this practice is the existence of market power on the part of the producer. Persuading distributors to provide these special services to consumers depends on product differentiation, and this differentiation inevitably goes hand in hand with market power. Telser, *Why Should Manufacturers Want Fair Trade?*, p. 87. The maximum price setting is also dependent on the market power resulting from product differentiation. See, for example, Easterbrook, *Maximum Price Fixing*, pp. 892-93, accepting that retailers can sell at a price above the cost price. The latter modality, as Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, J.L. & ECON., Vol. 34, 1991, p. 269, in her analysis of the impact of maximum resale price *maintenance* in cases decided between 1976 and 1982, argues, has been of little relevance in terms of litigation, which is explained by the fact that the setting of a maximum ceiling is hardly harmful to competition.

<sup>38</sup> Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, Part*, p. 430, n.º 111, stresses that Bowman also defended the fixing of the minimum price as a way of preventing *free riding*, which, however, he called "*spilling-over effect*". Similarly, Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, p. 89, n.º 4. As William Breit, *Resale Price Maintenance: What do Economists Know and When did They Know It?* Vol. 147, 1991, p. 72, Alfred Marshall's *Principles of Economics* was the first product "*in the English speaking world to be sold under a scheme of resale price maintenance*." Henry Ford used resale price maintenance to protect the margins of automobile distributors who had to teach consumers how to drive.

<sup>39</sup> As Telser, *Why Should Manufacturers Want Fair Trade?*, p. 89, notes, these services are not to be confused with the general services inherent in the marketing of products, such as credit, environment, delivery. These specific services are necessary only for new products or old products which are in demand by a small section of the market, that is, which are little known to the general public. These are cases where, in addition to advertising, a personalized action with the consumer is necessary for the most efficient promotion of the product.

<sup>40</sup> See Telser, *Why Should Manufacturers Want Fair Trade?*, pp. 90-93, explains that the free-rider effect is a market failure inherent in the use of independent distributors, as they tend not to provide promotional services, which increase the demand for the producer's products, but prefer to free ride on the promotional services provided by other distributors. Telser, *Why Should Manufacturers Want Fair Trade II?*, J. L. & Econ. Vol. 33, N.º. 2 1990, pp. 409-10, in the absence of vertical control, argues that this hitchhiking effect would lead to an inefficient equilibrium in which no distributor would provide special promotion services.

In this sense, the setting of a resale price has the advantage that, by fixing the *minimum gross mark-up* between the retail price and the production price, it limits competition by reducing price, encouraging competition for quality and variety of specific services in the marketing of the product<sup>41</sup>.

The alternatives to this practice, namely selling the services and the product separately, raise difficulties, since selling the services and the producer separately would make it overly complicated to charge customers for the cost of the special services provided. If services were of equal value to all consumers, it would be easy to set a price equal to marginal cost. However, consumers value these special services differently, making it difficult to apply a marginal cost system.

Another possible alternative would be to charge a lower price to distributors who agree to provide the special services and a higher price to those who do not, since *free riding is* since everyone buys the products at the same price, allowing those who do not provide services to make a profit equal to the cost of the special services. Through price discrimination, the producer or supplier would achieve the same result as *resale price maintenance*<sup>42</sup>. However, as price discrimination is a sensitive issue in competition law<sup>43</sup>, this result could be achieved through direct funding by the producer or supplier of the underlying costs of the special services. The disadvantage of this practice would be that it would oblige the producer and the supplier to monitor the distributor to see whether he provides the paid services, thus raising monitoring costs. On the contrary, resale price maintenance has low monitoring costs.

*Minimum resale price maintenance*, in this perspective, is a mechanism to ensure that distributors provide the special services *that producers want*<sup>44</sup>.

The effect of *resale price maintenance*<sup>45</sup>, from a competition law point of view, is to prevent the free-riding effect on the promotional services to be provided by

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<sup>41</sup> Telser, *Why Should Manufacturers Want Fair Trade?*, p. 92, considers that if these services prove unnecessary, the producer will rationally abandon resale price maintenance.

<sup>42</sup> As Telser, *Why Should Manufacturers Want Fair Trade?*, p. 94, the refusal to sell to distributors not providing these services would also oblige the producer, as with the direct payment of the costs incurred for the special services, to prevent and detect distributors selling to distributors to whom the producer refuses to sell.

