

THE SHADOW OF THE STATE: ANTITRUST LIABILITY AND STATE ACTION IN THE EU AND THE U.S.

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1. Introduction

In February 2015, the U.S. Supreme Court affirmed a Fourth Circuit decision, which upheld a Federal Trade Commission decision finding a state licensing board liable for Sherman Act infringements.¹ A couple of months prior, the EU Court of Justice² ruled that Italy infringed EU law obligations by delegating the power to fix minimum tariffs of road haulage services for hire and reward by API, a committee composed of a majority of representatives of the economic operators. A couple of years ago, the Hungarian agricultural government actively encouraged the joint setting of minimum prices for watermelon by associations of producers and supermarket chains. Even though the Hungarian Competition Authority opened an investigation, it was terminated soon after due to a lack of public interest. The competition watchdog

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¹ *North Carolina State Board of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013). See Aaron EDLIN – Rebecca HAW: *Cartels by another name: should licensed occupations face antitrust scrutiny?* (explaining that this was the only appellate court case to expose a licensing board to antitrust scrutiny and urging the U.S. Supreme Court to take this opportunity to hold boards composed of competitors to the strictest version of its test for state action immunity, regardless of how the board’s members are appointed).

² Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *Anonima Petroli Italiana SpA v. Ministero delle Infrastrutture e dei Trasporti, Ministero dello Sviluppo economico*, 4 September 2014, not yet published, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157343&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=296150>.

studied that in the course of the competition law procedure, the Parliament adopted an act introducing a sort of agricultural cartel exemption with a retroactive effect.³

These recent cases demonstrate that state and private competition restrictions can be closely connected on both sides of the Atlantic. Hybrid cases,⁴ involving agreements and decisions of undertakings that would violate antitrust rules, and corresponding state actions give rise to various challenging legal issues. States may rely on private actors to pursue economic or social policy objectives, thus they may encourage, support or approve market conduct that would normally be condemned as a cartel. The state may also decide to authorize a chamber or other association of undertakings to regulate market entry, quality of services or prices. In this paper I focus on how state involvement may impact corporate and individual antitrust liability. I will identify the state measures that may create immunity for companies and the measures that are considered as mitigating circumstances, reducing the extent of the responsibility of private actors.

The issues covered in this paper are closely linked to the theory and practice of *corporatism*. Several Western states employed corporatist elements to mediate conflict between businesses and trade unions.⁵ Corporatist theory is also invoked when representatives of a profession seek state approval to self-regulate the activities of its members, allegedly serving the public interest, just like guilds in the medieval period. Wolf Sauter notes that this system, usually associated with liberal professions, is attractive because the rules are enacted and enforced by experts, allowing for minimal formal state intervention at minimal cost. However, he also warns that the idea of collective representation is essentially antidemocratic, in as much as private interest groups adopt rules with semi-public functions instead of the vote of individual citizens represented by political parties.⁶ Public choice theory suggests that rules adopted and enforced by interest groups tend to benefit the members of that group while allocating the costs of the regulation to society as a whole.

State related anti-competitive actions involve a wealth of legal and policy issues. Therefore, I find it useful to state which aspects I will not address in this essay. I

³ Case Vj-62/2012, decision of the Competition Council of Act No. CLXXVI of 2012 adopted on November 19 amending Act CXXVIII of 2012 regulating the conduct of professional associations in the agricultural sector. For a short summary and evaluation, see: PÁL SZILÁGYI: Hungarian Competition Law & Policy: The Watermelon Omen. *Competition Policy International – Antitrust Chronicle*, 10/2. (2012) 2–5.; Tihamér TÓTH: The fall of agricultural cartel enforcement in Hungary. *European Competition Law Review*, 34/7., (2013) 359–366.

⁴ By 'hybrid cases' I refer to cases where there are two connected actions, one on the side of a state entity, the other by a group of undertakings. In theory, especially in the EU, both the state and the companies could be held liable.

⁵ *Encyclopedia Britannica*, <http://www.britannica.com/EBchecked/topic/138442/corporatism>. Wolf Sauter defines "private interest government, is a term of art in political science that refers to a form of organisation of society where industry bodies (formerly organisations of craftsmen, such as the guild system) play a crucial role in, first, setting rules that apply to their members (and that restrict membership), and second, acting in the public interest." Wolf SAUTER: *Containing corporatism: EU competition law and private interest government*. <http://ssrn.com/abstract=2550643>.

⁶ *Ibid* at 2.

do not intend to cover legal challenges available to attack the state measure itself⁷ or the separate antitrust liability of public companies.⁸ It is thus not the subject of this paper to look into the liability of states themselves under EU competition⁹ or free movement rules,¹⁰ under the WTO regime,¹¹ or to a lesser extent, under U.S. constitutional law,¹² or to consider the exact scope of the state action doctrine.¹³ The

⁷ See for example Marek MARTYNISZYN: *Avoidance Techniques: State Related Defenses in International Antitrust Cases*. 4–5. (quoting cases where U.S. courts accepted or refused to acknowledge foreign states as persons falling under Section 1 of the Sherman Act), available at: <http://ssrn.com/abstract=1782888>. Also, Spencer W. WALLER: *Suing OPEC*. *U. Pitt. L. Rev.*, Vol. 64., 2002. 105. (arguing that a case against the output restricting OPEC members could be successful, as the US courts have become more focused over time on the nature of the activities when dealing with cases implicating foreign states).

⁸ Public ownership is not a valid antitrust defense. Publicly owned undertakings come under the scope of competition rules on both sides of the Atlantic. In one notable case the U.S. Supreme Court refused to treat the U.S. Postal Service, lacking separate legal personality, as a 'person' under Section 2 of the Sherman Act: *Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004). In Europe, the Commission also found Eastern European public undertakings liable in the case of Aluminum imports (85/206/EEC: Commission Decision of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty, IV/26.870 – Aluminum imports from Eastern Europe, OJ L 92, 30.3.1985, p. 1–76.). The decision was addressed, among others, to Hungarian, Polish, East German and Czechoslovakian state owned foreign trade companies. Point 9.2 of the decision explained, "Entities which engage in the activity of trade are to be regarded as undertakings for the purposes of Article 85, whatever their precise status may be under the domestic law of their country of origin, and even where they are given no separate status from the State." No fine was imposed on the companies, arguably to avoid diplomatic conflicts and lengthy court procedures.

⁹ Prominent Articles of the TFEU are Article 37 (commercial state monopolies) and Article 106 (granting exclusive and special rights). Furthermore, the ECJ relied on the combined reading of various provisions of the Treaties to construe a general obligation for Member States not to make antitrust rules ineffective. Unlike the U.S. Supreme Court, the EU Court of Justice developed its own impressive case law according to which, under strict circumstances, even Member State legislative measures making practical use of antitrust rules can be declared unlawful based on competition law grounds. Article 101 TFEU prohibiting anti-competitive agreements is addressed to undertakings. However, if we 'mix' it with two other provisions, the result is a cocktail offered to Member States. These other necessary components of the cocktail are, first, the loyalty clause of Art. 4(3) TEU that obliges Member States to facilitate the achievement of the Union's tasks and avoid taking measures that would jeopardize these objectives. Second, Protocol No. 27 on the Internal Market and Competition annexed to TEU and TFEU provides that the EU 'includes a system ensuring that competition is not distorted' (before the Lisbon Treaty, the same 'non-distortion' aim was clear from Article 3(g) EEC, later Article 3(1)g) EC).

¹⁰ The free movement articles of the TFEU can also be used to challenge anti-competitive state measures (i.e., Article 34 relating to goods, Article 49 on freedom of establishment and Article 56 on the free provision of services).

¹¹ The instruments of the World Trade Organization do not address the issues of anti-competitive practices arising from private conduct, even if they are supported, and encouraged by states.

¹² *Interstate protectionism is illegitimate under the dormant commerce clause*. Herbert HOVENKAMP: *Federalism and Antitrust Reform*. *U.S.F.L. Rev.*, Vol. 40., 2006. 627., 646.

¹³ The act of state doctrine should not be confused with the state action doctrine. Although both can be used as a defense in cases brought against private parties, the application of the act of state doctrine does not turn on the identity of the defendants, or on a showing of compulsion. Act of state issues arise

paper does not cover statutory immunities that exempt a whole industry, an economic sector or some specific conduct from the reach of antitrust laws either.¹⁴ Instead, my aim is to focus on cases which, absent state influence, would fall under the scope of regular competition rules and to inquire to what extent undertakings can defend themselves with state actions. In other words, when and how can they rest peacefully in the comforting shadow of the state, escaping the heat around.

In the first part of the paper I set out the various legal standards applicable under EU and U.S. laws.¹⁵ We see that both the EU and the U.S. rely on case law based legal tests instead of well-structured legislation. States seem not to favor adopting clear-cut rules that tie their hands. The European Court of Justice (hereinafter: the ECJ) acknowledged that states can use undertakings, especially public ones, to implement their economic policies, particularly under Articles 37 and 106 TFEU. We will discuss how the *Parker* doctrine can be invoked by potential cartels in the U.S.

In the second part of the paper I present how these various legal standards are applied in practice by looking at a number of typical scenarios. *Hybrid cases* are common with regard to various boards, chambers and other quasi-public gatherings of professionals regulating entry conditions and fair business conduct. Affected markets involve, for example, dentists, lawyers and transporters. In some markets, state intervention is necessary to keep markets working properly. The state regulates conduct that would otherwise be a natural candidate for an antitrust investigation. Dicta in the U.S. *Trinko* case¹⁶ makes it easier for dominant companies to escape antitrust liability, which is in sharp contrast with the approach of the European Commission and European courts. The relevance of the U.S. 'filed rate' doctrine, giving safe haven to unilaterally charged prices by dominant companies rather than collective actions by competitors, will also be highlighted.

This paper will conclude that just like U.S. states themselves,¹⁷ U.S. companies benefit from wider protection than their European competitors when their action is

when a court must decide upon the effect of official action by a foreign sovereign. See: WALLER (2002) op. cit. 105. Furthermore, the act of state defense is invoked in international litigation, the state action doctrine is relied on in domestic litigation.

¹⁴ In the U.S., statutory exemptions relate to labor, insurance, etc. For example, under the McCannan-Ferguson Act, an anti-competitive business activity by insurance companies is exempt from federal antitrust laws to the extent regulated by state law (15. U.S.C. § 1013 (b)).

¹⁵ The temptation to write about how Hungarian law deals with this issue was almost irresistible. I decided not to include rules and practices of my own country, Hungary, so as not to confuse problems of a domestic, national legal system with those of federal, supranational legal orders.

¹⁶ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004).

¹⁷ Although the EU cannot be characterized as a state, if it were, it could be regarded as a more centralized formation than the U.S. federal system in the sense that EU competition rules impose many more restrictions on how constituent states may intervene in markets. To mention just one example, no competition rules exist in the U.S. on state aid granted to undertakings, whereas the control of state aid is one of the most important pillars of EU competition policy (Articles 107–109 TFEU). Given that the idea of free competition is more deeply embedded in American culture than in Europe, this can only be explained by a sort of 'overcompensation' by EU courts reflected at the unbalanced share of powers between the European (quasi-federal) and the member state level. I submit that if more

linked to state action. This reflects a stronger reliance on the theory of federalism in contrast to the basic idea of supremacy of EU law underlying the European integration process, heading toward accomplishing a genuine single market. Apparently, EU Member States enjoy a higher level of sovereignty than U.S. states in the areas of foreign, fiscal and defense policy. This seems to come at the expense of accepting more serious constraints to the regulation of their economies. The single market project, based on the four freedoms of goods, services, capital and establishment ties the members of the family of European countries together, so it needs strict rules also against state related competition restrictions.

