Consumer or Competition, Theory and Effect of Article 101 of the EU

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Introduction

This paper surveys the theoretical intent as well as the practical effects of the European Union's anti-competitive provision of Article 101 of the *Treaty on the Functioning of the European Union*. In order to analyse the intent and effect of Article 101, this paper is broken into three parts. Part one deals with the actual text and scope of Article 101 by looking at the history and reach of the article. Part two then turns the discussion toward the theoretical goals that Article 101 is designed to accomplish, or as I have preferred to call it the "intent" of the article. In order to analyse the theory behind Article 101, this paper gives a brief summary of the main antitrust schools of thought ultimately identifying the Post-Chicago school as the likely influencer of Article 101. Lastly, part three deals with the practical effects that Article 101 has had on competition both within the EU and by influence on other international jurisdictions. In accomplishing this task a light is shone on a couple of the most recent applications of Article 101, some potential benefits and drawbacks of the Article 101 scheme, and lastly a short canvassing of influenced foreign jurisdictions.

PART I

Text and Scope of Article 101

1.1 Article 101 History and at a Glance

Article 101 of the *Treaty on the Functioning of the European Union* (EU) (TFEU) is merely the most recent variant of EU legislation that targets anti-competitive behaviour within and connected to EU member states as well as states like Norway and Liechtenstein who are found in the European Economic Area agreement.[2] Prior to being numbered Article 101, the legislative provisions which targeted anti-competitive behaviour within the EU have been varyingly numbered Articles 81, 82, 85 and 86.[3] For the purposes of this essay only the most recent Article 101 is to be discussed, however much of the authoritative pieces on the subject matter address the content by its prior article numbers as just mentioned, and this should be kept in mind.

Article 101 of the TFEU may be summarised as the 'concerted practices and undertaking provision' which governs anti-competitive behaviour of the sort that may affect EU member states, and presumably the other affected states of the EEA.[4] This is to be juxtaposed to Article 102 which more directly targets the

[1] BA Philosophy and Political Science, University of British Columbia
[2] *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/119 (entered into force 1 November 1993) art 101(1). ('*TFEU*')
[3] 'Article 101, 102', *Technology and IP Law Glossary* (Web Page, 14 June 2013) <http://www.ipglossary.com/glossary/article-101-102-formerly-articles-81-and-82-and-before-that-85-86/#.XN8Y-chKiUk>.
[4] *TFEU*, art 101(1).

abuse of a dominant market position.[5] Article 101 at a glance mentions undertakings and concerted practices that may undermine the internal EU market and as such implies it is limited to govern only those actions which could affect EU internal competition.[6] While not the topic at hand, it is important to note that 'concerted practice' is actually a legal 'discovery' founded in EU law which has then spread to other jurisdictions.[7] The term 'concerted practice' has been defined as 'the object or effect [of a concerted practice]. . . is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting'.[8] The significance of the term 'concerted practice' is that mere attempts to share information or motive related to conduct, even where unsuccessful, will be considered a concerted practice which invites liability under art 101.[9] Where this is important is in the discussion over whether the theory and practice of article 101 is designed to, and in fact, does prioritize consumer protections or the maintenance of theoretical market competition. In particular in the interaction between concerted practice and vertical competitive restraints.

As regarding the term 'undertaking', this term is defined quite closely as it is used in other jurisdictions, including common law jurisdictions. EU precedent treats an undertaking as any entity engaged in economic activity regardless of its legality, its financing, or whether it falls short of traditional contractual agreements that undertakings tend to lead to.[10] Negotiations may or may not constitute an undertaking, but will often (depending on whether information discussed has an anti-competitive effect) fall afoul of being a concerted practice.[11] The Australian case of *AECL v ACCC* in 2017 restates similarly what 'undertaking' means in the domestic Australian setting as being akin to that of a contract, agreement, or understanding.[12]

