The Roots of Antitrust Policy in the United States' Sherman Act

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Abstract

The origins of modern competition policies date back to the end of the 19th century in the United States of America, as a reaction to the growth of certain companies and their economic power, which was the result of economic development and the consequent increase in competition that shaped American society in the second half of the 19th century. Companies began to organise themselves into large groups, establishing coalition relationships with each other and becoming subject to the same control, which, because it was exercised through fiduciary contracts, justified the use of the term trust to designate these corporate structures. The legislation that came to control these groups of companies, resizing companies and preventing excesses, was therefore called antitrust. In the second half of the 19th century, a number of factors allowed an increase in the size of companies. The last part of the 19th century was characterized by low and unstable prices, overwhelmed by two serious economic crises (1873-79 and 1883-86) which led some economists to adopt the term Great Depression to designate this period in American history, in a parallel with the recession that hit Europe at the same time, which was not unrelated to the need for the economy to adjust to the conditions resulting from the American Civil War, including the decrease in savings. It is in this context that companies, in order to reduce price wars and market instability, began to organise themselves into trusts and cartels. Price stability was thus achieved at the expense of the end consumer and producers, including farmers and small industrialists and traders, who were subject to discriminatory and unfair practices and restrictive agreements that strengthened the monopolies of large companies, eliminating small business competitors and imposing unfavorable conditions on those who had to negotiate with them. This small business was at the origin of a public outcry that reached its zenith in the last decades of the century with the passing of various state antitrust laws and the Sherman Act. In this paper, we aim at demonstrating the origins of at US antitrust policy by examining the Sherman Act. Therefore, it is pertinent to begin to trace the evolution of antitrust policy in Common Law. As we will conclude the US antitrust policy has been ever since forged by economic ideology.

Keywords: *antitrust, Sherman Act, competition policy, commercial law.*

JEL Classification: K22

1. Introduction

The origins of modern competition policies date back to the end of the 19th century in the United States of America, as a reaction to the growth of certain companies and their economic power, which was the result of economic development and the consequent increase in competition that shaped American society in the second half of the 19th century.

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term *trust* to designate these corporate structures.

The legislation that came to control these groups of companies, resizing companies and preventing excesses, was therefore called *antitrust*.

In the second half of the 19th century, a number of factors transformed the American business, allowing an increase in the size of companies[2].

One of these factors was the implementation of the railway network throughout the US, which, combined with the expansion of the telegraph and telephone, created a single market full of potential and new opportunities, in which companies began to exploit *economies of scale and scope*. The creation of this single market was associated with the development of competition, as companies began to have more distant companies as rivals. In addition, there was technological development in areas such as chemistry, metallurgy and energy, with the emergence of more advanced forms of capital markets and more efficient management systems.

The liberalization of corporate rules allowed the enlargement of the companies with a consequent increase in mergers and the professionalisation of managers[3].

The last part of the 19th century was characterized by low and unstable prices, overwhelmed by two serious economic crises (1873-79 and 1883-86) which led some economists to adopt the term *Great Depression to* designate this period in American history, in a parallel with the recession that hit Europe at the same time, which was not unrelated to the need for the economy to adjust to the conditions resulting from the American Civil War, including the decrease in savings[4].

This fall in prices, however, is explained by the increase in competition[5], by investment in *economies of scale and scope,* with an inevitable fall in transaction costs, the increase in companies' fixed costs with new machinery, the reorganisation of production and distribution, plus the constant rise in wages[6].

It is in this context that companies, in order to reduce price wars and market instability, began to organise themselves into *trusts* and cartels, through which they were able to reach agreements that would allow them to maintain high prices and margins, invest in the machinery needed for more efficient production, eliminate small entrepreneurs and reduce wages[7].

Price stability was thus achieved at the expense of the end consumer and producers, including farmers and small industrialists and traders, who were subject to

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[2] See Chandler Jr., Alfred, *Scale and scope. The dynamics of industrial capitalism*, The Belknap Press of Harvard University Press, Cambridge, Massachussets, 1994, pp. 51 ff*;* Eleanor M. Fox, Lawrence A. Sullivan, *Antitrust - Retrospective and Prospective: Where Are We Coming From? Where Are We Going?* 62 New York University Law Review 936 (1987), pp. 937-938.

[3] In this regard, F. M. Scherer, *Industrial Market Structure and Economic Performance*, Rand McNally & Co., U.S., Chicago, 1980, p. 492, highlighting the flexibility in the acquisition of social participation by other companies, which had previously been deeply restricted.

[4] Williamson, Jeffrey, *Late nineteenth century retardation*, The Journal of Economic History, Vol. 33, n.º 3, 1973, p. 581 et seq.; Williamson, Jeffrey, *Watersheds and turning points on the long-term impact of civil war financing*, The Journal of Economic History, Vol. 34, 1974, issue 3, p. 636 et seq.

[5] This revolution in production and distribution is described in detail in Chandler, *op. cit.*, p. 58-71.

[6] Ibid, p. 71. James Livingstone, *The social analysis of economic History and Theory: conjectures on late nineteenth century American development*, The American Historical Review, n.º 92, n.º 1, 1987, pp. 69 and ff, debunks the existence of a great depression, attributing this phenomenon to a distribution of profits from capital to labour.

[7] The oil industry and railway transport are the best examples. See James Livingstone, *op. cit.*, p. 82 et seq.

discriminatory and unfair practices and restrictive agreements that strengthened the monopolies of large companies, eliminating small business competitors and imposing unfavourable conditions on those who had to negotiate with them.

Farmers, for their part, witnessed the fall in the selling prices of their products as a result of successive crises, in contrast to the rise in *input* prices, especially in transport and energy. This *small business was* at the origin of a public outcry that reached its zenith in the last decades of the century with the passing of various state *anti-trust* laws and the *Sherman Act.*

At this time, restrictions on trade and monopolies were no longer foreign to the *common law*.

The "*contract in restraint of trade*" in England corresponded to a contractual restriction of a person's right to trade. This illegality was originally justified by the fact that it not only harmed the people, but also those who were bound to them[8]. Later, under the influence of economic doctrine, partial and reasonable restrictions were excluded from the prohibition of restrictions on trade, using the requirement of *consideration*[9].

It is in this context that the *rule of reason* was enunciated in the English case of *Mitchel v. Reynolds,* in 1711, in the assessment of these restrictions, with time and space limitations being adopted as the main criteria for assessing the reasonableness of the restriction[10].

Gradually, a jurisprudential trend began to take shape which argued that restrictions could be admitted provided that they were merely ancillary to the main purpose of the contract and were necessary for the enjoyment of fruits or to prevent them from being unfairly enjoyed by another party[11].

