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THE EVOLUTION OF US MERGER CONTROL POLICY – PART 2: 1974-2013

SUMMARY

The aim of the study is to present the changes in US merger control policy at different stages of development of competition theories and views on pro- and anti-competitive effects of mergers (especially Harvard, Chicago, and Post-Chicago Schools of Competition). The research methods used in the study include literature review as well as the in-depth analysis of US legislation, antitrust agencies' enforcement policy and federal courts' adjudication practice with focus on changes in the economic analysis of mergers and their impact on market competition.

This part of the study covers the period from the mid 1970s to the present time and comprises two stages of the development of US policy towards mergers. In the 1980s the Chicago School theories, efficiency primacy and minimum intervention principle prevailed in US antitrust policy. From the 1990s under the influence of Post-Chicago approach which no longer assumes that markets work perfectly the antitrust agencies have been more eager to intervene to block some (even vertical) mergers with potential anticompetitive effects (though the level of this intervention could be hardly compared with that of the 1960s). US merger enforcement policy has become more interdisciplinary with a more flexible approach to economic analysis as regards applied methodology which should be tailored to each transaction and supported by empirical evidence. Apart from consumer welfare its priority is protecting competitive process in the market.

Keywords: mergers, merger control policy, US antitrust, theory of competition

JEL Classification: K21, L4, L2, N11, N12, N81, N82

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INTRODUCTION

During the last two decades we have witnessed a rapid increase in both the number of and value of M&A transactions that have been expanding together with the globalization process and the development of foreign direct investments taken by transnational corporations. M&As are no longer a national phenomenon, they are more and more cross-border in nature and spread all across the world. Global M&A deal value amounted to 2,57 trillion US dollars in 2012 (in 2007 it attained the highest level in history of 2,69 trillion US dollars)[1]. The US M&As were worth 1,33 trillion US dollars in 2012 and constitute around half of the world transactions (i.e. 51,7% in 2012 and 45,8% in 2007)[2]. It is also interesting to compare the value of US mergers to the country's gross domestic product. In 2012 they equalled 8,3% of the US GDP[3]. Taking into account the significance of US M&As for the national and the world economy it is not surprising that merger control policy conducted by this country is so important, especially as the United States aims at applying it extraterritorially and outlines some legal and economic standards which become accepted in the course of time by other jurisdictions.

The aim of the study is to present the changes in US merger control policy at different stages of development of competition theories and views on pro- and anti-competitive effects of mergers. The research methods used in the study include literature review as well as the in-depth analysis of US legislation, antitrust agencies' enforcement policy and federal courts' jurisprudence with focus on changes in economic analysis during merger investigations. This part of the study comprises the period from the mid 1970s to the present time.

1. CHICAGO SCHOOL AND ANTITRUST REVOLUTION (FROM THE MID 1970S TO THE 1980S)

The US antitrust policy changed course in the mid 1970s as a result of growing popularity of the Chicago School economic ideology. The focus on preserving competitors, dispersion of economic power, reduction of political

[1] Wilmerhale, *2013 M&A Report*, Boston, 2013, p. 2.

[2] *Ibidem*.

[3] The US GDP (PPP) is estimated for 15,94 trillion US dollars in 2012. CIA, *The World Factbook*, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html, (27.09.2013).

influence of large firms and pursuing other social and political goals shifted to a critical economics-based examination of market power and how it might be exercised. The first merger case decided by the Supreme Court in line with the Chicago approach was General Dynamics[4]. The court refused to order the divestiture of acquired corporation on the basis of market share only and took into consideration other, in its opinion, important factors affecting the coal industry. As a substantial portion of the merged firm's coal reserves were already committed for future sales the company could not compete for long-term contracts (in a market where the price of coal is set by long-term contracts) and manipulate coal prices in the future or exercise market power.

The position of Harvard School that market concentration is an indication of collusion and leads to monopoly profits, which reflects a misallocation of resources is criticized by the Chicago School. According to the latter concentration is a result of greater economic efficiency or even sometimes is necessary to achieve this efficiency[5]. State intervention as market structure interference (including structural remedies) – except the case of some horizontal mergers of monopolistic proportions – are not acceptable. As vertical and conglomerate mergers do not contribute to a significant increase in market power they should not be blocked by antitrust authorities [6]. Chicagoans presumed that government intervention was more likely to make things worse than to make them better. The ultimate goal of competition policy should be the maximization of consumer welfare (or what we today call total welfare), expressed by efficiency. The most important in this approach is allocative efficiency which means that resources are allocated in consistency with macroeconomic optimum[7]. As R. H. Bork emphasized "the whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency[8] so greatly as to produce either no gain or net loss in consumer welfare"[9]. If a merger promises to improve economic efficiency it should be allowed, even if it creates market power and increases prices.