1.2 Scope of Article 101

Under its own text, Article 101 appears limited in scope to cover any restriction or distortion of competition within the internal market of the EU by way of any type of undertaking or concerted practice.[13] The text of the provision takes pains to especially enumerate five examples caught by the provision. These 'particular examples' range from direct and indirect price fixing or trading agreements, production and supply manipulation, unfair dissimilar dealing, and the inclusion of supplementary or third-party conditions in contract making.[14] Article 101 starts with the presumption that any such undertaking or concerted practice will be void,[15] unless it qualifies under a limited exception colloquially known as a 'block exception'.[16] Both theoretically and operatively it is the exception sub-provision that sheds light on the objective and effect of article 101. Article 101(3) exempts certain conduct which would otherwise fall afoul as a concerted practice or a voidable undertaking. Under article 101(3) such conduct may be exempt where the activity improves the production or distribution of goods or goes toward technical or economic progress in a way where consumers receive a fair share of the benefit.[17] Three things are to be taken from this part of the provision. First, the enumerated examples are not exhaustive but merely explicitly forbidden. Secondly, the exception provision does allow for conduct that would otherwise be forbidden but is instead allowed because of its beneficial consequences. Thirdly, and most importantly, is the requirement in the exception provision that the

[5] Ibid art 102.
[6] Ibid.
[7] *The Competition Act* (Singapore, cap 50, 2006 rev ed) s 34; *Competition and Consumer Act 2010* (Cth) s 45(1)(c); *Competition Act 1998* (UK) s 2(1).
[8] *Cooperative Vereniging 'Suiker Unie' UA v Commission of the European Communities* [1975] (40/73) EU:C:1975:174. (*'Vereinging'*)
[9] *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2010] (C-8/08) EU:C:2009:343, [35]. ('*T-Mobile*')
[10] *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe* [2017] (C-74/16) EU:C:2017:496, [41]–[43].
[11] *T-Mobile*, [20]–[21],[32],[35].
[12] *ACCC v Australian Egg Corporation Limited* [2017] FCAFC 152, [3]. ('*ACCCappeal*')
[13] *TFEU*, art 101.
[14] Ibid art 101(1)(a)–(e).
[15] Ibid art 101(2).
[16] Ibid art 101(3).
[17] Ibid.

'consumer' must have a fair share in the beneficial consequences. This third point is the most significant when evaluating the intention of Article 101, while also clearly serves to foreclose arguments from defendant entities who seek to justify otherwise forbidden conduct merely because the consumer gains any level of benefit.

Essentially summarised, the scope of Article 101 is aimed at market participating entities connected with or operating within the internal EU market. These EU operating market entities are then forbidden from conduct, whether an undertaking or a concerted practice, which may 'restrict or distort' competition within the internal market. Some examples of the conduct include price fixing or supply and dissimilar dealings but such examples are not ultimately exhaustive. Lastly, only where the defendant entity may demonstrate that its conduct has been materially, economically, or technologically beneficial in a way not-disproportionately beneficial to the consumers will the conduct be capable of being declared not void. Otherwise, where a defendant entity cannot demonstrate this fair benefit to the consumer the conduct will be presumed void. Where a defendant entity falls afoul of Article 101 then through Article 23(2)(a) of EU regulation *No 1/2003* the Commission may issue fines for any prohibited undertakings or concerted practices.[18] The fines levied by the Commission are often extensive as just this week the brewing conglomerate InBev was levied over 200 million euros in fines for participating in a concerted practice contra to Article 101.[19]

PART II

Theoretical Goals of Article 101

2.2 Harvard, Chicago schools of Anti-Competitive Legal Thought

Named after the respective universities of Harvard and Chicago, the Harvard and Chicago schools of thought on the topic of anti-competitive theory dominate much of the 20th-century approach to antitrust law. The Harvard school of thought originated with economists at Harvard and started to dominate the legal interpretation of American antitrust and competition statutes such as the *Sherman Act* and the *Clayton Acts*, early and primary federal antitrust statutes in the USA.[20] The Harvard school, at least according to Thomas Piraino, takes a strong but reliable position that holds that concentrated markets are likely to lead to anti-competitive conduct and that any market concentration is a negative to competition even where benefits accrued to the consumers.[21] At least while the Harvard interpretation reigned the courts are alleged to have taken an extremely narrow approach to any type of anti-competitive behaviour. Thomas Piraino points to an example where famous (and fantastically named) federal judge Learned Hand ruled Alcoa Aluminium was liable for monopolizing conduct in its aggressive market expansion to take advantage of economies of scale.[22] This liability was found even when the expansion by Alcoa resulted in greater and higher quality aluminium products being available to the consuming public at large.[23] While the certainty and rigidity of the Harvard school leant itself to clarity, the same rigidity also manifested in ways that appeared to stifle and deter transactions and conduct in heavily concentrated markets.[24] Following the Harvard school came the Chicago school of antitrust thought.

