

Much ado about the Post-Chicago School

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Abstract

In the middle of the 80s, an economic approach, that brings together a group of academics that stand out by the harsh criticisms to the approach of the School of Chicago towards competition, arouses interest among the scholars. This school will call into question some of the foundations and justifications presented by the Chicago School, by questioning, in first place, the single monopoly profit theory. In this sense, these authors will develop a set of models designed to demonstrate that the monopolist in the primary market has incentives to monopolize the secondary market. This School will also analyse the vertical restraints, standing out the development of Raising Rivals' Costs Theory and offer an explanation for free-riding. The Chicago School, on the other hand, is a coherent and heterogeneous economic school, responsible for the theory of oligopoly and collusion, which, by advocating the criminalization of price fixing, proceeded to analyse the anticompetitive effects of predatory pricing and various restrictions vertical. In this paper, we aim at demonstrating that the roots of the Post-Chicago School go back to the Chicago School, highlighting the contributions of Director and Levi in the construction of the Raising Rivals' Cost Theory and, considering the connection between the Chicago school and Transaction Costs Economics, the most complete empirical analysis of this theory led by Elizabeth Granitz and Benjamin Klein. The continuous omission of the Transaction Costs Economics, considering the steadiness between both, is one of the most negative aspects of this school, which can only be explained by the fact that heterogeneity of the Chicago School and Transaction Costs Economics unmask much of the criticism knitted. Post-Chicago School, as we will conclude, will be incapable of thwarting the ideological premises of the Chicago School.

Keywords: Chicago School, antitrust law, the Raising Rivals' Costs theory, Post-Chicago School.

JEL Classification: K22

However, in the hands of Chicago School proponents, economics has become an engine for an ideology hostile to the operation of antitrust law."

Thomas M. Melsheimer, *Economics and Ideology: Antitrust in the 1980s*, STAN. L. REV., Vol 42, 1990, p. 1335.

1. Introduction

This School will also analyse the vertical restraints, highlighting the development of the Raising Rivals Costs Theory.

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This theory, one of the main contributions of this economic current, will be the source of a set of theorems about the anti-competitive effects mirrored in the acquisition and maintenance of market power that are imputed to various business practices, under certain conditions, such as business exclusivity, tying agreements, without the existence of any benefits to competition².

Vertical integration will also be considered socially damaging whenever the proportions of the inputs are variable, being identified threats to competition, in mergers regarding markets of differentiated products, beyond those already specified in the traditional theory of collusion³.

This School focuses on the use by firms of an assortment of strategies, related to the price or not, that lessen the economic performance, namely, by preventing the entrance and expansion of rivals⁴.

This school has as its characteristic the defence of a wider area of competition law intervention, which is explained by the less confidence in the market and, therefore, the greater fear of the anticompetitive strategies of the dominant firms.

This analysis has as its characteristic the defence of a wider area of competition law intervention, which is explained by the less confidence in the market and, therefore, the greater fear of the anticompetitive strategies of the dominant corporations⁵.

The major difference between the Post-Chicago School and the Chicago School lies in the latter's rejection of game theory as a useful tool in the analysis of competition law, unlike the first that uses it as a way of inserting strategic behaviour in economic analysis of anti-competitive practices.

² One such condition is the unbalanced information. Warren S. Grimes, Spiff, *Polish and Consumer Demand Quality: Vertical Price Restraints Revisited*, CALIF. L. REV., Vol. 80, 1992, p. 815. On vertical restraints, see Thomas G. Krattenmaker, Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, The Yale Law Journal, Vol. 96, N° 2 (Dec., 1986), p. 224; Richard Markovits, *The Limits to Simplifying Antitrust, A Reply to Professor Easterbrook*, TEX. L. Rev., Vol. 63, 1984, p. 6. On exclusivity clause, see Eric B. Rasmusen, J. Mark Ramseyer, John S. Wiley, *Naked Exclusion*, AM. ECON. REV., Vol. 81, 1991, p. 1137; Ilya R. Segal, Michael Whinston, *Naked Exclusion: Comment*, AM. ECON. REV., Vol. 90, 2000, p. 296. On Tying agreements, Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, AM. ECON. REV., Vol. 80, 2000, p. 837, Dennis Carlton, Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, RAND. J. ECON. Vol. 33, 2002, p. 194.

³ Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, Q.J. ECON., Vol. 103, 1988, p. 345. Jonathan B. Baker, Timothy F. Bresnahan, *The Gains from Merger or Collusion in Product Differentiated Industries*, J. INDUS. ECON., Vol. 33, 1985, p. 427, Carl Shapiro, *Mergers with Differentiated Products*, ANTITRUST, Vol. 10, 1996, p. 23; Jonathan B. Baker, *Contemporary Empirical Merger Analysis*, GEO. MASON L. Rev., Vol. 5, 1997, p. 347; Jonathan B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis*, ANTITRUST, Vol. 11, 1997, p. 21; Christopher A. Velturo, *Evaluating Mergers with Differentiated Products*, ANTITRUST, Vol. 11, 1997, p. 16.

⁴ William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, Colum. Bus. L. Rev., 2007, p. 23.

⁵ Hovenkamp, *Post-Chicago antitrust: a review and critique*, Colum. Bus. L. Rev., 2001, p. 267.

This results in the excessive mathematical complexity of this theory and in the formulation of theoretical models, producing possibility theorems that abjure empirical testing⁶.

Timothy J. Brennan warns that Post-Chicago economics, given the inability of the courts to monitor it, will promote a return to pre-Chicago competition law. The author shows, from the comparison between the various theories erected by this School against Microsoft and those that actually originated the conviction of Microsoft, that, paradoxically, in competition, the more complex economic theories may be the source of wrong policies⁷.

On the other hand, the speech of some academics of the Post-Chicago School is, in some respects, characterized by ideological militancy – focused on reducing the Chicago School to “*one more cabal in the vast right-wing conspiracy trying to overthrow American political institutions and create a completely unregulated free-market state*”⁸, hence referred to a “*conservative economics*”, liable for driving competition law in the United States into a deeply wrong direction⁹. In this approach, academics associated with the Chicago School are described as “*extremists, close-minded fanatics, or mere ideologues*”¹⁰.

The compilation of *How the Chicago School overshoot the Mark* is clearly inclined towards this excessive ideological criticism that persists in lessening the economic approach attributed to the Chicago School to a mere radical ideology destined to extinguish antitrust law, being liable by the progressive weakening of antitrust law, which implementation, in 1980, was considered virtually lost¹¹.

The Chicago School, nevertheless, is a coherent and heterogeneous economic school, responsible for the theory of oligopoly and collusion¹², which, by advocating the criminalization of price fixing¹³, proceeded to analyse the anticompetitive effects of predatory pricing and various restrictions vertical¹⁴.

The roots of the Post-Chicago School go back to the Chicago School, bearing in mind the importance of Director and Levi to the Raising Rivals’ Cost Theory and the most complete empirical analysis of this theory led by Elizabeth

⁶ Bruce H. Kobayashi, *Game Theory and Antitrust, A Post-Mortem*, GEO. MASON L. Rev., Vol. 5, p. 1997, p. 412.

⁷ See *The Legacy of U.S. v. Microsoft, Regulation*, Vol. 26, N° 4, 2003, p. 22.

⁸ Crane, *Chicago, Post-Chicago, and Neo-Chicago*, U. Chi. L. Rev., Vol. 76, N° 4, 2009, p. 1914.

⁹ Pitofsky, *How the Chicago School overshoot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford University Press, Oxford, 2008, p. 6.

¹⁰ See for instance, Kovacic, *The intellectual DNA of modern U.S. competition law for dominant firm conduct: the Chicago/Harvard double helix*, p. 31, quoting Eliot G. Disner, *Antitrust Law: The Chicago School Meets the Real World*, p. 14 referring “*With a kind of religious fervor, the Chicago School intoned a mantra and used a language all its own to vivify, then empower, its world view*”.

¹¹ Pitofsky, *Introduction: Setting the Stage*, “How the Chicago School overshoot the mark”, pp. 5-6.

¹² George J. Stigler, *A Theory of Oligopoly*, J. POL. ECON., Vol. 72, 1964, p. 44.

¹³ Bork, *The Antitrust Paradox, A Policy at War with Itself*, New York, Free Press, 1993, p. 263 ff.

¹⁴ Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, p. 258, who has considered Chicago School “*the most coherent and elegant ideology that antitrust has ever experienced*”.

Granitz and Benjamin Klein, which we sustain is an evidence of the link between Chicago School and Transaction Costs Economics¹⁵.

One of the most negative aspects of this school is the constant omission of the Transaction Costs Economics, considering the relation of continuity existing between both, which can only be explained by the fact that the resulting heterogeneity of the Chicago School and Transaction Costs Economics expose much of the criticism knitted¹⁶.

