

## Chapter 2

# Person-Centred Approach

### 2.1 Introduction

Having established the deconstructability of prevailing antitrust theories in the preceding chapter, the imminent need to construct an alternative mode of antitrust analysis was established. An alternative mode was considered essential in order to meet the requirement of justice as inclusiveness. As potential candidates, Habermas' discourse ethics and the person-centred approach, were identified. However, the discourse ethics proved inadequate as it fell under scrutiny. This left us to consider the other alternative—the person-centred approach. This approach is the primary contribution of this thesis. However, for it to be adopted as the ideal mode of analysing antitrust for the purpose of achieving the requirement of justice as inclusiveness, it has to withstand the thorough scrutiny which the discourse ethics has been put through. At this point though, there is not much to scrutinise. Thus, given that it is a whole new approach, it is imperative that the contours of the person-centred approach are established first and then consequently scrutinised. This chapter paves the way for the thorough elucidation of this approach by emphasising its core attributes with adequate reference to competition law and policy.

The remainder of this chapter is thus divided into six sections. Section 2.2 contains a summary of the person-centred approach. Section 2.3 identifies the values of this approach vis-à-vis the top-down approaches. Section 2.4 details the requirements of the proposed approach. Section 2.5 focuses on the requirement of broadness while Sect. 2.6 delimits the scope of broadness sought by addressing the term “competition”. Section 2.7 contains the conclusion.

## 2.2 Person-Centred Summarised

The person-centred approach is built on tested theoretical accounts such as Coleman's idea of rights and Sen's Capability approach. At the centre of all these applied theories is the notion of the antitrust subject where the "subject" is either a single unit or an aggregation of persons.

Since we are addressing antitrust from the bottom, a conceptually sensible way of conducting the analysis would be to build an account of antitrust right. It makes sense that if we are arguing from the position of persons and for the advancement of antitrust subjects, we should be able to ascertain whether there could be antitrust right which might require advancement and also to confirm the persons who actually have rights which should be vindicated. This task is important, considering the fact that the notion of the antitrust subjects span through all possible actors and subjects of antitrust analysis. Another advantage of this right-based proxy is that it could simplify the task of policy makers, enforcers and the court as it allows us to address issues closely through the questions that our account of antitrust right raise.

At the moment, many a theory concerning both the substantive and procedural aspects of antitrust are modelled on "firm" theories such as rational choice, economic freedom, deterrence etc. These theories are not without their value. The contention however is that they cannot solely dictate the process and content of antitrust right. As such, it is imperative that our account of right accords with broadness. Though the reasons for these assertions are fleshed out in subsequent chapters, a brief exposition on what we expect of the person-centred approach is given below:

### 2.2.1 Substantive Aspect

The reason for substantiating an alternative approach to antitrust is because, as shown above, the traditional approaches run the risk of being incomplete and inherently mistaken with their narrow analyses of antitrust issues. However, in suggesting alternatives, it is imperative that a host of concerns which might impact on market behaviour should be considered. For instance, thorough theoretical exercise could help us make sense of the plural values which have been neglected or at best acknowledged in passing by antitrust scholars. In the substantive aspect, it helps us to de-bias antitrust law and policy by challenging the exclusivity of some of the prevailing axioms on antitrust and supplanting them with broader and much more inclusive conceptual foundations.

It should be reiterated that the person-centred approach is strictly a procedural mechanism aimed at justice as inclusiveness. Hence, based on this premise, it should go without saying that our reference to *antitrust right* is merely in the procedural context. As such, to say that a person has antitrust right is to say that such person is entitled to procedural justice by being included in issues that involve

or affect them. Thus, as it would be shown, the term antitrust right does not countenance any particular normative usage of the term right as it merely means that we are bound to consider the interrelatedness of interests held by persons in any given instance. For example, the way we conceive their relationship and the specific interests and values would influence how competition and hence, anti-competition is defined. Interests that could be considered in any given antitrust issue could range from employment to environment, integration, economic freedom to efficiency and so on.

Our conception of how certain antitrust issues are to be addressed have a direct bearing on our definition of competition and restriction and so on. To avoid errors, we must apply a broad-enough concept. Broadness can be ensured at the analysis stage by simply recognising that no single way of analysing right can conveniently represent all interests. Thus, in order to determine what best represents the interest of different persons, the person-centred approach avoids holding a normative stance as is often the case when one applies traditional antitrust theories.

Though it is possible that our idea of right in individual cases is influenced by one of efficiency, economic freedom, integration, industrial policy theories and so on, the extent to which they influence our idea of what best represents the interests of individuals and as such the goal of antitrust in such instance depends on what we consider to be correct. The idea of correctness cannot be premised on subjective considerations. Thus, the proper way of analysing the right and thereby determining the case-specific “goal(s)” of antitrust should result from our objective analysis of competing interests. However, maintaining objectivity is not always as easy as it may sound. Antitrust institutions would often have to deal with multitude of claims; for instance, a self-interested  $x$  who finds that competition is defined strictly through efficiency may genuinely think that another theory—perhaps economic freedom—would have been better; a bystander may think that  $x$ ’s claim should not be rejected merely because some efficiency theories say so.

Recognising these difficulties, “correctness” is to be achieved in relation to the first two questions on antitrust right by applying realistic theoretical constructs. This substantive aspect is thus primarily modelled on the capability approach and a decisional framework termed “antitrust pluralism”. The veracity and practicality of these frameworks would also be assessed.

### ***2.2.2 Enforcement Aspect***

In line with the person-centred approach, the aim at this point is to ascertain how antitrust should be enforced. The best way to enforce antitrust is to take note of the varied interests that could figure in antitrust enforcement. It is conceded that due to the nature of enforcement regimes, it is essential for institutions to set out well-defined prime enforcement objective(s). Nevertheless, antitrust institutions must be willing to balance such set priorities with alternative objectives. The argument is that if an antitrust body blindly insists on the pre-set enforcement objectives, it is

bound to be in error at some point. The major task thus lies in maintaining a balance between the pre-set objectives and alternative objectives as individual cases may require. When such regime finds that an approach or methodology leaves certain antitrust subjects compromised, it must be willing to make the necessary improvement so as to protect the interest of such aggregate of antitrust subjects. The challenge that however arises is that since the person-centred approach to antitrust takes cognisance of all conceivable antitrust subjects, it must be certain that the proposed solution does not by itself create a unique deficit for some other (unit or aggregate of) antitrust subject(s). Thus, with equal measure, institutions would have to approach their antitrust enforcement task with a good dose of dynamism and caution.

Conclusively, it must be stated that the person-centred approach is not foolproof. In the substantive aspect, it raises concerns such as uncertainty which, if not properly managed, might complicate the field of antitrust even more than traditional theories—if a regime forges an account of antitrust that dwells on some or all interests that individuals could truly value, it might be faced with an herculean task in finding the appropriate interest which should eventually be vindicated. At the enforcement aspect, even with our best effort at incremental enforcement, we might still be unable to explain the extent to which a core enforcement priority (either in public or private antitrust) should accommodate other factors. This could generate its unique form of uncertainty as well.

## **2.3 Value of the Person-Centred Approach Vis-à-Vis Top-Down Perspectives**

Arguing from a bottom-up point of view, it is not too far-fetched to contend that the person-centred approach, being a bottom-up, broad and open account, could in principle increase the tendency of achieving inclusiveness. Also, based on the fact that different possibilities are to be considered, the bottom-up perspective could potentially increase the demand for greater thoroughness. As such we might be able to spot some often overlooked advantages and ills that result from the top-down accounts. For example, we can observe not merely that specific antitrust theories confine the reach of antitrust authorities and courts, but also that such confinement invariably impacts on the interests of persons. In effect, we can conclude that such narrow top-down accounts do not give adequate attention to antitrust interests.

Top-down antitrust accounts are akin to Sunstein's top level theories<sup>1</sup> as they require firmly pre-set premises for the application of the law. Thus, just in the same way that top level theories can be criticised, one could say that top-down theories are equally "ill-suited to the extent of social heterogeneity and to the plurality of

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<sup>1</sup> See generally Sunstein (1996).

relevant values at stake.”<sup>2</sup> More specifically, as it is herein shown, theories based on the top-down approach to antitrust fail primarily because they do not: (1) fully reflect antitrust practice and, as such, do not totally reflect what courts could truly consider; (2) explain scenarios that fall outside their narrow construct; (3) reflect the array of interests that could arise from a single antitrust issue.