[18] *Council Regulation (EC) No 1/2003*; European Union, Office Journal of the European Union, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006/C 210/02.
[19] European Commission (EU), 'Antitrust: Commission fines AB InBev €200 million for restricting cross-border sales of beer' (Media Release, 13 May 2019).
[20] Thomas Piraino Jr, 'Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century' (2007) (Spring) 82(2) *Indiana Law Journal* 346, 348. ('*Reconciling*')
[21] Ibid 349.
[22] Ibid.
[23] Ibid.
[24] Ibid 350.

The Chicago school of antitrust thought emerged toward the end of the 1960s and is in some ways antithetical to the Harvard School.[25] While the Harvard school built its theory on the idea that Congress's legislative intent was to protect individual competitors,[26] the Chicago school started with a denial of that premise and did not find any manifested intent.[27] Writing at the dawn of the Chicago school in 1966, Robert Bork put forward—in his highly cited article—the idea that anti-trust legislation was aimed at the maximisation of wealth and wealth enhancement which necessarily put the consumer in the main seat.[28] The idea of wealth enhancement and the consumer in the main seat is essentially at odds with the prior Harvard school that viewed protection of the competitor as primary even when the alleged conduct was beneficial to consumers. The Chicago school embraced a tacit and much more *laissez-faire* approach, unsurprising given that the likes of Milton Friedman were resident there. Instead, an intervention was to be avoided except in circumstances where it was clear anti-competitive conduct was a threat to the consumer.[29] Thomas Piraino writes that by the 1990s the Chicago school had completed its influence on the analysis of antitrust law resulting more and more in the FTC and other enforcement bodies dropping presumptions of illegality to requiring proof of particular anti-competitive consequences.[30] Just as the Harvard school had its benefit in clarity and its detriment in rigidity so too did the Chicago school both empower inter-market dealings while also increasing the burden on enforcers, courts and juries.[31] The Chicago school's *laissez-faire* approach and general scepticism of intervention, at least according to Thomas Piraino, demanded that anti-competitive consequences must be demonstrated and proven leading to judges and juries having to make complex findings of fact on difficult and less than prescient economic models.[32] Where juries and judges are given the kind of fact-finding discretion required as presumption of illegality was removed, as Chicago displaced Harvard, the outcome spurred transactions but lead to a series of sometimes contradictory court precedent that raised more questions than it answered.[33]

To effectively summarise the Harvard and Chicago schools one merely needs to look at the premise of whether anti-trust is meant to protect the consumer or the competitor. Where the Harvard school appears to have taken a straight but perhaps all-to-rigid approach for the protection of the competitor, the Chicago school seems to defer strongly to a hands-off approach in so far as to do so is in the best interests of maximising the wealth of the hypothetical consumer. However, as astute critics and proponents have noted the EU appears not to have adopted either the Harvard nor the Chicago approach to any unbalanced degree.[34] At this point, the discussion turns to the theory underlaying the EU's Article 101 and to the anti-trust theory known as the Post-Chicago school.

2.3 The EU and the Post-Chicago School

The Post-Chicago school of anti-trust thought began in the mid-1980s but failed to take any prominent position amongst the courts and enforcers until the early 2000s.[35] Rather uncreatively, the Post-Chicago school proposed a middle-way between the Harvard and Chicago schools by seeking to mitigate the shortfalls of each school. Post-Chicago thought walks back the overly generous *laissez-faire* Chicago tendency not to regulate market competition by recognising that some markets will gravitate toward abusive dominant market monopolies.[36] While in resisting the Harvard side of the issue, Post-Chicago thought puts more care and attention toward the consumer benefits. Where conduct that was, under the Harvard school,

[25] Ibid.
[26] Ibid 348.
[27] Ibid 350.
[28] Robert Bork, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9 *The Journal of Law and Economics* 7, 7.
[29] *Reconciling,* 350.
[30] Ibid 351.
[31] Ibid.
[32] Ibid.
[33] Ibid 352.
[34] William Kovacic, 'Two Views of Exclusion: Why the European Union and the United States Diverged on Google' (2018) *Blog of the Stigler Center at the University of Chicago Booth School of Business*.
[35] Daniel Crane, 'Chicago, Post-Chicago and Neo-Chicago' (2009) 76 *University of Michigan Law School* 1911, 1911–1913.
[36] *Reconciling,* 364.

per se illegal, the Post-Chicago first seeks to identify whether that conduct is appropriate in benefitting either the consumer or competition by way of the size and dominance position of the connected entities in the market.[37] Thomas Piraino gives the example of Microsoft—famously broken up in the early 1990s over their software bundling[38]— wherein the advantage of their operating system could give a unique ability to foreclose entrance into the computer market of competitors but could also improve the wealth and quality of consumer products.[39] For the Post-Chicago school, instead of making Microsoft's bundling *per se* illegal, as Harvard would have it, and instead of completely deferring as the Chicago school would have it, the Post-Chicago school looks toward both the effect on the competitor and the overbalancing effects of any beneficial effect on the consumer.