2. The shield of state action

2.1. U.S. and EU law on State action

State action or state compulsion involves an action by the state exercising its sovereign powers of law making or public administration. Whenever the state is acting through a public undertaking, normal competition rules apply. Both jurisdictions acknowledge the unique nature of cases where the sovereign has made its point. The involvement of government officials in a cartel-like agreement or decision may serve as an umbrella to protect from the damaging rays of the ‘antitrust-sun’ rays. A common feature of EU and U.S. antitrust laws is that they both developed doctrines through judicial case law to exempt business conduct connected with state action from the reach of antitrust.¹⁸ Considering the serious nature of this issue involving important constitutional questions, this may come as a surprise.

There are also differences, though. EU law may provide full or partial immunity to undertakings, whereas the legal law consequences under U.S. law are less certain. Looking at the origins of the immunities, European immunity rules are rooted in the concept of economic activity, whereas U.S. law relies on the federalism doctrine to justify both public and private anti-competitive actions. Furthermore, we will see that the case law of the EU courts places more emphasis on the nature and intensity of state action, factors that are largely irrelevant for U.S. courts.

2.1.1. EU law

EU law allows for several defenses in cases where undertakings, subject to various degrees of state influence, act anti-competitively. A key feature of EU law is inquiring to what extent the state suppressed autonomous business decision-making. First, the state may create a *regulatory environment* where undertakings cease to enjoy entrepreneurial autonomy. Some agricultural markets may be good examples,

competence and financial resources were available at the European level, European institutions would be less inclined to exert strict control on regulatory actions by Member States.

¹⁸ Even more striking in the statute-based EU legal system is that EU Member States have consistently failed to codify this rule, despite numerous amendments of the founding Treaty.

especially under the previous, old-fashioned EU regulatory regimes. In such a command-state scenario, economic actors would not act as genuine entrepreneurs. Instead, they would act like agents implementing the rules set by the state. Any anti-competitive impact would be the direct result of the state measure itself and not be imputed to the undertakings. Second, a similar scenario would involve the state *compelling* a certain activity, such as setting the resale prices legislatively or by ministerial decree. Again, lack of autonomous business decision may lead to full immunity under competition law. To make this complex situation even more exciting, this immunity will not apply for the future activity of the undertakings if a competition authority or a court has given a final ruling on the incompatibility of the underlying state measure under EU law. The benefits of a case law based exemption can be taken away by the decision of a law enforcer.

As far as this first category of state measures eliminating business autonomy is concerned, the ECJ clarified its position in *Ladbroke Racing*.¹⁹ The judges noted that the EU competition rules of Articles 101 and 102 TFEU apply only to anticompetitive conduct of undertakings carried out on their own initiative. The court explained that if the conduct is required by the legislation, or if the legislation creates a legal framework eliminating competition on the part of the undertakings²⁰, the restrictions of competition are not attributable to the undertakings.²¹ This requires the EU Commission or national competition authorities and courts to analyze the wording of national legislation to check whether undertakings are prevented from engaging in autonomous conduct leading to an anti-competitive outcome.

Being an exception to the general rule, the standard will be set at a fairly high level. *Strintzis Lines* proves that the hurdle is high for companies to avoid liability.²² The European Commission imposed fines for collusion among ferry service companies operating between Greece and Italy. The companies argued that the regulatory framework and the official policy substantially restricted their autonomous conduct. They were obliged to contact each other to negotiate the parameters of their policies, including prices. Yet, the ECJ found that the undertakings still enjoyed some *autonomy* in setting their prices and there was no ‘irresistible pressure’ on them to conclude tariff agreements.

The ECJ did not elaborate on the inherent conflict between the principle of supremacy of EU law and legal certainty, also a central concept of the European legal order. Which law shall be followed? The law, often in the form of a statute of

¹⁹ *Commission of the European Communities and French Republic v Ladbroke Racing Ltd. (Ladbroke Racing)*, Joined cases C-359/95 P and C-379/95 P [1997] ECR I-6265.

²⁰ It is not easy to successfully argue that the regulatory framework alone is responsible for an anti-competitive outcome. In the Greek *GSK* case concerning parallel imports of medicine, the ECJ noted that, ‘[...] the degree of price regulation in the pharmaceuticals sector cannot therefore preclude the Community rules on competition from applying’. Joined Cases C-468/06 to C-478/06 [2008] ECR I-7139, para 67.

²¹ *Ibid* 33.

²² *Strintzis Lines Shipping SA v Commission of the European Communities (Strintzis Lines)*, Case T-65/99 [2003] ECR II-5433.

the host country, or the case law based European norm? Proponents of European federalism would argue that even if a member state measure obliges companies to establish a cartel, undertakings should disobey the national rules. The principle of supremacy of European competition rules enshrined in the founding Treaty shall win the battle. EU sceptics would defend national rules by recalling the principle of legal certainty. The ECJ confronted this issue more in depth in the Italian *CIF* case involving the regulatory framework of the Italian match industry.²³ Italian matchstick makers argued that their market quota allocation practice, raising entry barriers to other European companies, was the result of government regulation. The Court ruled that a national competition authority could indeed investigate the conduct of undertakings even if the cartel is the consequence of unlawful domestic legislation.²⁴ Such legislation must be disused not only by national judges, but also by national regulatory and competition authorities.²⁵ Yet, balancing general principles of EU law, primacy²⁶ and legal certainty, the ECJ admitted that this duty to disuse anti-competitive law cannot expose the undertakings concerned to any criminal or administrative penalties with respect to past conduct if the conduct was *required* by the law.²⁷ However, the primacy of EU law prevails for the foreseeable future. This means that once the national competition authority finds an infringement of Article 101 TFEU and disapplication of the anti-competitive national law becomes definitive, national law no longer shields the companies involved.²⁸ Put differently, their autonomy is re-established and released from the imperative will of the state.²⁹

A second category of state action is when the state measure merely *authorizes or promotes* a given activity. Here, undertakings can be held liable but could invoke state action as a significant mitigating circumstance when it comes to levying fines. This happened, for example, in Hungary during the hot summer of 2012. The State Secretary of the Rural Development ministry acknowledged that he participated in

²³ C-198/01 *Consorzio Industrie Fiammiferi (CIF) and Autorità Garante della Concorrenza e del Mercato* [2004] ECR I-8079.

²⁴ As previously noted, EU rules prohibit member states from adopting measures that would make EU competition rules ineffective. Consequently, both private and public actions can be deemed unlawful.

²⁵ *Id.* para 51. The act of 'disapplication' by an authority or a judge may result in legal uncertainty since the legislation found to infringe EU law formally remains in force as long as the national legislature decides to withdraw or amend it in line with national legislative procedures.

²⁶ In the U.S. context, see *Cooper v. Aaron*, where the U.S. Supreme Court explained that federal law prevails over state law due to operation of the Supremacy Clause, and that federal law, "can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes [...]" 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958). The Court held that states are also bound by decisions of the U.S. Supreme Court as precedence.

²⁷ The Court confirmed that if a national law merely encourages, or makes it easier for undertakings to engage in a cartel, those undertakings remain subject to EU antitrust rules and may incur penalties, including with respect to conduct prior to the decision to disapply the national law. Para 56.

²⁸ *Ibid.* para 55.

²⁹ One issue with this ruling is the confusion created in regard to the potential *erga omnes* effect of a judgment. Put differently, companies not involved in the administrative or judicial procedure, yet subject to the anti-competitive piece of legislation, may still argue that they are shielded from liability.

a cartel in the best interest of watermelon producers. The Ministry's goal was to increase the size of land where watermelon is cultivated and secure a 15–20% profit margin for farmers.³⁰ According to the GVH investigation, the Ministry hosted a meeting between representatives of watermelon producers and supermarkets in order to set a minimum retail price of HUF 99/kg and exclude imported watermelon from the shelves.

Another defense for a private entity involved in rulemaking or administration is to point out the *public nature* of its activity. The scope of EU competition rules covers only economic activities. Public measures, even with an economic impact, fall beyond the reach of competition rules. Even if corporations are entrusted with the implementation of environmental protection rules or monitoring the air, their action will be immune from antitrust rules. For chambers established by a statute, or for hybrid commissions with both public officials and representatives of corporations on their board, the blurring distinction between what is public and private will be an essential part of their defense. The composition of these bodies, the factors they are required to consider, and the veto or supervisory rights of the government are all important elements in the evaluation of whether the actions of a body like this are of a public nature or pursue profit motivated private goals.

This category of cases often involves unilateral actions potentially infringing Article 102 TFEU, or cartel-like rules set by associations. In the 1980s when predominantly publicly owned undertakings provided telecommunication services, these entities often enjoyed public law status and often combined rule-making with the provision of services. For example, the ECJ rejected the application of the Italian government against a Commission decision finding the activities of British Telekom (BT) unlawful under the equivalent of the current Article 102 TFEU.³¹ At that time, BT was a statutory corporation established under the British Telecommunications Act and owned by the state. BT had a duty to provide various telecommunication services as the holder of the statutory monopoly for running telecommunication systems in the United Kingdom. BT also had the right to exercise rule-making powers setting charges and conditions by means of schemes published in official gazettes. Some of these schemes were designed to prevent private message forwarding agencies from entering the BT monopolized market. The Commission argued that the schemes performed the same function as contractual terms, and were freely adopted by BT without any intervention on the part of the United Kingdom authorities.

There were other cases where the Court did not hesitate to refuse challenges against high fees qualifying the activity as public by its nature. *Eurocontrol* concerned allegedly abusive fees charged for the provision of services involving the supervision

³⁰ See the reports of the daily *Népszabadság* and online portal *Index*: http://index.hu/gazdasag/magyar/2012/08/13/budai_kartelleztunk_es_akkor_mi_van/. Later, he refused to use the term “cartel”, but did acknowledge that he invited supermarkets not to sell Hungarian watermelon at dumped prices and not to import the fruit from abroad.

³¹ Case 41/83 *Italy v Commission* (“*British Telecom*”) [1985] ECR 873. Remarkably, the Commission decision challenging the state of play in the UK was challenged by the Italian government seeking to maintain its similar institutional setup and not by the UK.

of air space. Since the ECJ held that these activities by their nature were connected to functions of public authority, the competition rules of the treaty designed to address restrictions arising from economic activities could not be applied.³² Eurocontrol was a public body, regulated by international agreements, which was not the situation for an undertaking registered in Italy as a private corporation that provided environmental protection services in the international port of Genoa for a fee. In *Diego Cali* the ECJ held that SEPG was entrusted with duties that belong in the public authority sphere and so 'clients' could not challenge the fees under antitrust rules.³³

In addition to pointing out the intensity of state intervention or the public nature of activity, undertakings and their associations may also argue that their rule-making activity was *necessary for the proper functioning* of their business or profession. *Wouters* was the first case where the ECJ acknowledged that there are restrictions adopted by an association of undertakings that can be justified under Article 101 (1) instead of the efficiency based exemption provisions enshrined in Article 101 (3).³⁴ This judicial ruling acknowledges that restrictions exist that are necessary for the proper functioning of a market that restrict free, autonomous market conduct without directly being related to efficiencies.³⁵ Under this *Wouter* formula, undertakings would not dispute the autonomous or economic nature of their activity. Rather, the emphasis is on the unavoidable necessity of the restriction so that it should not be interpreted as a restriction of competition. The state is involved by establishing a chamber and authorizing the chamber to adopt rules that govern the market activity of its members. In fact, these rules, often intended to maintain the integrity of a profession, could have or should have been adopted by the government itself.