## 2.4 The Person-Centred Requirements

It would be foolhardy to build an entirely new concept of antitrust. This means in effect that any concept or perspective on antitrust must draw on the foundational core and established theories of antitrust in one way or another. Hence, it is imperative that the person-centred approach herein developed takes account of the present top-down theories regardless of their ills and shortcomings. The extent of their relevance to the bottom-up account however need be clearly stated—for instance, they will be of value only to the extent that they accord with the primary conditions for the person-centred analysis which are that: antitrust analyses must be flexible, there must be adequate information, and that it must allow the incorporation of broad range of factors and interests. These conditions are addressed and substantiated through an evaluative exercise that showcases the ills of the top-down approaches while at the same time, drives home the value of the person-centred approach.

This sub-section is divided into two parts. Section 2.4.1 emphasises the significance of the requirement of flexibility to the person-centred approach. In order to establish an acceptable reason for developing the person-centred analysis as a possible alternative to the traditional top-down approaches, rule-based accounts of competition law will be shown to be prone to the peculiar problem of inflexibility. It will then be shown that the potential problem(s) does not arise where the person-centred approach is applied. Further, in an attempt to solidify its basis, the person-centred approach is linked to certain laudable legal requirements such as the need to obtain adequate information for the purpose decision-making as well as the need for broadmindedness in legal discourse, analysis, decision-making, implementation and enforcement.

### 2.4.1 *A Flexible Framework*

A basic requirement of the person-centred approach under consideration is that antitrust analysis should be based on a flexible framework. It thus goes without saying that from a person-centred perspective, any account of antitrust modelled on

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<sup>2</sup> Sunstein (1996), p. 99.

rigid rules would not be ideal.<sup>3</sup> This requirement should apply to every antitrust issue. It has unequivocally been stated that rigid rules must be avoided. One must however not lose sight of the fact that this assertion is not against rules per se but against rules that are inflexible and prone to blind dogmatic application. Person-centred analysis recognises the value of rules—by their making, rules are aimed at specifying outcomes before particular cases arise and, as Sunstein states, rule-making is often thought to be the signal virtue of a regime of law as one might legitimately argue that the rule of law requires a system of rules.<sup>4</sup> Moreover, rules could be desirable in the sense that they limit permissible grounds for actions and arguments. Rules by their very nature can play an enormous role in a heterogeneous society as they help in containing people of limited time and capacities.<sup>5</sup> As acknowledged by Sunstein, rules “save effort, time and expenses.” He states further that “[b]y truncating the sorts of value-disputes that can arise in law, [rules] also ensure[s] that disagreements will occur along a narrowly restricted range.”<sup>6</sup> Rules thus have a tremendous advantage over other alternatives in this regard.

One particular characteristic of rules is that they generally say that considerations that are relevant in many settings are not relevant to the issue they address. “Rules will say what sorts of considerations bear on what issues, and what sorts of considerations do not. Rules decide questions of appropriate role, and they say what is relevant for people in different social roles.”<sup>7</sup> This much is good about rules. The point at which we have to become wary of rules is when they interfere with interests. Even though it is inevitable to trade-off interests when concrete decisions are to be made, it would be inappropriate to engage in such trade-off solely on the grounds of external benefits such as administrative convenience.<sup>8</sup> Further, when one gets fanatical about rules, it becomes quite easy to be blinded to some of the imperfections that result from such rules. The danger of unwavering fondness for rules can be noted from Hayek’s position. He was fanatical about rules so much that he was willing to perpetuate injustice in the name of rule-making. He stated that “[t]he important thing is that rule enables us to predict other people’s behaviour correctly, and this requires that it should apply to all cases—even if in a particular case we feel it to be unjust.”<sup>9</sup> The reasoning underscores the danger of adhering to rigid rules as it may make people too mechanical such that they may

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<sup>3</sup> It should be noted that it is not the aim of this thesis to obliterate rule-making and to promote a regime totally devoid of rules. Rather, the criticisms of rules should be seen strictly in the light of “excessively rigid rules” while the promotion of flexibility should be such that even where a regime is rule-based, it allows for a discretionary application of the law.

<sup>4</sup> Sunstein (1996), p. 102.

<sup>5</sup> Sunstein (1996), p. 106.

<sup>6</sup> Sunstein (1996), p. 106.

<sup>7</sup> Sunstein (1996), pp. 107–108.

<sup>8</sup> It is quite often said by some scholars that certain goals should not be pursued by antitrust authorities not because they are inappropriate but simply because it will increase the “workload” of staff and other related concerns.

<sup>9</sup> Hayek (1944), p. 114.

insist on applying “general principles to particular cases [even where] they lead to palpable absurdity.”<sup>10</sup>

No matter how seemingly uncontroversial a rule might appear, it is not far-fetched to expect that substantive debates would arise at the stage of interpretation. We can thus wonder why we should be unduly fixated on rules especially where they may prejudice (some) antitrust interests.

Also, the general nature of rules and their blindness to particular instances is not always a virtue but rather a political vice, because a just system allows us to adapt the particular circumstances that shape individual cases. In effect, it may not be inappropriate in specific instances to say that rigid rules are obtuse since ideal justice is flexible and based on the situation at hand.<sup>11</sup>

In the context of the person-centred perspective, any theory that prescribes rigid antitrust rules will hardly be able to withstand scrutiny. It will struggle to show that its mode of analysing antitrust will fit in with the heterogeneous nature of society. As such, whatever the justifications are, we must keep in mind that “rules may misfire, precisely because they are too rigid and because they are laid down in advance; they go badly wrong when applied to concrete cases not anticipated when the rules are set down.”<sup>12</sup>

Moreover, strictly from the antitrust context, sheepish application of rules may be a clear sign of incompetence and lack of rigour. For instance, we can infer from Posner’s statement that strict adherence to rules is often the easy way out for the mediocre and incompetent. Posner stated that it was perhaps due to the lack of substantive economic knowledge that trial lawyers tended to be combative in antitrust cases rather than reflective. He stated further that government lawyers who were young or mediocre applied rules slavishly because of their incompetence. Posner asserted that they “fashioned a body of substantive doctrine and a system of sanctions and procedures that are poorly suited to carrying out the fundamental objectives of antitrust policy.”<sup>13</sup>

Other germane reasons why we should be cautious of excessive rule-making in the context of antitrust is that they will most likely end up being over- or under-inclusive if assessed by reference to their purpose. This conclusion is strengthened by the fact that rules can be easily outrun by changing circumstances. Also, legal abstraction involved in rule-making may sometimes mask bias. Rules may also

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<sup>10</sup> Sunstein (1996), p. 15. In fact, a closer look reveals that not all the values attributed to rules are true. Rules cannot always do what proponents of rule-making expect. This is because rules are not really what they appear to be—we would find out that rather than answering all questions in advance, the best rules might still provoke substantive disagreement at the moment of their application. As such, since even the best rules would inevitably require *ex post* interpretation, the aspiration of rule-bound justice is greatly undermined, Sunstein (1996), p. 121.

<sup>11</sup> Sunstein (1996), p. 15.

<sup>12</sup> Sunstein (1996), p. 15.

<sup>13</sup> Posner (1976), pp. 231–236.

drive discretion underground. Another likely downside of rules is that they may allow evasion by wrongdoers and can lead to procedural unfairness.<sup>14</sup>

The likelihood that we might be inflicted with the downsides of rule-making in market-related issues is pretty high. As Joskow observes, the relationship between the wide arrays of market structures, organisational arrangements, transactional attributes and contractual arrangements in a market economy and the market performance indicia of concern are imperfectly understood from both the theoretical and empirical perspectives. As such, there is always a tension between the specification of clear simple rules and their confrontation with situations where their rigid application can lead to type I or II errors.<sup>15</sup> It is even more pertinent that we desist from strict rule-making in antitrust because it is a dynamic field<sup>16</sup> that requires the complex interplay of law and economics.

It can be safely assumed that we should avoid rigid rules in most areas of law because the law has to be able to respond to changes in society. For example, courts have had to reinterpret their procedural rules on taking of evidence which was drafted prior to the computer age. If they are to keep up with the pace of the society, laws must be flexible enough to allow for a broader interpretation of relevant provisions in light of the technology in question. To this extent, the need to avoid rigidity is not unique to competition law. There is however a more peculiar reason why avoidance of rigidity is important for antitrust—there is good reason to avoid rigidity in fields that still struggle with very foundational issues of definition. It is contended that antitrust is one of such fields. For instance, we still struggle with foundational issues such as “what is competition?” The problem pertaining to the volatility of the definition of germane terms is not cosmetic as definitions and theories have a very strong influence on actual implementation and interpretation of competition rules.

