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Editorial - Current Competition Law Research: Developing New Themes between Continuity and Change

Arianna Andreangeli[*]

The last ten years have witnessed significant development of competition law in Europe as well as further afield: from the Modernisation reforms in the EU, to the adoption of groundbreaking decisions in the US federal courts, such as *Trinko* and *Leegin*,[1] and numerous significant changes have taken place to respond to the challenges posed by an increasingly globalised economy. In addition, the appearance of 'new actors', like the so-called 'emerging economies' in Asia and Latin America, and the occurrence of sometimes unpredictable events have required the existing competition law tools to adapt and respond, often relatively quickly, to new challenges and questions.

However, it is unclear to what extent these reactions to the 'new' actually results in significant change: on the one hand, it is beyond doubt that various factors, notably: the economic crisis, the growing importance gained by states which up to just a few years ago were considered to be developing countries in need of financial assistance, and the changing face of important economic sectors as well as of institutional frameworks have questioned much of the 'established wisdom' which had inspired the evolution of the competition rules and approaches. On the other hand, however, it appears that the competent agencies, including the courts, have often resorted to existing tools and approaches as a means to framing their responses to these new challenges, if necessary by adapting these tools to the changing circumstances.

The papers published in this special issue, aptly devoted to exploring the 'current trends' of competition law research can be seen as mirroring this tension between the 'old' and the 'new' and as reflecting how, in the search for innovative responses to the current challenges the competent authorities often tend to rely on 'tried and tested' approaches and principles. The paper by Bhawna Gulati embodies this trend, in as much as it seeks to examine a 'classic' and widely debated topic, i.e. the implications of resale price maintenance agreements for competition. Her objective is to investigate the reasons why these arrangements have been outlawed in numerous legal systems, including the EU and India and to suggest recommendations as to the possibility of introducing an alternative, more lenient perhaps, legal treatment for these arrangements.

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[*] Lecturer in Competition Law, Edinburgh Law School, University of Edinburgh. Heartfelt thanks are owed to Prof Barry Rodger, University of Strathclyde, for his feedback on an earlier version of this Editorial. The usual disclaimer applies.

[1] *Verizon Telecommunications Inc v Legal Offices of Curtis V Trinko LLP*, 540 US 398; *Leegin Creative Leather Products, Inc., v. PSKS, Inc.,* 127 S.Ct. 2705 (2007).

Although it could have been tempting to address such an emotive topic in an equally emotive manner, Gulati succeeds in providing us with a very 'cold-minded' and exacting appraisal of the arguments for and against resale price maintenance and places this assessment against the wider background of the rules adopted by a number of jurisdictions to respond to the possible competition objections arising from these arrangements. She argues that condemning RPM clauses is the outcome of a 'wrongly founded and premised' argument which seeks purportedly to protect intra-brand competition in the belief that it will serve consumer welfare. Her analysis, instead, shows that these arrangements can be, and often are, welfare-enhancing, in as much as they 'motivate retailers to provide sector specific services' that can be financed via relatively higher prices and also encourage suppliers to keep investing in research and innovation. Gulati convincingly suggests that for competition law to deliver, ultimately, on its purported objectives of economic efficiency and of consumer welfare, rivalry should not be reduced to a 'price war'. She expresses the view that 'if consumer welfare requires a deviation from price competition, the competition law and policy should not hesitate to allow for such a deviation'.

The paper by Marek Martyniszyn constitutes another example of this ongoing tension between 'old' and 'new'. The author tackles another 'classic' competition law topic, i.e. the concept and implications of the state compulsion defence to prima facie anti-competitive behaviour, in light of US antitrust law and the EU competition rules. He argues that in a fast-paced, globalised economy the predictability of the applicable standards in these cases would be highly desirable, to ensure greater legal certainty in the legal assessment of prima facie anti-competitive, yet 'defensible' practices. However, drawing from his assessment of recent decisions concerning the applicability of the defence to Chinese export cartels in the US, he expresses the view that the current rules are not entirely appropriate to deal with the still largely unknown legal consequences of foreign state compulsion on corporate actors.

In particular, Martyniszyn suggests that the requirement to prove compulsion is at present set too high to render this defence a 'reliable and workable tool' to respond to the challenges arising from the 'reactions' of individual states especially to the entry of foreign companies in their economies. He suggests that, unless a more flexible yet clearer set of principles is developed and more efficient international fora are established to deal with these cases, economic actors may be left relatively powerless against the action of public authorities, especially in the so-called BRIC states, designed to 'claw back' on their freedom to engage in commercial activities in emerging economies.

Andrea Gideon's contribution constitutes an insightful examination of an as yet relatively unexplored area, i.e. the implication of competition law and policy for higher education in the EU. As is well known, the ongoing trends in relation to the activities of academic research and of delivery of University education clearly lead in the direction of their increasing 'commodification', thus making this paper very topical and stimulating. Gideon reflects on the changing nature of University education from a 'public service'-type activity to an increasingly 'commercial' one, akin to the provision of services and argues that this progressive transformation is likely to make the rules on

free movement, state aid and competition more and more relevant for higher education providers. She also points out that while the 'public interest exception' contained in Article 106(2) TFEU is likely to provide a safe harbour for any prima facie 'restrictive practices' arising from these activities (such as joint research activities), its scope remains relatively undefined, thus raising questions as to whether 'all constellations' in the 'HEI galaxy' will be exempted from the applicability of the competition rules.

In the second part of her paper Gideon provides an exhaustive and engaging discussion of the possible challenges for higher education provision arising from the applicability the EU competition rules. Drawing from domestic decisions adopted, inter alia, in the Netherlands and Germany, she discusses the likely consequences of the application of Article 101 TFEU, albeit to a more limited degree, Article 102 TFEU, the merger rules, and of Article 107 TFEU (state aid principles) to a number of practices. Thus, with respect to the charging of uniform fees and cooperation in research among HEIs, she argues that although the legal exception could be applied either individually or via Block Exemption Regulations to avoid the nullity of these arrangements, it would depend on the individual circumstances of each case whether a justification may be available. As to the applicability of the state aid rules, Gideon also points out that any form of public financial assistance given to Universities to conduct research may remain unlawful, even if it entailed the exclusive use of public infrastructures, if the HEI concerned did not rely on full economic costing to account for the use of this finance. Overall, Gideon's paper deals proficiently with increasingly important issues to which to date not very many convincing answers have been given: her contribution is extremely important and likely to be a trailblazer for more work in the future.

'Old' and 'new' coexist also in Alina Kaczorowska's contribution, another article which promises to stimulate debate on the general objectives of competition policy in the context of the creation of novel multilateral enforcement and institutional structures, such as those envisaged by the Caribbean Community (CARICOM) Treaty's provisions on the Single Market and Economy. Starting from the premise that a discussion of what objectives these new frameworks should seek to achieve is fundamental for the framing of a 'coherent body of substantive competition law', the author starts with a brief examination of the CARICOM's rules and overarching objectives and focuses on the position of competition policy in this context. Thereafter, she discusses in more detail the goals that this policy should seek to achieve as part of the realisation of a common Caribbean Single Market: Kaczorowska forcefully argues that this question should be answered by bearing in mind the specificity of the Caribbean States' economies and their social and political make-up. Thus, having regard to the text of Article 169 of the CARICOM Treaty, which lists the priorities of the competition policy regime envisaged for the Caribbean area, she illustrates how these objectives are left intentionally 'open' and 'flexible' and are therefore capable of embodying different meanings, especially as a result of the influence of diverse economic and political theories.