There is somewhat of an open question on whether the EU has adopted a Post-Chicago school of thought or one of its own.[40] Where horizontal restraint of trade clauses manifest their anti-competitive behaviours more readily, being that these are transactions between direct competitors, it is vertical restraints of trade in all their nuance that bring fullness to the theory backing particular antitrust legislation. Alden Abbott, the general counsel to the Federal Trade Commission[41] gave a speech at Oxford on the differences between EU and American antitrust approaches.[42] Abbott points out that Article 101 (or rather Article 81 at the time) appears focused on protecting the economic needs of the consumer and manifests itself by the block exceptions that will exempt otherwise illegal conduct if it balances in favour of the consumer.[43] At a glance, this appears to align with the textual representation of Article 101, specifically the factor that the consumer must receive a 'fair share' of the benefit. Abbott identifies a schism between the EU and the American approach to restrictive vertical transactions.[44] Where the USA starts from a *per se* perspective that certain restrictive vertical contracts are unlawful, something closer to a Harvard approach than a Chicago approach, the EU is more accommodating.[45] This accommodation leads to the conclusion that the EU theoretical approach appears to be a Post-Chicago model even if the Director General's office might never admit it.

In light of the Chicago and Harvard schools of thought, one can see the middle ground being walked by Article 101. In line with the Harvard school of thought is the straightforward *per se* illegality of the enumerated examples which start illegal and must be declared exempt. This is in-line with the Harvard school approach to regulate first and care about any actual proven consequences later. However, the very nature of block exemptions so long as the consumer is fairly benefitted speaks more toward that of the Chicago school of consumer wealth maximisation. Article 101, therefore, appears to meld a *per se* interest of the Harvard school with a Consumer interest exception of the Chicago school, something that Post-Chicago thought also appears concerned with. Looking toward the policy guidelines, considering the explicit protection of the consumer, and starting with the presumption that sanctioned conduct is void, Article 101 appears to walk a ground in-between the Harvard and Chicago schools and as such seems most closely aligned with Post-Chicago thought.[46]

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[37] Ibid 365.
[38] *Note* Thomas Piraino does not bring up Microsoft's break up or software bundling at this point in the article but this coincides directly and historically and this is presumed to be what underlines his use of Microsoft.
[39] Ibid 364–365.
[40] Antonio Cucinotta et al, *Post-Chicago Developments in Antitrust Law* (Edward Elgar, 2002), 40.
[41] *Note* interestingly Abbott still appears in that post
[42] Alden Abbott, 'A Brief Comparison of European and American Antitrust Law' (Speech, The University of Oxford Centre for Competition Law and Policy, 2005). ('*Comparison*')
[43] Ibid 4.
[44] Ibid 6.
[45] Ibid.
[46] *Director General*, European Union, Office Journal of the European Union, Commission notice on best practices for the conduct of proceedings concerning Article 101 and 102 TFEU, 2011/C 308/06; *Council Regulation (EC) No 1/2003*; European Union, Office Journal of the European Union, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006/C 210/02.