On the other hand, the accusations that Chicago School promotes the irrational defence of a noninterventionist policy and it is theoretical construction without empirical foundation are going to be unsubstantiated.

Regarding noninterventionism, Crane considers it manifestly exaggerated, pointing as an example Posner's interventionist position on matters such as conscious parallelism, predatory pricing and price discrimination¹⁷.

The recognition of the merge of the robustness of the market, sustained by the Chicago School, with the limitations imposed by the administrability of legal rules and the its enforcement by the institutions, foreseen by the Harvard School, as supported by Kovaci, also weakens this objection, considering that, leading both to a lesser interventionism, it is encouraged a sharing of responsibility of the Harvard School with the Chicago School in the judicial path of competition law.

However, the Post-Chicago School, as happened with the Transaction Costs Economics, also ignores this economic theory.

With regard to the overly theoretical foundations of the Chicago School, the Post-Chicago School also does not offer an empirical basis that denies the many ideas of the Chicago School, bring essentially focused on game theory¹⁸.

Another failure pointed to the Post-Chicago School is the absence of a normative vision able to refute the ideological premises of the School of Chicago¹⁹.

¹⁵ Monopolization by "Raising Rivals' Costs": *The Standard Oil Case*, J.L. & ECON., Vol. 39, 1996, p. 1.

¹⁶ The reference to the Transaction Costs Economics would force the Post-Chicago School to admit that the Chicago School did not have perfect competition as its paradigm, starting with the real world with information costs, research costs, transaction costs, that is, ideas that were later expanded in the Transaction Costs Economics and in the Theory of Property Rights by Alchian, Coase, Demsetz, and Klein. See Wright, *Abandoning antitrust's Chicago obsession: the case for evidence-based antitrust*, Antitrust L J, Vol. 78, 2011, p. 305, Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, UCLA L Rev., Vol. 45, 1997, p. 143; Alan J. Meese, *Exclusive Dealing, The Theory of the Firm, and Raising Rivals' Costs: Toward a New Synthesis* Antitrust Bull., Vol. 50, 2005, p. 371, Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, J. COMP. L. & ECON, Vol. 1, N° 1, 2005, p. 21.

¹⁷ Crane, *Chicago, Post-Chicago, and Neo-Chicago*, U. Chi. L. Rev., Vol. 76, N° 4, 2009, pp. 1917-1918.

¹⁸ Timothy J. Brennan, *The Legacy of U.S. v. Microsoft, Regulation*, Vol. 26, N° 4, 2003, p. 22, refers that this school is grounded on "plethora of game theory and asymmetric information models to identify circumstances in which vertical practices may be more troublesome and competition less robust than "Chicago" economics suggested."

¹⁹ Crane, *Chicago, Post-Chicago, and Neo-Chicago*, p. 1929. As the author refers "its major contribution has been to grouse about Chicago rather than to articulate a clear and appealing vision about what antitrust should do and why".

One of the most flagrant cases of this lack of unity is the inability to unanimously point to an objective to antitrust law.

In this sense, while for some authors, antitrust law aims at maximizing welfare²⁰, for others it has distributive²¹ and political purposes²².

It is understood that, besides the important contribution to competition through Raising Rivals' Costs Theory, where Chicago's influence is notorious, this school has not offered any normative vision for antitrust law.

Although the Post-Chicago School has had a small impact on competition policy, some literature argue that the expansion of the rule of reason analysis in detriment of the presumption of legality evidences the influence of this school, pointing out, as the main example, the decision of the Supreme Court in the Eastman Kodak case²³.

Some literature admits the development of Neo-Chicago school by bringing together the flaws identified by the Post-Chicago School with the general principles of the Chicago School²⁴.

This would not be difficult, considering that authors associated with Post-Chicago economics erected their theories, starting from the theoretical and empirical works of the Chicago School, which explains that some authors of the latter recognize value to some ideas, denying a rupture between the approach of both economic schools on unilateral conduct and vertical restraints²⁵.

This would, however, require a reformulation of the theoretical foundations of the Chicago School, in particular the assumptions according to which: (1) markets are robust in competition and (2) the weakness of the courts in the enforcement of competition law and (3) the exhibition of empirical data that corroborate the presented theories²⁶.

²⁰ Kovacic, *The intellectual DNA of modern U.S. competition law for dominant firm conduct*, p. 23.

²¹ Robert H. Lande, *The Rise and (Coming) Fall of Efficiency in Antitrust Analysis*, Antitrust Bull., Vol. 33, 1988, p. 429.