To illustrate the peculiarity of the need to avoid rigid rules in antitrust, patent law is compared with antitrust law. In both areas of law, there are certain conditions and requirements which have to be interpreted in light of specific facts. For example, in most jurisdictions, patentability requirements include that an invention must: be of a patentable subject matter; novel; and involve an inventive step. In the same vein, there is often the need to identify the relevant market in antitrust cases. If one thus isolates the requirement of “novelty” under patent law and the question of “relevant market” under competition law and seek to interpret them in light of the changes in society, it is possible to give the same justification for requiring flexibility in the interpretation of both requirements. For instance, it could be observed that there might be need to avoid rigidity in the interpretation of the novelty requirement so as

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<sup>14</sup> Sunstein (1996), pp. 129, 130–135.

<sup>15</sup> Joskow (2002), p. 100. For example, where we rigidly apply antitrust rules without taking into account our imperfect understanding of market structures, organisational arrangement, market performance indicia and so on, we run the risk of allowing anti-competitive practises (type I error) or punishing a pro-competitive behaviour (type II error).

<sup>16</sup> Femi Alesin in Marsden and Waller (2009), p. 42.



not to deny a hitherto uncommon but legitimate claims such as “product by process” patent claims. Many would decry an irredeemably rigid system which is not willing to adapt to such scientific advancement.<sup>17</sup> In similar vein, provision regarding market definition must not be rigid and relevant authorities must not be numb to changing business environment which might impact on the scope of the market that is considered relevant. For example, regarding the requirement of demand substitutability in ascertaining the relevant market, it is imperative to remain flexible<sup>18</sup> and to adjust counterfactuals accordingly. For instance, it could be important to take due note of present conditions in ascertaining whether a consumer is likely to switch to another product in the event of a Small but Significant Non-transitory Increase in Price (SSNIP). Though it can be presumed that a product is not substitutable where there are transaction and information search cost involved in buyer switching to other suppliers, one must not disregard the peculiarities of individual issues and the societal trends. For instance, certain non-price factors or even brute consumerism might change the nature of an erstwhile inelastic market such that consumers would switch as a result of a SSNIP even where they will incur increased searching cost thereby making hitherto non-substitutable products interchangeable.

Having noted the similarity in the justification for flexibility under both patent law and competition law, it is imperative to identify the antitrust-specific concern against rigidity. In many areas of law, foundational issues of definition are relatively settled. Even where the boundaries of such laws are not well defined, it is often an academic or theoretical concern as to whether such field of law can be considered a coherent and distinctive subject of law. Thus, even if there are foundational issues of definition, they are hardly of intrinsic importance to the field per se.

It must be noted that antitrust does by all means form a distinct area of law. It should also be noted that there is grave uncertainty in terms of foundational definitions. Since there is no doubt as to the distinctiveness of antitrust laws, the issue of foundational definitions should be taken more seriously. It is important to identify the uniqueness of these definitional issues in antitrust by comparing antitrust law with patent law which is another fairly distinctive area of law. To a large extent, it is uncontroversial to assert that a patent consist of a set of exclusive

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<sup>17</sup> See generally the following US cases: *In re Stephens*, 345 F.2d 1020, 145 USPQ 656 (CCPA 1965); *Scripps Clinic & Research Foundation v. Genentech Inc.*, 18 USPQ 2d 1001; *Atlantic Thermoplastics Co Inc. v. Faytex Corp.*, 23 USPQ 2d 1481 (Fed. Cir. 1992) rehearing denied, 24 USPQ2d 1138; *Columbia University v. Roche Diagnostics GmbH*, 57 USPQ2d 1825 (D. Mass. 2000).

<sup>18</sup> See generally Willem Boshoff, “Antitrust Market Definition: Rationale, Challenges and Opportunities in South African Competition Policy” [<http://www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conference/Session-4B/Boshoff-Market-Definition.pdf>].

right which is granted to protect an invention.<sup>19</sup> On the other hand, the term “competition” cannot be so easily defined<sup>20</sup> which implies that there is a greater need to avoid rigidity in antitrust law.

Another important reason why some degree of flexibility is required in antitrust law stems from the fact that it is a dynamic field. In Europe for example, in the primordial days of competition enforcement, agreements that restrain competition were interpreted formally to cover any restraint on a trader’s freedom which was likely to affect the market. Whether or not an agreement restrains competition was decided in the abstract without a market analysis. This formalistic approach resulted in type I and type II errors as restrictions that are not legally enforceable were permitted, even if they restricted competition substantially, while enforceable horizontal restrictions on conduct were voided even if they did not.<sup>21</sup> However, in the recent past, Europe has unequivocally denounced its previous mechanical approach to competition law analysis. In the *Article 81(3) Guidelines* for instance, the Commission stated that the standards in the “guidelines must be applied in light of the circumstances specific to each case. This excludes a mechanical application. Each case must be assessed on its own fact and the guidelines must be applied reasonably and flexibly.”<sup>22</sup>

A degree of flexibility can be noticed in European competition law when one considers how the relevant European institutions assess provisions such as Article 101 of the Treaty for the Functioning of the European Union (TFEU). Arrangements prohibited by Article 101 include those where a supplier restricts its distributors from competing with each other, and as a result, the (potential) competition that could have existed between the distributors is extinguished. However, the European Union recognises that certain restraints may in certain cases not be caught by Article 101(1) when the restraint is objectively necessary for the existence of an agreement of that type or that nature.<sup>23</sup> For instance, territorial restraints in an agreement between a supplier and a distributor may for a certain period of time fall outside Article 101(1), if the restraints are objectively necessary in order for the distributor to penetrate a new market.<sup>24</sup> Similarly, a prohibition imposed on all distributors not to sell to certain categories of end-users may not be restrictive of competition if such restraint is objectively necessary for

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<sup>19</sup> Note that the difficulty of defining the term “invention” in patent law is a secondary definitional issue just like the problem with defining “relevant market”, “market share” “restriction” etc. under competition law.

<sup>20</sup> See Sect. 2.6 below.

<sup>21</sup> See Korah (1973), pp. 188–189.

<sup>22</sup> Commission—Guidelines on the application of Article 81(3) of the Treaty OJ No. C 101 of 27.04.2004. Para 6.

<sup>23</sup> See in this respect, the judgment in Case 56–65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235; Case 258/78 *L.C. Nungesser KG and Kurt Eisele v Commission* [1982] ECR 2015.

<sup>24</sup> See para 61–62 Guidelines on Vertical Restraints (2010/C 130/01)—OJ C 291 of 13.10.2000.

reasons of safety or health related to the dangerous nature of the product in question.<sup>25</sup>

Another example is the question of market power. The present position in Europe is that the prohibition of Article 101(1) only applies where, on the basis of proper market analysis, it can be concluded that the agreement has likely anti-competitive effects on the market unless the practice is considered to have an anti-competitive object.<sup>26</sup> In *European Night Services v Commission*,<sup>27</sup> the Court of Justice stated that in order to find an anti-competitive effect, it is necessary to show that the market shares of the parties exceed the thresholds set out in the Commission's *de minimis* notice.<sup>28</sup> Further, the Commission is of the opinion that the fact that an agreement falls outside the safe harbour of a block exemption is in itself an insufficient basis for finding that the agreement is caught by Article 101 (1) or that it does not fulfil the conditions of Article 101(3). Findings, it states, should be based on individual assessment of the likely effects produced by the agreement.<sup>29</sup>

Also, the flexibility of a regime can be assessed by the way it determines the restrictiveness or otherwise of an agreement. For example, should authorities and courts focus on per se analysis or should the effects of agreements be assessed as well? Does the classification into per se and rule of reason approaches require some flexibility? If we say that a particular type of agreement (such as resale price maintenance) is to be considered illegal per se, should we be able to alter this at a later stage where the circumstance requires us to look at the effect instead or are we to abide strictly by the rule which dictates the form by which we assess such agreements?<sup>30</sup> In line with the bottom-up perspective, we must be willing to consider fresh insights. For example, in the US case of *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>31</sup> the Supreme Court abandoned its hostility towards vertical restraints. It recognised that certain contracts which were once deemed unlawful per se may in fact attenuate or overcome market failure with the result that courts should evaluate such agreements under the more forgiving Rule of Reason. According to Meese, such decisions implicitly recognise that contracts producing price, output, or other terms of trade different from the *status quo ante* can be

<sup>25</sup> Art 81(3) Guidelines, para 18.