In 1890, English case law improved on *Mitchel*'s decision in *Maxim Nordenfelt*

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[8] Cfr. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, (6th Cir. 1898) (Taft, J.), p. 279, stating that *"The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labour. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others.*"

[9] Hovenkamp, Herbert, *The Sherman Act and the Classical Theory of Competition*, Iowa Law Review, Vol. 74, 1988-1989, p. 1027. *Jonh Dyer's case* in 1914 is identified by some doctrine as one of the first cases to reconcile freedom of contract with freedom of trade, admitting the possibility that the restriction imposed on the parties, in this case, the negative de facto fulfilment of not carrying on business for 6 months in the same city as the other party, could be valid, provided it was reasonable. See Sandra Marco Colino, *Competition law of the EU and UK*, eighth edition, Oxford University Press, 2019, p. 3.

[10] The restriction imposed in the non-compete obligation was considered valid "*if reasonable and ancillary to some principal (legitimate) transaction and if limited in time and space", as* long as *good and adequate consideration was* demonstrated, i.e. the consideration for the non-compete obligation. Cfr. Keith Hylton, *Antitrust law, economic theory and common law evolution*, Cambridge University Press, 2003, p. 33. We emphasise that this criterion of *reasonableness* was not known as the *rule of reason*, but there was a notion of reasonableness underlying the balance between the costs and benefits resulting from the conduct for consumers. Cfr. Keith Hylton, *op. cit*., p. 103. The *rule of reason* employed by case law under the *Sherman Act*, differs greatly from the judgement of reasonableness that shaped *common law* in England and the United States. Cfr. Freyer, Tony, *Legal Restraints on Economic Coordination: Antitrust in Great Britain and America, 1880-1920*, in Naomi R. Lamoreaux & Daniel M.G. Raff (eds.) *Coordination and Information: Historical Perspectives on the Organization of Enterprise*, University of Chicago Press, Chicago, 1992, p.187, available at http://www.nber.org/books/lamo95.

[11] Cfr. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, cit., pp. 281-283.

Guns and Ammunition Co. v. Nordenfelt by recognising the enforceability of a partial restriction, allowing it to be imposed by the courts. The restriction corresponded to the 25-year worldwide non-compete obligation imposed on Thorsten Nordenfelt when he sold his arms manufacturing company to *Maxim Nordenfelt Guns and Ammunition Company for a* considerable sum. Although he remained a partner, shortly afterwards he decided to leave the partnership, starting a new arms business with the weapons that *Maxim was selling*. The court of first instance upheld the argument that the restriction was unreasonable, but the court of appeal ruled in favour of *Maxim Nordenfelt Guns and Ammunition Company*, considering it a partial restriction that could be imposed by the courts.

In this case, Lord Mcnaghten remarkably constructed a criterion that made it possible to establish the legality of restrictions and, therefore, their enforceability, when he said that they can be "*justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it's the only justification if the restriction is reasonable-reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public*."[12]

Monopolies, historically, began as sums paid by the King to a person or persons, natural or legal, to stop them buying, selling, making or using something that they had previously been doing without limitations and restrictions, which in the long term had the effect of limiting entry into the market[13]. This is why monopolies were traditionally illegal, because they corresponded to a limitation of individual freedoms and were therefore contrary to the English Constitution and the interests of the people.

It is therefore possible to understand why the *common law* did not contain express prohibitions against monopolies set up by individuals, since these were an emanation of royal power.

However, the *common law* had a clear perception that individuals could, on the basis of the same freedom to contract that the *common law* sought to protect, engage in abusive behaviour in order to obtain the results inherent in monopoly power, harming the well-being of society.

In this sense, the *common law* criticised the harmful results of monopolies, such as price rises, hoarding, the distribution of territories, limits on production, progressively encompassing operations and their resulting effects in the concept of monopoly.

At *common law*, the unlawfulness of the monopoly was not centred on its creation by the individual, but on acts which, if not restricted, could lead to its typical results, restricting the freedom to contract and causing harm to society.

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[12] *Apud* Freyer, *op. cit.*, p.187. North American jurisprudence also adopted this rule from English law at an early stage, attaching great importance to *consideration.* Cfr. Hovenkamp, *op. cit.*, p. 1026 and ff.

[13] In this sense, the Judge White in the judgement in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), p. 51, relied on the concept propounded by Sir Edward Coke. 51, relies on the concept propounded by Sir Edward Coke, who defined it as "*an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade*" and by Hawk. P "*A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making, working, or using of anything whereby the subject in general is restrained from the freedom of manufacturing or trading which he had before."*

Thus, all contracts and acts that produced these effects were covered by the *common law* concept of *restraint of trade*[14].

In *Mogul Steamship Co. v. McGregor,* in 1892, the English legal system affirmed the principle that individuals were free to contract, not to contract and to exercise any reasonable right in relation to this freedom, unless it was intended to restrict, unfairly or willfully, the activity of trade.

This case involved a cartel of shipowners who, through various restrictive practices, including negotiating exclusivity, prevented a rival, Mogul, from entering the market. This agreement was considered a void *restraint in trade* because it was contrary to *public policy* and was denied enforceability by the courts. However, despite being void as a restraint of trade, it was not considered illicit from a criminal point of view. Restrictions that were contrary to *public policy* were not enforceable and could not be imposed by the courts, even though they were not criminal offences[15].

As was the case in England, in the United States fear of the consequences of monopoly has also justified acts that lead to its results being considered unconstitutional in some cases, and in others subject to legal and jurisprudential repression, including the repression of contracts and acts by individuals that could lead to these effects[16].

The US legal system, both through the law and through the courts, will adapt the known restrictions to new behaviours that have arisen in the meantime, which could produce the results of the monopoly that has always been tried to be prevented[17].

At the centre of the analysis of vertical restrictions in *common law* in the United States and England will be the dichotomy between freedom of contract, with the consequence of the law enforcing the fulfilment by the parties of freely contracted obligations, and freedom of trade, under which the parties were free to trade without being subject to restrictions imposed by third parties. This reflects the classical view of economics at the time[18].

As can be seen from this brief analysis, in the English legal system *in the* mid-19th century, the enforceability of the *contract in restraint of trade cases* depended on the partial nature of the restriction, according to the rule of reason set out in *Mitchel.* Partial restrictions could be coercive under certain circumstances, which was already denied in the case of total restrictions. The court also adopted the *public policy* criterion, considering that it could not enforce contracts contrary to *public policy* even though this did not mean that they were criminal offences.

In this sense, the courts, in the wake of the *Mogul* case, did not criminalise these contracts, but denied them enforceability[19].