²² Robert Pitofsky, *The Political Content of Antitrust*, U Pa L Rev, Vol. 127, 1979, p. 1051, considers that "It is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws".

²³ See Robert H. Lande, *Chicago takes it on the chin: imperfect information could play a crucial role in the post-kodak world*, Antitrust L.J., Vol. 62, 1993, p. 193 and Steven C. Salop, *The first principles approach to antitrust, kodak, and antitrust at the millennium*, Antitrust L.J., Vol. 68, 2000, p. 187.

²⁴ A Neo-Chicago, which starting from the assumptions of the Chicago School, would be sophisticated by criticism of the Post-Chicago School. See David S. Evans, A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, U. CHI. L. REV., Vol. 72, 2005, p. 75. Recognizes, however, the limited impact of this decision on the courts, David A.J. Goldfine, Kenneth M. Vorrasi, *The Fall of the Kodak Aftermarket Doctrine: Dying A Slow Death in the Lower Courts*, Antitrust L.J., Vol. 72, 2004, p. 209.

²⁵ Richard A. Posner, *Keynote Address: Vertical Restrictions and "Fragile" Monopoly*, Antitrust Bull., Vol. 50, p. 500, emphasizing the proximity mainly with the initial phase of the School of Chicago.

²⁶ Crane, *Chicago, Post-Chicago, and Neo-Chicago*, U. Chi. L. Rev., Vol. 76, N° 4, 2009, p. 1929. Richard Posner, *A Failure of Capitalism*, Massachusetts and London, England: Harvard University

Another literature, with which we agree, considers that the Neo-Chicago School, as a result of the combination of the Chicago and Post-Chicago School approaches and Frank Easterbrook's 'error-cost framework in antitrust rules' design, would not be different from original Chicago School²⁷.

2. The Raising Rivals' Costs theory

This theory will overcome the old exclusionary effect of the market attributed to vertical restraints, arguing that the anticompetitive effects reside in the more plausible effect of the increase of the costs of the rivals than in the exclusion²⁸. This is relegated to a form of predation that does not involve price, but increases the supply costs of rivals, thus sparing the traditional reduction of the price of output²⁹.

This theoretical construction, in this sense, provides an explanation for the inter-brand restrictions, such as exclusive dealing contracts, refusal to negotiate, tying agreements, demonstrating how these can be mechanisms to increase the costs of rivals, making production or distribution more costly and conferring market power to its beneficiary³⁰.

In this approach, producers use these business practices in order to close the market for the most efficient distribution channels, thus increasing the costs of their rivals³¹. These higher costs limit rivals' ability to compete, creating a "price umbrella" under which companies, which follow this method, can raise prices.

However, it is important to emphasize that the use of cost-raising strategies is not enough to be condemned by competition law. There will happen if the firm that employs this strategy increases the price above the competitive price³².

The Raising Rivals' Costs theory considers that these constraints, attached to collective action and the creation of barriers to entry, which are considered essential to the success of increased rival costs, can counteract distributors' efforts to resist to this effect, in particular by preventing other distributors from replacing

Press, 2009, p. 288 and ff, recognizes the absence of regulation as the origin of the crisis, demanding the need for greater regulation.

²⁷ In this sense, Wright, *Abandoning antitrust's Chicago obsession: the case*, pp. 310-311, emphasizes the influence of the Chicago School in the Post-Chicago School, especially in its major contribution, Raising Rivals' Costs Theory.

²⁸ Steven C. Salop, David T. Scheffman, *Raising Rivals' Costs*, AM. ECON. REV. Vol. 73, 1983, p. 267.

²⁹ Steven C. Salop, David T. Scheffman, *Cost-Raising Strategies*, J. INDUS. ECON., Vol. 36, 1987, p. 19.

³⁰ Thomas G. Krattenmaker, Steven Salop, *Competition and Cooperation in the Market for Exclusionary Rights*, AMER. ECON. REV. Vol. 76, 1986, p. 109, in this analysis of vertical restraints sustain that the imperfect elasticity of inputs prevents rivals from counteracting the tactics of increasing rival costs.

³¹ Thomas G. Krattenmaker, Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, The Yale Law Journal, Vol. 96, N° 2 (Dec., 1986), pp. 224-230.

³² *Idem*, p. 242.

distributors committed to the network, thus also making impossible for rivals to contract such distributors³³.