<sup>26</sup> See in this respect Joined Cases T-374/94 and others, *European Night Services v Commission* [1998] ECR II-3141.

<sup>27</sup> See in this respect Joined Cases T-374/94 and others, *European Night Services v Commission* [1998] ECR II-3141.

<sup>28</sup> See in this respect Joined Cases T-374/94 and others, *European Night Services v Commission* [1998] ECR II-3141.

<sup>29</sup> 81(3) Guidelines para 24.

<sup>30</sup> See generally the Guidelines on Vertical Restraints.

<sup>31</sup> 433 U.S. 36, 38–39, 59 (1977).

beneficial, and there is no reason to confine this reasoning to decisions policing the boundaries of the *per se* rule.<sup>32</sup>

The EU example can be noted from the Research and Development (R&D) aspect. The previous Research and Development Block Exemption Regulation did forbid certain agreement which it categorised as hardcore violations. However, the new regulation reflects a systemic change as some agreements which were considered “hardcore” may now be placed under the category referred to as “excluded restrictions”. Article 6 of new Regulation<sup>33</sup> now allows as “excluded restriction” things such as a prohibition to challenge the validity of intellectual property rights, protecting R&D after completion of the R&D and so on.

The dangers of an extreme rule-based culture in antitrust is also vivid in the enforcement aspect. The US has a long standing tradition of awarding treble damages in antitrust suits. Determining whether multiple damages are an effective means to reach institutional goals is truly a complex task. This complication arises as a result of the many different types of conduct that might require the award of multiple damages. It is also worsened by numerous circumstances under which such conduct could occur, be discovered, and prosecuted.<sup>34</sup> Notwithstanding this, those who argue for an automatic multiple damages regime base their arguments on three main reasons. They say that: (1) treble damages are necessary to deter potential antitrust wrongdoers; (2) treble damages provide necessary incentives for private plaintiffs to bring antitrust suits; and (3) treble damages fully compensate victims of anticompetitive conduct.<sup>35</sup>

Noting the advantages of treble damages, the question is not whether the award should be allowed or not. Rather, it is whether it should be applied blindly and uniformly. As queried by Greenfield et al, even if we rightly conclude that some conduct such as price-fixing and market allocation should attract harsh penalties, whether all antitrust wrongdoers should automatically face multiple damages is another matter, particularly given the other severe penalties that wrongdoers face.<sup>36</sup> The strictness of the rule on treble damages means there is a risk that the law will either be over-detering or fail to deter.<sup>37</sup> As such, one would expect that the inherent difficulty in assessing the ideal state of damages suggests that the question of multiple damages may best be resolved on a case-by-case basis rather than through uniform rules.

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<sup>32</sup> Meese (2003), p. 81.

<sup>33</sup> Commission Regulation (EU) No. 1217/2010 on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of Research and Development Agreements.

<sup>34</sup> Greenfield and Olsky (2007).

<sup>35</sup> See, e.g., ABA Antitrust Section, Monograph No. 13, Treble-Damages Remedy 16–21 (1986).

<sup>36</sup> Greenfield and Olsky (2007), p. 4.

<sup>37</sup> Greenfield and Olsky (2007), p. 4.

A major irony of the automatic treble damages rule is that the uncompromising nature of such rule could weaken the system such that infringing companies may go unpunished. If one of the primary reasons necessitating treble damages is to deter, it does then appear to be counter-intuitive that the regime is even worsened as a result of the rule-based nature of the treble damages. Greenfield et al state in this regard that:

it is impossible to divorce the question of remedies from the procedural and substantive standards that govern antitrust litigation. Over the past decades, the U.S. courts have imposed heightened evidentiary, antitrust injury, and standing requirements on plaintiffs seeking to bring antitrust claims. . . Although it is very difficult to determine how much of this movement towards restricting private actions is attributable to the judicial concern about over-deterrence from treble damages awards, it seems likely that treble damages have played a role. Accordingly, the treble damages remedy in some instances may have the unintended consequence of *limiting* the circumstances under which plaintiffs can recover.<sup>38</sup>

There are advantages that can be derived from the application of specific rules. In particular, rules can play a huge role at both the procedural and substantive levels of antitrust as they may help to prevent uncritical ideas from creeping into the field. This value notwithstanding, we must not lose sight of the fact that because of its unique dynamics, antitrust is not well suited for strict rules. Antitrust issues are not only highly fact intensive. They also depend heavily on a mixture of the antitrust ideas, the circumstance surrounding a case, and specific characteristics of the market in which the issue has arisen. It will therefore be disingenuous to have an “ideal” type of antitrust which is to be sought through strict rules.

From the foregoing, it becomes clear that antitrust laws should be applied flexibly. From the person-centred perspective, this is even the more so considering the fact that some interests may be unduly jeopardised where we apply a rigid construct.

### 2.4.2 Adequate Information

Apart from having a flexible framework, the person-centred approach makes it imperative that decision-makers have and obtain adequate information. Though not exclusive to it, this condition is built into the person-centred account in order to be able to decide firmly between different interests. It is thus expected that as a result of the unavoidable conflict of interests, antitrust institutions must, as a preliminary condition, seek adequate information at both the investigation and the decision-making stages. These stages are explained in turn:

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<sup>38</sup> Greenfield and Olsky (2007), p. 13.

### 2.4.2.i Investigation Stage

Antitrust institutions must actively source obvious and non-obvious information pertaining to various interests as identified through the person-centred perspective. It is thus expected that for an antitrust regime to prevent or at least limit errors, antitrust arbiters must have adequate knowledge of market structures, organisational arrangements, transactional attributes and contractual arrangements in a market economy and the market performance indicia of concern and so on. However, due to human imperfections, we cannot possibly guarantee the perfect market information in order to eliminate errors. We are however expected to strive and put in extra efforts (within reasonable cost) to ensure that the knowledge we have and the information we seek with regards to specific issues are actually the best we could possibly get. This is particularly essential for authorities who have to make firm decisions on antitrust issues. For instance, with regards to antitrust adjudication, it might mean that the courts and antitrust authorities should be willing to follow an inquisitorial approach as opposed to an adversarial approach<sup>39</sup> where the former generates more concrete and relevant information.

Over the years, there have been continuous debates as regard the trial procedure that helps most in obtaining the relevant information in a case.<sup>40</sup> When one extends this debate to antitrust, it does appear that the need to consider the inquisitorial approach is strengthened because parties who are meant to play the role of claimant may not be easy to identify. They might also be too large in number which would raise free-rider concerns. In such instance, information is best gathered through inquisitorial approach whereby the antitrust authority or court plays the role of an impartial or active judge.<sup>41</sup>

In the public sphere, it might be that institutions should make use of tools beyond their traditional investigative powers. They should be able to (if and when required) make use of other means that could help in information gathering. In Europe for instance, chapter V of the Regulation 1/2003<sup>42</sup> endows the Commission with various powers which include the power to request information<sup>43</sup> and power to

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<sup>39</sup> Inquisitorial approach should be preferred as long as it avoids extremism. See generally Neven (2006), p. 741.

<sup>40</sup> See generally Tullock (1988), pp. 3–27. Posner (1988), p. 29. See also the empirical analysis of Froeb and Kobayashi (2001), pp. 267–72. Also, Shin (1998), pp. 378–405.

<sup>41</sup> See Neven (2006), p. 763. This could be with or without a prosecutorial bias. For a contrary view on the preferred approach, see Bruce Lyon “How should Decisions be made in a Competition Authority?” [<http://competitionpolicy.wordpress.com/2011/06/02/how-should-decisions-be-made-in-a-competition-authority/#more-579>].

<sup>42</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty *OJ L 1, 4.1.2003*.