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[14] The evolution of the economy and society meant that it was later recognised that some of these acts, covered by the legal prohibition, could contribute to the development of trade. Cfr. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), p. 55.

[15] In this sense, Lord Chancellor Halsbury in the Mogul decision states that *"contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all,"* even if they had been agreed to by the parties. cfr. Freyer, *op. cit*., p. 186.

[16] In *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1 (1911), an overview of the legislation and decisions in this area can be found.

[17] This evolution is documented in decisions such as *National Cotton Oil Co. v. Texas,* 197 U. S. 115 and *Shawnee Compress Co. v. Anderson,* 209 U. S. 423.

[18] Hovenkamp, *op. cit*., pp. 1026-1028.

[19] Freyer, *op. cit*., p. 184.

The courts will apply the same principles to price-fixing agreements, which included the imposition of resale prices and collective refusals to negotiate (*boycotts).*

The US legal system, at the end of the 19th century, approached this dichotomy between freedom of contract and freedom of trade in different ways.

While the English legal system takes a non-interventionist stance that favours competition, but in which reasonable restrictions are recognised as being enforceable, the US legal system, at the end of the 19th century, moved away from this position, which it had also initially embraced, embarking on a path where the influence of the notion of neoclassical competition is evident, culminating in the denial of the enforceability of these restrictions and their criminalisation, in a move influenced by the notion of neoclassical competition[20].

Faced with the inefficiency of the one-off legislative experiments adopted by some federal states to control cartels and *trusts,* usually of a supra-state dimension, in 1890 a federal law was adopted in this area, the *Sherman Act*. This law is still today the most perfect example of *antitrust* legislation[21].

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[20] Ibid, p. 184. Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, BYU Law Review, 1999, issue 4, p. 1301 et seq. Available at: https://digitalcommons.law.byu.edu/lawreview/vol1999/iss4/4. On the initial influence of *common law* in the first decisions on the *Sherman Act,* see Hovenkamp, *op. cit*., pp. 1035-1039.

[21] Motta, Massimo, *Competition policy: theory and practice*, Cambridge University Press, 2004, p. 3. About a year earlier, Canada had adopted a similar rule, which was timidly applied. Shortly afterwards, it was Australia's turn, in the *Australian Industries Preservation Act 1906,* to criminalise certain anti-competitive acts carried out with the intention or to obtain results that harm the public. In 1890, when the *Sherman Act* was passed, only a few laws imposed sanctions against the obstruction and abuse of interstate circulation. However, the main purpose of the Sherman Act was not to regulate this circulation, but to repress conduct that jeopardised the expanding commerce between the states. The intention behind the *Sherman Act* has given rise to intense and fruitful discussion in American economic literature. For some authors, the purpose of the *Sherman Act* was to prevent restrictions on competition present in commercial transactions that could restrict production, increase prices or otherwise control the market to the detriment of consumers. Cfr. *Apex Hosiery Co. v. Leader* 310 U. S. 1940, pp.492-93, n.º 15. While other authors, including Bork, question whether the *Sherman Act* was passed to limit economic power, defend competition, protect the interests of small businesses and satisfy the demands of farmers in the face of the concerted practices of large companies. Cfr. Bork, Robert H., *Legislative Intent and the Policy of the Sherman Act*, Journal of Law and Economics, Vol. 9, 1966, No. 1, Article 5, p. 10 and ff, 44, note 106. Available at: https://chicagounbound.u chicago.edu/jle/vol9/iss1/5. On the other hand, for the populists, the purpose of the *Sherman Act* was to ensure productive efficiency as a way of guaranteeing consumers the benefits of competition. The central concern was the redistribution of the *consumer surplus*. Cfr. David Millon, *The Sherman Act and the Balance of Power*, Southern California Law Review, 1988, Vol 61, pp. 1233-34 and Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, Hastings Law Journal, Vol. 34, N.º 1, 1982, pp. 74 and ff. At the modern Harvard School, Hovenkamp, Herbert, *The Antitrust Movement and* the *Rise of Industrial Organisation*, 2009, Texas Law Review, Vol. 68, 105, 1989, p. 107; Hovenkamp, Herbert, *The Antitrust enterprise*, Harvard University Press, 2008, pp. 39-42, reasons, calling on the historical context of the Sherman Act and subsequent legislation, the protection of small businesses as an objective of the *Sherman Act*. In the *Post-Chicago* school, Eleanor Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as Window*, New York University Law Review, Vol 61, 1986, p. 554; Robert Pitofsky, *The Political Content of Antitrust*, University of Pennsylvania Law Review, Vol. 127, 1979, p. 1051 and John J. Flynn, *The "is" and "ought" of vertical restraints after Monsanto co. v. Spray-rite service corp*, Cornell Law Review, Vol. 7, 1985-86, p. 1095 and ff. the *Sherman* Act is interpreted in the light of political values, such as the fear that excessive concentration of economic power will create undemocratic political pressures, the guarantee of individual freedom, with the reduction of control over everyone's well-being by a small number of subjects and the repression of economic concentration in a few companies as a

2. Sherman Act

The most relevant Sections of the Sherman Act are 1 and 2.

The first prohibits contracts, agreements and conspiracies that restrict trade[22].

The second prohibits unilateral conduct by companies aimed at monopolising or attempting to monopolise the market and conspiracies to monopolise any part of trade between different states or nations.

Violations of competition rules are treated as predicate offences, punishable by high fines and prison sentences. These violations can also trigger civil proceedings.

The generic nature of these provisions has enabled Congress to give federal courts broad powers to draw the line between acceptable forms of cooperation and illegal collusion, as well as between aggressive competition and illegitimate monopolisation. On the other hand, it allows for an unprecedented convergence between economics and the law, since the shape of competition policy is shaped by countless economic contributions[23].

As we shall see, the Sherman Act will allow for the progressive construction by case law of a competition policy in which the application of the respective rules follows the evolution of economic doctrine[24].

The broad wording of Section 1 in prohibiting any type of contract, association or conspiracy that restricts trade "every contract, combination conspiracy among multiple firms that is in "restraint of trade" covers all practices that have the effect of reducing output and increasing price, including joint ventures, vertical agreements, mergers, as long as the conduct results from the coordination of the efforts of one or

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way of protecting the free market and preventing state intrusion into economic affairs. In the 1970s, decisions such as *National Soc'y of Prof'l Engineers v. United States* 435 U.S. 679 (1978) and *Continental T.V., Inc. v. GTE Sylvania, Inc.* - 433 U.S. 36 (1977), by bringing the analysis of the economic impact of restrictions into the jurisprudence, overcome the notion that the *Sherman Act* is a *Magna Carta* that implements freedom without curing the economic consequences. Cfr. Meese, Alan J., *Competition and Market Failure in the Antitrust Jurisprudence of Justice Stevens*, Fordham Law Review, Vol. 74, issue 4, 2006, p. 1790.