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[4] *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

[5] H. Demsetz, *Economics as a Guide to Antitrust Regulation*, „The Journal of Law and Economics", Vol. 19, Issue 2/1976, p. 383.

[6] *Ibidem*, p. 375.

[7] Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. R.H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, Basic Books, New York 1978, reprinted with a New Introduction and Epilogue, 1993, p. 90.

[8] Efficient uses of recourses in the individual firm by economies of scale or transaction-costs efficiency.

[9] R.H. Bork, *op. cit.*, p. 91.

A producer is also a consumer so the latter will always win. For the Chicago School antitrust issues are analysed in a static manner using price theory, which means that perfect competition and monopoly serve as standards of reference[10]. However, they view competition as a dynamic process and do not see the market equilibrium of neo-classics as a final state that will actually be reached[11].

During the presidency of R. Reagan the Chicago School found a platform to transform their views into the law and policy of the United States. In 1982, the DoJ revised its 1968 Merger Guidelines so as to reflect changes in the theory of competition and to present the new approach in merger enforcement policy. The central goal of merger policy was not to prevent undue concentration but to eliminate mergers that may create or enhance market power or facilitate its exercise. The 1982 Guidelines[12] emphasized that merger analysis should involve more than calculation of market shares, other qualitative factors such as market entry, product homogeneity or buy characteristics should be also considered. According to this set of Guidelines most mergers do not threaten competition or are in fact pro-competitive or beneficial to consumers. The focus was placed on horizontal effects of a merger. The Guidelines introduced the five per cent elasticity test for the determination of product and geographic markets and recognizing the growing significance of foreign competition considered the possibility of extending the geographic market beyond US boundaries[13]. Important changes were also envisaged for ascertaining market concentration - the CR4 criterion was superseded by the Herfindahl-Hirschman Index (HHI) which is the sum of the squares of market shares of the firms in the industry. Whereas the CR4 take into account the market share of only the top four firms, the HHI gives importance to the market share of each of the firms in the relevant market and is nowadays widely used in antitrust analysis all over the world[14].

In 1984, The DoJ introduced some considerable changes into the Merger Guidelines[15] including the replacement of the five percent price elasticity test

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[10] H. Demsetz, *op. cit.*, p. 371.

[11] R.H. Bork, *op. cit.*, p. 98.

[12] US DoJ, *Merger Guidelines 1982*, http://www.justice.gov/atr/hmerger/11248.htm, (1.10.2013).

[13] J. Wilson, *Globalization and the Limits of National Merger Control Laws*, Kluwer International, The Hague, London, New York, 2003, p. 94-95.

[14] M. Motta, *Competition Policy. Theory and Practice*, Cambridge University Press, Cambridge 2004, p. 235.

[15] US DoJ, *Merger Guidelines 1984*, http://www.justice.gov/atr/hmerger/11249.pdf, (1.10.2013).

with a more open-ended test assessing the impact of Small but Significant and Non-transitory Increase in Prices (SSNIP)[16] over a period of one year. While the 1982 Guidelines gave the impression that efficiencies would only be considered in exceptional circumstances their new version (1984) stated that all types of efficiencies (not only those related to the economies of scale) would be taken into account in merger analysis.

Although the new guidelines (1982, 1984) did not go as far as some Chicago School adherents might have wished they were generally well received. The problem was the antitrust authorities did not actually apply them. Under the Reagan Administration relatively few enforcement actions were brought and even mergers among giant competitors were often cleared. The federal enforcement rate fell by more than two-thirds, to challenging only 0,7% of notified mergers in 1982-1986, while in 1979-1980 it accounted 2,5%[17]. The DoJ and the FTC seemed to presume that mergers would not decrease competition except in extreme cases.