Finally, for the sake of completeness, I mention Article 106 (2) TFEU, which provides a specific exception for undertakings that perform a *service of general economic interest* from infringing competition rules. This defense is not frequently used as it is difficult to prove all the elements of this provision. The undertaking should be expressly entrusted with an activity that involves a genuine public service. The second part of the test is that the undertaking be un able to fulfill its mission

³² C-364/92 *SAT Fluggesellschaft v. Eurocontrol* [1994] ECR I-43.

³³ C-343/95 *Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG)* [1997] I-1547.

³⁴ Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577. The Court also applied this reasoning in *Meca Medina* in connection with the Olympic sports doping rules: C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-7006.

³⁵ The only problem is that the text of Article 101 does not foresee such a category of exemption. Arguing that a restriction like this amounts to an anti-competitive restriction that is justifiable because of its necessity is an extremely vague and somewhat contradictory effort to circumvent the textual limitations of EU competition rules. I suggest that a somewhat less contradictory approach would have been to label these cases as having neither an anti-competitive aim nor effect. A restriction that is absolutely necessary to the rules of the game is a pre-requisite for that market to exist and not really a restriction of autonomous business conduct.

laid down by the member state.³⁶ Finally, the restriction of competition should not go against the interests of the common market.

I should note that under EU law, the form of the manifestation of the state will does not seem to matter. It is certainly much more straightforward to prove state compulsion if a legislative or regulatory act is present, but it is not a pre-requisite to establish the lack of liability of the undertakings concerned. In *Asia Motors III*, the ECJ held that Article 101 should not apply if the conduct was imposed by the authorities through the exercise of 'irresistible pressure'.³⁷

2.1.2. U.S. law

On the other side of the Atlantic, the U.S. Supreme Court has long held that anticompetitive action by state governments and private conduct³⁸ in compliance with that measure are immune from liability under the Sherman Act.³⁹ The state-action doctrine provides antitrust immunity if the state's intent to displace competition with regulation is "clearly articulated and affirmatively expressed as state policy".⁴⁰ For non-public actors, the state should also establish a mechanism to ensure that private interests do not interfere with the public ones. The test examines whether the private party's anticompetitive conduct promotes state policy rather than merely the party's individual interests.⁴¹

The leading authority is *Parker v. Brown*, 317 U.S. 341 (1943) involving a raisin cartel sponsored by the State of California in response to a crisis caused by the oversupply of raisins. To put this case into an integration perspective, some 95% of California raisins were sold in interstate or foreign commerce, meaning that California essentially shifted the costs of the market protection measure to consumers outside of California. There does not seem to be much impact on relations between states in the EU or the U.S. Interestingly, the measure was not challenged by a foreign importer but by a Californian raisin producer arguing that the scheme was a conspiracy in violation of Section 1 of the Sherman Act. The plaintiff sued the director and members of the California state advisory committee. The prorate zone was proposed by producers and the prorate program was approved by raisin producers but it was the State of California, acting through a commission, that adopted and enforced the program.

³⁶ Due to space constraints, I will not deal with this unique defense category in much detail in this paper.

³⁷ *Asia Motor France SA and others v Commission of the European Communities (Asia Motor III)*, Case T-387/94 [1996] ECR II-961.

³⁸ Since Section 1 of the Sherman act is addressed to 'any persons,' a category wider than the concept of 'undertaking' applied in Article 101 TFEU, the American state action doctrine also encompasses actions by state or local government officials.

³⁹ *Parker v. Brown*, 317 U.S. 341 (1943). The U.S. Supreme Court held at 351 that, '[t]here is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only »business combinations«.

⁴⁰ *Cal. Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97, at 105 (1980).

⁴¹ *Patrick v. Burget*, 486 U.S. 94, at 101 (1988).

The *Parker* Court ruled that the U.S. Congress did not intend for the Sherman Act to preempt state economic regulation, “[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”⁴² The Court could also point out that there was no contract, agreement or conspiracy under Section 1 of the Sherman Act. Actually, it was the State’s action that made such conspiracy superfluous. Even though the marketing program for the 1940 raisin crop eliminated competition among producers with respect to the terms of sale, including the price, of the crop and to impose restrictions on the sale and distribution to buyers who subsequently sell and ship in interstate commerce, this regulation of state industry was held to be of local concern not prohibited by the commerce clause in the absence of Congressional legislation.⁴³

Antitrust is influenced by state sovereignty and federalism. Under the Tenth Amendment of the U.S. Constitution,⁴⁴ the powers not delegated by the Constitution to the federal government remain in the competence of states. The United States Constitution grants the sovereignty of each state. The authority to regulate their economies is among the powers not delegated to the federal government, as long as such economic regulation does not unduly impede interstate commerce.⁴⁵ Judge Kennedy’s recent opinion in *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. (2015) recalled that federal antitrust law is a central safeguard for free-market structures. However, there are other values regulated by states at the expense of the Sherman Act. State-action immunity exists to avoid conflicts between state sovereignty and the national commitment to a policy of robust competition.⁴⁶ The Court cited *FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003 (2013) and *FTC v. Ticor Title Ins. Co.*, 504 U. S. 621 (1992) in warning that the immunity is not unbounded, “[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state action immunity is disfavored, much as are repeals by implication.’”⁴⁷ This comes close to acknowledging the supreme nature of free markets and competition. Exceptions to the competition principle should be clearly expressed.

The proper definition of “state” and thus the scope of the exception has been the subject of controversy. The U.S. state action doctrine first applies to state

⁴² *Parker v. Brown*, at 359.

⁴³ *Parker v. Brown*, at 368.

⁴⁴ The Tenth Amendment, as part of the Bill of Rights, was ratified on December 15, 1791. The Court reasoned in *Parker v. Brown* that, “[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.” *Ibid.* at 351.

⁴⁵ *New York v. U.S.* 505 U.S. 114 (1992).

⁴⁶ *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U. S. (2015).

⁴⁷ *Id.* (slip op.) at 7 [citing *FTC v. Phoebe Putney Health System, Inc.*, 568 U. S.,133 S.Ct. 1003 (2013) quoting *FTC v. Ticor Title Ins. Co.*, 504 U. S. 621, at 636 (1992)].

governmental persons and governments themselves who are generally immune from antitrust liability without further inquiry. The Court explained that “[w]hen the conduct is that of the sovereign itself [...] the danger of unauthorized restraint of trade does not arise.” The doctrine also covers quasi-governmental entities, like cities and other municipalities, regulatory boards and private actors, but they need to pass a two-prong test. The two-prong test is also applied to hybrid cases subject to this essay.

CLEARLY ARTICULATED STATE POLICY

The seminal *Parker v. Brown* decision focused on the liability of the state and its officials and the Court did not need to resolve the question to what extent state mandated private action can be shielded from antitrust laws. The Court developed the two-prong test in *Cal. Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).⁴⁸

The first prong is “clear articulation.” This prong ensures that the state has clearly authorized departures from the principles of free-market competition. The second prong of the test is called “active supervision,” which is intended to ensure that state action immunity covers only the particular anticompetitive acts of private parties that actually serve state regulatory policies. Overall, the state action doctrine makes clear that a properly adopted and thoroughly supervised regulation preempts federal antitrust policy and creates immunity for companies.

A general grant of authority to set prices or acquire other entities does not appear to meet the clear articulation prong of the test. In *Community Communications Inc., v. City of Boulder*, 455 U.S. 40 (1982), the U.S. Supreme Court emphasized that a general grant of authority is not equal to an authorization to engage in specific anticompetitive conduct.⁴⁹ Yet, in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Court decided that giving cities the authority to decide where to provide sewage services foreseeably included potentially anticompetitive conduct in the form of refusing to serve.⁵⁰ This low standard for foreseeability led to many cases exempting companies from the reach of antitrust law. In *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), the Fifth Circuit held that when the legislature authorized the hospital to contract with any individual for the provision of kidney dialysis services a subsequent exclusive contracts cannot be subject to antitrust laws, because the alleged anticompetitive exclusive agreement was foreseeable.⁵¹

Clear articulation does not require that the state *compels* the anticompetitive conduct at issue. In *Southern Motor CarriersRate Conference, Inc. v. United States* 471 U.S. 48 (1985), the Supreme Court reasoned that a state legislative decision to set rates through a public service commission, rather than through free market forces,

⁴⁸ *Cal. Liquor Dealers v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

⁴⁹ *Community Communications Inc., v. City of Boulder*, 455 U.S. 40, at 56 (1982).

⁵⁰ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, at 41–43 (1985).

⁵¹ *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996).

clearly demonstrated its intention to displace competition in motor carrier ratemaking and satisfied the first requirement.⁵² The absence of compulsion does not mean that there is a lack of state policy. U.S. law is more permissive than the EU in this regard. Under EU law, permission to restrict competition does not result in immunity. Since the autonomy of undertakings was only limited and not eliminated, they are liable under Article 101 TFEU.

One challenge with the state action doctrine is that some lower level courts extensively apply the doctrine, exempting government officials and undertakings from the reach of federal antitrust laws.⁵³ The Antitrust Law Section of the American Bar Association (ABA Antitrust Section) warned that, “[s]tate action immunity drives a large hole in the framework of the nation’s competition laws.”⁵⁴ The Federal Trade Commission also urged courts to clarify and re-affirm the original purposes of the state action doctrine to help ensure that robust competition continues to protect consumers.⁵⁵ Hebert J. Hovenkamp warned that inferring immunity from the mere grant of otherwise ordinary corporate powers would disserve principles of federalism as well as competition policy.⁵⁶

⁵² *Southern Motor CarriersRate Conference, Inc. v. United States* 471 U.S. 48, at 60 (1985).

⁵³ A. M. Dively notes that, “the elusive contours of the doctrine have caused circuit splits and overbroad application that threatens to subvert the goals of both federalism and competition”. She analyzes the United States Court of Appeals for the Eleventh Circuit decision in *Federal Trade Commission v. Phoebe Putney Health System, Inc.* as an example of misapplication of state action immunity. The case was about a merger between private hospitals under an allegedly “sham” authorization by the state hospital authority. The district court held the combination of the authority’s power to acquire and lease hospitals, to operate on a nonprofit basis, and to operate hospital networks demonstrated that Georgia’s legislature “intended to guarantee that hospital authorities could accomplish their mission of promoting public health regardless of the potential anticompetitive effects”. In *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1378 (11th Cir. 2011) the appellate court affirmed the district court’s ruling that because the Georgia Legislature clearly articulated the intent to empower county hospitals to engage in anti-competitive activity, the Hospital Authority of Albany–Dougherty County’s proposed acquisition of its only competitor was protected under the state action doctrine. *Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369. In: Angela M. DIVELY: Clarifying State Action Immunity under the Sherman Antitrust Laws: *FTC v. Phoebe Putney Health System. St. Thomas Law Review*, Vol. 25., 2012. 74. Since then, the U.S. Supreme Court agreed with the Federal Trade Commission’s petition and more clearly defined the contours of the doctrine.

⁵⁴ AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW: *The State of Antitrust Enforcement – 2001*. at 42 2001., available at http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf.