Kaczorowska is conscious that this relatively 'fluid' reading of the Treaty's objectives may be in some way detrimental to the coherence of competition policy; however, she argues that a degree of 'balancing' between economic goals, such as those of market

efficiency, and 'other objectives', such as, inter alia, the implementation of effective 'social, employment, industrial and trade policies', is indispensable for the attainment of the CARICOM's overarching aims. How in practice these goals should be secured and, especially how this 'balance' must be struck are the questions addressed by the latter part of this article: drawing from the examples offered by the case law of the Court of Justice of the EU, Kaczorowska examines the structure and the provisions of the Treaty and argues that the 'intentionally imprecise' goals enshrined in it should be ranked in a way that best serves the features of the economies of the Caribbean states. In this context, the creation of a common market across the Caribbean area and the protection of consumers should be prioritised.

Overall, the author concludes that while 'starting with a blank canvas' has clear advantages for policy makers, since it allows them to identify and prioritise the objectives that are most appropriate to the CARICOM members' interests, the drawing of these priorities should never occur without making reference to strong and transparent economic theories. Kaczorowska's article is extremely current since it represents perhaps the first opportunity for a European audience to become familiar with a new multilateral instrument for the creation of a single market, this time in the Caribbean area. At the same time, however, her contribution demonstrates that in new regimes just as in established ones, debate as to 'what competition law is for' and to what role economic concepts should play in its application remains central since it provides the background against which to frame legal rules that are appropriate to a specific institutional, political and economic context. Due to the novelty of the topic and to the state of infancy of the CARICOM Treaty, as well as to the growing importance of the Caribbean states, Kaczorowska's contribution is sure to inspire more discussion in the future.

The much awaited preliminary ruling in the *Murphy* case[2] constitutes perhaps the single most influential decision of the Court of Justice of the EU in 2011, due to the significance of the interests involved as well as of the importance of the issues at stake in the case. Although it would be tempting to define it as just 'one more case' on territorial exclusivity, to be assessed in light of Article 101 TFEU and of the rules on the free movement of services, it is beyond doubt that the ruling tackles more general questions affecting the very way in which the Treaty competition rules should be interpreted today. Stuart Pibworth's case note presents the reader with an agile analysis of the Court's decision and seeks to place it against the wider background of the case law concerning the distinction between infringements of Article 101 'by object' and 'by effect'.

Pibworth analyses the challenges arising from the application of established legal principles to TV broadcasting licenses and seeks to provide answers to the important practical questions arising from the ruling and relevant especially for broadcasters. He argues that the prohibition of arrangements such as the one in issue is, on the one hand, entirely consistent with established EU competition law principles, according to which any arrangements partitioning the single market along national boundaries, either

[2] Cases C-403 & 429/08 *Football Association Premier League v QC Leisure* [2011] ECR I-0.

directly or indirectly, represents a 'by object' infringement of Article 101 TFEU. On the other hand, however, he points out that this outcome may have unexpected consequences for TV broadcasters and their licensors (in this case, the English Football Premier League Association), who may have to reconsider their licensing practices and consider moving to 'pan-European' licenses.

Using a comparative approach, which draws from the US experience as well as from European jurisdictions, Pibworth questions whether upholding the goal of market integration 'at the expense' of other important considerations, such as the economic integrity of the intellectual property rights held by the licensors (such as the Premier League) still constitutes the 'right approach' in this area. He points out that holding an exclusive right to broadcast and to license the broadcasting of 'valuable content' (such as the live images of a football match) is not incompatible, according to the *Coditel* decision,[3] with the EU competition rules. Against this background, he questions the approach adopted by the Court on the ground that the latter did not examine in any depth if the *Coditel* 'exception' could 'salvage' the FAPL license. In addition, he seems to take exception to the lack of any detailed consideration of the question of whether the legal exception of Article 101(3) TFEU could be applicable to the arrangement.

More generally, Pibworth poses the question of whether attaining the common market objective is still an acceptable justification for 'trumping' other reasons, such as pursuing economic efficiency or protecting the right to exploit 'valuable' content, including TV broadcasts. He argues that, although the CJEU's conclusions were consistent with the applicable legal rules, they could have a potentially adverse effect on future licenses: although Pibworth rightly acknowledges that it would be open to individual licensors to stipulate 'pan-European' arrangements and in general to adapt their practices to the legal requirements spelled out in the judgment, he also argues that this may result in sports broadcasts being available to fewer customers. Overall, he suggests that the decision seems to overlook the 'real reason' for Mrs Murphy's behaviour, namely the considerable price differential existing among Member States and the apparent unwillingness of licensors to adapt their arrangements to make licenses more 'worthwhile' and therefore more attractive for individual licensees.

Seeking to provide a 'snapshot' of the state of play of the 'current research' in any area of the law is never easy and is even more challenging in a fast-paced field, such as competition law. Add to the 'ever-changing' nature of the subject the equally evolving state of the global economy, which is characterised by the emergence of 'new' states as new economic powerhouses as well as by the apparent stagnation, if not decline, of hitherto established world leaders and the picture blurs even more.

However, these papers highlight one of the key guiding trends in this fluid landscape, namely the coexistence of 'old' and 'new' and, consequently the temptation to apply established legal rules to novel economic phenomena as well as the desire to uphold 'cherished' values, such as market integration in the EU or consumer protection in

[3] Case 262/81 *Coditel SA v Cine-Vog Films* [1982] ECR 3381.

emerging 'free trade areas', such as CARICOM, above other equally important albeit perhaps more 'politically challenging' values and approaches.

Although they seek to deal with issues that appear to have little in common with one another, all these contributions share a common theme, namely how the existing trends and the current legal and economic approaches characterising competition enforcement can be applied to new phenomena—in other words, how 'new wine' can be put in 'old skins' while making sure that the latter do not 'burst' at the seams - and thereby lead to change which is more akin to evolution and growth than to 'dismantling' and revolution. Relying on a more 'economics-based approach' to the assessment of prima facie anti-competitive practices, reflecting on new, more imaginative ways on the possible goals that competition law and policy should pursue, for instance by relying more often and maybe more 'courageously' on the legal exception of Article 101(3) TFEU, while at the same time upholding established achievements and using them as a blueprint for new structures, are tools that may assist in solving the tensions arising from the path to change.

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Minimum Resale Price Maintenance Agreements - and the Dilemma Continues

Bhawna Gulati[*]

Economics, as an important tool of interpreting competition law principles gained momentum by the emergence of Chicago School economics in 1960-70's. It not only led to over-ruling of age-old established principles of competition law but elevated the 'efficiency' criterion as the chief decisive factor in evaluating anti-competitive effects of any conduct. The treatment accorded to vertical restraints underwent a major change during this phase and their ability to enhance consumer welfare started attracting appreciation. However, in spite of many countries (especially US) following this more liberalized approach towards vertical restraints, some countries continued to remain in dilemma and adopted strict penalization approach instead. The paper analyses one such case of vertical restraint—Minimum Resale Price Maintenance (RPM)—and inquires whether the strict penalization of such conduct by various countries is well deserved. The paper illustrates how EU, on one hand moved towards a 'more economic approach' by adoption of the guideline on the TFEU (Treaty on the Functioning of the European Union), but on the other hand retains its stand of treating some vertical restraints as hard core restraints without any exemption or exception available. RPM agreements are (and were) considered anti-competitive as it is an established position, both in law and economics, that they destroy 'intra-brand price competition'. This paper, however, proclaims that 'intra-brand price competition' at the distributor's level is neither required nor is welfare enhancing. Rather, the minimum RPM agreement actually fosters the real competition among retailers/distributors by shifting their focus from illusionary price competition to the competition based on 'services' (pre/post sale). The paper elucidates how, at times, the non-price competition can be more welfare enhancing than the price competition. The paper concludes that in case of some goods, 'Experience Goods' at least, minimum RPM can be welfare enhancing.