2. INFLUENCE OF POST-CHICAGO SCHOOL ON MERGER ENFORCEMENT POLICY (FROM THE 1990S TO THE PRESENT TIME)

At the beginning of the 1990s the Chicago economic thought was still present in the US antitrust policy but it was under increasing forceful attacks from the so-called Post-Chicago theorists[18]. The Post-Chicago School is not based on any specific concept of competition, its views are in transition and it defines itself largely by the ways it differs from antitrust thinking associated with Posner and Bork[19]. It was born out of criticism of the Chicago economics[20] and reflects progressive changes in the field of industrial organization[21].

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[16] The so-called „hypothetical monopolist test" used in merger analysis in many countries. The DoJ refers to a 5% increase in prices while the European Commission examines 5-10% increase. For more details see M. Motta, *op. cit.*, p. 102-103 and R. Whish, *Competition Law*, Fifth Edition, Lexis Nexis, London 2003, p. 30.

[17] D. Valentine, *The Evolution of U.S. Merger Law*, Prepared remarks of Assistant Director for International Antitrust, Federal Trade Commission, before INDECOPI Conference, Lima, August 13, 1996, p. 5.

[18] L. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate World*, „Antitrust Law Journal", Vol. 63, Issue 2/1995 p. 669.

[19] R.H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, „Antitrust Law Journal", Vol. 58/1989, p. 632.

[20] S.M. Royall, *Symposium: Post-Chicago Economics – Editor's Note*, „Antitrust Law Journal", Vol. 63, Issue 2/1995, p. 445.

[21] L. Sullivan, *op. cit.*, p. 670.

In the new approach the primary purpose of antitrust policy is to prevent consumers from paying prices that exceed competitive levels. Contrary to the Chicago economics supporters that follow a total welfare approach ignoring distributional concerns, the Post-Chicago scholars are in favour of incorporating wealth transfer effects into antitrust analysis. The efficiency paradigm should be replaced by tighter merger enforcement and blocking any combination of firms that leads to increase in consumer prices[22]. In their opinion the Chicago efficiency concept is too limited. Neither economic efficiency should be the sole concern of antitrust policy nor antitrust analysis should consider only allocative or productive efficiencies but also the prospects for dynamic efficiency gains connected with investments in innovation[23]. For Chicagoans any effort to limit concentration results in losses of efficiency while the Post-Chicago School views market power as a threat to efficiency[24]. In Post-Chicago approach market power is as an outcome of firms' anticompetitive actions not of firm's superior performance[25].

The main criticism concerns the Chicago methods of economic analysis. In the view of Post-Chicago scholars antitrust issues cannot be examined through the lens of neo-classical theory[26], Chicago models are too abstract and simplistic to address market realities. They prefer more sophisticated, dynamic models that are individually tailored to a given market[27], including game theoretic models and others explaining firm behavior[28]. For Post-Chicagoans the Chicago School relies too heavily on economic theory and too little on empirical inquiry and detailed factual analysis[29]. It is accused of placing too much confidence in the market discipline and self-regulation. The Post-Chicago School views markets as largely imperfect with market failures, is more fearful of strategic anticompetitive behavior by dominant firms and believe in efficacy of government intervention[30].

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[22] R.H. Lande, *op. cit.*, p. 642.

[23] D. Hildebrand, *The Role of Economic Analysis in the EC Competition Rules*, Second Edition, Kluwer Law International, The Hague, London, New York 2002, p. 152.

[24] R.D. Atkinson, D.B. Audretsch, *Economic Doctrines and Approaches to Antitrust*, The Information Technology & Innovation Foundation, Washington, January 2011, p. 18-19.

[25] *Ibidem*, p. 12.

[26] L. Sullivan, *op. cit.*, p. 670.

[27] S.M. Royall, *op. cit.*, p. 446.

[28] B.H. Kobayashi, T.J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, „George Mason Law & Economics Research Paper", No. 12-31/2012, p. 15.

[29] L. Sullivan, *op. cit.*, p. 678.

[30] H. Hovenkamp, *The reckoning of post-Chicago antitrust*, [in:] A. Cucinotta, R. Pardolesi, R. van der Bergh, *Post-Chicago Developments in Antitrust Law*, Edward Elgar Publishing, Northampton 2002, p. 3.