[22] Section 1. Trusts, etc., in restraint of illegal trade; penalty. *Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.* Section 2. Monopolising trade a felony; penalty. *Every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court*. Prison sentences can be up to 10 years. As we shall see, the European Union's *antitrust* provisions do not provide for criminal penalties. The *Sherman Act* is currently codified 15 U.S.C. §§ 1-7...

[23] William E. Kovacic, Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, Journal of Economic Perspectives, vol. 14, no. 1, 2000, p. 43.

[24] In this sense, Herbert Hovenkamp, *op. cit. (The Sherman Act and the Classical Theory of Competition)*, p. 1019, considers that it is one of the great myths to argue that US competition policy only adopted an economic approach in the late 1970s and early 1980s, arguing that it was moulded from the start by economic ideology.

more economic agents. This includes all practices that produce anti-competitive effects as a result of co-operation between two or more economic agents[25].

Section 2 of the Sherman Act prohibits companies from monopolising or attempting to monopolise the market or conspiring to monopolise the market. This broad prohibition covers all practices by which dominant companies maintain their monopolistic position, as well as practices used by a company that is not a monopolist but intends to monopolise the market[26].

The use of the verb "*monopolise"* is interpreted as criminalising all anti-competitive conduct aimed at creating and maintaining monopolies, without, however, covering the mere possession of monopoly power[27]. In this sense, proof of the existence of monopoly power is not enough; proof of *"the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business accumen, or historic accident*" is required[28].

The courts are concerned that the repression of monopolies obtained without recourse to practices that violate competition will have the effect of dissuading companies from *competing on merits*, through product innovation and cost reduction, which competition law itself aims to protect[29].

Some doctrine has defended the criminalisation of this "*no fault monopolisation"* on the grounds that the mere existence of a monopoly increases price and reduces quantity, regardless of whether it is obtained innocently or through acts contrary to competition[30].

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[25] As Posner points out in Posner, Richard A., *Antitrust Law*, 2nd ed., The University of Chicago Press, Chicago, 2001, p. 259, virtually all the practices discussed in that book, including those with exclusionary effects, involve this co-operation.

[26] Where it says *"every person"*, *it* necessarily means individuals and companies. The reference to *"any part"* has a geographical and distributive meaning, meaning any part of the territory of the United States and any actor in interstate and international commerce who carries out any of the acts sanctioned by the legal provision. *Standard Oil Co. v. United States*, 221 U.S. 1, 1911, pp. 61-62.

[27] The courts exclude from *section* 2 the monopoly obtained through the natural characteristics of the market or through *competition on the merits*. In this sense, Judge White in *Standard Oil Co. v. United States*, 221 U.S. 1, 1911, pp. 61-62, argues that the verb *to monopolise is* intended to cover all acts that lead to the "*prohibited results"* identified in the regulation, and that the reference to the prohibition of monopoly in concrete is omitted. Also Learned Hand, in this sense, states in *United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416 (2d Cir. 1945), p. 429,* that the courts placed emphasis on *"the use of the active verb, 'monopolize'"* to avoid criminalising those who *"unwittingly find themselves in possession of a monopoly without having intended to put an end to existing competition"*, concluding, p. 430, that *"A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand. Or there may be changes in taste or in cost which drive out all but one purveyor. A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry.*"

[28] *United States v. Grinnell Corp*., 384 U.S. 563, 570-71 (1966). This decision is known as the *"Griffith formula"* in determining that "*the use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.*"

[29] See Hovenkamp, Herbert, *Federal Antitrust Policy*, 3ª ed., West Group, St. Paul, 2005, § 6.3. In this sense, Judge Hand, Alcoa, 148 F.2d, p. 430, states that *"the successful competitor, having been urged to compete, must not be turned upon when he wins"*. The court in *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, (9th Cir. 199*)*, rejects censuring companies that *"achieve monopoly through superior competitive performance without engaging in predatory conduct."*

[30] Oliver E. Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations*, Harvard Law Review, Vol. 85, 1973, pp. 1522-25; Eleanor M. Fox, *Monopoly and Competition: Tilting*

However, the courts have required that the acquisition and holding of a monopoly be the result of anti-competitive practices[31].

The *Sherman Act* did not enjoy great popularity among economists, either because they doubted its effectiveness in stopping large companies or because they feared it was a way of preventing companies from joining together to take advantage of the economies of scale generated by the technological developments of the time[32].

2.1. The common law school - *Sherman Act*: 1890-1914

The first years of the *Sherman Act* were shaped by the strong influence of classical economics, in which competition was associated with the self-determination of individuals in the allocation of resources, with the main aim of limiting the powers of state intervention in the economy. Classical economics repudiated the creation of inequalities in business opportunities through the state granting special privileges to certain companies and individuals to the detriment of others[33].

Free enterprise, in the liberal conception of the 19th century, was considered a fundamental value, informing the notion of competition and compatible with the liberal conception of how the market works.

This notion of competition, based on individual liberty and freedom of choice, which will mark contract law in the *common law*, justified the censorship of *contracts in restraint of trade*, as they were instruments that restricted the activity of an individual or company that undertook not to carry out a certain activity in favour, as a general rule, of the competitor.

Anti-competitive behaviour is thus identified with practices that limit freedom, in which the coercion exercised by one economic agent on another is important, thus explaining the condemnation of boycotts and the little importance given to the distinction between vertical and horizontal restrictions, as well as the tolerance of voluntary price-fixing agreements.

Economic and contractual doctrine will, however, show that some restrictions on the freedom to contract are important for industry and good faith.

Around these restrictions, case law developed the doctrine of *consideration*,

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the Law To-wards a More Competitive Economy, Washington and Lee Law Review, Vol. 37, 1980, p. 49. In case law, this position is reflected in *United States v. Griffith*, 334 U.S. (1948), p. 107, which states that *"Monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised"* and Alcoa, 148 F.2d, p. 428, which seems to suggest that the mere existence of a monopolist violates the rules of competition law.

[31] In this sense, in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 2004, p. 407 it was decided that monopolists did not violate *Section 2* because they charged a monopoly price and could be an important element of the *free-market system*. Recently in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 1985, p. 600, it was decided that *"even a firm with monopoly power has no general duty to engage in a joint marketing programme with a competitor" and approving of jury instruction stating that "a firm possessing monopoly power has no duty to cooperate with its business rivals"*.