⁵⁵ The FTC State Action Report concluded that, “[s]ome lower courts have implemented the clear articulation standard in a manner not consistent with its underlying goal.” Office of policy planning, FTC, report of the state action task force 5 (2003), at 25. available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

⁵⁶ Herbert J. HOVENKAMP: *Antitrust’s State Action Doctrine and the Ordinary Powers of Corporations* 6–7. (July 12, 2012), available at <http://ssrn.com/abstract=2012717> (criticizing some judgments that carried the idea of “authorization” much further, concluding that authorizing a firm to engage in its ordinary corporate activities, such as contracting or acquiring assets, also operates to authorize conduct that would otherwise be unlawful under the antitrust laws).

ACTIVE SUPERVISION BY THE STATE

State action immunity covers public actors and private actors may also benefit from the antitrust shield. *Parker* immunity may also cover non-sovereign actors controlled by market participants, but they must demonstrate that the challenged restraint is clearly articulated as state policy, and is actively supervised by the state. These two conditions endeavor to ensure that a non-state entity may invoke immunity only if it exercises the state's sovereign power. Accordingly, *Parker* immunity requires that the anticompetitive conduct of non-sovereign actors, especially those authorized by the state to regulate their own profession, results from procedures that suffice to make it the state's own.

Political subdivisions of the state, such as municipalities, cities or townships, are not entitled to the same protection from antitrust law as the state itself.⁵⁷ When faced with actions of an entity that has a combination of public and private attributes courts usually inquire whether the connection between the state and the entity in question is sufficiently strong that there is danger that it is involved in a private arrangement.⁵⁸ The city must thus show that there is a state policy to displace competition and that the legislature contemplated the kind of municipal actions alleged to be anticompetitive.⁵⁹ The federal government reacted to this narrow interpretation by passing the Local Government Antitrust Act (LGAA) of 1984, barring antitrust damage actions against local governments or private parties whose conduct was based on official action by a local government.⁶⁰

In *GF Gaming Corporation v. City of Black Hawk*, 405 F. 3d 876 (10th Cir., 2005).⁶¹, the businesses and property owner plaintiffs in the Central City, Colorado sued the neighboring city of Black Hawk and several casinos for conspiring to restrain and monopolize trade in the limited gaming industry. The 10th Circuit Court of Appeal held that even if defendants met with city officials and urged them to take anticompetitive action, as plaintiffs alleged, this falls under the *Noerr-Pennington* doctrine, which makes no distinction between petitioning government officials and conspiring with them.⁶² The Court made it clear that allegations of private defendants

⁵⁷ Assuming that cities act in their public capacity and not as an economic actor, contrasting with the ECJ interpretation that makes no distinction whether the state measure originates from the Parliament, a government entity, or a local municipality.

⁵⁸ *Crosby v. Hospital Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1524 (11th Cir. 1996) and *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*, 753 F.2d 790, 792 (9th Cir.1985).

⁵⁹ *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*, at 792. See also: *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (holding that Colorado may have authorized the City of Boulder to regulate cable television services but the statute did not sufficiently articulate state policy to confer protection from antitrust laws).

⁶⁰ 15 U.S.C. § 34–36. Note that the act does not impose a bar on injunction actions.

⁶¹ *GF Gaming Corporation v. City of Black Hawk*, 405 F. 3d 876, 886-87 (10th Cir., 2005).

⁶² *Ibid.* at point 16.

conspiring to further private interests is irrelevant to the question whether they are entitled to immunity under the Local Government Antitrust Act of 1984 (“LGAA”).⁶³

Boards, bars, and various other agencies with mixed private-public features are also subject to the second prong of the test. The Supreme Court held in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that even if the Virginia State Bar is a state agency for some limited purposes, it is not allowed to foster anticompetitive practices for the benefit of its members.⁶⁴

The second part of the *Midcal* test, active supervision, requires the actual involvement of the state. The existence of a state’s authority to exercise supervisory power is not sufficient. *Midcal* involved a California statute that required liquor manufacturers to impose resale prices on distributors. The unanimous decision of the *Midcal* Court established that resale price maintenance (RPM) arrangements are not immune under *Parker* due to the lack of active supervision of the state approved price schedules.⁶⁵ This test is more demanding than the EU case law. For the statute and subsequent private competition restriction to become lawful, the state not only needs to articulate its policy clearly, but it must also review the reasonableness of the resale prices.

Another interesting case is *Federal Trade Commission v. Ticor Title Insurance Company et al.*, 504 U.S. 621 (1992).⁶⁶ The Federal Trade Commission (FTC) filed an administrative complaint charging insurance companies with horizontal price fixing in setting fees for title searches and examinations. In each of the four States concerned – Connecticut, Wisconsin, Arizona, and Montana – uniform rates were established by a rating bureau licensed by the relevant state and authorized to establish joint rates for its members. Rate filings were made to the state insurance office and became effective unless the state rejected them within a specified period. Various institutions evaluated this set of facts quite differently during the course of the procedure. The Administrative Law Judge of the FTC held that the anticompetitive activities were covered by state-action immunity in Wisconsin and Montana. The Commission held on review that none of the states had conducted sufficient supervision to warrant immunity.⁶⁷ When the matter came to the courts, the Court of Appeals reversed,

⁶³ Ibid. at point 27.

⁶⁴ *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 791 (1975).

⁶⁵ *Midcal*, a wine wholesaler, sold a number of cases of wine at a price below the effective price schedule. In a similar case, in the EU, the Court did not hold the state measure imposing a vertical RPM unlawful. A 1981 French statute obliged all publishers and importers to fix the retail price for their books. As a rule, retailers were not able to sell books cheaper than 5% of the fixed price. It is also true, that the Court inserted the qualification, that this measure does not contravene EU competition rules “as Community law now stands” and also warned that other rules of the Treaty, notably the free movement provisions, may prohibit a law like this. 229/83, *Association des Centres distributeurs Edouard Leclerc and others/SARL »Au blé vert« and others* [1985] ECR I. The Court did not have to deal with the liability of the undertakings themselves, but based upon the doctrine of autonomous business conduct, publishers and importers setting the RPM would have been exempt from antitrust rules, since their action was prescribed by the state.

⁶⁶ *Federal Trade Commission v. Ticor Title Insurance Company et al.*, 504 U.S. 621 (1992).

⁶⁷ In re *Ticor Title Ins. Co.*, 112 FTC 344 (1989).

holding that state action immunity applied in each of the four states. The Court explained that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the active supervision requirement.⁶⁸

The *Town of Hallie* Court explained that where the action of a government entity is at issue, it is presumed that it is engaged in state policy, with little chance of being unduly influenced by private interests.⁶⁹

The U.S. Supreme Court was more demanding in its most recent *North Carolina State Board of Dental Examiners* case. The justices pointed out that there is a structural risk of market participants confusing their own interests with the State's policy goals.⁷⁰ The second part of the test is to ensure that these entities should not diverge from the State's considered definition of the public good and engage in private self-dealing.⁷¹ The Court emphasized that the supervision requirement turns not on the formal designation to regulators but the structural risk of market participants confusing their own interests with the State's policy goals.

What do public officials need to do in order to meet the second part of the test? The content of this obligation is still not sufficiently clear. The Antitrust Modernization Commission recommended that courts could consider using a flexible, "tiered" approach that requires a different level of active supervision depending on various factors, like the type of conduct at issue, the industry, and the regulatory scheme. If the conduct at issue were price-fixing, the affirmatively articulated state policy ought to be more detailed and specific than if the conduct involved less clearly anticompetitive activities.⁷²

The U.S. Supreme Court stated in *North Carolina State Board of Dental Examiners* that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a non-sovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests. The Court also identified a number of requirements for active supervision: the supervisor must review the substance of the anticompetitive decision; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; the state supervisor may not itself be an active market participant; and the mere potential for state supervision is not sufficient.⁷³

An interesting question is to what extent an authorization by the state can meet the second prong of the test as far as the *past effects* of an anti-competitive conduct are concerned. In *Columbia Steel v. Portland General Electric Co.*, 111 F.3d 1427

⁶⁸ Tigor Title Ins. Co. v. FTC. 922 F.2d 1122 (1991).

⁶⁹ *Ibid.* at 45–47.

⁷⁰ *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U. S. (2015), at 13.

⁷¹ *Ibid.* at 10.

⁷² Antitrust Modernization Commission Report, at 373.

⁷³ *Ibid.* at 13–14., quoting Patrick and Tigor.

(9th Cir. 1996),⁷⁴ the 9th Circuit held that retroactive amendment of an order does not immunize the anti-competitive conduct of the past 20 years. The opinion emphasized that, “state-action immunity is a question of federal antitrust law that turns on the clarity of a state’s expression of its policy, not the subjective intent of its policymakers”.⁷⁵ However, in a case decided ten years earlier, the same court agreed that the state’s authorization shields conduct that occurred before the measure, provided that this was the intent of the legislator.⁷⁶ The plaintiff argued that the provisions of the legislation were enacted in 1982, and those statutes cannot confer retroactive immunity upon a lease agreement that was signed back in 1966. The court disagreed by recalling the legislative intent that was to articulate and affirm a pre-existing state policy of allowing municipalities to enter into anticompetitive agreements at public airports.⁷⁷ In contrast to this, measures by an EU member state simply reinforcing, or approving past conduct infringing antitrust rules would not shield undertakings from liability.⁷⁸

If freedom of competition is to be taken seriously, courts should require genuine evidence that the state did intend to replace market functions with other means to reach its goals. Silence on this issue, just like silence regarding the second prong of the test reviewing private business conduct, should not be sufficient to apply the state action doctrine to exempt otherwise unlawful, anti-competitive private action.

⁷⁴ *Columbia Steel Co. v. Portland General Electric Co.*, 111 F.3d 1427, 1442 (9th Cir. 1996). Columbia Steel was a large consumer of electric power in Portland, Oregon. The company brought action against two electric utilities charging them with dividing the City of Portland into exclusive service territories in violation of the Sherman Act. The companies raised a state-action immunity defense on the basis of a 1972 order of the Oregon Public Utility Commission that approved a division of the Portland market into exclusive service territories. The Court decided that the state did not clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland in 1972. The 1992 decision by the regulatory commission “could not satisfy the Midcal test retroactively by amending the 1972 order years after the company entered into the monopolistic agreement it now seeks to cloak with federal antitrust immunity. In other words, the state of Oregon cannot satisfy the objective Midcal clear articulation test by declaring that it had intended to displace competition with regulation 20 years earlier.”

⁷⁵ *Ibid.* at 7–9.

⁷⁶ *California Aviation v. City of Santa Monica*, 806 F.2d 905 (1986). California Aviation, Inc. sued the City of Santa Monica alleging that the City engaged in unlawful price fixing and unfair competition in the execution of a lease with California Aviation at Santa Monica Municipal Airport. In 1966, California Aviation and the City entered into a thirty year lease at Santa Monica Municipal Airport. The lease provided that California Aviation could charge no less for petroleum products than the City charged. California Aviation contended that this lease provision violated the Sherman Act.

⁷⁷ Section 21690.5 of the Californian code stipulates, “[t]herefore, since the proper operation of the state’s publicly owned or operated airports is essential to the welfare of the state and its people, the Legislature recognizes and affirms such operation as a governmental function to be discharged in furtherance of the policy of securing the benefits of commerce and tourism for the state and its people”.