This theory is also characterized by the denial of the leverage theory that the Chicago School, through the single monopoly profit theory, destroyed when it demonstrated that there was only an optimal monopoly price and that the monopoly firm could not increase market power through monopolization of the secondary market. In this sense, they pointed to the risk of the pre-existence of market power, the double marginalization, which, leading to an increase in prices and a reduction in output than in a single monopoly, could have harmful consequences for the monopolist, making him lower prices³⁴.

This argument was one of those, together with those resulting from the anticipation of the Transaction Costs Economics, that allowed Chicago School to sustain that vertical restraints were economically efficient and should therefore be legal per se³⁵.

However, the Raising Rivals' Costs theory, despite the fact that most analyses performed assume the existence of market power independently of this strategy of raising the costs of rivals, will defend that even a company without market power can, through exclusive rights contractually recognized, increase the costs of the rivals and thus acquire market power³⁶.

In this perspective, instead of compelling distributors to accept the contracts, the producer, even without market power, can persuade input suppliers or distributors to enter into such agreements voluntarily by promising to share with them some of their monopoly profits³⁷. This means that this theory is not concerned with coercive imposition, but with the existence of agreements that reallocate property rights in order to confer market power and profits on the parties involved³⁸.

The Post-Chicago School in resorting to this reallocation of property rights is relying once again on one of the contributions of the Chicago School and later on

³³ *Idem*, pp. 224–30, 269–72.

³⁴ *Idem*, pp. 248–249. Price theory argued that these agreements served for the producer with pre-existing market power to impose these contracts on distributors and suppliers, allowing the monopolist to expand its power or increase prices on vertical secondary markets. See Meese, *Exclusive dealing, the theory of the firm, and raising rivals' costs: Toward a new synthesis*, The Antitrust Bulletin, Vol. 50, N° 3, Fall, 2005, pp. 408–409.

³⁵ This analysis was later formalized by the Transaction Costs Economics, through Coase and in particular of Williamson, with the consequent explanation of vertical integration and vertical restraints as mechanisms to reduce transaction costs.

³⁶ Thomas G. Krattenmaker, Robert Lande, Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, GEO. L.J., 1987, Vol. 76, pp. 254–55. Thomas G. Krattenmaker, Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, The Yale Law Journal, Vol. 96, N° 2 (Dec., 1986), pp. 248–252.

³⁷ Steven C. Salop, David T. Scheffman, *Raising Rivals' Costs*, p. 267. Thomas G. Krattenmaker, Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, p. 251, Thomas G. Krattenmaker, Robert Lande, Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, GEO. L.J., Vol. 76, 1987, pp. 254–55.

³⁸ Meese, *Exclusive dealing, the theory of the firm, and raising rivals' costs: Toward a new synthesis*, p. 409.

the Economic Theory of Property Rights developed under New institutional economics³⁹.

One the criticism of this theory is that it only assumes relevance when the exercise of market power results from constraints imposed by regulation or because the government has market power⁴⁰.

In fact, the increase in the costs of rivals is due to the increase in inputs, whose condition is the existence of market power in that market or a pre-existing, but limited power in the upstream market.

The acquisition of market power is already repressed by the Sherman Act, and therefore nothing new is added.

Concerning the pre-existence of market power it is necessary to investigate why it was not exercised previously and how the company's actions in the downstream market change the capacity and incentives to take advantage of market power⁴¹.

Another aspect that weakens this theory lies in the difficulty of fulfilling the necessary conditions for the success of these strategies to increase the costs of rivals with anticompetitive effects⁴².

This theory has also been criticized for dealing more with the interests of rivals than with consumer welfare, making courts and authorities more sensitive to protecting the well-being of rivals over the regular functioning of the process competitive⁴³.

In spite of bringing new ideas to the approach to anticompetitive practices, the practices with anticompetitive effects require the horizontal monopolization that conventional analysis already knows, tending, in the analysis made to vertical restraints, to render innocent and socially efficient conducts suspected of infringement of competition law.

Hovenkamp, while acknowledging the contribution of the analysis of the raising rivals' costs theory to competition law by replacing previous theories of exclusion, highlights, considering the influence of the modern Harvard School, the difficulties regarding the administrability of this theory by the Courts in the analyses of restrictions⁴⁴.

³⁹ This economic current, developed by UCLA scholars, was initially associated with the Chicago School, and was later developed under New institutional economics, highlighting the contribution of Harold Demsetz. This author in *Barriers to Entry*, AM. ECON. REV., Vol. 72, N° 1., 1982, p. 47, explains how property rights can be a barrier to entry.