Another criticism is that Chicagoans determine market power too narrowly - they assume that firms lacking economic power and acting alone are unlikely to harm competition. Post-Chicago economists believe that such firms can in some situations unilaterally restrict competition by, for instance, raising rival's costs or by exploiting captive consumers who lack perfect information[31]. In contrast to Chicago theorists who treat vertical mergers as generally neutral for competition or pro-competitive the Post-Chicago approach supporters tend to block some of them as they can lead to anticompetitive effects under some circumstances. In modern industrial economics vertical mergers[32]: 1. result in real foreclosure in which the net supply of inputs available to rivals is decreased or 2. contribute to enhanced economic power and monopoly profits with no efficiency benefits. According to D. Wright and H. Hovenkamp the rich Post-Chicago literature on the possibility of vertical foreclosure resulting from business arrangements that raise rivals' costs (RRC) and ultimately reduce competition and harm consumers has become the most influential Post-Chicago contribution in antitrust economics[33]. The substitution of the RRC theory for the older foreclosure theories has provided better explanation of certain exclusionary practices and has improved antitrust analysis significantly, aligning it much closely with formal economic theories of strategic behaviour. Moreover, the so-called unilateral effects theory of horizontal mergers has also turned out to be a significant litigation success. Both theories are capable of providing courts with administration rules for distinguishing anticompetitive conduct from that which is beneficial or merely harmless[34]. However, except its great achievements, such as publications in top journals, substantial influence on competition policy in the European Union, and dominance within modern economics departments, the Post-Chicago approach has had only modest impact in American courts, especially the Supreme Court[35].

The Supreme Court's 1992 decision in Kodak case[36] is acknowledged as a breakthrough for post-Chicago economics. The question was whether a photocopier manufacturer with a non-dominant share in the primary market could nevertheless have significant market power and increase prices in the market for its aftermarket parts. Although Kodak's analysis of poten-

[31] D. Hildebrand, *op. cit.*, p. 152.

[32] *Ibidem*, p. 153.

[33] J.D. Wright, *Abandoning Antitrust's Chicago Obsession: The case for Evidence-Based Antitrust*, „Antitrust Law Journal", Vol. 78, No. 1/2012, p. 249 and H. Hovenkamp, *op. cit.*, p. 22.

[34] H. Hovenkamp, *op. cit.*, p. 16-22.

[35] J.D. Wright, *op. cit.*, p. 250.

[36] *Eastman* Kodak *Co. v. Image. Technical Services, Inc.*, 504 U.S. 451 (1992).

tial anticompetitive effects of tying in proprietary aftermarkets started from a Chicago School premise - that competition among equipment manufacturers should prevent anticompetitive aftermarket practices - much of the Court's decision was dedicated to explaining, in a manner characteristic of post-Chicago analysis, that this paradigm might not hold true by reason of various market imperfections (such as switching costs and imperfect information of consumers)[37]. In Kodak decision the Supreme Court called for a more fact-based and empirical approach to antitrust, versus the simplified methodology and deductive approach of the Chicago School[38].

From the 1990s clearly more mergers have been challenged[39] and their analysis has become "more heavily economic"[40]. In 1992 the DoJ and the FTC for the first time jointly issued new Horizontal Merger Guidelines[41] that, however, did not represent any radical departure from the 1984 Guidelines. The section on efficiencies remained largely unchanged, with one exception. The sentence providing that efficiencies would not be considered unless they were established by "clear and convincing evidence" was removed. As a result merging parties could more frequently put forward efficiency claims[42]. The policy was still to prevent mergers that could enhance market power or facilitate its exercise though became more sophisticated at recognizing certain characteristics (e.g. product homogeneity, sales that are frequent and relatively small) that might make the joint exercise of market power after an acquisition more likely[43]. In 1997, the Merger Guidelines were amended by federal agencies to account more generously for merger synergies in analyzing competitive effects. In consequence the law became more friendly to some mergers[44]. The Guidelines gave instructions how to identify efficiencies that would lead merging firms to lower prices, improved quality, enhanced service, or new products. They emphasized that only merger specific (i.e. resulting from the transaction) and ver-

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[37] See S.M. Royall, *op. cit.*, p. 448.

[38] G.T. Gundlach, J.M. Phillips, D.M. Desrochers, *Antitrust and Marketing: A Primer and Call to Research*, „Journal of Public Policy & Marketing", Vol. 21, Issue 2/2002, p. 233.

[39] D. Valentine, *op. cit.*, p. 5.

[40] W.E. Kovacic, C. Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, „Journal of Economic Perspectives", Vol. 14, No. 1/2000, p. 57.