> 'A major source of objection to a free economy is precisely that it gives people what they want instead of what a particular group thinks they ought to want. Underlying most arguments against the free market is a lack of belief in freedom itself.'[1]

INTRODUCTION

The importance of applying economics in interpreting the principles entrenched in competition law has become inevitable in the last few decades. The emergence of the Chicago School of economics in the 1960s-70s led to jurisprudence which encouraged economics as the basic premise of antitrust decisions in the US. Quite interestingly,

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[1] Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), pp. 7-17.

during that period the US courts expressly overruled some of its earlier celebrated decisions where economics principles were thrown out of the courts in pursuit of achieving 'other' ends of antitrust law. One of the major reasons why economics was often ignored in competition law in the US and Europe until the 1970s was a belief that other goals, apart from economics, were more important. The goals that were considered more important were, among others, promoting and protecting small business, promoting competitive processes where everyone had a 'fair go', distributional goals, and promoting economic integration (especially in the EU).[2] It is reasonable and understandable that each jurisdiction adopts an optimum mix of regulation and competition after gauging its socio-economic growth and devises the best national competition policy to guarantee the best rights and lives to its citizens. Indian Competition Law[3] also strives to attain the basic economic objective of efficiency by blending it with distributive social objectives as has been laid down in the Directive Principles of State Policy (DPSP) of the Constitution of India. Article 39 of the Constitution specifically talks about ensuring social justice with economic growth and regulating concentration of economic power to the common detriment.[4]

This, however, becomes problematic when the assessment by the policy makers or the understanding of market functions is ill premised. Sometimes the pursuit of protecting consumers and over-regulating market forces does more harm than good. The advocates of free markets argue that these free market forces are capable of correcting almost all defaults which regulation seeks to cure. The concept of 'invisible hands' proposed by Adam Smith in his famous writings also re-enforced this view in following words:

> 'By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for society that it was no part of it. By pursuing his own interest [an individual] frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the [common] good.'[5]

The evolving literature on the Chicago School of economics provided the much awaited and desired momentum to the importance of economic principles in understanding the market behaviour. The Chicago School economists emphasized that whatever exists in the marketplace exists because it is efficient unless it has been put

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[2] Dr Robert Ian McEwin, Competition Law and Economics, power point series for class lectures.

[3] Indian Competition Act, 2002, available at http://cci.gov.in/images/media/competition_act/act2002.pdf?phpMyAdmin=QuqXb-8V2yTtoq617iR6-k2VA8d

[4] Amitabh Kumar, 'The Evolution of Competition Law in India', in Vinod Dhall (ed), *Competition Law Today—Concepts, Issues and the Law in Practice* (New Delhi: Oxford University Press, 2007), pp 480-81.

[5] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (London: Methuen and Co., Ltd., 1904. Edwin Cannan, ed. First published 1776).

there by government fiat.[6] They argued that allocative efficiency and consumer welfare should be the only goal of competition law and also believed that markets are self-correcting because chiselling erodes cartels, and entry erodes monopoly, quickly, unless the government intervenes to create barriers to entry and the expansion of fringe firms.[7]

The strongest legitimate explanation for the growing importance of economics in interpreting competition law, by most countries in the world, is its basic objective. Competition law seeks to govern ethical behaviour in the market where, ideally, producer of goods and services compete with each other. The primary economic rationale of competition law is efficiency creation that results in price reduction and thereby enhances consumer welfare. It is understood competition between the actors of production ensures that a firm has an incentive to find newer and better ways of reducing cost; otherwise, someone else will reduce their cost of production and take the market away from them. Therefore, this unending struggle between the competing producers ensures that prices of the products/services will not cross its justiciable limit. However, a general misconception regarding the role of 'price' in ensuring consumer welfare often drives the competition authorities to view every price fixation with a suspicious eye. Undoubtedly, a lower price leads to higher consumer welfare but price is not, and ideally should not, be the only criteria to measure and judge consumer welfare. There can be situations where some non-price factors, that might push the price a little above the competitive price but, result in higher consumer welfare. The author, in this paper, attempts to take up one such case where a control over the price of the product can be beneficial for all actors in the market - the producers, the consumers and the retailers.

The paper will analyse in detail minimum resale price maintenance agreements (a kind of vertical price restraint) and how they are held as anti-competitive in most parts of the world, both developed and developing. By gauging the prospective benefits of such agreements in ensuring consumer welfare against the prevailing subjugation; this paper will propose recommendations on this issue.

The dilemma of policy makers whether to penalize or legalize minimum resale price maintenance agreements is evident from the difference in approaches employed by different countries and also from the inconsistent approach followed by some countries over time.[8] 'Resale Price Maintenance (RPM) Agreements' are not just held to be anti-competitive but also treated to be illegal per se in many jurisdictions. It is an established position, both in law and economics, that RPMs destroy 'intra-brand price competition'. This paper basically proclaims that 'intra-brand price competition' at the distributor's level is neither required nor is welfare enhancing. Rather, the minimum

[6] FM Scherer, *Some Principles for Post-Chicago Antitrust Analysis, Antitrust: New Economy*, New Regime: Second Annual Symposium of the American Antitrust Institute, 52 Case W. Res. L. Rev. 5 (2001-2002).

[7] Ibid.

[8] US is a good example in this context where RPM was *per se* anticompetitive for as many as 96 years before it was held to be worthy of evaluation under the *rule of reason* approach.

RPM agreement actually fosters the real competition among retailers/dealers[9] by shifting their focus from illusionary price competition to competition based on 'services' (pre/post sale). The paper illustrates why minimum RPM is welfare enhancing and, therefore, needs a revisit for further consideration.

RESALE PRICE MAINTENANCE AGREEMENTS

A resale price maintenance (RPM)[10] agreement is a contract in which a manufacturer and a downstream distributor agree to a minimum or maximum price that the retailer will charge its customers.[11] This is often termed as a vertical price restraint as the manufacturer and downstream distributor are not operating at the same level of production cycle. Most jurisdictions treat such vertical price restraint as anti-competitive. Section 3(4) of the Indian Competition Act, 2002, enlists 'Resale Price Maintenance' agreement as a vertical anti-competitive agreement, though not subject to the 'shall presume' rule[12] which means that it is equivalent to the 'rule of reason' approach used in the US.[13] For decades, the position in US was not the same as it stands today. The venerable *Dr Miles Medical* case[14] condemned *per se* the resale price maintenance (RPM) agreements. Although, the *Dr Miles* decision was attacked by the *Colgate* Doctrine[15] and several legislative amendments,[16] the subsequent developments[17] reinstated the *Dr Miles* dicta as good law till 2007. It was only after *Leegin*[18] when the US Supreme Court reversed *Dr Miles* dicta and held that RPM is no longer condemned *per se* but is instead to be treated under the rule of reason.[19] However, the mass opprobrium to the *Leegin* decision speaks volume of the perception of legal practitioners and academicians regarding the effects of RPMs in destroying consumer

[9] Retailers and Dealers will be used interchangeably in this article and for the sake of simplicity intended to mean the same.