⁴⁰ The government can raise the costs of the productive process, by prohibiting certain types of production. Timothy J. Brennan, *Understanding "Raising Rivals' Costs"*, Antitrust Bulletin, Vol. 33, N° 1, 1988, pp. 96, 99-100.

⁴¹ Wesley J. Liebeler, *Exclusion and Efficiency*, Regulation, Vol. 11, 1987, p. 34.

⁴² Krattenmaker, Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, The Yale Law Journal, Vol. 96, N° 2 (Dec., 1986), p. 267.

⁴³ Timothy J. Brennan, *Understanding "Raising Rivals' Costs"*, The Yale Law Journal, Vol. 96, N° 2 (Dec., 1986), pp. 107-109.

⁴⁴ Hovenkamp, *Post-Chicago antitrust: a review and critique*, Colum. Bus. L. Rev., 2001, p. 321. Also, Hovenkamp, *op. cit* (*Post-Chicago antitrust: a review and critique*), pp. 275, 277-278, 336, underlines the difficulties that the courts and jury face in the complexity of this theory, which

In this analysis, the author emphasizes that if there are cases where the strategy of raising costs of rivals is notorious, in others it is less clear, being necessary to determine if the rivals have been able to neutralize the strategy and if the restriction produces anticompetitive effects⁴⁵.

One of the examples given is exclusive dealings, which can be used by a dominant company to prevent rivals from having access to the best inputs and distributors, without giving any justification of the most efficient efficiency. But it can also emerge in a greyer scenario where the strategic is circumvented by rivals or where efficiencies are substantial. In this case, Hovenkamp rejects the balance between anti-competitive and pro-competitive effects, advocating the lawfulness of the restriction, in order to avoid deterring efficient competitive practices⁴⁶.

Another of the criticisms raised by Hovenkamp is that this theory chooses to condemn practices, based only on the structure of the market, without a proof of the anti-competitive effect⁴⁷. As an example, Hovenkamp once again gives exclusive dealings. This restriction will tend to concentrate the market of distributors still accessible to rivals and to cause collusion phenomena by other distributors. However, the Raising Rivals' Costs theory chooses to condemn the practice of collusive effect, considering the structure of the market enough, without first asking whether it really exists⁴⁸.

In addition to the difficulties in administrability, there is also the risk of disapproval of false positives, that is, conducts that are not anti-competitive, but only damages rivals and potential rivals, undermining the principle emphasized by the modern Harvard School that the law should protect competitors and not competitors⁴⁹.

Abroad, the approach of US law from the perspective of the Chicago and Post-Chicago School will be very popular, with most authors attributing noninterventionism to the Chicago School, with the omission of the contributions of the modern Harvard School and of New institutional economics. For these authors, the treatment by American competition law to dominant firms is viewed with scepticism, in a vision clearly clouded by the ideological extremism that is

increases the probability of error by contrast with the elegant but simple model of the Chicago School. For this reason, Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, Colum. Bus. L. Rev., 2003, p. 357, sustains that this theory should be left to academics.

⁴⁵ Hovenkamp, *op. cit.* (*Post-Chicago antitrust: a review and critique*), p. 322.

⁴⁶ *Idem*, p. 323. Also, Brennan, *The Legacy of U.S. v. Microsoft*, Regulation Winter 2003-2004, p. 22.

⁴⁷ Hovenkamp, *op. cit.* (*Post-Chicago antitrust: a review and critique*), 2001, p. 322. Timothy J. Brennan, *Understanding "Raising Rivals' Costs"*, Antitrust Bulletin, Vol. 33, p. 108 points out that this theory focuses on the market where the infringer operates, neglecting the market in which anti-competitive control takes place.

⁴⁸ Thomas Krattenmaker, Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, The Yale Law Journal, Vol. 96, N° 2 (Dec., 1986), pp. 240-242.

⁴⁹ David T. Scheffman, Richard S. Higgins, *Twenty years of raising rivals' costs: history, assessment, and future*, GEO. MASON L. REV., Vol. 12, N° 2, p. 382.

imputed to the Chicago School, in relation to which the Post-Chicago School is regarded as “an antidote”⁵⁰.

This simplistic view of foreign doctrine can only be explained by the little attention given to the modern Harvard School and the New institutional economics.

3. The Post-Chicago explanation to free riding

The Post-Chicago School will challenge the explanation given by the Chicago School to justify vertical restraints based on the free riding effect⁵¹.