[41] US DoJ & FTC, *1992 Horizontal Merger Guidelines*, http://www.ftc.gov/bc/docs/horizmer.shtm, (15.10.2013).

[42] OECD, *The Role of Efficiency Claims in Antitrust Proceedings*, DAF/COMP(2012)23, Paris, 2 May 2013, p. 20.

[43] D. Valentine, *op. cit.*, p. 5.

[44] W.E. Kovacic, C. Shapiro, *op. cit.*, p. 57.

ified efficiencies would be considered in merger analysis[45]. The claimed efficiencies should be passed on to consumers rather than only benefit the merger parties[46]. Even though the Guidelines indicated very clearly consumer welfare (or surplus) standard in merger analysis, in practice the antitrust agencies have applied sometimes total surplus standard (courts generally have adopted consumer surplus standard and have favoured price tests as its indicator)[47].

Despite the Chicago School obvious faults, such as being too theoretical, simple, speculative and unempirical[48], its theories have heavily influenced the 1992 Merger Guidelines (and their revised version from 1997) and have been still ascendant in merger enforcement policy[49]. Though the Post-Chicago School offers more complex and sophisticated models that reflect better markets reality, they are often untested and too complicated to be applied by lawyers who prefer the principles of neoclassical price theory[50]. Moreover, the lack of empirical verification of many Post-Chicago theories and high costs of economic analysis have limited the impact of this approach on US antitrust policy so far[51].

However, recently one can observe a trend towards a more "evidence-based approach". Antitrust agencies (and rarely courts) try to rely more frequently upon theoretical models best supported by empirical data, no matter what label these models have - the Chicago, Post-Chicago or other school of economic thought[52].

In 2010 the federal agencies released comprehensive revisions to their 1992 Horizontal Merger Guidelines[53]. According to this document merger analysis is a fact-intensive exercise that requires a more flexible approach

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[45] OECD, *op. cit.*, p. 20.

[46] L.H. Röller, J. Stennek, F. Verboven, *Efficiency Gains from Mergers*, [in:] *The Efficiency Defence and the European System of Merger Control*, „European Economy. Reports and Studies", No. 5, 2001, p. 74-75;

[47] *Ibidem*, p. 75 and 78.

[48] According to the Post-Chicago School supporters' views.

[49] T.J. Horton, *The New United States Horizontal Merger Guidelines: Devolution, Evolution, or Counterrevolution?*, „Journal of European Competition Law & Practice", Vol. 2, No. 2/2011, p. 164.

[50] The Chicago School has the advantage of offering solutions that are not only simple theoretically, but simple practically (including nonintervention rule). D.A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, „University of Chicago Law Review", Vol. 76/2009, p. 1927.

[51] Compare B.H. Kobayashi, T.J. Muris, *op. cit.*, p. 3 and S.M. Royall, *op. cit.*, p. 454.

[52] J.D. Wright, *op. cit.*, p. 241-243, 262-263.

[53] US DoJ & FTC, *Horizontal Merger Guidelines 2010*, http://www.ftc.gov/os/2010/08/100819hmg.pdf, (17.10.2013).

- tailored to each transaction. It need not begin with, nor focus on, market definition or concentration in the relevant market. The revised Guidelines refocus horizontal merger analysis on competitive effects and offer several analytical tools for measuring them such as merger simulation models, critical loss analysis and the "Upward Pricing Pressure" test (the latter as an alternative to market definition analysis in which the SSNIP test is still in use though the overall approach to market determination is now much more evidentiary-based than formulaic)[54]. The Guidelines also reflect the primacy of unilateral effects analysis in merger investigations including exclusionary conduct, and impacts on non-price competition such as quality, variety, and innovation[55]. They have removed the 1992 Guidelines' 35 per cent market share safe harbour for potential unilateral effects and have added a significant discussion as to how the antitrust authorities may analyse those effects. The revised Guidelines comprise expanded sections on entry, power buyer, and efficiencies (with focus on dynamic efficiency). As regards market concentration they loose the HHI thresholds contained in the previous Guidelines: "unconcentrated markets" are now those with a HHI below 1500 (formerly 1000); "moderately concentrated markets" are characterized by a HHI from 1500 to 2500 (formerly 1000-1800); and on "concentrated markets" a HHI exceeds 2500 (formerly above 1800). These new higher thresholds, however, do not reflect the antitrust agencies' practice. The FTC and the DoJ rarely challenge mergers with HHIs less than 2000 points[56].