⁷⁸ Moreover, also the member state itself would be liable under the “reinforce” limb of the *effet utile* rule. See, for example: C-35/96, *CNSD* [1995] ECR I-2883, para 53–54.

Courts should not simply infer from circumstances, or second-guess crucial public policy objectives.

The cases presented so far involved a clash between federal antitrust law and private action supported by a state or municipality. In addition, state courts held that *state antitrust rules* cannot apply to instances of state action. For example, the plaintiff was unable to successfully challenge the fee of a taxi company that was regulated by the City of Chicago.⁷⁹

2.2. Foreign state compulsion

A specific form of the state action doctrine is when the sovereign is a foreign state. Hybrid cases involving a foreign undertaking being used by the authorities of its country may also lead to immunity, yet the bar seems to be fairly high in practice.⁸⁰ The foreign state compulsion defense may provide safe harbor for a corporation or individuals who participated in otherwise unlawful anti-competitive conduct ordered by a foreign sovereign. Unlike the EU's autonomous economic activity concept or the federalism based state action doctrine in the U.S., this exception recalls international law principles like non-intervention and comity.⁸¹

Both U.S. and EU case law require compulsion for successful use of this defense. If only the advice, support, or encouragement by the foreign government can be established the defense will be unsuccessful.⁸² The Antitrust Enforcement Guidelines of the U.S. DOJ and FTC from 1995 consider the threat of penal or other severe sanctions indispensable for recognition of compulsion.⁸³ It is pointed out that the defense is unavailable in cases where the conduct occurs in the U.S.

In the U.S., a federal district court in *Animal Science* elaborated a three-part test whereby a defendant alleging compulsion should show: (i) the existence of an entity in the defendant's state qualifying as an arm of the state by enjoying governmental or quasi-governmental powers that are 'either uniquely peculiar to sovereigns or of essentially sovereign nature'; (ii) a direct link between the entity's powers and the defendant, allowing the entity to compel the defendant, subject to significant negative repercussions for non-compliance; and (iii) the compulsion is the fundamental force

⁷⁹ *Chirikos v. Yellow Cab*, 410 N.E. 2nd at 69.

⁸⁰ M. Martyniszyn, *ibid* at 63 (recalling that although it seems to be universally recognized, it is a judge-made rule, not a principle of international law). See furthermore *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980) (the court in New Mexico allowed a claim to proceed despite allegations that the uranium cartel was compelled by the Canadian government).

⁸¹ See for example the 1988 Guidelines the DOJ did not share this logic and considered application of the state action doctrine inappropriate in international cases, citing the federalist concepts behind it and difficulties in establishing "clearly articulated state policies and active state supervision" in an international context.

⁸² Spencer W. Waller notes that this defense has been successful only once, in *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970). *Ibid.* at 133.

⁸³ Antitrust enforcement guidelines for international operations, April 1995, point 3.32, available at: <https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations>.

causing the defendant's act, challenged as a violation of U.S. law.⁸⁴ The court noted that participation in the framing of the governmental prescript does not exempt it from compulsion.

In *Swiss Watchmakers*⁸⁵ the court acknowledged that the compulsion would lift liability from the compelled companies. This case involved state approved and state facilitated regulation of the watch industry. This state action aimed at keeping all the know-how, machinery and watch parts in Switzerland to protect the Swiss watch industry from potential competition. Although the regulation was recognized and approved by the government, it was still considered a private agreement that was subject to antitrust rules and the claim of foreign sovereign compulsion was not successful. Despite the state's engagement, the direct foreign government action compelling the defendant's activities was missing.

A recent state compulsion related case in the U.S. was the Chinese *Vitamin C case*.⁸⁶ Chinese manufacturers of Vitamin C and their trade association were accused of price-fixing and limiting exports in 2005.⁸⁷ According to plaintiffs, prices rose as high as \$15, from about \$2.50, a kilogram during the scheme from about 2001 to 2006. In March 2013, the Brooklyn jury found in favor of the U.S. Vitamin C buyers and awarded \$54.1 million in damages which was then tripled to \$162.3 million under relevant U.S. law. The federal district court found the available evidence too ambiguous and denied the foreign sovereign compulsion defense. It was not enough that the Chinese government submitted an *amicus brief* to the U.S. court admitting that companies were required by law to coordinate export prices and volumes. The court concluded that the government influence was not to be regarded as conclusive evidence of compulsion, especially since other documentary evidence submitted by the plaintiffs contradicted the brief's position.⁸⁸

As far as the EU is concerned, the ECJ was also confronted with arguments relying on irresistible pressure by foreign governments. Yet, this pressure has never been found so intense as to eliminate corporate liability. *Aluminum imports*⁸⁹

⁸⁴ *Animal Science Products v. China Nat. Metals & Minerals Import & Export Corp. (Animal Science)*, 69.

⁸⁵ *United States v. Watchmakers of Switzerland Information Center, Inc. (Swiss Watchmakers)* 1963 Trade Cases (CCH) 70,600 (S.D.N.Y. 1962), *modified*, 1965 Trade Cases (CCH) 71,352 (S.D.N.Y. 1965).

⁸⁶ *In re Vitamin C Antitrust Litigation (Vitamin C)* 584 F. Supp. 2d 546 (E.D.N.Y. 2008). While more companies were sued, only North China and Hebei Welcome remained in the case at the time of the verdict. Other companies settled out of court. The case is now under appeal: *Re Vitamin C. Antitrust Litigation*, 13-4791, U.S. Court of Appeals for the Second Circuit (Manhattan).

⁸⁷ This suit came after EU and U.S. federal agencies imposed huge fines on mostly European manufacturers of various vitamins, including Vitamin C. Interestingly, this lawsuit was initiated by lawyers of private plaintiffs. The EU Commission did not investigate the alleged infringement.

⁸⁸ *Ibid.* 557. A retired ministry employee who was formerly in charge of vitamin C exports admitted at trial that 'on the whole,' the government did not involve itself in price fixing.

⁸⁹ European Commission, *85/206/EEC, Decision Relating to a Proceeding Under Article 85 of the EEC Treaty, IV/26.870 – Aluminum imports from eastern Europe (Aluminum imports)*, OJ L92, 1-76 (1984). Note that there was no subsequent court review procedure.

concerned anticompetitive agreements with very broad membership between mostly primary manufacturers of aluminum and a decision adopted shortly before the fall of the Berlin Wall. The EU Commission noted that even if a government *supported* a contract in violation of the competition law, this does not alter the position of the companies involved. EU competition law does not distinguish between private and public undertakings and both are subject to competition rules, even if the latter can be used as a tool to pursue public policy.⁹⁰ In *Wood Pulp*, a U.S. export cartel attempted to rely on this defense.⁹¹ The ECJ noted that the U.S. legislation at issue, the Webb Pomerene Act, exempts only export cartels from the scope of application of U.S. antitrust, but does not require their creation.

2.3. Summary of the tests: different philosophies with similar but not identical results

To conclude the first part of this paper, the common denominator of various European scenarios is the distinction made between economic activity and public actions. Whenever the entity involved in the anti-competitive action can be characterized as an *undertaking* for purposes of EU competition rules, it will be subject to antitrust rules. More specifically, antitrust rules will apply whenever the activity is an *economic activity*, regardless of the public or private law status of the actors.

U.S. case law also covers individual actions of public officials and representatives of undertakings due to the different personal scope of the cartel prohibition. Therefore, rules need to be enacted to carve out officials who implement state policy and thereby interfere with free competition. States may then provide for the defense and indemnification of agency members in the event of litigation. States can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision.

The European approach does not interpret this antitrust shield in the light of proper allocation of sovereign powers between EU (federal) and member states (state) levels of government.⁹² Neither undertakings, nor national governments could successfully argue that EU competition rules should not be applied just because a clearly articulated national policy restricted competition. The emphasis in Europe is to draw a line properly between public and genuine business action.

It seems that competition policy protecting the functioning of the single European market is *superior* to industrial and other national policies even if they are clearly articulated and supervised by member states. The U.S. approach reflects a stronger trust in the judgment of states. This U.S. approach is in sharp contrast with

⁹⁰ For example, according to established case law related to Article 107 (1) TFEU, the resources of public undertakings can be regarded as state resources for the purposes of state aid control. That is, a public undertaking selling below market prices may involve providing state aid to the buyer.

⁹¹ *A. Ahlström Osakeyhtiö and others v Commission of the European Communities (Wood Pulp)*, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 [1988] ECR 5193, para 20.

⁹² On the other side of the Atlantic, federal law respects the residual sovereignty of states by acknowledging their right to regulate their domestic economies the best they can, even by eliminating or restricting competition.

European law and policy where member state regulations are generally suspected of protectionism that undermines the grand enterprise of the European single market.

3. Specific scenarios contrasting the application of U.S. and EU law

In this chapter I compare cases with similar fact patterns to inquire whether the somewhat differing European and U.S. state action tests lead to different results. First, I consider seemingly business conduct aimed at persuading government to adopt rules consistent with the interests of these lobbyists. Second, I discuss regulatory, or tariff setting committees that are undoubtedly part of the public administration but transformable into a cartel meeting by decisive influence of corporate representatives. Next, I present the issues related to regulatory bodies composed of market participants, i.e., chambers in Europe and boards in the U.S., which often have a public law foundation. Government influence may manifest itself either before the chamber action occurs, i.e., by giving market actors an uncontrolled power to set market parameters, or afterwards, in the form of approving a previous decision by this association of undertakings. Then, we turn our attention to regulated industries, like energy, telecommunications and other public utilities where public service is sometimes provided subject to price regulation.

3.1. Self-regulation by chambers and other associations of undertakings

The potential competition law issues attached to the functioning of associations of undertakings are of manifold. The state may authorize them to adopt rules regulating entry, advertisement or even prices. This can be done regardless of subsequent state approval. Even if these associations do not defend their case with a reference to direct state involvement, they may argue that their activity was necessary to serve the public interest. A well-organized cartel can also be seen as a form of self-regulation aimed at eliminating risk and rivalry. Will the legal evaluation change if the state empowers an association of undertakings to set certain rules of the game for themselves? In cases under this heading the state exercises soft intervention, i.e., doing nothing more than creating or authorizing the creation of the association. It is then the association, the chamber of undertakings itself that adopts anti-competition action that presumably serves other public policy goals.

As to the public or private nature of rulemaking by association, the ECJ summarized the point of attribution of liability in *Wouters*. According to this, undertakings are exempt from the reach of antitrust, [...] when it (*the Member State*) grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the

professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.⁹³

Regulatory bodies not covered by the state compulsion defense often develop creative arguments to explain why the anti-competitive consequences of their measures are not contrary to public interest. In Europe, ECJ case law acknowledges that under exceptional circumstances, restrictions inherent in the nature of the private regulatory measure may not fall under the prohibition of Article 101 TFEU at all. This special rule of reason case law may open the door to creative ideas by associations to explain why their profession is special and why they could never properly function without the competition restriction at hand.