[10] For the purpose of this article RPM, wherever not mentioned specifically, will mean minimum retail price mechanism.

[11] KG Elzinga and DE Mills, 'The Economics of Resale Price Maintenance', in KG Elzinga & DE Mills (eds), *Issues In Competition Law And Policy* (3-Volume Set), ABA Section of Antitrust Law, 2008. Available at SSRN: http://ssrn.com/abstract=926072.

[12] The horizontal agreements like cartels, horizontal price arrangements, bid rigging etc. are presumed to be anti-competitive as per Sec 3(3) of the Indian Competition Act, 2002.

[13] Vinod Dhall, 'The Indian Competition Act, 2002' , in Vinod Dhall (ed.)*, Competition Law Today—Concepts, Issues and the Law in Practice* (New Delhi: Oxford University Press, 2007), pp. 509-511.

[14] *Dr. Miles Medical Co. v. John D. Park,* 220 U.S. 373 (1911).

[15] *United States v. Colgate Co.*, 250 U.S. 300 (1919). In that case the Supreme Court allowed the manufacturer to unilaterally suggest the RPM for it products and refuse to deal with suppliers/distributors that do not sell at the suggested price.

[16] In 1937 and 1953, the Miller-Tydings Act and McGuire Act were passed, entailing state exceptions for RPM agreements.

[17] The enactment of Consumer Goods Pricing Act in 1975 repealed the legislative enactments of 1937 and 1953 (Miller-Tydings Act and McGuire Act).

[18] *Leegin Creative Leather Products, Inc., v. PSKS, Inc.*, 127 S.Ct. 2705 (2007)

[19] Kenneth G. Elzinga and David E. Mills, 'Leegin and Procompetitive Resale Price Maintenance', (2010) 55(2) The Antitrust Bulletin pp 349.

welfare. Where on the one hand States like New York, New Jersey and California already have state antitrust laws that specifically ban RPM agreements, on the other hand there is the State of Maryland which passed a '*Leegin* repealer' (in 2009) that effectively reaffirmed the *per se* illegality rule against RPM under state antitrust law.[20]

Unlike the US, EU competition law consistently has considered RPMs as a hard core restriction. It almost comes across as an irony of policy decision where on one hand the guideline on the TFEU (Treaty on the Functioning of the European Union) envisages an analysis that reflects consumer welfare economics, connecting the concept of a 'restriction of competition' with (likely) price and output effects of a particular restraint, but on the other hand retains its stand of treating some vertical restraints as hard core restraints without any exemption or exception available. Surprisingly, despite the 'more economic approach', there is a condemnation of minimum RPM as a hardcore restriction. The courts and Commission in the EU have consistently opined that such agreements by definition restrict competition and, therefore, do not require further analysis to establish that they fall under Art 101(1) TFEU.[21] And since these agreements are hardcore restrictions, block exemption is not available. The 'New EU Vertical Restraint Regulations'[22] have further made it clear that resale price maintenance is a hardcore restriction and the exemptions and safe harbour provisions introduced in other vertical restraint agreements will not apply to vertical agreements that establish a fixed or minimum resale price. Therefore, strict rules against RPM were grandfathered, even while Europe moved toward a more consumer-welfare oriented competition regime.

The guidelines, however, avoid explaining how frequent the scenarios are in which RPM might have harmful effects compared to scenarios where the effects would be benign or procompetitive, and also conveniently ignores any attempt to quantify the harmful effects of RPM. It is arguable that the guidelines cannot rely on any case law experience that would support the proposed rules as no Commission or court decision appears to have ever included factual findings on the harmful effects of RPM.[23] This is because the EU law has always prohibited RPMs as hardcore restrictions without ever going into the question of their economic or commercial justification.

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[20] Lao, Marina L., 'Resale Price Maintenance: A Reassessment of its Competitive Harms and Benefits' (2009). To appear in Josef Drexl et al. (eds), *More Common Ground For International Competition Law?*, Edward Elgar, forthcoming. Available at SSRN: http://ssrn.com/abstract=1434984.

[21] Frederik Van Door, Resale Price Maintenance in EC Competition Law, Utrecht University School of Law (Master Thesis), July 2009.

[22] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ 2010 L 102, p. 1), replacing Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999, L336/21). The New Guidelines can be found at: http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf.

[23] Andreas P Reindl, 'Resale Price Maintenance and Article 101', (2011) 33(4) Fordham International Law Journal 1300.

The guidelines rather justify the categorization of RPM as a hardcore restriction in the block exemption regulation by stating that RPM leads to higher prices and therefore is presumably unlawful. This price justification provided in the guidelines is not only wrong in theory (because RPM may not always lead to a higher price),[24] but is also unsupported by case law. RPM in the EU competition law, resultantly, is presumed unlawful unless the RPM proponent shows the restriction is indispensable to promoting technical or economic progress or improving the production or distribution of goods, and that consumers receive a fair share of the resulting benefits under Art. 101(3).[25]

Canada and Australia[26] also impose a *per se* prohibition on resale price maintenance agreements.

A quick look on the legal provisions relating to RPM in various jurisdictions makes it clear that the confusion persists to cloud the legitimacy and acceptability of RPM as an efficiency enhancing tool. The dichotomy, if any, has existed primarily only to the extent of whether the RPMs be evaluated under '*per se*' or 'rule of reason' approach, thereby ruling out all possibilities of guarantying a safe legal status to RPMs as 'generally efficiency enhancing'. Singapore, commendably, differs in its approach while dealing with the vertical agreements. The Third Schedule very specifically states that the Section 34 prohibition shall not apply to any vertical agreement,[27] other than such vertical agreement as the Minister may by order specify. Singapore follows 'allowed unless specifically prohibited by order' approach as opposed to the 'prohibited'[28] or 'prohibited unless allowed because of efficiency consideration'[29] approach.

Having discussed the cross country approach on minimum RPMs, it will be interesting to analyse the arguments proffered by different competition authorities for taking up a hostile approach against the RPMs.

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[24] *Ibid.* at 1319.

[25] *Supra* note 22 at 17.

[26] In Australia, RPM agreements are per se illegal for both goods and services but can be authorized on public benefit grounds. In UK, though, the conduct must have 'appreciable effect' – implicitly requires some market power. Singapore also follows that direction because vertical restraints are not prohibited unless the abuse of dominant position can be proved. The probable explanation for such a stand is that rule of analysis is quite a costly exercise and lack of information to analyse any such agreement might lead to false positives and false negatives. Therefore, Singapore's competition authority finds it better to focus on whether firms with considerable market power can engage in successful exclusionary practices rather than proscribe vertical conduct.

[27] Section 34 of the Singapore's Competition Act prohibits anti-competitive agreements. See, Clause 4.1 of the CCS Guidelines on the Section 34 Prohibition, available at http://app.ccs.gov.sg/cms/user_documents/main/pdf/S34_Jul07FINAL.pdf. Also see Third Schedule to the Competition Act 2004 available at http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_legdisp.pl?actno=2004-ACT-46-N&doctitle=COMPETITION%20ACT%202004.

[28] '*Per se*' approach followed in Canada, Australia and EU.

[29] Rule of reason approach followed in US (after *Leegin's* case decided in 2007) and India.