In the classical example, restrictions such as territorial or customer exclusivity and the imposition of resale prices were explained by the need for distributors to provide certain services in the pre-sale of the products, such as demonstrations, explanations, showrooms and other specialized services. These mechanisms were considered as a means of preventing other distributors, who did not provide those services, from marketing the products, from free riding services and from having lower prices for those services⁵².

The Post-Chicago School begins by emphasizing that this classic example, although theoretically valid, has little application in real life, since there are few products that require this kind of services.

This School will criticize the condemnation of those who offer discounts, based on the assumption that the producer will always choose the most efficient distributors⁵³.

In this theory, it is called into question that the distributor, to whom advantages are recognized through the restriction, is the most efficient. In this sense, it is argued that this may be the distributor with larger operations, with a wider set of customers, but less efficient. By contrast, there are distributors, who, having a smaller market share, can be more efficient and offer lower prices⁵⁴.

This School also calls into question the fact that these intangible services are used to attract consumers from other brands and increase inter-brand competition. Given that most distributors are multi-branded, it will be very difficult to distinguish the effect of this type of intangible services on a given brand, as

⁵⁰ Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, Colum. Bus. L. Rev., 2007, pp. 28-29. Even in American literature there is a certain tendency to identify only these two great poles, which is much criticized by Kovacic, *op. cit.*, 2007, pp. 21-23, pp. 28-29.

⁵¹ Robert Steiner, *Manufacturers' Promotional Allowances, Free Riders, and Vertical Restraints*, Antitrust Bull., Vol. 36, N° 2, 1991, p. 383.

⁵² Being used in products as simple as: pet food, shampoos, vitamins, cosmetics, fashion accessories in which there is no basis for applying the theory of the free –riding effect of the Chicago School. Robert Pitofsky, *Why Dr. Miles Was Right*, REGULATION, Vol. 1984, pp. 29-30.

⁵³ Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, “How the Chicago School overshoot the mark”, Oxford University Press, Oxford, 2008, p. 201.

⁵⁴ Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance*, “How the Chicago School overshoot the mark”, Oxford University Press, Oxford, 2008, p. 202.

consumers who go to the store with all these intangible services will be able to take advantage of the other brands by the distributor.

In this sense, they reject the argument that the imposition of resale prices, in the absence of the free-riding effect, favours inter-brand competition by encouraging the provision of such intangible services⁵⁵.

Another reason for the need for vertical restraints was based on the prevention of the free - riding effect on the reputation and image of the brand certified by the distributor⁵⁶.

This School had as its starting point that certain distributors invest substantially in the reputation of the brand, in the quality, in certain specific services, thus bearing costs, namely the salaries for the best employees, the maintenance of a certain ornamentation, the place where the store is installed. Because of this reputation, the decision to distribute the brand ultimately increases brand value and also assures consumers that the products have the qualities that attract them.

Free riding, in this case, lies in the fact that consumers, after having been awarded the quality certification by distributors who invest in reputation for those products, end up buying from the distributors, who do not make that investment, sell the products of that brand to a lower price, thus free riding in distributors with reputations.

The imposition of resale prices appears in this scenario to prevent the free riding effect, ensuring that prestige dealers have incentives to maintain their image and to continue to serve as a certification of the brand itself, with a return on investment. In this sense, the imposition of resale prices ends up assuming a pro-competitive function by protecting the brand image.

The Post-Chicago School, while considering this argument theoretically legitimate, will point out weaknesses.

In this sense, the authors of the Post-Chicago school understand that, from an economic and antitrust view, it does not appear that this free riding effect is harmful to social welfare, unless it somehow undermines the availability of the service or the product⁵⁷. Still considering that the effect of the image is substantial for selected products, they argue that it will hardly affect the desire of the prestigious distributor to continue providing this service to the product. First and foremost, there is always a time gap between the start of the marketing of the product by the prestigious distributor and the process of quality certification, both to the consumer and to other distributors. In this time gap, the distributor of prestige can charge a higher price, and when the other distributors are able to take

⁵⁵ *Idem*, pp. 202-204.

⁵⁶ Marvel, *The resale price maintenance controversy: beyond the conventional wisdom*, "Antitrust L.J. Vol. 63, N° 1, 1994, pp. 65-67, Howard P. Marvel, Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, "The RAND Journal of Economics", Vol. 15, N° 3, 1984, pp. 347-349.

⁵⁷ Marina Lao, *op. cit.*, 2008, p. 205.

advantage of the quality certification given by the distributor, it has already recovered its investment⁵⁸.