This rule of reason exemption was also considered and elaborated upon by the ECJ in *API* relating to the Italian regulation of road haul tariffs. The Court explained that in order to properly assess the objectives and effects of a decision, the overall regulatory and economic context should be taken into account.⁹⁴ The Court applies a proportionality test,⁹⁵ verifying whether the restrictions imposed by the rules at issue in the main proceedings are limited to what is necessary to ensure the implementation of legitimate objectives.⁹⁶ Yet, the Court was confident that the minimum fees set by the commission, and also the legislation approving those fees, were not justified by a legitimate objective. The Court acknowledged that preserving road safety can be a legitimate public interest objective, but refused to accept the argument that road safety would call for setting minimum prices.⁹⁷ The Court pointed out that a mere reference in a general manner to the protection of road safety, without establishing any link whatsoever between the minimum operating costs and the improvement of road safety is insufficient. Furthermore, the measures in question go beyond what is necessary. The rules would not enable carriers to prove that they fully comply with the safety provisions in force even though they offer prices that are lower than the minimum tariffs fixed. In addition, there are a number of EU and national regulations protecting road safety that constitute more effective and less restrictive measures.⁹⁸

What is striking with this reasoning is that the ECJ did not even mention the option of Article 101 (3) to justify the anti-competitive rules. Rather, it relied on its case law developed under the free movement provisions relating to goods, services and establishment which relate to member state measures hindering trade between EU countries. In other cases the Court was more restrictive, quickly dismissing

⁹³ *Wouters and Others*, C-309/99, EU: C:2002:98, para 97 (on rules imposed by the Dutch Bar restricting the establishment of joint offices with accountants).

⁹⁴ *Ibid.* para 47. Quoting the *Wouters* judgment the ECJ noted that it has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

⁹⁵ Proportionality is an important principle of EU law that can be applied in various circumstances and in various ways. See Wolfgang SAUTER: Proportionality in EU law: a balancing act? *TILEC Discussion Papers*, January 25, 2013.

⁹⁶ *Ibid.* para 48. See also *Meca-Medina and Majcen v Commission*, C-519/04 P, EU:C:2006:492, para 47.

⁹⁷ *Ibid.* para 50–57.

⁹⁸ Rigorous compliance with those rules on the maximum weekly working time, breaks, rest, night work and roadworthiness tests for vehicles can indeed ensure an appropriate level of road safety.

company arguments that their imposed restrictions would pursue public interests.⁹⁹ The protection of public interest is not the task of entrepreneurs but belongs to the hard-core competence of the state.

Another way to make an allegedly anti-competitive agreement lawful is to prove that the four conditions of Article 101 (3) are fulfilled. This balancing act, giving efficiency claims the green light to proceed is paralleled in U.S. antitrust law by the rule of reason principle in Section 1 of the Sherman Act. However, it is uncommon for a sector specific regulatory measure intended to set minimum prices or restrict advertisement to survive the four-prong test of paragraph (3). Competition watchdogs would typically argue that it is the role of the state to act in the public interest, not the undertakings which are inherently obsessed by their own profit motives.

In the U.S., the *North Carolina State Board of Dental Examiners* opinion is the leading authority.¹⁰⁰ This Board is the state agency that regulates the practice of dentistry in North Carolina. Six of its eight members are licensed, practicing dentists. The Board administers a licensing system for dentists. Following complaints that non-dentists were charging lower prices for teeth whitening, the Board issued at least 47 official cease and desist letters to non-dentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This led several non-dentists to stop offering teeth whitening services in the state.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. The FTC, sustaining the administrative law judge's ruling, reasoned that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the state to claim immunity, which was not the case. The FTC determined that the Board had unreasonably restrained trade in violation of antitrust law. The Fourth Circuit affirmed the FTC decision. The Supreme Court held that the Board could not invoke state-action antitrust immunity because it was not subject to active supervision by the state. The fact that a controlling number of the Board's decision makers are active market participants was a decisive factor.

Parker immunity may also cover non-sovereign actors controlled by market participants but they must show: 1) that the challenged restraint is clearly articulated as state policy; and 2) it is actively supervised by the state. These two conditions strive to ensure that a non-state entity may invoke immunity only if it exercises the state's sovereign power. Accordingly, *Parker* immunity requires that the anticompetitive conduct of non-sovereign actors, especially those authorized by the state to regulate their own profession, results from procedures that suffice to make it the state's own. The second part of the test is to ensure that these entities should not diverge from the

⁹⁹ See Hilti (the dominant company unsuccessfully arguing that tying the purchase of cartridge nails to the machine itself is required to protect the safety and health of users).

¹⁰⁰ *North Carolina State Bd. of Dental Examiners v. FTC*, No. 13–534., decided February 25, 2015.

state's considered definition of the public good and engage in private self-dealing.¹⁰¹ There is a structural risk that market participants would confuse their own interests with the state's policy goals.¹⁰²

3.2. Regulatory committees

Whenever market parameters, like prices, are not set by the free play of supply and demand, but by some combination of market players and state officials, there is always a danger of a disguised cartel behind the regulatory process. Usually, there is a top down and a bottom up approach. By top down, I mean when the government creates a committee to be in charge of the regulation and invites representatives of market players to contribute. In my view, there is less likelihood of a disguised cartel in situations like this when the state sets up the consultation mechanisms and takes the initiative. The bottom up approach refers to associations, chambers created by the market players themselves, which take up self-regulatory duties in co-operation with state authorities.¹⁰³ These institutions are at the border of public and private law. Their actions are on the edge of anti-competitive decisions, or agreements.

According to EU caselaw, committees that include representatives of enterprises may propose that prices be set by the state, provided that the committee members decided not only for their own private interests but also for the public. Public interest must be taken into account and the State has the power to alter or override a committee proposal.

In *Centro Servizi Spediporto*¹⁰⁴ the ECJ held that, where legislation of a member state provides for road-haulage tariffs to be approved and brought into force by the state on the basis of *proposals* submitted by a committee, the fixing of those tariffs cannot be regarded as an agreement where: that committee is composed of a majority of representatives from the public authorities and a *minority* of representatives from the economic operators concerned; and its proposals must observe certain public interest criteria. Three years later, the ECJ specified in *Librandi*¹⁰⁵ that there is no cartel agreement even if the representatives of economic operators are the majority of the committee, provided that: the tariffs are fixed with due regard for the public interest criteria defined by law; and the public authorities make the final decision considering the observations of other public and private bodies.

¹⁰¹ Ibid. 10.

¹⁰² Ibid. 13.

¹⁰³ I find these two groups useful for the purposes of this paper, even though there is a grey area, i.e., a chamber for a profession established by law with compulsory membership.

¹⁰⁴ EU:C:1995:308. In this and similar cases quoted here, the ECJ was asked to rule on the liability of member states to establish state liability under the combined readings of Articles 101 TFEU and 4(3) TEU a private anti-competitive action should also be identified. Therefore, these cases can help explore the conditions under which an anticompetitive agreement is absent.

¹⁰⁵ C-38/97, EU:C:1998:454.

Criticizing the ECJ, Damien Gerard observed that the Court's jurisprudence lacks consistency and there is no clearly articulated and consistently applied test.¹⁰⁶ The reason for that might be because most of the cases decided by the Court focused on the liability of member states in connection with an allegedly anti-competitive private conduct. The Court was obviously cautious not to put an unbearable and unjustified burden on member states, so it tried to navigate wisely to emphasize the factors that helped to legitimize the state measure.¹⁰⁷

The most recent *API* judgment gives an example for anti-competitive state regulation involving cartel-like conduct in the Italian road transport sector. The Osservatorio adopted a series of tables fixing the minimum operating costs of road transport undertakings for hire and reward. The Osservatorio was composed principally of representatives of professional associations of carriers and customers.¹⁰⁸ Furthermore, decisions of the Osservatorio were approved by a majority of its members without a state representative having a right to veto.¹⁰⁹ Those tables were set out in a ministerial decision a couple of days later.¹¹⁰

A subsequent ECJ note is interesting and worrying at the same time. The Court emphasized that the activity of the Osservatorio would fall outside the cartel prohibition if its members were to act as 'experts' who are independent of the economic operators concerned, being required to set tariffs taking into account their

¹⁰⁶ Damien GERARD: *EU Competition policy after Lisbon: time for a review of the „state action doctrine“?* available at: <http://ssrn.com/abstract=1533842>.

¹⁰⁷ The reason for this 'conscious inconsistency' is that, unlike free movement rules, the European *effet utile* rule as applied to antitrust cases does not allow for justification based on important public interests, like security, consumer, or environment protection. So, the only chance to save a well intentioned state measure is to establish that the *effet utile* rule was not infringed, due to the lack of link between the private and public measures, or that a formal residual power left with authorities meant that potential anti-competitive private conduct was supervised by the government. Advocate General Maduro suggested in his opinion delivered in *Cipolla* that, even though the Italian scheme for regulating minimum lawyer fees may be lawful under the *effet utile* test, it is likely that it would fail to meet the requirements of free movement provisions (point 67.). Joined cases C-94/04 and C-202/04 *Cipolla and others*, opinion delivered on 1 February 2006. ECR I-11426.

¹⁰⁸ At the material time in the main proceedings, 8 of the 10 members of the Osservatorio represented the views of associations of carriers and customers.

¹⁰⁹ The state had the power to disregard the desires of private companies in the German cases decided some 20 years earlier, see *Reiff* (C-185/91, EU:C:1993:886, para 22) and *Delta Schiffahrts- und Speditionsgesellschaft* (C-153/93, EU:C:1994:240, para 21). The 'agreement' or 'decision' was always conditional on the approval of the public representative. Thus there was no genuine agreement or decision approved by the state, and neither undertakings nor the state could be held liable under EU competition law.

¹¹⁰ The Italian legislation envisaged a three-layer hierarchy for establishing the minimum operating costs: primarily the professional associations of carriers and customers would adopt an agreement, failing that the Osservatorio decides, and in the event of inaction by the latter, the Ministry for Infrastructure and Transport takes action. During the period between November 2011 and August 2012, to which the cases in the main proceedings relate, the minimum operating costs were in fact fixed by the Osservatorio. From 12 September 2012, the tasks of the Osservatorio were legally assigned to a department of the Ministry for Infrastructure and Transport.

own business interests, the public interest and the interests of undertakings in other sectors or users of the services in question.¹¹¹ Can you imagine that a gathering of persons affiliated with various competing undertakings who are empowered to adopt regulatory decisions without, or even with, the presence of some public officials would be able to forget where they came from and where they will return after the meeting? Can they genuinely represent the diverging interests of other market players?

Retaining the right to actively supervise the decision of the undertakings is crucial in the U.S. too. The FTC enumerated a number of factors in *Kentucky Household Goods Carrier Association* that are relevant in determining whether the supervision was indeed actively exercised. These factors include: (i) did the authority proceed with a properly noticed hearing?; (ii) did the agency issue a written, reasoned decision?; (iii) was there a qualitative and quantitative agency assessment of how private action served the public interest enshrined in state legislation?; (iv) what business data was collected to establish the background of the decision?; (v) were economic studies conducted? ;(vi) were operating costs and profit levels checked?; and (vi) the history of denying previous rate proposals, simple ‘rubber stamping’ being insufficient.¹¹²

To conclude this topic, only commercial, economic conduct is caught by competition rules on both sides of the Atlantic. For example, if the rules of the game are such that individuals participating in rulemaking do not act as representatives of corporations, but as experts serving the public interest while under the control of public officials, then their gathering would not be regarded as a cartel meeting. Consequently, the rules on the composition and operation of bodies taking part in the lawmaking process are relevant. The ECJ considers the composition of these bodies, i.e., whether private representatives are in a majority, who chairs the meeting, what interests the participants consider, and how private members are nominated. The foregoing is not an exhaustive list and the Court usually looks at the totality of relevant factors before deciding on the existence of market conduct falling under EU antitrust rules.