The reason why resale price maintenance agreements have often been subjected to this strict evaluation is its ability to destroy the intra-brand price competition among the retailers. It is argued that by fixing the minimum floor price that can be charged to the ultimate consumer, it removes the possibility of a potential price reduction at the retailers' level. The prime reasons for adopting a hostile approach towards minimum RPMs is their ability to facilitate collusion upstream among producers or downstream among retailers. It is generally understood that price transparency (which is obvious in case of RPM agreements) can facilitate upstream collusion among manufacturers who might not otherwise be able to detect each other's cost of production and profit margins. Retailers can also act as enforcers under the RPM – informing manufacturers of potential breaches of the cartel. Research suggests this type of cartel enforcement is especially effective when there is an interlocking network of contracts between upstream manufacturers and downstream retailers.[30]

RPMs can be competition distortive or welfare diminishing particularly in two circumstances. In some cases, retailers may collectively (and collusively) induce the manufacturer to impose RPM agreements to prevent discount retailers from selling to the consumer. In yet another set of cases, the manufacturer might be a dominant player having enough power to set an unreasonably high minimum RPM. It is worthwhile to note that the two scenarios just explained - 'retailers colluding to induce the manufacturer to impose RPM' and 'manufacturing imposing RPMs because of its dominant position in the relevant market' can be dealt under horizontal agreements and abuse of dominant position, respectively. Because if the manufacturer imposes RPM pursuant to his own unilateral decision and he does not possess any dominant market power, he will be governed by the invisible hand of market forces which will govern his decision and which will stop him from fixing an unreasonable minimum RPM for his product. Each such manufacturer would like his product to be competitive in terms of price with that of the other competing brands available. That way the market forces and competition at the manufacturer level will keep the minimum RPM on the lower side.

It should also be noted that the argument that price competition at the retailers level ensure price competition among retailers, though seems to be a strong advocate of banning RPM, is flawed in its necessary assumption. The argument assumes that intra-brand price competition[31] at the retailers' level is welfare enhancing. The argument further assumes that such price competition is efficiency enhancing and required for consumer good. The next part of this paper goes on to explain how this assumption is deceptive and how intra-brand price competition diminishes consumer welfare and should, therefore, be discouraged.

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[30] OECD Policy Roundtables, 'Resale Price Maintenance', 2008, DAF/COMP(2008)37, available at http://www.oecd.org/dataoecd/35/7/1920261.pdf

[31] Intra-brand price competition is the competition among retailers for the price of the same product.

INTRA-BRAND PRICE COMPETITION: WHY RETAILERS SHOULD NOT COMPETE ON PRICE OF THE SAME PRODUCT?

Competition law aims at ensuring 'production efficiency'[32] and guaranteeing that a firm has the incentive to find newer and better ways of reducing cost. The European Commission stated that the purpose of competition law 'is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.[33] This makes it undoubtedly clear that the protection of competition is only a means to meet the 'greater end' which is 'Consumer Welfare Maximization'. Two important observations here - firstly, competition law seeks to protect competition and not only 'price' competition and secondly, as long as the protection of competition is not leading to welfare maximization, there should be a room for deviation.

Production efficiency occurs when the firms seek to achieve the goal of producing goods at the minimum possible cost of production and they have an incentive to find newer ways to reduce costs as much as possible to earn maximum possible profits.[34] It is incontestable that manufacturers' sales and profits are inversely related to the price of the product,[35] i.e. lower the price at which the distributors resell the products to the consumers, the greater will be the demand for the product and the profits will be higher accordingly.[36] Therefore, the manufacturer's desire to eliminate the intra brand price competition by imposing a minimum RPM cannot be said to be without any purpose. Lester G Telser,[37] has beautifully explained why a manufacturer is motivated to impose minimum resale price when 'he' himself[38] will benefit the most if the price of the product is kept at a minimum.[39] This raises an important question—what is the role of retailers in the process of production of goods and why would the manufacturer want to regulate the retailers' activities?

Certainly, the retailer is not contributing towards the production of the goods in literal sense of the words. He comes into picture only when the goods are produced and are ready to be transferred to the final consumer through the commercial process.[40] The retailer is actually a producer of services (distribution) and facilitates the sale of goods produced by the manufacturer. However, in the absence of RPM, the retailer (who is

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[32] Also 'allocative efficiency and 'dynamic efficiency.

[33] Asian Development Bank Toolkit, Economic Foundations of Competition Law, available at http:/www.adb.org/Documents/others/OGC_Toolkits/Competition-Law/documents/Chap1.pdf.

[34] Ibid.

[35] For the purpose of this article, monopoly market model has not been considered; otherwise the results of situations considered will lead to variant consequences.

[36] Lester G Telser, 'Why Should Manufacturers Want Fair Trade?', (1960), Journal of Law and Economics, 86.

[37] An American Economist and Professor Emeritus in Economics at the University of Chicago.

[38] 'He', wherever used in this article, is intended to be a gender neutral term implying 'he/she'.

[39] *Supra* n 36.

[40] For the sake of simplicity the distributor is presumed to be the only linking pin between producer and final consumer, all other middlemen or multiple distributors are ignored.

not contributing in the production process as such but is only selling the product which is produced by the manufacturer) is competing on the price of the product when essentially he has no control over its cost of production at the manufacturer's level. So the reduction in price, at the retailer's level, which reaches the consumer is not because the retailer has become efficient or because the goods are procured at a lower cost, but because he has cut down on the services he was offering before. Although this might make the product more attractive in terms of price, it takes away the services which the consumer finds useful and for which the consumer is willing to pay.

The Chicago School[41] of thought rightly highlights that discounted dealers, who appear to benefit the consumer in the short run by providing products at cheaper prices, are in fact renegade free riders[42] who, if they remain unchecked, will destroy the manufacturer's place in the inter-brand market and ultimately decrease consumer choices.[43] Therefore, the prohibition on the minimum RPM under the competition law not only harms the manufacturers but also the consumers.[44] Telser, in 1960, provided the possible justification for imposing minimum resale price mechanism by emphasizing on the free riding problem. Telser argued that 'no frills distributors might 'free ride' on the promotional efforts of full service distributors, thereby undermining the incentives of full service dealers to expend resources on promotion.'[45] Thus, each person has an inducement to obligate others to bear the cost of providing pre-sale services and not personally contribute. The free rider problem occurs because one does not have an incentive to account for the global benefits of a private act.[46] In the absence of an RPM agreement, the motivation to provide pre-sale services, if not altogether missing, will be extremely minimal. If the retailers choose to provide pre-sale service like expert pre-sale assistance on the product information, trial usage of the product etc, the cost of such service will increase the cost of the product. This will make it difficult for such retailers (those who are providing pre-sale services) to provide heavy discounts to consumers. They cannot sell the product below the cost they are incurring on procurement and presale services, except at a loss. The problem arises when some retailers provide and some do not provide the important product specific pre-sale services. In such a scenario, the cost of the same product will be different for the two sets of retailers - for those providing pre-sale services and for those not providing pre-sale services. The consumer can go to the former retailer, see the product and avail all the pre-sale services which are free of cost and buy the product from the

41 See generally, Richard A. Posner, 'The Chicago School of Antitrust Analysis', (1979), 127(4) University of Pennsylvania Law Review, 925.

42 Free Rider is a situation commonly arising in public goods context in which players may benefit from the actions of others without contributing (they may free ride).

43 Jean Wegman Burns, 'Challenging the Chicago School on Vertical Restraints', (2006), Utah Law Review, 913, available at http://privateweb.law.utah.edu/_webfiles/ULRarticles/69/69.pdf.

44 This is explained in the later part of the paper.

45 *Supra* n 36.