[32] George Joseph Stigler, *The Economist as Preacher and Other Essays*, University of Chicago Press, Chicago, 1982, p. 41; James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918.* Ohio State Law Review, Vol 50, 1989, pp. 258-59, 287. As noted in F.M. Scherer, *Efficiency, Fairness, and the Early Contributions of Economists to the Antitrust Debate*, Washburn Law Review. Vol 29, 1989, pp. 243-55, few considered this rule a useful instrument for controlling abusive behaviour.

[33] Hovenkamp, *op. cit. (The Sherman Act and the Classical Theory of Competition)*, p. 1021.

which made the legality of these agreements dependent on the existence of a quid pro quo for the non-competition obligation. In this way, the damage caused to society and the individual by the negative de facto obligation assumed was compensated for and the voluntary nature of the agreement was justified[34].

The doctrine of classic competition was thus intertwined with the principle of freedom of contract that dominated *common law* contract *law*. Restrictions on freedom could be legal as long as they resulted from a contract and provided *consideration*.

The limitations in time and space evident in the *rule of reason,* enunciated in the English case of *Mitchel v. Reynolds,* paved the way for the admission of partial restrictions.

On the other hand, restrictions that were merely ancillary to the main purpose of the contract and were necessary for the enjoyment of fruits or to prevent them from being unfairly enjoyed by another party began to be recognised as enforceable.

From this classical perspective of competition, cartels and mergers, because they were not the result of a limitation on freedom, did not deserve much attention, and the attack on monopolies was justified because they resulted from the granting of special privileges.

However, whenever restrictions on trade concerned essential goods, which included price-fixing agreements and mergers, the courts adopted a more demanding stance, considering that these, given the effects produced, including price increases, constituted means of coercion and therefore an intolerable limitation on the freedom of consumers, who had no other alternatives[35].

The *rule of reason* applied to this type of restriction thus had the following guiding criteria: limitation in time and space; the use of coercive means against third parties and the nature of the products.

In this sense, the Supreme Court also adopted the *rule of reason* for certain restrictions, considering that the restriction on the non-compete obligation was illegal if it was unreasonable.

It is not surprising that the courts found it difficult to identify in *Section* 1 the condemnation of *restraints in trade* and in *Section* 2 cartels and mergers with the intention of acquiring or maintaining a monopoly, because the *common law,* influenced by classical competition and the emphasis on the freedom of individuals, looked down on voluntary agreements that restricted competition.

It is therefore understandable that the *common law* approach to the *Sherman Act*, evident in the first years of its application, interprets the concepts "*contracts", "combinations", "conspiracies in restraint of trade"* and *"monopolisation" in the common law* sense, i.e. necessarily associated with the restriction, through coercion, of freedom to exercise an activity[36].

The *Sherman Act was* therefore initially limited to artificially imposed restrictions on the freedom of individuals, without curing voluntary agreements that

[34] Ibid, pp. 1027-30.

[35] Ibid, p. 1051.

[36] The application of *common law* principles to the interpretation of the *contract in restraint of trade in* the Sherman Act is present in the dissenting opinion of Mr Justice Holmes in *Northern Securities Co. v. United States,* 193 U.S., 1904, p. 404 and Mr Justice Taft in *United States v. Addyston Pipe & Steel Co.*, (6th Circuit) 1898, cit, pp. 279-83. Herbert Hovenkamp, *Antitrust policy after Chicago,* Michigan Law Review, vol. 84, Issue 2, 1985, p. 213, places this phase of US jurisprudence in the *common law school.*

had the effect of increasing prices, unless they involved basic necessities.

The *Sherman Act*, at this stage, was considered a mechanism through which the legislator had federalised the *common law*, which, as we have already mentioned, had nothing to do with protecting competition, but with safeguarding freedom of contract in line with the classic notion of competition[37].

In this sense, US courts prohibited and considered unlawful contracts or acts with the intention of harming the public and unfairly restricting competitive conditions, limiting the rights of individuals, restricting free trade, increasing prices or reducing production[38].

This interpretation of the *Sherman Act* under *common law* will favour the conclusion of horizontal agreements and the consequent increase in the size of business organisations.

The notion of neoclassical competition based on the relationship between cost and price, concerned with the relationship between *consumer surplus* and monopoly, with the effects of cartels and marginal cost and revenue curves, initiated at the end of the 19th century by Marshall, began to influence US economics and jurisprudence at the beginning of the 20th century[39].

This will essentially be characterised by hostility towards cartels, with the repression of price-fixing agreements, accompanied by a reduction in the repression of trade restrictions[40].

Initially, due to the influence of the doctrine of basic necessities, the cartels that were initially condemned involved basic necessities, but progressively this distinction lost importance and hostility towards cartels became widespread[41].

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[37] Hovenkamp, *op. cit.* (*The Sherman Act and the Classical Theory of Competition)*, p. 1032. In this approach, which is evident in Holmes' dissenting opinion in *Northern Sec.*, cit. p. 404, the voluntary elimination of competition by agreement between companies is considered legal. Cartels are only considered restrictions on trade if they directly involve restrictions on the freedom to carry out a particular activity. Also in this dissenting vote, Justice Holmes considers that the Sherman Act "*in the form of trust or otherwise*" does not refer to price-fixing agreements, but to practices of excluding competitors by a broad association. In this sense, the courts will absolve cartels and mergers that are not accompanied by non-compete obligations. Cfr. *United States v. Greenhut (In re Coming)*, 51 F. 205 (N.D. Ohio 1892). On the other hand, cartels and agreements concerning basic necessities were treated more strictly, since in this type of goods there was coercion on consumers who had no alternative. Cfr. Honvenkamp, op. cit. (*The Sherman Act and the Classical Theory of Competition)*, p. 1051. The *Supreme Court* later, in 1897 and 1898, condemned railway cartels in *United States v. Trans-Missouri Freight Association* and *United States v. Joint Traffic Association* where only voluntary price agreements were at issue. cf. Hovekamp, *op. cit.* (*The Sherman Act and the Classical Theory of Competition)*, cit., pp. 1051 and ff.

[38] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), p. 2.

[39] Hovenkamp, *op. cit.* (*The Sherman Act and the Classical Theory of Competition)*, pp. 1022,1038-1041.

[40] The neoclassical influence expands the concept of coercion to include collective refusals to negotiate, eventually including the payment by consumers of higher prices as a result of cartels and monopolies in line with *Section 7*. See Hovenkamp, *op. cit. (The Sherman Act and the Classical Theory of Competition)*, cit., pp. 1037-1038. One of the aspects where we can see a reduction in the demands made on trade restrictions is in the application of the *rule of reason*. The US courts, influenced by the neoclassical current, began to argue that restrictions, even if they were not limited in time and space, as was argued in the English case of *Mitchel v. Reynolds*, could be reasonable, provided that they were merely ancillary to the main purpose of the contract and were necessary for the enjoyment of fruits or to prevent them from being unfairly enjoyed by another party. Hovenkamp, *op. cit. (The Sherman Act and the Classical Theory of Competition)*, pp. 1036-1037, 1041-1044.