Not only is the composition of these groups relevant, but also the factors they are supposed to consider. If these factors are unregulated, it is likely that participants will follow their own private economic interests. There is a fair chance of independent action as a wise professional instead of an economic actor, if the factors to be considered for regulating tariffs are well defined by the law.

Finally, the residual role retained by the state, usually by a minister, is decisive in deciding whether the adopted rules fall into the category subject to antitrust or are exempted due to the public nature of the rule making process. A common concern for both jurisdictions is the extent to which government authorities retain the final decision in the regulatory process. Under the more formal approach represented by EU law, EU competition law will not be applicable if the minister has the authority to disregard or amend the agreement or decision put forward by a committee of

¹¹¹ Here the ECJ refers again to *Reiff* and *Delta Schiffahrt*, where it was argued that members of the committees were more like experts than representatives of undertakings.

¹¹² 139. FTC 404 (2005), aff’d, 2006 U.S. App. LEXIS 21864 (6th Cir. 2006).

representatives of undertakings. The activity and final work product of the commission will be considered merely a proposal that is incapable of having any legal or practical impact without the decision of the minister. The actual interventional history of the state does not seem to matter. The potential for state veto is sufficient to grant immunity from the reach of competition laws. An effect-based approach, like the abuse of dominance provision of Article 102 TFEU, would do no harm here either. U.S. law is more demanding and more realistic in this respect. If the supervision is merely formal, second condition of the state action doctrine will not be met and private anti-competitive conduct will not be immunized.

3.3. Lobbying for regulation

Public officials usually take into account the intelligence of market players before adopting rules that would govern future market conduct. A distinction should be made between the democratic rulemaking process where market players also play an active role as well as cartels sponsored by the government. If representatives of corporate interests do nothing but lobby for a piece of legislation that would serve their interest then antitrust law would not apply. This form of rent-seeking is not caught by antitrust, but may be subject to other specific laws regulating contacts between business and government. Setting a common price level by the government is not a cartel agreement on prices applied by companies themselves, even though the result for consumers is the same. The rationale is that state intervention into the free play of markets is meant to serve broader public interests, even if they coincide with the private interests of certain companies. This is so regardless of whether the lobbying is in the form of a bilateral relationship, with one undertaking talking to the government, or a multilateral scenario where a group of undertakings strive to persuade the public decision makers.

European law makes a fine distinction between cases where companies genuinely recommend government officials a certain way of conduct and scenarios where undertakings conclude an anti-competitive agreement and then seek state approval or support, i.e., by making their agreement compulsory for every market participant. An agreement among competitors setting the same price would be a naked competition restriction, whereas agreeing on a common plan to lobby the government to set the same price by way of regulation is exempt from the reach of EU competition law.

As far as the U.S. is concerned, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S.127, 135 (1961) established a specific exemption for individuals and corporations.¹¹³ The U.S. Supreme Court made it clear that, “we think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take

¹¹³ *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S.127, 135 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

particular action with respect to a law that would produce a restraint or a monopoly.¹¹⁴ The U.S. approach is based on the respect for the institutions of representation and *the right of petition*. Antitrust rules are meant to govern economic activity. Actions by companies targeting government officials are characterized as political activity, even if they eventually have economic effect.

However, *Noerr-Pennington* does not provide an unlimited coverage for business and context does matter. For instance, firms cannot bring an anticompetitive agreement outside the reach of the Sherman Act merely by requesting a subsequent legislative approval to their pre-existing arrangement. In *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972),¹¹⁵ the U.S. Supreme Court held that the immunity does not apply where defendants tried to defeat the plaintiff's application to obtain licenses to operate a common carrier by sham complaints before regulators and courts. The Court also refuses to acknowledge immunity if a boycott was aimed at petitioning economic ends.¹¹⁶

In sum, bi or multilateral lobbying is beyond the reach of antitrust on both sides of the Atlantic. However, this may not serve as a disguise for genuine cartel conduct, existing prior and without relevance to the subsequent lobbying activity. Representatives of undertakings have a narrow path to walk.¹¹⁷

3. 4. The filed rates doctrine

Another issue, closely related to lobbying and sector specific regulation to be discussed below, is the doctrine of filed rates. What is the consequence of an administrative authority approving the tariffs proposed by one or more undertakings? Depending upon the market structure, this approval may shadow their liability under the cartel rules or the rules prohibiting an abuse of their dominant market position.

¹¹⁴ Ibid. at 136. This conclusion was reached even though the truck companies lobbied against the truck industry in a deceptive and unfair way.

¹¹⁵ *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972).

¹¹⁶ For example, in *SCTLA*, an association of lawyers did not accept new cases until the District of Columbia did not raise the hourly fees of court-appointed criminal defense lawyers. *FTC v. Superior Court Trial Lawyers Ass'n (SCTLA)* 493 U.S. 411 (1990).

¹¹⁷ In Europe, the liability of member states may also depend upon how the private component can be categorized. The *effet utile* rule bites only if there is a cartel-like activity connected to the state intervention. State measures creating market circumstances identical to a cartel are not caught by this rule. If there is no conduct by undertakings or their associations running against the cartel rules, Articles 101 TFEU and 4(3) TEU cannot be applied in combination. However, for the sake of completeness, we should mention that state regulation fixing minimum prices may nonetheless be found unlawful under the free movement rules of the TFEU. See, for example *Cipolla and Others*, C-94/04 and C-202/04, EU:C:2006:758, para 46 (judgment finding Italian rules on setting minimum lawyer fees not infringing this *effet utile* rule for the lack of delegation of regulatory powers to undertakings). The Court excluded the application of the *effet utile* rule but explained that treaty rules on free provision of services and establishment may be hindered by minimum tariffs making the (higher priced) services of non-Italian lawyers unavailable. Yet, the Court also said that the restriction can be justified under certain circumstances on consumer protection grounds.

U.S. law is driven by the *Keogh* judgment prohibiting a private plaintiff from pursuing an antitrust action seeking treble damages where the plaintiff claimed that a rate submitted to, and approved by a regulator resulted from an antitrust violation. The U.S. Supreme Court explained that only the competent regulator could change these rates, even if the rate was higher due to a price-fixing conspiracy. The Antitrust Reform Commission was quite critical of this exemption. Relying on the two-prong structure of the state action doctrine, it suggested that the U.S. Congress should legislatively overrule when the regulatory agency no longer reviews and just rubber stamps proposed rates.¹¹⁸

Similar issues were raised in the influential *Ticor* opinion. The FTC filed an administrative complaint against six of the nation's largest title insurance companies alleging horizontal price fixing in their fees for title searches and title examinations. The Commission charged the title companies with violating Sec.5(a)(1) of the Federal Trade Commission Act that prohibits "unfair methods of competition in or affecting commerce."¹¹⁹ The U.S. Supreme Court ruled that where prices or rates are initially set by private parties, subject to veto only if the state chooses, the party claiming the immunity has the burden to demonstrate that state officials have taken the necessary steps to determine the specifics of the price-fixing or rate setting scheme. The mere potential for state supervision is not an adequate substitute for the state's decision. While most rate filings were checked for mathematical accuracy, some were completely unchecked. Absent active supervision, there can be no state-action immunity for what were otherwise private price-fixing arrangements.

In the EU, if a tariff is set by the state, an undertaking suggesting this tariff would not be caught by competition law. The conclusion could be different when the dominant undertaking applied an unfair price as a result of its autonomous business decision and sought state approval in the second phase. This rubber-stamping by the state could be held to infringe the *effet utile* rule, the legal shield would disappear and the dominant company could be held liable. Yet, if the state does not automatically transform the private price offer into a public tariff and gives it some consideration, then EU competition law would not be applicable either on the public or private action.

3.5. Regulated industries

Competition laws may become superfluous whenever free competition is replaced with regulation since there will be no competition in the form of independent business decisions to be protected. One issue is how intense this regulation should be to eliminate corporate responsibility. An interesting subsection of cases relates to

¹¹⁸ Report, recommendation No. 68.

¹¹⁹ 38 Stat. 719, 15 U.S.C. 45(a)(1). Title insurance involves insuring the record title of real property for persons with some interest in the estate, i.e., owners. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers.

challenging the fees of companies active in the regulated sectors. Another inquiry is, how clearly do these sector specific rules state whether and to what extent antitrust rules are set aside?¹²⁰

Regulation interfering with competition rules is not only an issue in the telecommunication and energy industry. Agriculture is also heavily regulated. The ECJ addressed this issue in *Suiker Unie*.¹²¹ The common organization of the sugar market provided that each member state shall fix, on the basis of the quantity allocated to it for each factory or undertaking producing sugar in its territory, minimum and maximum quotas. The Court acknowledged that this restriction, together with the relatively high transport costs, is likely to have a considerable effect on the essential supply element of competition, and consequently on the volume and pattern of trade between member states.¹²² However, the common market regulation did not fix consumer prices and producers were consequently each allowed some freedom to determine the price at which they intend to sell their products.¹²³ EU rules also did not preclude competition on quality. The Court ruled that regulation left, in practice, a residual field of competition that comes within the provisions of the competition rules.¹²⁴ Therefore, whenever market regulation leaves some room for autonomous business conduct, collusion among market players will be caught by EU competition rules.

In the U.S., where regulatory statutes are silent with respect to antitrust, courts must determine whether these rules implicitly preclude the application of antitrust laws. The U.S. Supreme Court in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975) took into account the following factors: (i) the existence of regulatory and supervisory authority under the securities law; (ii) evidence that the regulatory authority did in fact exercise its authority; and (iii) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting results.¹²⁵

The Antitrust Modernization Commission concluded in 2007 that U.S. courts are usually reluctant to recognize implied immunities to the antitrust laws in the absence of a clear exception clause.¹²⁶ In contrast, in *Credit Suisse Sec. v. Billing*, 127 S. Ct.

¹²⁰ The Antitrust Modernization Commission recommended that statutory regulatory regimes should clearly state whether and to what extent Congress intended to displace the antitrust laws. Furthermore, courts should interpret savings clauses to give deference to the antitrust laws, and ensure that Congressional intent is advanced in such cases by giving the antitrust laws full effect (recommendations No. 64–65.). The practice of the Hungarian Competition Authority has always been not to give way to arguments claiming a lack of jurisdiction just because there exist sector specific regulation in the given sector, i.e., in telecommunications. According to Section 1 of the Hungarian Competition Act, the scope of the Act covers economic activities unless another law in the form of an act of Parliament provides otherwise.

¹²¹ Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie v Commission* [1975] ECR 1663.

¹²² *Ibid.* para 17.

¹²³ *Ibid.* para 21.

¹²⁴ *Ibid.* para 24.

¹²⁵ *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975).

¹²⁶ Report p. 341.