However, they accept the argument that the imposition of minimum resale prices facilitates new entrants into the market, which means producers who want to enter the market with new products are able to get distributors to make the necessary investments to distribute that new product, since the imposition of resale prices will ensure that these investments are recoverable⁵⁹.

Ton the imposition of resale prices is pointed out as anti-competitive effects, the creation of conditions that facilitate cartels of distributors and producers and the exclusion in some circumstances of competitors. Imposition of minimum resale prices is also considered liable for an increase in price. The explanation given, based on the provision of ancillary services to the marketing of the product, that the increase verified corresponds to these services, is not considered sufficient⁶⁰.

On the other hand, the fact that the imposition of resale prices limits intra-brand competition is also a negative point highlighted by this School. In this sense, they argue that price competition under the same brand encourages new or even existing distributors to develop other forms of distribution or even different services. If price competition is banned for most products, there will be less incentive for this innovation.

The key point of this analysis is the competition in the intra-brand price, to which suppression more losses are attributed. In this issue, there is a contradiction with Chicago School, which argued that inter-brand competition should be the main concern of antitrust law.

As examples of less restrictive alternatives, are pointed out the payment to the distributors for the services rendered, the separate contracting of the services to be rendered and even, eventually, the possibility of being charged, separately, to the consumers these services⁶¹.

These alternatives, as will be demonstrated by the New institutional economics, will be more costly and less efficient, considering the incompleteness of the contracts, resulting from the lack of perfect information, the high costs of monitoring and the opportunism of the parties.

On the other hand, the empirical studies presented, in support of this thesis, are still insufficient to overcome the empirical analysis developed both by the Chicago School and in the scope of the Transaction Costs Economics⁶².

Lastly, the imposition of resale prices, while not excluding the risk of distributors being the subject of free-riding, is a private mechanism for enforcing

⁵⁸ *Idem*, p. 205.

⁵⁹ *Idem*, pp. 206-207.

⁶⁰ Marina Lao, *op. cit.*, 2008, p. 210.

⁶¹ Marina Lao, *op. cit.*, 2008, pp. 212; Robert Steiner, *Manufacturers' Promotional Allowances, Free Riders, and Vertical Restraints*, Antitrust Bull., Vol. 36, N° 2, 1991, pp. 398, pp. 409-411.

⁶² Crane, *Chicago, Post-Chicago, and Neo-Chicago*, U. Chi. L. Rev., Vol. 76, N° 4, 2009, pp. 1936-1927.

the contract, encouraging the distributor to provide the special services desired by the producer in the marketing of the product and to which selection and performance, the distributor is the agent in the market with more information.

4. Conclusions

The major difference between the Post-Chicago School and the Chicago School lies in the latter's rejection of game theory as a useful tool in the analysis of competition law, unlike the first that uses it as a way of inserting strategic behavior in economic analysis of anticompetitive practices.

This results in the excessive mathematical complexity of this theory and in the formulation of theoretical models that shun empirical testing

Owing to this complexity and sophistication, Courts will be unable to follow Post-Chicago economics, as demonstrated by the comparison between the erected by this School against Microsoft and those that actually originated the conviction of Microsoft.

This failure of the Courts to understand this School could have jeopardized a coherent economic approach to competition.

The irrational defense of a noninterventionist policy and deny an empirical underpinning attributed by this School to Chicago School are going to be unfounded.

Another failure pointed to the Post-Chicago School is the absence of a unified and strong normative account of antitrust law capable of refuting the ideological premises of the School of Chicago.

In fact, besides the Raising Rivals' Costs Theory, where Chicago's influence is notorious, this school does not offer any normative theory of competition law.

Some literature sustains the possibility of creating a Neo-Chicago School by bringing together the flaws identified by the Post-Chicago analysis with the general principles of the Chicago School, owing to the fact that the authors associated with Post-Chicago School support their theories on theoretical and empirical works of the Chicago School.

Even though Raising Rivals Costs Theory is the major contribution of this School to economic literature, there are undeniable flaws, especially as it disregards an effective anticompetitive effect.

The Post-Chicago School will also challenge the explanation given by the Chicago School to justify the vertical restraints based on the free riding effect.

However, the explanation for free riding is insufficient and it will be overcome by Transaction Cost Economics.

Summing up, we may conclude that Post-Chicago School failed to thwart the economic analysis of the Chicago School and later New Institutional Economics, mainly through Transaction Cost Economics.

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