<sup>43</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty *OJ L 1, 4.1.2003*, Art 18.

conduct inspections.<sup>44</sup> In the performance of its duties, Article 18 allows the Commission to request for “all necessary information”<sup>45</sup> vital to its duties. Article 18(2) states the conditions of the request which are that the Commission must state the legal basis and purpose of the request, with specific reference to: the information required; the time-line within which it is to be provided; and the penalties for non-compliance.<sup>46</sup> Article 19 empowers the Commission to interview natural and legal persons for the purpose of collecting information relating to the subject matter of an investigation. However this interview can only take place with the consent of the interviewee and there is no penalty for providing false or misleading information. Also, the possibility of a dawn raid also increases the chance of obtaining relevant information. Article 20 enables the Commission to conduct all necessary inspection on business premises.<sup>47</sup> If it finds it necessary, the Commission can inspect other premises and also individuals’ homes.<sup>48</sup> The possibility of obtaining information is also enhanced as the fining guidelines provide that refusal to cooperate with or obstruction of the Commission’s activities may be a basis for increasing the fine payable by the firm whose activity is under review.<sup>49</sup>

These administrative powers indicate that the European Commission is modelled to actively seek relevant information. However, the system is by no means foolproof as the information gathered might be inadequate or even misleading. Where the traditional investigative powers prove inadequate, institutions should be willing to do more in order to fill potential voids and consequently secure various interests that may be injured as a result of the gap. For instance, so as to increase the chance of obtaining relevant information, the institution could initiate a leniency programme. This scheme has been adopted with a substantial degree of success at both sides of the Atlantic. Another means of gathering relevant information is through the application of forensic economics. Information could also be sought through reward schemes.<sup>50</sup>

<sup>44</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty *OJ L 1, 4.1.2003*, Art 20 and 21.

<sup>45</sup> For the definition of “all necessary information”, see case C-36/92 *PSEP v Commission* [1994] ECR I-1911.

<sup>46</sup> See Reg 1/2003, Article 23. The Commission has a choice between making a simple request or a decision. Where the Commission opts for a simple request, the firm would not be obliged to answer although there would be penalties for providing wrongful or misleading information. The firm is however expected to respond to the Commission’s request as failure to respond could lead to imposition of penalty under Article 23. The letter must also state that the firm has the right to seek judicial review, should any penalty be imposed.

<sup>47</sup> This inspection could either be by agreement or with an element of surprise.

<sup>48</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty *OJ L 1, 4.1.2003*, Art 21. This should however be done with judicial authorisation, see also Recital 26.

<sup>49</sup> Commission—Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003. *OJ C 210 1.09.2006*.

<sup>50</sup> These tools are addressed in Chap. 6.

Worthy of particular mention is the UK's market investigation whereby relevant authorities are inclined to actively assess markets over a period in order to ascertain the state of competition. Section 5 of the Enterprise Act 2002 provides, amongst other functions, that the UK Office of Fair Trading is to obtain, compile and keep under review information about matters relating to the carrying out of its functions. One way of achieving this function is to undertake market studies. Particularly, the Market and Policy Initiative Division of the OFT is responsible for examining how well markets are functioning and for considering when a market investigation reference would be appropriate.<sup>51</sup> For instance, the OFT may make market investigation reference to the Competition Commission when it has reasonable ground for suspecting that one or more of the features of the market prevent, restrict or distort competition.<sup>52</sup>

Also in line with the bottom-up perspective is the Commission's effort aimed at overcoming the structural information asymmetry in the private aspect of antitrust enforcement. For instance, the Commission suggests that a minimum level of disclosure *inter partes* for EU antitrust damages cases should be ensured across the EU. In particular, some of the Commission's suggestions are that: national courts should, under specific conditions, have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence. Disclosure is however not automatic as the claimant has to show to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, otherwise to produce the requested evidence.<sup>53</sup>

#### 2.4.2.ii Decision Stage

In line with the bottom-up perspective, it is important that antitrust enforcers and courts are awake to the complexity of interests and entitlements (for instance, interests of complainants, alleged infringers and the industry as a whole). As such, they are required to obtain adequate information about those interests and the different possible interpretations before they go about their decisional activities.

The problem with the top-down approaches is that issues are addressed by alluding only to information and opinions which are considered important by the respective theories. The danger here is that we could be in error (be it type I or type II)<sup>54</sup> as we are likely to jettison the necessary additional information because of our myopic inclination. To illustrate this point, Sen's *Fable of the Bamboo Flute* is

<sup>51</sup> See generally Whish (2008), pp. 439–468.

<sup>52</sup> Section 13 United Kingdom Enterprise Act 2002. Note generally that there is presently a proposition to merge the OFT and the Commission to form the Competition and Market Authority.

<sup>53</sup> European Commission, "White Paper on Damages Actions for Breach of the EC Antitrust Rules" COM (2008) 165 final. 4.

<sup>54</sup> Note that for the purpose of this thesis, type I and type II errors are not to be predetermined by reference to any theoretical metric. In other words, the terms are not to be understood as terms of art as, they are, for instance, understood by efficiency theorists.



instructive—How should an arbiter resolve a dispute between three individuals over ownership of a bamboo flute where the flute was made by A, B can play it best and C (unlike the others) has nothing else to play with? The resolution of such dispute which is quintessentially a dispute about ownership of a resource is contingent on the information available to the arbiter. Take it that the alternatives available to the arbiter are mutually exclusive and any choice made is conclusive and irreversible. If the information put before the arbiter is simply that the first individual “made the flute”, and if the arbiter thinks strictly through Marxian–Nozickian rule of allocation, she would allocate the flute to the first individual. If the information is however that the second individual “can play the flute” and if the arbiter is persuaded by Benthamite–Utilitarian rule, she would allocate the flute to the second individual. Finally, if the information made available to the arbiter is about the “poorest” of the three and if she is persuaded by a Rawlsian rule, she would allocate the flute to the third individual.

As far as the person-centred approach is concerned, we cannot underestimate the need to ask the three questions prior to choosing—who made it, who plays it best and who is the most disadvantaged. It however does not end here. We should also endeavour not to be locked into any of the three rules of allocation.

However, from a neutral point of view, the alternative approach herein developed is not without its downsides. For instance, with regards to the condition for decision-making, an expected objection is that the process of seeking information might be too expensive. In fact, we cannot afford to engage in an uncontrolled information gathering exercise.<sup>55</sup> A more comprehensive evaluation of this alternative approach vis-à-vis the traditional approach will thus be conducted in subsequent chapters.

## 2.5 The Requirement of Broadness Expatiated

The ultimate requirement of the alternative herein developed is that antitrust analysis must be broad. This requirement invariably combines the requisite flexibility and adequacy of information. It could thus be stated that the precondition for the application of the person-centred approach is that antitrust analysis should be open-textured so as to ensure that plural interests are respected.

It is imperative that the very idea of broadness envisaged under the alternative approach is clarified; the idea of broadness here encapsulates notions beyond mere flexibility. While flexibility and broadness may intersect in a lot of ways, they are no synonyms. Take for example the general effect-based approaches to antitrust analysis. Many economists would passionately and convincingly argue for a case-by-case reasoned analysis of antitrust issues. In fact, those who call for a “more

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<sup>55</sup> It would be disingenuous to aim at absolute information in antitrust. See generally McGowan (2005), p. 1185.

economic approach” in Europe are particularly critical of rigid and formalistic approaches which mean in effect that they are in favour of a flexible approach to antitrust analysis.

The US’s Rule of Reason and Europe’s Article 101(3) exemptions are illustrative of the flexibility that exists in antitrust even if we consider it from the top-down perspective. In order to determine whether a particular agreement violates antitrust laws, the US applies a three-step tests in their rule of reason analysis which is generally believed to help courts distinguish those contracts that harm or destroy competition by creating or exercising market power from those that promote it.<sup>56</sup> First, a plaintiff must establish a *prima facie* case by showing that the restraint produces tangible anticompetitive harm. Typically, the plaintiff would have to show “actual detrimental effects” such as increased price or reduced output.<sup>57</sup> Second, the defendants must prove that their agreement produces “pro-competitive” benefits that outweigh the harm implicit in plaintiff’s *prima facie* case.<sup>58</sup> Third, even if the defendants can substantiate the claim, the plaintiff can still prevail by proving that the defendants can achieve the same benefits by means of a “less restrictive alternative.”<sup>59</sup>

In assessing the pro or anti-competitive effect of agreements in Europe, Article 101(3) TFEU affords the flexibility required. The sub-article contains four cumulative conditions which, if satisfied, would not void a generally anti-competitive agreement. First, the agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress, for instance, where such improvement leads to efficiency gains. Second, the restrictions must be indispensable to the attainment of the efficiency gains. Third, consumers must receive a fair share of the resulting benefits. To satisfy this condition, the efficiency gains attained by the indispensable restrictions must be sufficiently passed on to consumers. Hence, efficiencies only accruing to the parties to the agreement will not suffice. Finally, the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

It can be observed that there are areas in both EU and US antitrust law and practice where flexibility is not only welcome but also promoted. However, this does not mean that they are broad, or at least, “broad” in the context of the alternative bottom-up perspective. The bottom-up perspective will consider the US rule of reason not to be broad enough for instance because it focuses on the concept of efficiency. The European equivalent is also not broad enough from a person-centred perspective despite the possibility of arguing that it allows for

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<sup>56</sup> Meese (2003), p. 80.