PART III

Practice and Effect of Article 101

3.1 Article 101 in Action

Especially as of late, it appears a safe statement to declare that the EU has not been hesitant to employ Article 101 against market participating entities with dramatic and expensive results. As mentioned in passing in Part I, brewing giant InBev was nailed with over 200 million euros in fines for anti-competitive concerted practice of restricting cross-border sales between Belgium and the Netherlands just days ago.[47] Notably, in the InBev situation, the restriction of cross-border sales was conduct particularly sanctioned by Article 101(1)(a). However, many large market entities have been taken to task with fines ranging from the millions to the billions for violations of Articles 101 and 102. Also previously mentioned was a concerted practice fine levied against T-Mobile in *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* wherein mere communications between phone service providers was ruled by the ECJ to qualify as a concerted practice and which opened T-Mobile up to fines.[48] In 2017 as well as recently in 2019 Google has met billions of euros in fines from the EU Competition Commissioner for violations of both Articles 101 and 102, so far totalling almost four billion euros in total fines in two years.[49] Whether a vociferous and overzealous prosecutor of honest business or a gallant protector of competition and consumer, the EU Commission has not taken a passive role. The Google fines are an apt example of the active application of Article 101 by the Commission as the same set of facts that prompted the 2017 fine by the EU were not acted upon by the Department of Justice in the USA.[50] At a minimum, it can be said that the EU appears neither disinterested nor intimidated to investigate and fine even the largest providers operating within the internal market. However, the most recent heavy fines in the hundreds and billions of euros look to be somewhat of a recent trend, at least over the past ten or so years. This may leave a question as to the sustainability of such aggressively high fines. Following the 2017 fine to Google, Alphabet the parent company of Google complained loudly about the effect such fines could have on their ability to operate within the EEA.[51] Considering the March 2019 fine against Google, and Alphabet's lack of response so far, the chilling effect of such fines on particular markets may soon become apparent. Patrice Bougette et al, writing in 2014, viewed recent movements (mainly within Article 102) of the EU Commission to be a concerted effort to move toward an 'effects-based' approach to antitrust.[52] However, detractors have begun to illustrate the negative practical effects of this direction.

3.2 Practical Drawbacks of Article 101

[47] European Commission (EU), 'Antitrust: Commission fines AB InBev €200 million for restricting cross-border sales of beer' (Media Release, 13 May 2019).
[48] *T-Mobile*, 31.
[49] European Commission (EU), 'Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service' (Media Release, 27 June 2017); European Commission (EU), 'Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising' (Media Release, 20 March 2019).
[50] William Kovacic, 'Two Views of Exclusion: Why the European Union and the United States Diverged on Google' (2018) *Blog of the Stigler Center at the University of Chicago Booth School of Business*.
[51] Natalia Drozdiak, 'Alphabet's Google Responds to EU Antitrust Fine', *The Wall Street Journal* (online, 30 October 2017) < https://www.wsj.com/articles/alphabets-google-responds-to-eu-antitrust-fine-1509388512>.
[52] Patrice Bougette et al, 'When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law' (2014) *GREDEG Working Paper* No 2014-23, 2.

In a 2011 article, Chris Townley does an excellent job of enumerating a number of positive and negative practical effects of the EU's current approach to Article 101 and 102 antitrust enforcement.[53] Chris Townley notes that between the older Article 81 and the newer Article 101 confusion has clouded how entities and enforcers are to approach antitrust enforcement.[54] Townley gives three areas that generate a certain amount of confusion. The first, alleges Townley, is that Article 101 functions as trojan horse wherein the application and interpretation is too oft at the hands of individual commission officials and generates uncertainty to approach and candour of the article.[55] Secondly, Townley identifies an almost 'blind fetishism' towards consumer welfare and in pursuing this goal binds itself too strongly to in-house economist predictions.[56] Thirdly, decentralisation between the Commission and individual National competition schemes of the member states has clouded who is responsible for whom and how much freedom national schemes actually have under the EU overlordship.[57] Townley points specifically to the guidelines for Article 81(3) promoting consumer welfare as the sole goal, with that of how the ECJ has rejected that guideline for Article 101 by also taking on board public policy concerns.[58] Townley identifies advantages of taking non-economic goals into consideration as part of the 'benefits' to consumers as found under Article 101(3). Such advantages include significant non-monetary benefits to consumers, non-interference with governmental policies, and consistent cost-benefit analysis as well as the development and growth of the internal EU market.[59] However, such advantages are also said to come with the disadvantages of quantification problems, the inconsistency of costs to benefits actually measured, and the concerns of internal institutional cronyism or corruption.[60] Fundamentally, Townley argues that the direction the EU is taking Article 101 is a direction that will make cost-benefit and fine quantification overly complex and prone to political exaggerations.[61] Having written this concern in 2011, and having now demonstrated the immense fines levied against the likes of Google, as well as topical and tacit threats to Facebook,[62] Townley's critique appears apposite against the manner in which the EU calculates its fines as against offenders. The take away may very well be that the current trajectory of Article 101 may begin to have a chilling effect on large internationally participating market entities.