<sup>43</sup> Price discrimination, as Doris Hildbrand notes, *The role of economic analysis in the EC competition rules*, p. 110, is an unfortunate term that has been given a pejorative interpretation, suggesting that price differences are bad. Price discrimination can only be said to exist when it is not cost-related and can mean that the same product is sold at different prices or at the same price, but which does not correspond to the actual cost price. Discrimination may be geographical, justified by transport costs, or it may take the form of discounts or promotions to attract customers, or, in an extreme situation, it may take the form of predatory pricing. As to predatory pricing, Posner, *Antitrust Law*, cit. 1978, p. 189, 2001, p. 215, diverges from the majority position of Chicago that recondemned it to an irrational activity, not even deserving to be appreciated as referred by Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, p. 263 and, in more moderate terms, Bork, *Antitrust Paradox*, pp. 144-55. Posner, moreover, in this matter is more interventionist than the position of the Harvard School, resulting from the article *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, authored by Areeda/Turner, published in the Harvard Law Review, Vol. 88, N.º 4, 1975, pp. 697-733, as we have already underlined in our note above 550.

<sup>44</sup> Telser, *Why Should Manufacturers Want Fair Trade?* p. 91, note 13, *idem*, *Why Should Manufacturers Want Fair Trade II?* p. 409, indicating as special services the sales promotion at points of purchase and information about a particular product.

<sup>45</sup> Telser, *Why Should Manufacturers Want Fair Trade?*, pp. 96-99, accepts that *resale price maintenance* can be a means of cartel protection, serving to safeguard monopoly profits.

distributors, with repercussions on consumer welfare<sup>46</sup>.

The justification for fixing a maximum price is to prevent the distributors from exploiting a monopolistic position with consumers or from organising themselves into a cartel<sup>47</sup>. In the latter case, the fixing of the maximum price, coupled with the marketing of the product only to those distributors who undertake to comply with the maximum price, acts as a means of persuading the distributors to abandon the cartel. Where the producer and the distributor have monopoly power, the fixing of a maximum price assures the producer that the distributor will not reduce *output* in its interest and thus jeopardise the collective interest. The restriction in this situation has a clear competitive effect, since, instead of decreasing output, it allows *output* to increase<sup>48</sup>.

This mechanism can be used, like advertising, to reduce search costs. The producer creates a reputation among consumers that the marketing price is low, setting an attractive price, to which distributors, by setting the maximum resale price, adhere. In this way, consumers are able to identify sellers with low prices, which reduce the search costs, with a corresponding reduction in price and increase in sales<sup>49</sup>.

Another of the purposes attributed to this restriction is the reduction of transaction costs<sup>50</sup>, a position that supports the pioneering role of the Chicago School.

One effect of this restriction is that it may lead to a higher price following the incentive to provide special promotion services<sup>51</sup>. However, such a higher price does not reflect the exercise of market power or harm the consumer, since these special services entail costs for the undertakings which must be recovered<sup>52</sup>.

The Harvard School, however, does not accept these justifications, considering that these services are a form of advertising, whose negative effect is the differentiation of the product, which leads to a barrier to entry<sup>53</sup>.

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<sup>46</sup> Posner, *Antitrust law*, 1976, pp. 14-15, 172-73, even compares the effect of *resale price maintenance* in promoting competition on factors other than price to the effect of the cartel agreement in promoting by each member services on the backs of the other members.

<sup>47</sup> The imposition of maximum resale prices has been far less controversial than the fixing of a minimum price, with few authors advocating the application of a ban *per se*, primarily because the existence of a ceiling on the price has the benefit of preventing price increases resulting from successive monopolies. In that sense, if the producer has a certain degree of market power, through the use of vertical restraints, franchising or simple distribution contracts, it confers that power on its distributors, and the fixing of a ceiling is a way of constraining distributors to exploit that market power. Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom*, p. 62, n.° 2.

<sup>48</sup> Bork, *The rule of reason*, pp. 464-65.

<sup>49</sup> In this sense, Easterbrook, *Maximum Price Fixing*, cit., pp. 892-95, which adds that even the Antitrust division accepted this argument. Posner, Easterbrook, *Antitrust: cases, economic notes, and other materials*, 2d ed. West Group, 1981, St Paul, pp. 114-18, stress that the reduction in search costs brought about by fixing the price even slightly above the competitive price is beneficial because it represents a reduction in information costs.

<sup>50</sup> In this sense, Benjamin Klein, *Transaction Cost Determinants of "Unfair" Contractual Arrangements*, AM. ECON. REV., Vol. 70, N.° 2, 1980, p. 356 and ff.

<sup>51</sup> Telser, *Why Should Manufacturers Want Fair Trade?* p. 91 and William F. Baxter, *The Viability of Vertical Restraints Doctrine*, pp. 945-46.