[41] Hovenkamp, *op. cit. (The Sherman Act and the Classical Theory of Competition)*, p.1053.

In response to those who considered that these price-fixing agreements were the product of voluntary agreement between the parties, protected by freedom of contract, and therefore did not constitute *unreasonable restraints of trade,* the *Supreme Court,* by Justice Peckham in *Addyston Pipe & Steel Co. v. United States,* replied that although freedom of contract has constitutional protection, the power of Congress to regulate interstate commerce is also protected by the Constitution. This power not only meant a division of regulatory power between the government and the state, but also between the government and individuals. In this sense, whenever contracts entered into by private individuals conflicted with Congress' power to regulate interstate commerce, which included the *Sherman Act*, freedom of contract could not prevail[42].

The courts, despite the very timid application of the *Sherman Act* in its early years, began to shape the generic terms of the regulation, starting by distinguishing between forms of collaboration that suppress competition and those that promote growth[43].

In 1897, the *Supreme Court* ruled that it was illegal, even after it had been voluntarily dissolved, for the fifteen railways that were part of the *Trans-Missouri Freight Association*, which competed in the transport of goods between Missouri, Mississippi and the Pacific Ocean, to set prices for the transport of goods by agreement[44].

This judgement, also reported by Judge Peckham, inaugurated the theory that the wording of the *Sherman Act* was intended to cover all contracts and acts that restricted trade without leaving any room for the *rule of reason,* with the result that the prohibitions contained therein had to be applied to all cases covered by the literal element. Regardless of whether the restrictions were considered reasonable or unreasonable by *common law*, they were prohibited by the *Sherman Act*.

Thus, the court held that all the prohibitions contained in the *Sherman Act* applied to all contracts containing restrictions on interstate or international commerce without exceptions or limitations, and were therefore not limited to unfair restrictions[45].

This decision, however, cannot be interpreted literally, but must be analysed in the context of the dispute between Judge Peckham and Judge White.

As Bork notes, the reasoning put forward by Judge Peckham in this case is a response to those who, like Judge White, argued that the *Sherman Act* only covered unreasonable restrictions and that, in this case, the reasonableness of the price fixing would depend on the *Interstate Commerce Commission*'s (ICC) judgement of reasonableness on the price fixed. However, Peckham objected to this criterion of

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[42] *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) which affirmed *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898). As Hovenkamp notes in *The Sherman Act and the Classical Theory of Competition*, p. 1057, this decision has the virtue of distinguishing the classical concern with freedom of contract from the *Sherman Act*'s concern with the elimination of competition.

[43] Shapiro, Kovacic, *op. cit. (Antitrust Policy: A Century of Economic and Legal Thinking)*, p. 1014.

[44] Cfr. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897). George Stuart Patterson, *The Case of the Trans-Missouri Freight Association*, The American Law Register and Review, Vol. 45, No. 5, May 1897, pp. 313 et seq. critically analyses this decision, opposing this general application of the *Sherman Act to* all contracts containing restrictions on competition, without assessing their reasonableness.

[45] *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), pp. 327-328. In his dissenting opinion, Justice White considers that the *Sherman Act*, by deviating from the *rule of reason* to condemn *per se* restrictions, would constitute a violation of the constitutional principle of freedom of contract provided for in the *Fifth Amendment to the Constitution*.

reasonableness, which he considered to be subject to great uncertainty and very difficult to formulate[46]. Therefore, in his reasoning, he rejected the reasonableness criterion that Judge White wanted to operationalise in the application of the *Sherman Act*. It is in this context that he argues that the *Sherman Act* applies to all contracts that restrict trade, regardless of their reasonableness. However, he anticipates the position that Taft will later take in *Addyston Pipe and Steel Co. v. United States on the* reasonableness of *ancillary restraints* by admitting the possibility that the restraint of trade present in the non-compete obligation *ancillary* to the contract for the sale of a property in order to protect the sale of the property purchased is not covered by the letter of the *Sherman Act*. Peckham, in this passage, as Bork notes, is admitting that contracts that can be categorised as *"in restraint of trade*" at *common law* are not covered by the letter of the *Sherman Act*[47]. Although he doesn't call it a *rule of reason,* Peckham was building an approach based on a criterion of reasonableness distinct from that advocated by White. This removes the historical imputation to Peckham of the defence of the *per se* approach to the restrictions covered by the Sherman Act[48].

As far as competition is concerned, this *United States v. Freight Association* decision inaugurated the prohibition of price agreements between competitors, which is still a very strong principle in US law today, with few exceptions[49].

This doctrine would later be followed in *United States v. Joint Traffic Association*, referring to the *Joint Traffic Association* resulting from an agreement between 31 railway companies, whose business was transport between Chicago and the Atlantic Coast, to supervise competing traffic and set rates[50].

To the contrary, the *6th Circuit*'s decision in *Addyston Pipe and Steel Co. v. United States, in which* William Howard Taft, later elected President of the *United States and Chief Justice of* the *Supreme Court*, participated, considered that the rules contained in the *Sherman Antitrust Act* were subject to the *rule of reason,* invoking the *common law* principle according to which restrictions on trade can only be admitted if they are merely ancillary to the main purpose of the contract and if they are necessary for the enjoyment of fruits or to prevent them from being enjoyed by third parties[51].

This decision is extremely important in competition law to put a stop to the blanket prohibition of all restrictions on trade based on the literal interpretation of *Section 1* of the *Sherman Act* that was drawn from *United States v. Trans-Missouri Freight Ass'n*[52].

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[46] Bork, Robert H., *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, Yale Law Journal, Vol. 74, n.º 3, 1966, p. 786.

[47] Ibid, p. 789.

[48] This is corroborated by the decision in *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898), p. 568. See Bork, *op. cit., (The Rule of Reason and the Per Se Concept...)*, p. 796.

[49] As Massimo Motta notes in *Competition Policy, op. cit.*, p. 4, footnote 9, exceptions were made for the insurance sector, agriculture, fishing, professional baseball and labour organisations.

[50] *United States v. Joint Traffic Association*, 171 U.S. 505 (1898).