46 Shor, Mikhael, 'Free Rider', Dictionary of Game Theory Terms, Game Theory.net, http://www.gametheory.net/dictionary/FreeRiderProblem.html, Web accessed: 24 September, 2010.

latter retailer at a discounted price. The latter retailer can give heavy discount because he is not incurring any cost on providing pre-sale services. Minimum RPM can solve this free riding problem by making retail prices uniform, so that customers no longer have a reason to shop from one store and buy from another. Apart from dealing with the free rider problem, the minimum RPM also has another added advantage. It shifts the focus of the retailers from intra-brand price competition to intra-brand non-price competition. With no possibility to compete with each other on the basis of price, retailers that operate under RPM conditions will focus on non-price factors, i.e., services.[47]

It might be argued in some instances that consumers do not require pre-sale services and, therefore, should not be charged for it. However, the problem arises in the cases where consumer needs some pre-sale services before making an informed decision for buying a product. This is true at least in case of some goods.[48] The kind of product market a consumer is facing today, presenting a wide array of differentiated products with specialized features and functions of every product, information regarding the functions and usage of the particular product becomes very important. A consumer buying an automobile will like to have a test drive and a consumer buying cosmetics will like to have a free application test. There are various other product categories falling in this category, namely perfumes, electronic items, mobile phones etc. In such product markets, demand is the function of product features and quality as well as the price of the product.[49] Therefore, to know those product specific features, consumers need pre-sale services. But the problem is that, in the absence of minimum RPM, the retailers compete with each other on the price at which they offer the products to the final consumer. In the effort of attracting consumer, the retailers may bring down the price further and further to make 'their' product seemingly more economical. The dilemma here is that whether such a price war at the retailers' level is welfare maximizing and should it be allowed? Whether 'intra-brand price competition' should be motivated?

The author is of the opinion that such intra-brand price competition is not only illusory but is also welfare diminishing because it might disincentivise the full service retailer to offer the important retail services that he was offering before. It will not only adversely affect the manufacturer but also the consumer. On the one hand, the manufacturer will be harmed because the product will not be able to capture the demand (at least that part of the demand which is directly proportional to the pre-sale services) in the absence of pre-sale services. On the other hand, the consumer will make less informed choices and they might end up making a wrong decision, thereby resulting in

[47] *Supra* n 36.

[48] Here a distinction can be made between experience goods and search goods, as the latter will not require much of pre-sale service while the former will. An example of search good can be cotton, pencils, pens etc where consumer does not require much information or pre-sale service to make a right choice. This, however, is not the case with experience goods where the absence of pre-sale services can lead the consumer to make a wrong choice.

[49] *Supra* n 36.

diminished consumer welfare. However, by imposing minimum resale price restraint, a manufacturer can eliminate the unnecessary intra-brand price competition which in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers.[50]

This can be well explained with the help of an example. Suppose the manufacturer deals in product 'x' which is an experience[51] good e.g. a perfume. He sells the product to the retailers at a price of $100. It is quite obvious for a rational consumer to first experience such product (perfume) before making a decision whether to buy or not to buy the product. Assume that the cost to provide such pre-sale application test service is $5. Now consider the following two contrasting situations and their probable outcomes.

Scenario 1

RPM is illegal and therefore, not imposed: in the absence of RPM, the dealers can charge any price equal to or above $100. In the short run, some retailers might be willing to provide the pre-sale application test service but certainly most of them do not find it profitable to do so. As long as some of them are providing such services, the remaining retailers have enough incentive to free ride on them. The former cannot sell below $105, while the latter category of retailers can charge the price as low as $101 or may be even $100 to capture consumer demand. In order to avoid losses and to compete with the latter category of retailers, even the former will withdraw the pre-sale service. In the short run, free riding (as explained above) will take place and, in the long run, all retailers might stop providing pre-sale service. This mimic behaviour if not obvious, is very likely. The result will be two fold - the consumers will be bereft of necessary information to make an informed decision and the demand for manufacturers' product will be adversely affected. Now let us analyse the other situation.

Scenario 2

RPM is not illegal and therefore, is imposed: in the presence of minimum RPM imposed by the manufacturer (suppose $105 is the minimum resale price), the dealer cannot compete now on price as all will be selling at either $105 or above. In such a situation the only way they can capture consumer demand is by providing useful services. The margin of $5 is available with every dealer to utilize it as efficiently as possible. This will motivate the dealer to produce the services efficiently to bring down the cost of producing services and thereby increase his profit from that margin. It will not only take away the intra-brand price competition but also instigate intra-brand non-price competition, which is the required outcome.

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[50] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), available at http://scotusblog.files.wordpress.com/2007/06/06-480.pdf

[51] An experience good is a product or service where product characteristics such as quality or price are difficult to observe in advance, but these characteristics can be ascertained upon consumption. See Wikipedia at http://en.wikipedia.org/wiki/Experience_good

Some scholars argue that minimum RPM provides too much liberty to the manufacturer to impose the minimum price at which the product should be sold and thereby deprives the consumers of the benefits of price competition among retailers. This argument doesn't stand good, unless the manufacturer is a dominant player in the market and he is abusing his dominant position to dictate the product's price. And if that is the case, then there is an altogether different provision in competition law of all jurisdictions to deal with such a situation - abuse of a dominant position.[52]

It should be noted here that the minimum RPM of $105 cannot be an arbitrary figure because every manufacturer is incentivised to keep the price as low as possible. *Ceteris paribus,*[53] the minimum the price, the more will be the demand for his product. Therefore, the minimum resale price decided by the manufacturer will keep in consideration the optimum amount of pre-sale services required to build and maintain the demand for his particular product and the price of other competitive products in the market. Therefore inter-brand price competition will ensure that the manufacturer is not keeping the RPM towards the higher side to exploit the consumers. Inevitably, these opposite forces will keep a check on the minimum RPM fixed by the manufacturer.

SINGLE ECONOMIC ENTITY JUSTIFICATION

Another important justification for minimum RPM flows from the legal immunity endowed to vertical restraints such as RPM in case of 'single economic entities'. Subsidiaries may be independent legal entities but for the purpose of competition law, they are viewed as part of the parent company and are considered not to have any independent market power to guide their actions.[54] Therefore, any agreement between a parent company and a subsidiary company is immune from the clutches of competition law, as they are regarded as the single economic entity which cannot theoretically contract or collude with itself. Obviously, it is a question of fact, to be decided by the ruling court, whether the entities are part of the single economic entity or not but such difference of approach in dealing with 'agreement between manufacturer and retailer' formed between independent undertakings and those formed between related undertakings incentivizes the manufacturer to set up or acquire the vertical chain. Because that is the only way where he can impose minimum RPMs (for ensuring provision of pre-sale services and controlling free rider problem) and escape the competition authority's strictures. It is interesting to note that EU law does not apply the Art 101 TFEU prohibition to agreements between entities that form a single economic entity.[55] Also, in the US, the Act does not apply to action by people within a single enterprise. The Supreme Court has held that a parent and a fully-owned

[52] In the US, the term used for this provision is 'monopolization'.

[53] Ceteris Paribus is a latin phrase that literally means 'others things being constant'

[54] D Chalmers, G Davies, G Monti, *European Union Law: Cases and Materials* (Cambridge University Press, 2010), pp 964-965.