<sup>52</sup> Alan Meese, *Price Theory, Competition, and the Rule of Reason*, U. ILL. L. REV., Vol. 2003, N.° 1, p. 81.

<sup>53</sup> See Posner, *The Chicago School of Antitrust*, p. 930, explains that underlying this position is the premise, contrary to the rationality presumed in price theory, that consumers are irrational and manipulable. Speaking out against this practice, Joseph P. Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, Vanderbilt Law. Review, Vol. 33, 1980, pp. 285-86, arguing the presumption that they are anticompetitive, subjecting the defence to careful analysis, W. David Slawson, *A Stronger, Simpler Tie-*

Territorial exclusivity, as the agreement to allocate an exclusive geographical area to retailers, who undertake not to sell outside this area, will also be examined by this economic stream.

As advocated for the fixing of a minimum resale price, this clause was seen as an incentive for distributors to provide marketing services, such as product demonstrations, advertising, after-sales services such as repair and maintenance. In that sense, Bork argued that this mechanism ensures that distributors invest sufficient resources in the promotion of the producer's products<sup>54</sup>.

Like resale price maintenance, territorial exclusivity guarantees distributors that the fruit of their efforts to promote the products will be repaid<sup>55</sup>.

On the other hand, this restriction allows producers to reduce their sales force and orders to flow more efficiently, allowing better planning of production. The savings in these costs may exceed the losses of the monopoly<sup>56</sup>.

Resale price maintenance and territorial exclusivity, also referred to as *intra-brand* restraints, given their effects on intra-brand competition, although they reduce competition between the various distributors, at a stage following the transfer of ownership, appear, from the Chicago School's perspective, as methods to overcome the existing market failures in distribution caused by the distributors' free-riding effect<sup>57</sup>. While they may have a negative effect on *intra-brand competition*, they may intensify *inter-brand*<sup>58</sup> competition and, since only one brand is involved, it cannot be argued that they have a foreclosure effect<sup>59</sup>.

Some members of the Chicago School will consider *minimum resale price fixing* and exclusive territories as means of distinguishing products, encouraging promotion and associating the product with a distributor<sup>60</sup>.

In view of the above, it is possible to divide the Chicago School approach to vertical restraints into two distinct methodical phases.

Firstly, the anti-competitive effects imputed by the Harvard School are denied

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*in Doctrine*, Antitrust Bull., Vol. 25, 1980, p. 672 (1980), W. David Slawson, *A New Concept of Competition: Reanalyzing Tie-in Doctrine After Hyde*, Antitrust Bull., Vol. 30, 1985, pp. 258-59, stating that they necessarily restrict competition regardless of the presence of monopoly power.

<sup>54</sup> Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, pp. 430-433. See Posner, *The Chicago School of antitrust*, p. 927, on the imposition of resale prices. Alan Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, J. COMP. L. & ECON., Vol 1, N.º 1, p. 53, considers that, in this position, Bork reveals an outside-in approach in the analysis of integration, whether contractual or through ownership, as a means to overcome the same market failures.

<sup>55</sup> Baxter, *The Viability of Vertical Restraints Doctrine*, p. 946, Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, pp. 430-38; Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, U. Chi. L. Rev., Vol. 45, 1977, p. 4.

<sup>56</sup> Easterbrook, *Predatory Strategies and Counterstrategies*, p. 337, n.º 165.

<sup>57</sup> Telser, *Why Do Manufacturers Want Fair Trade?*, pp. 96-99, claiming that resale pricing can counter the distributor's hitch effect and ensure an optimal level of promotional services. Bork, *The antitrust paradox*, pp. 430-38. This clearly anticipates the contributions that will later be made by Oliver Williamson's Transaction Cost Theory.

<sup>58</sup> Bork, *The antitrust paradox*, pp. 430-38.

<sup>59</sup> Meese, *Monopolization, Exclusion and the Theory of the Firm*, p. 824.

<sup>60</sup> William F. Baxter, *Vertical Practices: Half Slave, Half Free*, Antitrust L.J., Vol. 52, 1983, pp. 747-50, Easterbrook, *Vertical Arrangements*, p. 150. In this sense, Bork, *The Antitrust paradox*, *op. cit.*, pp. 435-436, compares these restrictions to the decision of the company that advertises its articles and instructs the employees to charge a higher price to cover this promotional investment.

and, secondly, the pro-competitive effects are explained<sup>61</sup>.