<sup>57</sup> See, e.g., *Re/Max Int’l Inc.*, 173 F.3d at 1014–1015.

<sup>58</sup> See *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), at 113–120 where the court upheld the plaintiff’s claim because the defendant failed to prove existence of pro-competitive benefits.

<sup>59</sup> See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

notions beyond efficiency and economic welfare.<sup>60</sup> Moreover, it appears that even its relative broadness might be pegged in the wake of the call for a “more economic approach”. In fact, a read through the recent Horizontal Guidelines<sup>61</sup> indicates that Article 101(3) is likely to be interpreted more narrowly thereby further distancing it from the broadness required when addressing antitrust from a bottom-up perspective as it appears that the Commission seeks to focus on efficiency.

To show that the flexibility achieved in Article 101(3) is unlikely to match the bottom-up idea of broadness, we can consider the debate whether environmental concerns in their own right are likely to be factored into the decision to grant exemptions. In its 2001 Guidelines, the Commission affirmed that improving the environment contributes to improving production or distribution or promotion of economic or technical progress.<sup>62</sup> It has even mentioned environmental protection in at least three decisions.<sup>63</sup> The Commission had explained how environmental protection is to be weighted in the Article 101(3) balancing exercise. In fact, its provision on the mode of assessing cost has led some scholars to argue that Article 101(3) might very well accommodate environmental protection as a matter of public policy. Monti had considered that the requirement that the “net benefit goes to consumers” in Article 101(3) actually refers to consumers as a whole. In other words, it would mean that we look at the benefit to the society at large rather than to consumers of the products in question.<sup>64</sup>

The fluid argumentations of scholars notwithstanding, just like in the US, the flexibility in Article 101(3) is likely to be considered narrow when antitrust issues are assessed from a bottom-up perspective. For example, all indications in the 2011 Horizontal Guidelines are that efficiency and nothing else should be the basis upon which flexibility is to be employed regarding horizontal agreements. Moreover, the aspect of the 2001 Guidelines which arguably left open the room for public policy has been narrowed. The Commission unequivocally states that “for the purposes of these guidelines, the concept of “consumers” encompasses the customers, potential and/or actual, of the parties to the agreement”.<sup>65</sup> This removes the possibility of viewing the public in general as “consumers”.

It is equally important that we assess the enforcement part in light of broadness. Concerning private antitrust for instance, while the US courts seek to ensure efficiency of the process, there has been an attempt in Europe to promote a damages regime.<sup>66</sup> The manner in which enforcement is undertaken in the US requires some

<sup>60</sup> Guidelines on the applicability of Article 81(3) of the EC Treaty to Horizontal Cooperation Agreements OJ C 3 06.01.2001.

<sup>61</sup> Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements OJ C11 14.1.2011.

<sup>62</sup> Guidelines on the applicability of Article 81(3) of the EC Treaty to Horizontal Cooperation Agreements OJ C 3 06.01.2001. Para 193.

<sup>63</sup> Commission Decisions, *Assurpol*, OJ 1992 L37/16 para 38; *Ford/Volkswagen*, OJ 1993 L20/14 para 26; and *Exxon/Shell*, OJ 1994 L144/20 para 68.

<sup>64</sup> Monti (2002), p. 1065; Monti (2007), p. 92; López (2002).

<sup>65</sup> Horizontal Guidelines 2011, para 49.

<sup>66</sup> White Paper (2008).

flexibility. This is because decisions on procedures and entitlements depend on what is considered efficient in the case at hand. For instance, an efficient process of antitrust enforcement seeks deterrence if the enforcement cost is manageable. Thus, in looking for the “most efficient enforcer”<sup>67</sup> and efficient enforcement,<sup>68</sup> the regime would have to balance the need for deterrence with the transaction cost. Where the transaction cost is zero, everything can be thrown into achieving deterrence. However, such a regime might have to temper its deterrence drive if the transaction cost (either in terms of administrative cost or error cost) may be too high. In Europe as well, the willingness to adjust the procedures and practices so as to remove the unnecessary clog in private antitrust enforcement is also a sign that the regime is open to alternatives.

Their relative flexibility in enforcement notwithstanding, the important question is to see if these regimes’ enforcement modus are in fact broad enough. There is no clear answer to this because what is broad enough within the context of a bottom-up analysis need to be balanced with what is feasible in implementation and enforcement. Thus, just as it has been emphasised in the preceding part, a thorough evaluative exercise will be conducted in assessing whether the very idea of broadness as promoted through the alternative bottom-up perspective is practicable. The answer to this query will ultimately lead us to determining whether the proposed alternative is truly worthy of trumping the traditional approach or whether antitrust is better off with the traditional approach despite its shortcomings.

### **2.5.1 Broadness Applied: The Example of Enforcement**

By according with the broadness required by the bottom-up perspective, we can fully reflect on all possibilities that may impact on various interests. The task at this point however is for us to determine what a broad antitrust regime should be like. In the substantive aspect, it is pretty straightforward; we should consider the different meanings of terms and the different standards which can be applied. We should also ensure that it is not applied in a way that infringers are able to escape capture or that some actions or inactions are allowed or disallowed solely because a single theory recognises or does not recognise them as infringements. This concern is strengthened if we streamline our analysis strictly through individual theories. There is thus a great deal of assessing and balancing that has to be done to avoid this problem. Achieving broadness at the enforcement aspect could even be more daunting. This is because institutions often have set enforcement goals and procedures. If one thus puts the bottom-up perspective on broadness in context, it might appear that such set goals and procedures might be too narrow. However, it is argued that the

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<sup>67</sup> In the US, the conditions were set in the case of *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

<sup>68</sup> That is in terms of fines.

requirement of broadness can still be achieved despite the fact that enforcers have clear goals, objectives and procedures. It is for them to seek to achieve their goals through a broad mind-set. In a nutshell, the broadness required in antitrust enforcement is directed at the enforcers and the court. The level of their broadmindedness will be evident when one considers how much they are willing to modify their practices in order to reflect the peculiar factors that are unique to individual cases.

For illustrative purpose, a detailed exposition is given on how institutions could reason broadly while attempting to meet their institutional goals or objectives. Thus, for the sake of this analysis, an example of private action is given. Let us assume that an antitrust regime vindicates private claims based on their belief that injured victims should be compensated. In such regime, it is still for the court to consider whether compensation will truly vindicate antitrust interests. If in its remedial disposition, the arbiter strictly requires that in order to grant compensatory award, the claimant has to prove the correlativity of gains and losses. It might disregard the fact that there could be cases in which it is necessary to alter those conditions because of the unusual difficulty the claimant might face as a result of the conditions. In difficult cases, the inability of a corrective justice-based regime to conceive the problem might, in effect, frustrate certain interests. From the bottom-up perspective, it is for us to consider in individual cases whether any specific goal which might be sought by an antitrust regime does not contain loopholes that might eventually jeopardise the effort to protect the society at large. Hence, if a particular mechanism is likely to lead to absurdities in specific cases, the relevant institution should take time to fully reflect on alternatives.

I illustrate here how an institution which has a set procedure for remediation in private antitrust actions can be broadminded in its disposition especially in difficult instances. I continue with the example of compensation. In those difficult cases, it will be for the relevant institution to take a practical view on whether their *ex ante* procedure be applied strictly or whether it should be modified or substituted. Generally, since no goal is all encompassing and perfect, there are bound to be loopholes. Thus, where we align with compensatory justice in antitrust, we should readily appreciate other thoughts such as those based on economic reasoning (for example, game theory) which may play a vital role in determining what the form of action should be.

The institutions could follow a descriptive bottom-up model. For instance, the analysis could be centred on the (prospective) violator. Assuming a firm wants to decide whether to join a cartel, we could assume (beyond the idea of moral rightness or wrongness of such decision) that the firm weighs its decision on a cost/benefit basis—it may consider the possibility of being apprehended by the authorities and the likely penalty. In addition, this firm might have to consider the possibility of private actions by consumers.

Based on this brief scenario, antitrust institutions could (aside from establishing breach through the harm to consumers) test the effectiveness of compensatory remedy by factoring-in the (prospective) infringer's likely thought process. Thus, they could proceed on the assumption that within its rational decision making process, the firm will consider the worst possible effect of its breach and thereafter

decide whether its unlawful conduct could go unpunished. Breach will be advantageous where the damages and the cost of litigation are below the possible gains from anti-competitive practice. A firm will thus go ahead with the planned breach if the likelihood of being apprehended is below the benefit it would derive from the cartel. It is for the institution to pre-empt the firm and juggle its conclusions on how compensations could be sought. If it considers that the procedural requirements for granting compensation might tilt the cost over the benefit in the (alleged) infringer's cost-benefit calculus, the authorities would have to find a way to streamline such procedural requirements.