[51] *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, (6th Cir. 1898). Thomas Thacher, *Mr Taft and the Sherman Act*, The North American Review, Vol. 189, N.º. 641 (Apr. 1909), pp. 513-526, on the proposals put forward by Taft at a conference in Ohio to revise the *Sherman Act.*

[52] Judge Taft's reasoning is considered by Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, op. cit.*, p. 783, *"one of antitrust's most suggestive opinions"*, in which Taft makes *"an ambitious attempt to provide the Sherman Act with a workable formula"*, based on the *common law* concept of *ancillarity*.

In this sense, Taft distinguishes between *naked trade restraints, in which* the rivals agreed to restrict *output* and increase prices, which were therefore unreasonable and unnecessary given the objectives of the agreement, and *reasonable ancillary restraints*, in which the restriction was to the extent necessary to increase *output* or create a new product that only one of the parties alone could not produce. These ancillary restraints are directly related to the main object of the agreement and are necessary for its proper functioning and the purposes it pursues[53].

Underlying the determination of the need for the restriction, as advocated in the *Addyston, Rule of Reason, is* the assessment of the existence of an alternative, less restrictive means. In fact, the existence of a less restrictive means that produces the same effects would make the restriction unreasonable, because it is no longer necessary, regardless of the pro-competitive effects it produces[54].

Taft, in this decision, also suggested the possibility that the vertical price-fixing agreement had the purpose of eliminating *interbrand* competition, thus making the agreement legitimate[55].

The generic construction of the wording of the *Sherman Act was* therefore not intended to blindly and unfairly cover all contracts and acts, but to avoid the unfair sanction resulting from the exhaustive list.

In turn, the use of the *rule of reason made it* possible to define, on a case-by-case basis, the limits imposed by the *Sherman Act*, reasonableness, the principles of law and the duty to pursue the public policy set out in the *rule*.

On the basis of this distinction, Taft defended the application of the *rule of reason* to *ancillary restraints*, even if the non-compete obligation was limited[56].

The restriction was therefore legal if it was *reasonably necessary* for the legitimate purpose of the agreement, i.e. if it was no more restrictive than necessary to pursue the legitimate purpose of the contract to which it was ancillary[57].

The position taken in *Hopkins v. United States*, which comes between the decisions in *United States v. Freight Association* and *United States v. Joint Traffic Association*, reinforces the thesis put forward in this judgement[58].

At issue in this dispute was the *Kansas City Live Stock Exchange*, an association of cattle breeders who received cattle on consignment from other breeders

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[53] *United States v. Addyston Pipe & Steel Co.* (85 Fed. 271 [6th Cir. 1898], Bork, Robert H., *The Antitrust Paradox, A Policy at War With Itself*, New York, Free Press, 1993, p. 26, states that *"Indeed, given the time at which it was written, Addyston must rank as one of the greatest, if not the greatest, antitrust opinions in the history of the law."*

[54] See Turner, Donald F., *Some reflections on antitrust*, New York State Bar Association Antitrust Law Symposium, 1966, p. 4, stating that "*The salutary principle of invalidating arrangements that are more restrictive than necessary was one of the great developments of the common law. It was indeed the heart of a properly applied ancillary restraint doctrine".*

[55] This line of reasoning was later rejected by Justice Hughes in *Dr Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) and recovered by Justice Douglas in *White Motor Co. v. United States*, 372 U.S. 253, 260 (1963). Cfr. Bork, *op. cit. (The Rule of Reason and the Per Se Concept: Price Fixing and Market Division)*, pp. 810-811.

[56] Taft suggests applying this concept of *ancillarity* to vertical agreements. Cfr. Bork, *op. cit. (The Rule of Reason and the Per Se Concept: Price Fixing and Market Division)*, p. 798.

[57] Eldridge, Clarence E., *A New Interpretation of the Sherman Act*, Michigan Law Review, Vol 13, 1914, p. 10.

[58] *Hopkins v. United States*, 171 U. S. 578 (1898).

to raise and sell, sharing a portion of the profits made on the sale with the breeders, to whom they sometimes advanced money. This association forbade members to buy from traders who were not members of the association, set commissions for the sale of livestock, forbade the use of agents, unless a salary was paid in writing, and expelled anyone who traded in violation of the regulations or with anyone who had been expelled from the association. It was decided that this type of agreement was not covered by the *Sherman Act* because it had no direct effect on interstate commerce.

This thesis, by requiring that the qualification of an act as a restriction of trade depends on the production of a direct effect on competition, implicitly rejects the automatic and generic application of the *Sherman Act*, forcing the application of the *rule of reason.*

This decision is at the origin of the distinction defended by Peckham in *United States v. Joint Traffic Association* between *direct restraint*, i.e. that which has a direct restraining effect on trade, such as the cartel agreement, which is therefore condemned by the *Sherman Act,* and *indirect restraint, the* effect of which is indirect and incidental in the pursuit of legitimate aims and which should therefore not be covered by the act[59].

As Bork notes, despite the different nomenclature, *non-ancillary restraint* corresponds to Peckham's *direct restraint,* the agreement whose main purpose is to restrict trade, just as *ancillary restraint* is identical to Peckham's *indirect restraint,* as an agreement that reduces competition accidentally in pursuit of a legitimate aim[60].

In *Standard Oil Co. v. United States*, one of the most famous cases in US competition policy, Justice White developed a defence of the application of the *rule of reason* that would have a decisive influence on US jurisprudence's assessment of the restrictions referred to in the *Sherman Act.*

In this regard, the *Supreme Court has ruled that the rule of reason* should be the main method of analysing possible anti-competitive behaviour, reserving the application of the criterion of illegality *per se* for particularly serious behaviour[61].

The *Supreme Court* takes as its starting point the general construction of the wording of the *Sherman Act*, considering that it allows for the inclusion in its provisions of contracts and associations that have arisen in the meantime, the purpose of which is to unfairly restrict trade, in particular those that reduce competition and thus increase prices. From this perspective, the *Sherman Act* was intended to absorb economic criteria, preventing the *"evils"* that the *common law* attributed to monopolies, i.e. the elimination of the power to fix prices, the power to restrict *output* and the dangers of deteriorating product quality[62].

The fact that the *rule* refers to classes of acts and contracts which, in turn, cover all acts and agreements likely to restrict trade means that, when judging the lawfulness of a given act or contract, the judge must have a *standard of reason,* or later *rule of reason,* which allows him to assess the legality of the conduct in the light of the

[59] Bork, *op. cit. (The Rule of Reason and the Per Se Concept: Price Fixing and Market Division)*, pp. 799-800.
[60] Ibid, p. 799.
[61] See *Standard Oil Co. v. United States* (221 U.S. 1 [1911]).
[62] Ibid, p. 52.

Sherman Act[63].