2383 (2007).¹²⁷ the U.S. Supreme Court applied the previous three-prong test and made it fairly difficult for plaintiffs to rely on the applicability of antitrust in the regulated markets of financial services. Under the third prong, the Court reasoned its decision to reverse the contrary decision of the Second Circuit that there is a serious risk that antitrust courts, with non-expert judges and non-expert juries, will produce results conflicting with the position of the Securities and Exchange Commission. Thus, allowing an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market.¹²⁸

Another case on point is *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko LLP*, 540 U.S. 398 (2004).¹²⁹ *Trinko* is cited quite frequently in Europe by incumbents trying to escape additional antitrust control by national authorities or the EU Commission. Interestingly, the Antitrust Modernization Commission warned that *Trinko* is best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act and that it should not be construed as displacing the role of the antitrust laws in regulated industries.¹³⁰

The European approach is quite different, giving more room for EU antitrust rules in sectors where there is a national regulator. One of the reasons lies in the supremacy of EU law. The other, there is no fear of generalist, non-expert judges or juries reaching flawed conclusions. According to EU case law, EU competition rules do not apply if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part. In a situation like this, the restriction of competition is attributable to the action of the government and not the autonomous conduct of the undertakings. This exception excluding the applicability of EU competition law provisions has only been accepted under exceptional circumstances.¹³¹

For example, the European Commission did not hesitate to impose fines on Deutsche Telekom for a margin squeeze despite the wholesale fees of the German incumbent having been approved by the sector regulator.¹³² It was argued that the

¹²⁷ *Credit Suisse Sec. v. Billing*, 127 S. Ct. 2383, 426 F. 3d 130 (2007).

¹²⁸ *Ibid* p. 17. The Court also noted that in this sectors antitrust has little if any added value to the sector specific regulations. The conduct challenged in this case was also prohibited by SEC and there was also a right for bringing damage actions.

¹²⁹ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004). In a previous case of *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), the First Circuit rejected monopolization claims brought by a municipally owned electric utility against an integrated electric utility. The same Judge Breyer argued that there was no obvious basis for concluding that federal judges sitting in antitrust cases could do a better job than the sectorial regulators in addressing the competitive problem.

¹³⁰ Report, recommendation No. 67.

¹³¹ See Case 41/83 *Italy v Commission* [1985] ECR 873, para 19; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettindustrie and Others v Commission* [1985] ECR 3831, para 27 to 29; and Case C-198/01 *CIF* [2003] ECR I-8055, para 67.

¹³² Commission Decision of 21 May 2003 (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG), OJ L 263, 14.10.2003.

regulation did not prohibit lowering retail prices so the undertaking could have avoided squeezing its competitors out of the market. Cases like this demonstrate the implications of the well-established EU case law on special responsibility of dominant undertakings.¹³³ Dominant undertakings are obliged to preserve the residual competition that remains on markets dominated by them. The ECJ also held¹³⁴ that the liability of the undertaking is not constrained just because the national regulatory authority may have infringed Article 102 TFEU in conjunction with the *effet utile* principle the Commission could have brought an action for failure to fulfill obligations against Germany.¹³⁵ Since EU law is supreme to national law, it is unconcerned with expressing the intentions of domestic lawmakers or the clarity of the relevant member state measure. The rule is that member states should not adopt measures that could restrict the full application of EU competition rules. This is due to the supremacy of EU law to national laws, even legislation adopted by parliaments, and not because competition policy is regarded as superior to other public policies.

4. The liability of the state in hybrid cases

EU law seems to be stricter against member state measures than U.S. law, respecting state sovereignty regarding regulating their own economies. EU Article 16 TFEU addresses the issue of state measures related to public undertakings, and those with exclusive or special privileges. More general case-law based on the *effet utile* doctrine also exists which makes states responsible for their measures approving, encouraging, and prescribing cartel-like conduct, including the unsupervised delegation of regulatory powers to industry actors. U.S. states cannot be held responsible for legislative or regulatory measures like these. So, does it mean that EU law does not need antitrust rules covering state-driven anti-competitive actions? Does U.S. antitrust law cover a wider range of issues to counterbalance the lack of state-related competition law provisions?

The practice of the EU Commission regarding hybrid cases seems to support this distinction. Only once has the EU competition watchdog pursued both the undertakings and the state itself in a case involving tariffs set by Italian customs agents. A law authorized the CNSD, a national association of customs agents, to adopt minimum and maximum tariffs that were subsequently approved by a ministerial decree. The Commission addressed the CNSD decision and also sued Italy before the ECJ for infringing its obligation under the Treaty.¹³⁶ The ECJ had no doubt that even an association created by an act of Parliament can be seen as an association of undertakings for the purposes of Article 101 TFEU. It noted that members of the

¹³³ Case 322/81 *Niederlandsche Banden-Industrie-Michelin v Commission* [1983] ECR 3461, para 57.

¹³⁴ Case C-280/08 P., *Deutsche Telekom AG v European Commission*, judgment of the Court of 14 October 2010., [2010] ECR I-09555., para 91.

¹³⁵ *Ibid.* at para 91.

¹³⁶ C-35/96, *CNSD* [1995] ECR I-2883, para 53–54.

CNSD were not appointed by the government, and they were not obliged to take the public interest into account.

Nowadays, the Commission prefers to challenge anti-competitive state regulation on the basis of the four freedoms, especially the free movement of goods and the free provision of services, or, under Article 37 TFEU regulating commercial state monopolies. Most of the European case law on anti-competitive state practices arose on the basis of competitor challenges before national courts. In the 1980's the Commission adopted a number of decisions addressing monopolies in the telecommunication and postal sectors but it has yet to establish a consistent enforcement policy. We can claim that the European *effet utile* rule is stricter than the U.S. state action doctrine in as much as it does not allow member states to create cartel-like arrangements and justify them by invoking important public interests going beyond competition policy. The consequence would be a broader liability for companies engaging in anti-competitive activities under the public umbrella. However, we should add that other TFEU provisions relating to the free movement rules can more easily be invoked against anti-competitive state actions without the need to prove the link with an Article 101 TFEU-like cartel. These provisions do allow for a public interest defense taking into account other interests than undistorted free competition.¹³⁷ With that, more state interventions could be justified, so the room for legitimate anti-competitive behavior by undertakings may not be as narrow as if we considered only the competition rules of the Treaty.

The European internal market rules have a broader reach than the U.S. equivalent 'dormant commerce clause' since the EU rules also include non-discriminatory state measures. Article 1, Section 8 of the U.S. Constitution gives Congress the power to "*regulate Commerce [...] among the several States*". The U.S. Supreme Court interpreted the Commerce Clause as depriving states of the power to impede interstate commerce and that interpretation is known as the Dormant Commerce Clause. The Dormant Commerce Clause has been applied against discriminatory state measures and indirectly provides more room for U.S. states to legalize anti-competitive market effects.

5. Conclusion

The *Midcal* test is a "rigorous" one that ensure[s] that private parties [can] claim state-action immunity from Sherman Act liability only when their anticompetitive

¹³⁷ This relationship between competition and free movement rules is also emphasized by Damien Gerard, who suggests that the legality of assessing the legality of state measures limiting competition should be assessed under the internal market rules instead of the ill-equipped competition rules. GERARD *op. cit.* One remark I would like to add is that this indeed seems to be the policy of the EU Commission. However, the Court has less freedom to make this policy choice since its jurisprudence is largely driven by the questions posed by national courts. If the national litigation is centered around competition rules, the Court has some difficulty in orienting national judges towards internal market rules.

acts [are] truly the product of state regulation.¹³⁸ The *Parker* test is different in the sense that it looks at the existence of a clearly established and supervised state policy and does not inquire whether entities subject to the regulation had any realistic chance to deviate from the state policy. In the EU, EU antitrust rules continue to apply when the government only supports an agreement interfering with the free play of competition.

Another important difference between the European and U.S. perspectives, also noted by the Antitrust Modernization Commission,¹³⁹ is that the state action doctrine applies regardless of the effects the state measure may have in other states. For example, in *Parker v. Brown* the vast majority of consumers who paid higher prices for raisins because of California's regulatory scheme were outside the state since most of the raisins were sold outside of California, Internalizing the positive effects and exporting the negatives one is a typical result of protectionist state regulation. Avoiding this spillover effect is central to how EU law perceives this issue.

Due to the different conceptual settings of the two approaches, U.S. state action doctrine does not automatically apply if a municipality is the actor, unlike EU case law. It must be proven that the actions of the municipality reflect state policy.¹⁴⁰ This is not the situation in the EU where measures adopted by local governments are treated the same way as measures of the state.

Under the second prong of the U.S. test, the state must actively supervise the action of private entities. Passive supervision does not suffice. In contrast, EU courts do not inquire how intensively public officials control the activity of undertakings when it comes to approval of a previous anti-competitive agreement. The second prong of the U.S. state action test is more demanding, whereas the first prong allows for much more leeway by not requesting autonomy erasing compulsion by the state. In sum, it is difficult to judge which approach is stricter. U.S. law provides immunity for firms that were not compelled by the state to act in an anti-competitive manner so long as the state actively supervises their activity. The same situation would constitute an infringement of EU law.

In the EU, the internal market principle and the commandment of free, undistorted competition play a central role in uniting 28 different countries. In the U.S., the 50 states share a common history born in wars and united by strong common interests that are expressed in strong federal foreign, defense, monetary and fiscal policies, all of which are missing in Europe. Perhaps that is one of the reasons why European integration is much more sensitive to state imposed competition restrictions and stricter conditions on member states with an indirect impact on businesses are imposed.¹⁴¹

¹³⁸ *Patrick v. Burget*, 486 U.S. 94, 100 (1988).

¹³⁹ *Ibid.* at 374.

¹⁴⁰ *City of Lafayette v. La. Power & Light Co.*, 435 U.S. at 412–413. (1978).

¹⁴¹ Another reason is that in Europe, state owned undertakings, even monopolies have played and still play a more decisive influence in the economy as in the U.S.

One area that European law could learn from the U.S. jurisprudence is to give more importance to the ex-post control of the government on anti-competitive, state authorized competition restrictions. The test applied by the ECJ is more formalistic than that of the U.S. Supreme Court. Greater ex-post control would lead to the illegality of some state measures and vanishing of the shield protecting business from antitrust rules as a result. U.S. case law, unlike its European counterpart, does not draw a bright line between state measures mandating or simply encouraging anti-competitive conduct. The autonomous decision making doctrine of the ECJ is clearly well established from a conceptual perspective. Practically, however, it does not really matter whether the state's action is to be classified as mandatory or suggestive given the enormous pressure government entities can exert on individuals or corporations. Loyal entities may even be expected to guess and act according to the will of the state.

A crucial question is, to what extent can the state measure relating to an otherwise cartel-like private arrangement genuinely protect public interest? Under certain circumstances, other public policy interests, like safety, consumer or environment protection, may legitimize the restriction of economic freedom. In other situations, the reference to 'other public policies' covers nothing more than the particular interests of a group of market players.

Judge Kennedy's *North Carolina Dental Examiners* opinion recalled that although federal antitrust law is a central safeguard for free market structures, there are other values regulated by the state at the expense of the Sherman Act. State-action immunity exists to avoid conflicts between state sovereignty and the national commitment to robust competition policies.¹⁴² The Court quoted *Ticor* warning that the immunity is not unbounded, "[g]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, "state action immunity is disfavored, much as are repeals by implication."¹⁴³ This comes close to acknowledging the supreme nature of free markets and competition. Exceptions to the competition principle should be clearly expressed.

I believe that free and undistorted competition is key to our human flourishing and the performance of our economies. Yet, competition is not all-mighty. There can be various reasons why it does not function properly, and why the side effects of rivalry call for state intervention. The ultimate question comes easily, but is difficult to answer, to what extent do we trust the state when it regulates markets? The problem is much more complex than the existence of corruption. Lack of information about real and future market circumstances and the lobbying efforts of strong players can easily distort public decisions. I believe that a narrowly construed antitrust immunity for state action can help to properly answer these questions.

¹⁴² Ibid. 6–7.

¹⁴³ Ibid. 636.