Posner and Bork, even in a scenario of concentrated market power, will defend the legality of vertical restraints<sup>62</sup>.

The Chicago School has also the merit of underlining the lack of interest in distinguishing between price and non-price restrictions, arguing that they all influence the price. In this sense, territorial exclusivity, by encouraging distributors to provide more services and information to the consumer, works as compensation for the costs borne by distributors. The producer necessarily has to increase the distributor's margin, thus demonstrating the influence on price<sup>63</sup>.

On the other hand, the Chicago School will emphasise the difference between vertical and horizontal agreements.

In effect, vertical agreements, having the purpose of placing the products on the market, are used to make the vertical relationship more efficient, otherwise inefficiency and consumer dissatisfaction will spill over to both parties. This interdependence, which does not exist in horizontal agreements, leads to the conclusion that the agreements tend to pursue interests that benefit consumers and do not jeopardise welfare<sup>64</sup>.

In this context, the Chicago authors will also rehabilitate vertical integration by showing that there are no grounds to fear that the monopolist will use vertical integration to dominate distribution, in order to obtain monopoly profits in distribution and production. In fact, since both stages are complementary, this increase in price in distribution would have the effect of reducing demand for the products, with a consequent reduction in profits. The combination of vertically related monopolies is denied any effect in increasing the profit of the monopoly already obtained<sup>65</sup>.

Based on this argument, it will also be possible to rule out those who consider vertical integration, given the requirements at the level of capital needed to invest, to be a barrier to entry, since this would only happen if the two levels at which new rivals had to enter were monopolised, which, as we have seen, is rejected by the Chicago school on the basis of *single monopoly theory*<sup>66</sup>.

Having denied the foundations of monopoly power, in view of the absence of effects on market share and entry of new rivals, the Chicago School excludes the pursuit by vertical integration of monopolistic objectives<sup>67</sup>.

In this sense, vertical integration will be justified with the desire to increase

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<sup>61</sup> Bork, *The antitrust paradox*, *op. cit.*, pp. 280-96, regarding the imposition of resale prices and the vertical division of the Market. Posner, *Antitrust law*, pp. 147-66, about distribution restrictions.

<sup>62</sup> Bork, *The Antitrust paradox*, pp. 288-289, Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, *op. cit.*, pp. 6-26.

<sup>63</sup> Easterbrook, *The limits of antitrust*, p. 14.

<sup>64</sup> In this sense, William F. Baxter, *Substitutes, Complements and the Nature of the Firm*, "The law and economics of competition policy", p. 38, distinguishes vertical from horizontal agreements, using the notion of complementary and substitute products, considering that the former are concluded between companies that produce substitute goods, while the latter have as parties companies that produce complementary products.

<sup>65</sup> Bork, *Vertical integration, and the Sherman act: the legal history of an economic misconception*.

<sup>66</sup> *Ibid*, p. 195, until such impediments are demonstrated, the capital requirement should not be attributed an adverse effect on market entry. See Bork, *The antitrust paradox*, p. 172, note 65.

<sup>67</sup> See Bork, *Vertical integration, and the Sherman act: the legal history of an economic misconception*, pp. 195-196.

efficiency, thus benefiting consumers<sup>68</sup>.

This analysis will lead to the conclusion that firms cannot obtain or maintain by unilateral action a monopoly unless they are willing to irrationally bear losses.

Competition law should then address cartels and horizontal mergers that may create monopoly or allow the cartelization of the market, drastically reducing the number of producers in the market<sup>69</sup>.

This vision results in a sharp decrease in the scope of action of competition law, which is compatible with the position advocated within the scope of the administrability and enforcement of competition law.

### 3. Conclusions

This brief analysis leads us to conclude that the Chicago School justification for vertical restraints, although not expressly referring to market failures and transaction costs, was grounded in these, as Williamson himself acknowledged when analysing the theoretical constructions of Telser and Bork<sup>70</sup>.

Aaron Director and Edward Levi, in their justification of tying contracts, invoked the existence of information costs that prevented price discrimination.

Telser, in his justification for minimum resale price maintenance, also pointed to the prevention of the free-riding effect in promotional efforts, extending Ward Bowman's analysis. Although he never expressly stated the influence of Coase, Telser concluded that the decision between opting for distribution, through independent resellers or internalising the operation is imposed by the costs of resorting to alternative mechanisms for the provision of retail services.

Telser also pointed out that contractually setting the optimal level of service to be provided by retailers had high monitoring and enforcement costs, which made it less attractive compared to resale price maintenance. Resale price maintenance, on the other hand, allowed distributors to compete with each other in the provision of services until costs rose to the set price. On the other hand, this investment in resale price maintenance emerged as a substitute for advertising, allowing consumers to be informed.