[55] R Whish, *Competition Law* (Oxford University Press, New York, 2009), p 91.

subsidiary are not legally capable of conspiring in violation to the Sherman Act.[56] India also follows the similar approach as the definition of enterprise includes all entities forming part of the single economic entity.[57]

Considering the prevailing legal rules that allow the manufacturer to fix the price for the retailer, only when they are part of the same economic entity, it is clear that the manufacturer has huge incentive to own the distribution system and then impose minimum resale price. Such a situation has the tendency to destroy intra-brand competition, both price and non-price. If the manufacturer knows that he can regulate the behaviour of the retailer down in the chain by establishing holding-subsidiary relation or exclusive agency relation, he will aim at doing so. There are real examples of such strategic behaviour. In the EU, Parker Pen embarked on the same strategy and owned all its distributors and the Court of Justice held that it was not caught by Article 101, being a single economic entity.[58] The strategy was in response to an earlier decision[59] whereby the Court penalised Parker Pen for indulging in anti-competitive behaviour. In the long run, if every manufacturer thinks in similar fashion, the retailers who are not related to the upstream distributor will be thrown out of the market and there will be an unprecedented parallel distribution chains between every manufacturer-retailer (of one economic unit) competing with manufacturer-retailer (of other economic unit) and so on. This is a kind of exclusionary conduct that destroys intra-brand price and non-price competition between the retailers. It therefore, might be more welfare enhancing to allow the manufacturer to impose RPM. Anyways the 'Invisible hand'[60] of the competition law in the form of free unregulated market will correct the abuse, if any, intended by the market actors and will restore low prices and optimum output.

CONCLUSION

This paper highlights the discourse and developments in the treatment of retail price maintenance agreements in various parts of the world. The paper argues in favour of 'Resale Price Maintenance' agreements and explains how the myth of RPM being anti-competitive is wrongly founded and premised. The above analysis argues that minimum RPM agreements, though traditionally held to be anti-competitive, actually lead to higher consumer welfare. It is quite apparent that a ban on resale price maintenance agreements not only allows the burgeoning of illusory intra brand price competition

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[56] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), available at http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&court=US&case=/us/467/752.html.

[57] *See* Indian Competition Act, Section 2(h).

[58] D Chalmers, G Davies, G Monti, *European Union Law: Cases and Materials* (Cambridge University Press, 2010), pp 964-965.

[59] Commission Decision 92/426/EEC of 15 July 1992 relating to a proceeding under Article 85 of the EEC Treaty (Case IV/32.725 - *Viho/Parker Pen*), available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=392D0426&lg=en

[60] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (London: Methuen and Co., Ltd., 1904. Edwin Cannan, ed. First published 1776).

among the retailers but also demotivates the manufacturer to produce innovative products which can enhance consumer utility and surplus. Besides creating an artificial demand-supply mismatch in the market, it might also limit consumer choices, thereby prompting the consumer to take an ill informed decision which will further result in a welfare loss. By lifting the ban from minimum resale price maintenance agreements, the regulators can actually motivate the retailers to provide product specific services. Such services help in building the demand for certain products and are of vital value not only to the consumers but also to the manufacturer. The elimination of intra-brand price competition not only stimulates intra-brand non-price competition but also inspires inter-brand price competition. The paper in a way also elucidates a broader view - how price competition is not, and ideally should not, be the only aim of competition law. 'Competition is not an end in itself but a process that advances goals of economic well-being, ultimately for consumers'.[61] And if consumer welfare requires a deviation from price competition, the competition law and policy should not hesitate to allow such deviation.

[61] Sir John Vickers, the former Chairman of the Office of Fair Trading, *Competition is for Consumers*, a speech given to the Social Market Foundation, available at http://www.oft.gov.uk/shared_oft/speeches/spe0102.pdf.

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A Comparative Look at Foreign State Compulsion as a Defence in Antitrust Litigation

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This paper presents and investigates foreign state compulsion as a defence in transnational antitrust cases. It takes a comparative approach by looking at the doctrine and its developments in the United States and in the European Union. To illustrate the relevance of the defence and the difficulties of its applicability, this paper analyses the new antitrust case law emerging in the US involving Chinese export cartels. It is argued that at present the standard required to prove compulsion is too high to serve its function.

INTRODUCTION

Internationally varying levels of state involvement in economic affairs mark international trading. This poses multiple challenges for the global regulatory framework, especially in such fields as competition law, which are not formalised through binding agreements at the multilateral level. Competition laws and policies while being generally consistent and self-contained domestically or regionally (as in the case of the European Union), lack coherence internationally. One of the weaknesses unveils itself in transnational cases involving or implicating foreign states. Fundamentally, the issue of foreign state responsibility for anticompetitive conduct in such a context remains largely *terra incognita*. It is not well addressed within the WTO framework, while domestic institutions seem ill-equipped to deal with it.[1] From a more practical perspective, the availability of various state-related defences significantly limits the power of antitrust in such cases.[2]

Foreign state compulsion is one such state-related defence, or to better reflect their common effect: avoidance techniques.[3] It is a valid defence in antitrust cases,

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[*] Doctoral Student, Ad Astra Scholar, University College Dublin School of Law. This article is an edited part of a larger piece of research presented at the 18th CLaSF Workshop on 22 September 2011, drawing from M. Martyniszyn, 'Avoidance Techniques: State Related Defences in International Antitrust Cases' (CCP Working Paper No. 11-2, 2011). Thanks to Imelda Maher, Joseph McMahon, Spencer Weber Waller and the CLaSF Workshop participants for helpful comments. The usual disclaimer applies.

[1] See, for example, DD Sokol, 'Limiting Anti-Competitive Government Interventions that Benefit Special Interests', 17 Geo. Mason L. Rev. 119 (2009).

[2] For analysis of state-related defences available in antitrust litigation see M Martyniszyn, 'Avoidance Techniques: State Related Defences in International Antitrust Cases' (CCP Working Paper No. 11-2, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1782888; SW Waller, et al, *Special Defenses in International Antitrust Litigation* (ABA Antitrust Section, 1995).

[3] Fox used this term to refer to state immunity, act of state doctrine and non-justiciability. I argue that foreign state compulsion fits well into this category. Compare H Fox, 'International Law and Restraints on the Exercise of Jurisdiction by National Courts of States' in MD Evans (ed), *International Law* 363-65 (Oxford University Press, 2nd ed, 2006).

potentially fully removing liability from the party invoking it. Although widely recognised,[4] it is a rule of domestic law, not a principle of international law. Foreign state compulsion is usually treated as a *sui generis* defence, peculiar either to the international context or even to the antitrust area.[5] The rationale behind it is at least twofold and includes comity and fairness considerations.[6] Comity among nations calls for a domestic court to give due deference to the governmental (*de jure imperii*) acts of a foreign sovereign. Fairness requires not holding an entity liable for a conduct which it did not undertake of its own free will. Unfortunately that is where clarity ends. Despite the reasonably straightforward logic behind it, the foreign state compulsion doctrine remains a rather poorly defined legal tool, offering little predictability in terms of possible outcomes in both leading competition law regimes: the US and the EU. This is unsatisfactory especially as strong industrial policies and state regulation in economic affairs are not reminiscences of the past, but still a feature of important economies, for example in the BRIC states.[7]

This paper offers a new contribution to the extensive literature on the international aspects of competition laws. It aims to partly fill the existing gap by providing a comparative perspective on the issue of foreign state compulsion as a defence in antitrust cases in the US and in the EU. It also attempts to indicate the present contours of the defence, in light of the most recent and still emerging US case law, underlining the aspects of the doctrine requiring further consideration. This paper argues that at present the standard required to prove compulsion is set too high to make it a workable and reliable legal tool, serving its purpose.