In this regard, the *Supreme Court* emphasized that traditionally in *common law* and US law, when these matters are at issue, the *rule of reason is* used as a paradigm, thus making it possible to verify whether or not the act under analysis produces any of the results that the *Sherman Act* was intended to repress. *Section* 2 is interpreted as a complement to the former, in order to ensure that any of the contracts and acts likely to cause damage to competition do not escape legal scrutiny.

Thus, in line with the meaning prevailing in *common law* and the US legal system, it is argued that the legislator, when using the term *restriction of trade,* meant to cover acts, contracts and agreements that unfairly restrict competition or obstruct the course of trade[64].

White considers that the *Sherman Act* does not restrict the power to enter into normal contracts for the pursuit of trade, and that the elimination of competition is not enough to make the conduct legal[65].

The generic language of the law is justified by the legislator's intention to cover all acts that cause the effects prohibited in the law, as well as to accompany developments towards new forms of agreements and contracts that can produce the results sanctioned in the *Sherman Act*[66].

On the one hand, it argues that the harmonization between the first two paragraphs of the *Sherman Act makes it* possible to infer that the criterion used to consider that certain acts produce the effects prohibited in the *Sherman Act* is the *rule of reason*[67].

On the other hand, and considering the evolution of *common law,* he argues

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[63] Bork, *op. cit. (The Rule of Reason and the Per Se Concept: Price Fixing and Market Division),* p. 804, states that White makes it the Court's duty to carry out an economic analysis to ascertain whether the conduct and agreements contain the *evils of monopoly.*

[64] In this sense, *Standard Oil Co. of New Jersey v. United States,* cit, 59-60. In *United States v. American Tobacco Co*., 221 U.S. 106 (1911), p. 179, *'restraint of trade'* only involves acts, contracts or agreements which "*operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade"*. The *rule of reason,* in White's formulation, is applied to the agreement considering its nature, its effects and its purpose in producing the harms of monopoly, in a three-part test. Nature is taken to mean prohibition *per se* or *naked restraint* or *non-ancillary restraints*. If it does not fall into this category, the effects produced and the purpose pursued must be analysed. In this sense, Bork, *op. cit. (The Rule of Reason and the Per Se Concept: Price Fixing and Market Division),* pp. 804-805, considering that *inherent* refers to *effect* draws the need for the test to contemplate the market power of the party and not the effects actually produced. Thus, the agreement or conduct is unlawful *per se* when it results from its nature and is subject to the *rule of reason* when it results from market power or the objective pursued.

[65] Throughout the decision, White makes it clear that the purpose of the *Sherman Act is* consumer welfare, which requires sanctioning the restriction of *output* without jeopardising efficiency. In this sense, Bork, *op. cit.* (*The Rule of Reason and the Per Se Concept: Price Fixing and Market Division)*, pp. 804-805, considers this formulation to be close to that of Peckham and Taft, distinguished by the fact that it is translated into economic language. The *rule of reason* constructed by White, which is permeable to advances in economic analysis, therefore incorporates a principle of change.

[66] In this regard, cf. the brilliant reasoning of the decision in *Standard Oil Co. v. United States,* p. 221 U. S. 1, pp. 59-60.

[67] While paragraph 1 prohibits all means of monopolising trade, all forms of unfair restriction by contract, act or association, the second part targets act which, although not covered by the list in paragraph 1, produce restrictions on trade. In this sense, *Standard Oil Co. of New Jersey v. United States,* cit, pp. 61-62.

that the *Sherman Act*, despite having a wide application in its two paragraphs, does not contain any direct prohibition in relation to monopoly, which indicates the legislator's belief in freedom of contract as the most efficient means of preventing the formation of monopolies, subjecting it to restrictions when used improperly and unfairly. Freedom of contract thus appears as the safeguard of freedom to contract without unfair restrictions[68].

In this sense, the *Supreme Court* concludes that the *Sherman Act* only condemns unreasonable restrictions, the reasonableness of which is judged using the *rule of reason*, based on an analysis of their nature, the market power of the parties and their purpose[69].

This formulation by White has the virtue of incorporating the *common law* version of the consequences of monopoly for consumers in the *Sherman Act*[70].

3. Conclusion

The analysis of case law on Sherman Act until 1914 clearly revealed that competition policy in US has been shaped by economy.

This study also allowed us to understand the *per se* prohibition and the *rule of reason*, criteria that are going to be used by the Supreme Court to assess vertical agreements to determine whether the agreements comply with the competition law.

The court's effort to find an operational formula that would allow the Sherman Act to be identified from those that were not, such as Peckham's proposed distinction between direct and indirect restraint or naked/non ancillary restraint from Taft's ancillary restraint, led to the construction of a category of unlawful agreements and conduct per se.

If a commercial practice is considered illegal per se, it is not necessary to demonstrate that the conduct produces anticompetitive effects, since the conduct itself already amounts to a violation of the law. As such conduct does not produce any pro-competitive effects, but only seriously harms competition, it does not justify an investigation of the actual effects associated with it.

However, through a case-by-case assessment and weighing of the pro-competitive and anti-competitive effects of the conduct, permitted by the *rule of reason,* it is possible for the alleged offender to convince the court that the commercial practice adopted, in those specific circumstances, does not jeopardize competition.

One of the immediate consequences of this new formulation is to consider that the agreement is only reasonable if it regulates and thus promotes competition, contrary to the rule of reason enunciated in Standard Oil, which recognized as legal a conduct that, despite restricting competition, generated benefits that outweighed the losses caused by restrictions on competition.

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[68] In this sense, *Standard Oil Co. of New Jersey v. United States*, cit, p. 62.

[69] Market power is the power to raise or maintain prices above the competitive level for a significant period of time. Cfr. Hovenkamp, *op. cit. (Federal Antitrust Policy § 3.1)*, p. 80.

[70] Cfr. Bork, *op. cit. (The Rule of Reason and the Per Se Concept: Price Fixing and Market Division)*, p. 805; Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, Southern California Law Review, Vol. 61, 1988, p. 998, considering that *"[I]n 1911 the Supreme Court led antitrust ... into the twilight zone with its announcement of the 'Rule of Reason' in Standard Oil ...."*).

The court, instead of focusing on the necessity of the restriction, shifts attention to competition by proposing a cost-benefit analysis of the competitive and pro-competitive effects of the restriction.

The use of the rule of reason made it possible to define, on a case-by-case basis, the limits imposed by the Sherman Act, reasonableness, the principles of law and the duty to pursue the public policy set out in the rule, revealing that the Sherman Act was therefore not intended to cover all contracts and acts blindly and unfairly.

We may conclude that the Sherman Act enabled, through jurisprudence, the progressive growth of a competition policy, in which the application of the respective rules follows the evolution of economic literature.

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