This explanation of resale price imposition is clearly tributary to the analysis of transaction costs, making the decision to resort to the market instead of internalising the transaction within the company fall on these costs.

The explanation found by the Chicago School that, unlike the Harvard School, was able to point to efficiency as a justification for these practices, which Williamson called nonstandard, rests on the overcoming by Chicago School of the model of perfect competition advocated by the price theory.

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<sup>68</sup> See Posner, *The Chicago school of antitrust analysis*, p. 927. As Posner, *The Chicago School of Antitrust*, cit. notes, pp. 937-938, Kaysen and Turner, who in 1959 argued for the illegality of vertical merger that gave a firm a 20% or more market share, in 1978, in *Antitrust law*, Areeda and Turner were already unconcerned about the anticompetitive effects of vertical integration, opting for legality *per se*.

<sup>69</sup> Posner, *The Chicago school of antitrust*, pp. 928, 932-933. The more orthodox Chicago position, represented by Bork, "the diehard Chicagoan" in Posner's description, limited competition law to explicit price fixing and large mergers with monopolistic intent.

<sup>70</sup> Williamson, *The economic institutions of capitalism: firms, markets, relational contracting*, p. 185 n.° 22, *idem*, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, pp. 955, 958, n.° 26, 983, n.° 101. See Wright, *Abandoning antitrust's chicago obsession: the case for evidence-based antitrust*, pp.304-305.

In fact, the positions taken by the Chicago School on vertical restraints reveal, in several aspects, the proximity to the New Economic Institutionalism, in particular the Transaction Cost Theory and the abandonment of the perfect competition model<sup>71</sup>.

For example, minimum pricing and territorial exclusivity are designed as methods to ensure that distributors provide the services desired by the producer. These services include advertising, product demonstrations and after-sales services such as repair and maintenance. By recognising territory exclusivity, the producer secures for distributors the benefits of its efforts to attract and keep customers, whilst the minimum price prevents distributors from free riding on the services provided by other distributors by charging a price below the minimum price. The combination of these restraints therefore allows the distributor to direct its efforts towards competition on non-price aspects, i.e. competition through pre-sales and after-sales services, while at the same time preventing a free ride on the services provided by other distributors.

In the particular case of vertical restraints in distribution, the Chicago School was sensitive to the need, formalised by Transaction Cost Theory, for firms to adopt contractual methods designed to lower transaction costs, i.e. the costs of relying on the market, in the case of distribution, to distribute goods<sup>72</sup>.

Therefore, we conclude that the Chicago School approach to vertical restraints is not exclusively grounded in price theory, but also in transaction cost analysis, with the consequent overcoming of the perfect competition model<sup>73</sup>.

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<sup>71</sup> Wright, *Abandoning antitrust's chicago obsession: the case for evidence-based antitrust*, Antitrust L J, Vol. 78, 2011, p. 305.

<sup>72</sup> Easterbrook, *Vertical Arrangement the Rule of Reason*, Antitrust L.J., Vol. 53, 1984, p. 150, referring, following Telser's analysis, to the existence of forms of organization that depart from atomistic competition, in order to minimize the costs inherent in organizing the market and obtaining information. See Meese, *Price theory and vertical restraints*, pp. 164-165.

<sup>73</sup> Meese, *The price theory and vertical restraints*, p. 159. Kovacic, *The intellectual DNA of modern US competition law for dominant firm conduct: the Chicago/Harvard double helix*, p. 14, n.º 36, regarding the composition of the intellectual DNA of competition law in the US being the result of the combination of the Chicago School and the Harvard School, excludes the importance of the New Economic Institutionalism and the Transaction Costs Theory. See Alan J. Meese, *Competition and Market Failure in the Antitrust Jurisprudence of Justice Stevens*, Fordham L. Rev. Vol. 74, 2006, p. 1775. Kovacic, in the scarce reference he makes to Williamson, takes as a starting point that he is not associated to the Chicago School, nor to the Post-Chicago School, considering him close to the former regarding the legality of vertical restrictions and mergers and to the latter regarding the potential exclusionary effects resulting from some conducts of dominant companies. The author, by omitting the presence of the Transaction Cost Theory in the Chicago School, which he examines in detail, devalues, from the outset, the influence that this theory had in the North American competition law, in particular, in the justification of restrictive practices as a means to overcome market failures and transaction costs, impoverishing the analysis developed.

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