In this instance, one could suppose that in order to ascertain the propriety of the procedure for the particular case in hand, the court could mirror the firm by considering the steps the firm might take in ascertaining the "efficiency" of its breach. For instance, we could assume that the firm might consider all the possible responses that might result from its decision to either engage in anti-competitive practice or abstain from it. Applying game theory idea, the court might find that a firm will be faced with at least four possibilities which are:

- The firm engages in price-fixing but consumers do not sue;
- The firm engages in price fixing and consumers institute court actions;
- The firm does not go ahead with the price-fixing arrangement so consumers do not have any reason to sue;
- The firm does not engage in price fixing but consumers sue anyway.

The firm will be more concerned about the first two possibilities since the last two are even farther beyond its control and they do not involve a breach on its part. The court might have to take into account that the firm might seek to take advantage of the loophole in the compensation regime. For instance, the firm could employ strategies that will indirectly influence consumers' decisions to sue or not to sue. Depending on how the relevant institution conceives the likelihood that infringing firms can exploit the regime, the institution (because of its broad thinking) could modify the goal or the means of achieving the goal in specific cases.

For the relevant institution to accord with the requisite broadness, it must think exhaustively on how such firm might take advantage of the system. For instance, the company could, together with the other participants in the cartel, increase prices slightly and gradually on a broad range of products over a long period of time. The concern here is not about the firms' evading capture. The purpose might be that even if their practice is found to be anti-competitive, they would have succeeded in de-motivating consumers from instituting private actions since the products might span various markets and, as such, different categories of consumers who will all suffer "negligible" losses compared to the transaction cost of litigation.

If the likelihood of such sinister calculation is high, an antitrust institution that addresses antitrust from the bottom-up perspective should assess the possible

reaction of a rational consumer in order to determine whether the level of his motivation to sue will change as different procedures and remedies are applied.<sup>69</sup>

In sum, the broad factors that might deserve the attention of the relevant institution may include the following:

- Whether antitrust institutions should vindicate antitrust claims through a corrective justice mechanism in order to restore the injured to their pre-violation state. This in particular takes care of the interest of the victims;
- In the same vein, they have to consider whether the mechanism is effective enough to deter anti-competitive practice. This is imperative in order to protect an even wider set of interests which includes victims, potential victims and other firms;
- Thus, antitrust institutions should avoid a “too narrow and inflexible” enforcement strategy because;
  - (i) There is always the risk that companies may outsmart the enforcement institution by plotting strategies to, for instance, frustrate consumer actions by making private action undesirable on a cost/benefit basis;
  - (ii) Legal processes discourage certain potential claimants (direct purchasers) from instituting remedial actions since they have passed on the overcharge and have thus incurred no loss;
  - (iii) For indirect purchasers, the expected value of trial is so low that a lawsuit will be an economically irrational decision;

Conclusive therefore, it is opined from a person-centred point of view that a much deeper thought is given to the idea of broadness.

### ***2.5.2 Is Broadness Becoming the Norm in Antitrust Analysis?***

Above, the ills of the theories based on the top-down approach have been identified. It has however been emphasised above that the argument proffered in favour of the person-centred approach should not be considered definitive but rather should be seen as a substantiation of a point of view which still need to be thoroughly evaluated. At this juncture however, the thesis moves from the “ought” and “ought not” by assessing some patterns of antitrust analysis in order to ascertain

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<sup>69</sup> In general, private actions are often a function of the remedy sought. Ideally, the effect should be that the availability of a substantial pecuniary remedy (e.g. account of profit) will increase the filing of legal complaints since the remedy increases the value of trial. In the long run however, the potential defendant will become cautious of its acts in order to avoid the injuries that propel law suits. The logical consequence therefore is that anti-competition will become economically “unfashionable” and law suits will reduce accordingly. The institution should also reflect on how structural constraints will impact on antitrust interests.

whether (and if so) the extent to which the notion of broadness implied by the bottom-up perspective is discernible from the present practice.

Moving from abstraction to real practice, can it be said that institutions truly act within the straight-jackets of theoretical constructs such that their activities would hardly be broad enough? It is contended that at the moment, institutions do not in fact channel their thoughts too narrowly. As Hawk observes, there is a consensus among stakeholders from different enforcement regimes that there is a considerable gap between the rhetoric of competition law objectives and the reality of their actual implementation.<sup>70</sup>

To show that enforcers and courts might be inclined to address issues from a broader perspective than the prevailing theories suggest, some of the cases on Article 101 decisions of the Court of Justice are instructive.

Concerning the case of *GSK v. Commission*<sup>71</sup> which addressed Article 101 TFEU, the Court of Justice was primarily asked to assess Glaxo's differentiated pricing system for its products within the internal market. In general, Glaxo attempted (through sales conditions) to restrict parallel traders who sought to profit from arbitrage opportunities which arise from low prices imposed on medications in Spain. Deciding on the propriety of the practice, the Commission held that the sales condition which restricted parallel trade amounted to an infringement of competition rules. The General Court however did not agree with the Commission and rather assessed whether the clause resulted in a violation through a consumer interest analysis. In essence, the General Court opined that since the prices of medicines were shielded from the incidence of demand and supply, it could not be presumed that the clause would restrict competition to the detriment of the final consumer. As such, the Spanish intermediaries who take advantage of the arbitrage opportunities might as well keep the advantage.<sup>72</sup>

However, the Court of Justice reasoned differently. Regarding Article 101(1), it stated thus:

First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Second, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article [101 TFEU] aims to protect not only the interests of competitors or of consumers, but also of the market, and in so doing, competition as such.<sup>73</sup>

The Court of Justice disagreed with the General Court's position which was that consumers are restricted to the "final consumers". The Court of Justice's reasoning reflects a level of broadness as this shows that consumers could also include businesses. Some degree of broadness is also evident from the Court's statement

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<sup>70</sup> See Hawk (1998), p. 353.

<sup>71</sup> Case C-501, 513, 515 and 519/06 *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291. Hereinafter referred to as *Glaxo*.

<sup>72</sup> See Case T-168/01 *GlaxoSmithKline Services v. Commission* [2006] ECR II-2969.

<sup>73</sup> *Glaxo* [2009] 2, 63.



to the effect that not only consumers but also competition in its own right is worthy of attention in antitrust.

The observations made in this part could possibly give the impression that the law is already taking account of the requirement of broadness, thereby reducing the imperativeness of an alternative approach. Nevertheless, it would not be accurate to say that antitrust institutions and courts always apply in full the concept of broadness in their antitrust analysis. This means therefore that there is still a material difference between the traditional approach (whether theoretical or practical application) and the alternative person-centred approach. As such, despite the tendency for authorities to occasionally apply the concept of broadness in their antitrust analysis, it remains a worthy exercise to assess whether the traditional approach should be substituted with the person-centred account.

## 2.6 Delimiting the Scope of the Broadness Sought

So far, this thesis has continuously emphasised the primary aim of the person-centred approach which is to accommodate different interests in antitrust issues. This inevitably requires that the framework for antitrust analysis should be broad if one is to truly avoid the injustice that could result from excluding some interests. However, caution must be taken in applying a broad framework for antitrust in order not to blur the scope of antitrust claims such that any interest that claims to be “antitrust-related” is accepted within the person-centred framework. Even where we are intuitively aware of what really is an antitrust issue, there seem to be nothing yet in the above explanation of the person-centred approach that showcases a principled way of determining what falls within and outside of antitrust. If reliance is placed solely on intuition, there is a serious risk that on the watch of the person-centred approach, antitrust will degenerate into an unintelligible discipline which is itself a recipe for arbitrariness.

Thus, in order to avoid over-stretching the bounds of antitrust, I attempt here to delimit the scope of the broadness sought by analysing the term “competition”. It should be noted that it is not the aim here to actually fashion a definition or to give a conclusive description of what competition entails. Rather, the aim is to keep the focus of the person-centred process on issues that truly matter to antitrust.