Most commentators on US antitrust policy agree that the 2010 Guidelines will likely result in a more activist merger enforcement policy. Referring to the Clayton Act incipiency standard, the agencies may now challenge every mergers that in their judgment pose a real danger of harm through coordinated effects, even without evidence. The 1992 Guidelines language that the government must prove that "a merger is likely substantially to lessen competition" was replaced with the new Guidelines wording referring to the actual Clayton Section 7 standard prohibiting mergers that "may be substantially to lessen competition, or tend to create monopoly"[57]. The 2010 Guidelines are designed to be more litigation-friendly towards

[54] Compare T.J. Horton, *op. cit.*, p. 160.

[55] Although the 1992 Guidelines also addressed the potential „lessening of competition through unilateral effects", they were concerned mainly with pricing competition.

[56] See for instance FTC, *Horizontal Merger Investigation Data. Fiscal Years 1996-2011*, Washington, January 2013, p. 10.

[57] T.J. Horton, *op. cit.*, p. 159.

the FTC and the DoJ than the 1992 Guidelines which laid down a mechanical five-step review process aimed at limiting the antitrust agencies' discretion[58]. The revised Guidelines do not appear to signify any revolutionary departure from current merger analysis. Rather, they seem to gather the methodologies already implemented at the agencies. However, their effectiveness depends on the willingness of the federal courts to sanction the new approach to antitrust analysis. That approach, as well as the subordination of market definition to competitive effects, conflicts with well-established precedent in merger cases and the courts' great attachment to the 1992 Guidelines.

CONCLUSIONS

The US merger control policy has been developing together with the US economy, processes of market concentration, anticompetitive practices of firms hampering free competition and theories of competition. It has shifted position and attached different significance to various competition policy goals over time. In the early years of the Sherman Act and the Clayton Act, the courts and the antitrust agencies took a lenient attitude toward mergers. In the 1950s and 1960s their approach altered for more interventionist in consistency with Harvard School theories. The antitrust law enforcement was rigorous and geared towards blocking almost every merger on the basis of market share only. The consumer interests and efficiencies were not taken into account as protection of competitors, especially small businesses, was the main priority. During the Chicago era (1980s) antitrust policy changed to a very passive, almost laissez faire policy, which was justified by its supporters with purely economic reasoning. Merger control policy was to concentrate above all on the improvement of allocative efficiency. However, even during that period, the Supreme Court never fully embraced the concept that only efficiency mattered.

In the 1990s and at the beginning of the 21st century, despite the development of Post-Chicago sophisticated theoretical models that reflect better market reality, the Chicago School approach and neoclassical methods of merger analysis have predominated, especially in courts, owing to their relative simplicity. However, we can observe some important changes in US merger policy. From over two decades it has focused on improving consumer welfare and protecting competitive process rather than preserving competitors

[58] *Ibidem*.

or supporting solely firms' efficiencies. Currently, antitrust agencies and federal courts lie somewhere between the interventionism of the 1960s and anti-interventionism of the 1980s[59]. Antitrust analysis applied by the FTC and the DoJ is based more and more on economic models best explaining the business conduct in the light of the available data, no matter these are Chicago, Post-Chicago or other theories. The latest revision of Merger Horizontal Guidelines (2010) proves that merger analysis is an evolutionary process accommodating to the development of industrial economics, growing knowledge on various forms of anticompetitive (cooperative and unilateral) conduct, types of mergers that predominate in a given period, increasing number of M&A transactions, especially of cross-border nature as well as the internationalization of competition policy.

The US competition policy including merger control has a very long tradition and have inspired the development of sophisticated merger regimes across the globe. Although merger analysis does differ from jurisdiction to jurisdiction, many elements of US approach (e.g. market definition and SSNIP test, the SLC standard for merger review and especially the core principles of the 1992 Guidelines), have been replicated in law and practice in dozens of countries. The 2010 Guidelines represent a substantial convergence of US policy towards horizontal mergers with the EU rules[60]. They can contribute to shaping the future of international merger control policy promoting a less rigid and more flexible analytical process of merger assessment by antitrust authorities.

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[59] M. Motta, *op. cit.*, p. 9.

[60] See for instance T.J. Horton, *op. cit.*, p. 163.

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