3.3 Article 101 and the Effect of Concerted Practice on International Jurisdictions

It looks as though, at least for the time in which this paper is written, it is too early to gauge any significant chilling effect on larger entities in the internal market. Yet it is not just the application of Article 101 itself for which the article is limited in its practical effects. Bearing in mind that Article 101 is a continuation of older versions, the soul of the article remains substantially the same. The EU in enacting the Article 101 family appears to be the first substantial jurisdiction to introduce the very concept of a concerted practice. Article 101 and its forbearing provisions are nearly perfectly mirrored by antitrust UK provisions.[63] Where Article 101 of the TFEU became the dominant and primary influence on the analogous UK legislation, the same influenced UK legislation, in turn, is a dominant influence and precedent on analogous Singaporean legislation.[64] But the practical influence, at least in so far as it concerns international

[53] Chris Townley, 'Which goals count in Article 101 TFEU? Public policy and its discontents: the OFT's roundtable discussion on article 101(3) of the Treaty on the Functioning of the European Union' (2011) 32(9) *European Competition Law Review* 441. ('*Which Goals Count*?')
[54] Ibid 441.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid 442.
[59] Ibid 444.
[60] Ibid 446.
[61] Ibid 448.
[62] Reuters, 'EU's Vestager says not precluding Facebook case in future', *Reuters* (online, 10 October 2018) <https://www.reuters.com/article/us-eu-antitrust-facebook/eus-vestager-says-not-precluding-facebook-case-in-future-idUSKCN1Q828V>.
[63] *Competition Act 1998* (UK) s 2(1).
[64] *Balmoral Tanks Ltd v Competition and Markets Authority* [2019] EWCA Civ 162, [2]–[6]. ('*Balmoral*'); *Pang's Motor Trading v Competition Commission of Singapore* [2014] SGCA 1, [33]; *Financial Advisers Penalised by CCS for Pressurising a Competitor to Withdraw Offer from the Life Insurance Market* [2016] CCS500/003/13, [41].

jurisdiction, extends down to the domestic sphere of Australia. Following the Harper reforms which concluded in 2017, Parliament enacted an amendment to the *Competition and Consumer Act 2010* (Cth) (CCA) which saw the introduction of concerted practices as sanctioned conduct.[65] These changes, according to the explanatory memorandum, introduce concerted practice to the CCA where before only offending CAUs (contracts, agreements, and understandings) were capable of inviting the jurisdiction and punishment of the ACCC. When evaluating the early roots of the EU's concerted practice provisions, now found in Article 101 it may be the case that Article 101's largest practical influence is actually its international significance in introducing the concept of concerted practices to the general and wider world. With that revelation, Article 101 may be the 'chromosomal Eve' of an entire new antitrust phenomenon bound up in a confusing admixture of competition and consumer protection.

Conclusion

Whether the EU's Article 101 provision is of a particular school is somewhat complicated by the critiques mentioned by Chris Townley, as discussed in Part III. This paper has looked at the two initial schools of antitrust thought both of which originated from the prestigious universities of Chicago and Harvard. The Harvard school with its rigid application of staunch maintenance of competing parties was somewhat dethroned by the Chicago school's hands off and 'prove the damage' approach. The EU's approach to antitrust is then somewhat muddled in that it appears to follow a sort of Post-Chicago school that considers some markets should be treated like the Harvard school yet many markets should be treated like the Chicago school for the pursuance of consumer wellbeing. On top of this Chris Townley's criticisms are not without merit. The political masking behind Article 101 leaves some concern that antitrust is now too focussed in the economic opinions and individual whims of the economists and officials behind the Director General's office. The appearance of increasing fines growing more and more into the billions of euros, while undoubtedly a lovely coffer filling income, may dissuade large international firms such as Google and Facebook from integrating themselves too closely in the internal market. So, what can be said about Article 101 with any certainty? At the least, it appears that the theory behind Article 101 is Post-Chicago in style, even if unadmitted. And, that Article 101 lays out in its text an apparent desire to balance consumer welfare with block exceptions where acceptable. Practically speaking, however, given the alarmingly high fines that companies such as InBev, Google, and (maybe) Facebook now appear to be facing, the future of Article 101 may not be so static. But in the end, the EUs development of concerted practice seems to have escaped the continent to the far shores of Singapore, and Australia, and in that form appears destined to stay for yet a while longer.

[65] 'Significant changes made to Competition and Consumer Act 2010', *Hall & Wilcox* (Web Page, 19 October 2017) <https://hallandwilcox.com.au/significant-changes-made-to-competition-and-consumer-act-2010/>.