The term competition has been defined severally. For instance, competition is defined in the Oxford English Dictionary as “the action of endeavouring to gain what another endeavours to gain at the same time”. Apart from the general idea of competition, there is a different idea of “competition” which is often used by economists. This idea of competition, it has been recognised, has a theoretical dimension absent from its everyday use and, as such, to the economists, it has become a term of art that has broken away from its ordinary usage.<sup>74</sup>

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<sup>74</sup> Black (2005), p. 8.

To start with, it is taken as trite that the term competition as referred to in this thesis means “economic competition”.<sup>75</sup> This leads us to the next query which is how to determine what amounts to economic competition. The answer to this query is far from straight-forward as even economists have not reached a consensus in defining the term. As Bork noted, there is yet to be “one satisfactory definition of ‘competition’”<sup>76</sup> as the term “has taken a number of interpretations and meanings, many of them vague.”<sup>77</sup>

To illustrate the absence of satisfactory definition for the term “competition”, reference will be made to the analysis and counter-analysis of scholars on two specific interpretations of the term; the definition of competition as a state of perfect competition and as a process of rivalry. Each of these conceptions of competition has a unique effect on what is considered to constitute an antitrust concern. For instance, with regards to the former, competition is seen as constituting nothing other than a state of perfect competition which involves “no presumption of psychological competition, emulation, or rivalry”.<sup>78</sup> Applying such a definition, a cooperative behaviour between competing firms would not necessarily be considered to be anti-competitive.<sup>79</sup> On the other hand, where competition is identified as implying rivalry between firms, we are invariably looking at the effect of competition by merging the concept of competition and the market which thus allows for the introduction of behavioural content in defining the term. In other words, “competition” is regarded as a phenomenon of exchange.<sup>80</sup> This definition relates systematically to the technique of production within, or to the organisational form of firms. In this regard, this concept of competition puts prime importance on economic goods (price and quality) and to the firm’s external relationship in the market.<sup>81</sup> As a result, cooperative behaviours will be treated with circumspection.

The two distinct definitions identified above have been faulted as inadequate or inappropriate. For instance, definition of competition through the idea of perfect market is considered inappropriate because perfect competition is a state that is quite incompatible with the idea of any and all competition and even if it is compatible, it is incapable of actual realisation.<sup>82</sup> The idea of competition is also considered antithetical because despite the fact that perfect competition results from free entry of a large number of formerly competing firms, such a state of the market would lead to a situation where the relationship of firms have evolved and progressed to the point where “the effect of competition have reached their limit”.<sup>83</sup>

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<sup>75</sup> “Today it seems clear that the general goal of the antitrust law is to promote ‘competition’ as the economist understand that term” Areeda and Hovenkamp (2006) para 100a.

<sup>76</sup> Bork (1978), p. 61. See also Stigler (1957), p. 1.

<sup>77</sup> Vicker (1995), pp. 1, 3. See also Kobayashi (1970).

<sup>78</sup> Knight (1968), pp. 639–656.

<sup>79</sup> See e.g. TCE approach in Meese (2003).

<sup>80</sup> McNulty (1968), p. 645.

<sup>81</sup> McNulty (1968), p. 645.

<sup>82</sup> McNulty (1968), p. 643.

<sup>83</sup> McNulty (1968), p. 642.

This definition is also considered less than ideal because by viewing the term through the theory of monopolistic competition, it fails to take account of the concept of competitive market.<sup>84</sup>

The criticism for the definition of competition as a process of rivalry is that contrary to the assumption that rivalry and self-interest serves as the spine of competition which consequently implies efficiency as an integral definition of the term, there is no unblemished evidence (empirical or otherwise) linking firm rivalry and productive efficiency.<sup>85</sup> Also, it has been argued by Stigler that the fact that this definition merges the concepts of competition and the market is rather unfortunate as each deserved a full and separate treatment”.<sup>86</sup>

There are also those who are of the opinion that the definition of competition is not restricted to either of these interpretations. For instance, Black sought to identify what constitutes a state of economic competition and what it mean when it is said that A competes with B.<sup>87</sup> He identified that the operation of competition between A and B could be expressed in more than one way—one may compete via rivalry or through cooperation etc.<sup>88</sup>

Based on these different views about the intrinsic meaning of competition, different ways of viewing a competitive state emerges. For instance, competition can be identified in normative terms. It could also be identified, as a matter of policy, through its effect.<sup>89</sup>

Though the specific inadequacies in the economic concept of competition have been said to impact on both analyses and policies,<sup>90</sup> it is hereby argued from the person-centred point of view that such inadequacies should be celebrated rather than condemned. Also, it is equally good, especially in order to delimit the scope of the person-centred analysis, that we clearly recognise competition as meaning “economic competition” even though the concept cannot be firmly defined. What this means in practice is that even within the broad framework of the person-centred approach, claims could only be instituted where they fall in line with one or more of the definitions of economic competition.

As a result of the diverging analysis of the term, scholars such as Bork attempted to streamline the various definitions of economic competition. For instance, Bork mentioned five conventional ways of discussing the meaning of competition. He states that competition has been seen as: a process of rivalry; the absence of restraint over one firm’s economic activities by another firm; the state of the market in which the individual buyer or seller does not influence the price by his purchase or sale; the existence of fragmented industries and markets; and a state of affairs in

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<sup>84</sup> Moore (1906), pp. 211–230.

<sup>85</sup> McNulty (1968), p. 656.

<sup>86</sup> Stigler (1957), p. 6.

<sup>87</sup> Black (2005), pp. 6–32.

<sup>88</sup> Black (2005), pp. 6–32.

<sup>89</sup> Stucke (2012), pp. 30–31.

<sup>90</sup> McNulty (1968), p. 639.

which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree.<sup>91</sup>

It is contended that accounts that seek to define competition in one way to the exclusion of others will not fit with the person-centred approach. Thus, for example, competition should not be seen strictly in the Borkean sense whereby the term is intrinsically linked to consumer welfare. Rather, the alternative definitions should be accommodated within the definition of economic competition even though each definition of competition is individually deconstructible. It is important to accommodate the different conceptions of economic competition which one is only able to do if rigid interpretation of the term is avoided. Fuchs has thus rightly noted that:

[T]he lack of a comprehensive definition of competition is not a relevant deficiency [as] you do not need a comprehensive definition of competition that fits all situations and applies to all kinds of economic behaviour. It is totally sufficient to identify certain acts of enterprises as interfering with undistorted competition... This indirect approach has the additional advantage that the rules are flexible enough to protect new forms of competition which were previously unknown and could not have been implemented into a concrete definition.<sup>92</sup>

The analysis so far clearly shows that some degree of flexibility should be applied regarding the term competition. It however also implicitly limits the type of claims that could be brought within a person-centred antitrust framework. By defining competition in line with both present and future conceptions of the term as economists understand it, we are invariably implying that an issue can only be flagged as an antitrust issue if it fits in with one or more of these conceptions. As such, no “interested” person would be allowed to represent for example, a strictly environmental issue as raising an antitrust concern if such issue cannot be linked to one or more of the conceptions of economic competition; a spade does not turn into a spear merely because the owner calls it a spear.

As such, it is expected that to raise an antitrust issue from any enquiry or dispute, such issue must satisfy some basic conditions which are: (1) the issue must relate to interaction between market participants; (2) the basis and the nature of such interaction must be economic; (3) the issue must relate to one of the above identified patterns of competition between firms. For instance, a policy initiative that promotes competitiveness in an industry does not necessarily raise competition issues even if it is at the expense of other industries.

The importance of these requirements can be brought to light by way of illustration: antitrust is not to be broadened to an extent such that politically-motivated policy which impacts on the competitiveness of an industry as against another is considered to constitute an antitrust concern. However, such issue might raise competition concerns where the so-called political decision is made by representatives of interested market participant especially where such decision is to their favour as against other firms that are unrepresented. This requirement also

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<sup>91</sup> Bork (1978), p. 58.

<sup>92</sup> Fuchs (2012), p. 54.

shows that completely non-economic factors can only play an auxiliary role in antitrust analysis rather than being considered to constitute antitrust issues in their own right.

## 2.7 Conclusion

In this chapter, a cursory exposition of the person-centred approach has been given. In addition to evaluating this approach as against top-down accounts, this chapter emphasises the requirement of broadness. However, noting the dangers associated with overly broad laws, an attempt has been made to delimit the scope of the person-centred antitrust analysis. This is achieved by addressing the term “competition”. The chapter stresses the need to remain open and to desist from following one conception of “competition” at the expense of another. It however succeeds in delimiting the scope of analysis by emphasising that an antitrust problem can only be said to have arisen when it involves *economic competition* in any of its ramifications.

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