Part I of this paper presents and explores the development of the defence in the US, a jurisdiction which led in extraterritorial application of antitrust laws and seems to have first recognized this defence. Part II presents US domestic state action, a defence available in intra-US antitrust cases involving an action of a US state. Despite similarities, both doctrines use different standards, with the former being much more narrowly framed and being often criticised. In Part III this article analyses foreign state compulsion as a defence in the EU regime: the state action doctrine. Part IV looks at the recently emerging case law involving the issue of foreign state compulsion in the US. The conclusions suggest that the standard required to prove foreign state compulsion is set too high. An approach more in line with the US domestic state action

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4 For example in the US, EU, Japan, Australia, New Zealand. *Compare* C. Noonan, *The Emerging Principles of International Competition Law* 335-37 (Oxford University Press, 2008).

5 Waller, et al, see supra note 2, at 78.

6 Compare Waller, *Antitrust and American Business Abroad* § 8:22 (West Group, 3rd ed, 1997-2010); The Department of Justice, The Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations (1995), 68 Antitrust & Trade Reg. Rep. (BNA) No. 1707, § 3.32.

7 BRIC is an acronym referring to the dynamically developing economies of Brazil, Russia, India and China. It seems to have been introduced by O'Neill, who underscored the growing importance of BRIC in the world economy. Compare J O'Neill, 'Building Better Global Economic BRICs' (Goldman Sachs Global Economics Paper No. 66, 2001), available at http://www2.goldmansachs.com/our-thinking/brics/brics-reports-pdfs/build-better-brics.pdf.

doctrine would serve the issue of predictability better. It would also create incentives to look for an international forum better fitted to address such concerns.

1. FOREIGN SOVEREIGN COMPULSION IN THE UNITED STATES

The foreign sovereign compulsion doctrine is recognized in the US as a defence on the merits in antitrust litigation. Private firms compelled by a foreign government may be relieved from liability for their anticompetitive conduct. The Supreme Court acknowledged, without further deliberations, its existence in *Hardford Fire*, referring to it as a 'true conflict'.[8] Despite rather broad recognition of this principle by the courts, *Texaco Maracaibo*[9] decided in 1970 remains the only case where reliance on it was successful. The US authorities recognized foreign sovereign compulsion as a self-standing legal defence only in 1988.[10]

Texaco Maracaibo dealt with an alleged concerted boycott by companies exploring for and extracting crude oil in Venezuela, who refused to sell to the plaintiff, whose business was based on those deliveries. When the supplies stopped despite numerous efforts of the plaintiff, he brought the action for treble damages for violation of US antitrust law (on a refusal to deal basis). The defendants claimed that the decision to stop supplies was not autonomous, but forced by the Venezuelan government who forbade them to deal with the plaintiffs. They did not deny the refusal to deal, or the fact of damages. The court found in favour of defendants.

The business of oil extraction by foreign companies was tightly-regulated in Venezuela. A special office (the Coordinating Commission) laid down rules regarding the sale of the extracted oil and supervised all the concessionaires. The sanctions for non-compliance were severe, including a suspension of the right to export the oil. The Commission instructed the defendants by phone that no further deliveries were to reach the plaintiff, who was subsequently duly notified about the situation by the defendants.[11]

The court held that the defendants were compelled by the authorities to boycott the plaintiff. More generally, it held that compulsion is a complete defence to an antitrust action.[12] It considered its form irrelevant. In the instant case there was no special legislation, or written order. The fact of compulsion was established on the basis of an informal oral instruction.[13] Moreover, responding to the argument that in cases of

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[8] *Hardford Fire Insurance Co.* v *California*, 509 U.S. 764, 798 (1993). For different ways of interpreting this statement see Waller, et al, see supra note 2, at 84-85.

[9] *Interamerican Refining Corp.* v *Texaco Maracaibo, Inc.* (Texaco Maracaibo), 307 F. Supp. 1291 (D. Del. 1970).

[10] The Department of Justice, Antitrust Enforcement Guidelines for International Operations (1988), 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391, § 6. Compare 'Report: Analysis of Department of Justice Guidelines- International Operations- Antitrust Enforcement Policy', 57 Antitrust L. J. 957, 966 (1988).

[11] Texaco Maracaibo, see supra note 9, at 1294-95.

[12] Id. at 1296.

[13] Id. at 1295-96.

compulsion, the compelling acts must be valid under the law of the country involved, the court referring to the act of state doctrine and *Sabbatino*, held that validity is not to be investigated.[14] It should be also pointed out that in *Texaco Maracaibo* the reliance on the foreign sovereign compulsion doctrine was upheld by the court without territorial limitation. The defence was recognised despite the fact that Venezuelan authorities compelled the defendants not to deal in the US. This issue was not even raised in the case.

The recognition of foreign sovereign compulsion as a defence can be traced back to the much earlier *Sisal* case,[15] dealing with the monopolization of the sisal imports from Mexico. In this case the court held that when a private party solicited the government to enact the legislation that led to the private anticompetitive acts, foreign sovereign compulsion as a defence does not apply. The compulsion was given further recognition in *Swiss Watchmakers*,[16] where the court acknowledged that the compulsion would remove liability from the compelled companies.[17] The case dealt with state-approved and state-facilitated regulation of the watch-making industry, which aimed at keeping the know-how, machinery and watch parts in Switzerland, so as to protect the Swiss watch industry from potential competition. Although the regulation was recognised and approved by the government, it was still considered a private agreement, subject to the 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. The issue of state engagement was further clarified in *Mannington*,[18] where it was held that the party asserting the defence must prove that the foreign state's involvement was more than merely peripheral to the anticompetitive conduct involved. Therefore simple approval of the state does not meet the threshold necessary for the doctrine to apply. Moreover, the defence was considered not applicable if the defendant could have legally refused the state's wishes.[19]

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[14] Id. at 1299.

[15] *United States* v *Sisal Sales Corporation* (Sisal), 274 U.S. 268 (1927). Later *Sisal* was referred to in *Continental Ore* where American and Canadian companies were accused of monopolizing trade in vanadium. In this case a particular company was appointed by the Canadian authority as the exclusive agent responsible for vanadium for Canadian industry in wartime. It helped the main defendant by refusing to buy from the plaintiff. The defendants claimed that they should be released from liability as they acted pursuant to the orders of the government agency. In this respect the court relied on the *Sisal* authority and noted that a company violating antitrust rules may be held liable for its conduct, even if aided by the foreign government. In the instant case, the court found no evidence indicating that the government agency approved or would have approved of the efforts to monopolize the market. *See Continental Ore Co.* v *Untion Carbon & Carbide Corp.* (Continental Ore), 370 U.S. 690, 705-07 (1962).

[16] *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).

[17] 'If, of course, the defendants' activities had been required by Swiss law, this court could indeed do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation.' id. at XLVI.

[18] *Mannington Mills, Inc.* v *Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979).

[19] Id. at 1293. It is worth pointing out that the defence was also recognized in various consent decrees and judgments settling government cases. For example in *GE Incandescent Lamp* it was established that the foreign

A major policy consideration underlying the compulsion defence is one of fairness to the defendant. The other rationale usually provided in this respect is the comity consideration.[20] Fairness requires allowing the defendants to justify or excuse the compelled conduct, whereas comity helps determine whether the conduct is justified, excused or rather subject to the full range of sanctions, depending on the context.[21] Moreover, apart from those two principal considerations further grounds are suggested, among them the analogy to the domestic state action doctrine,[22] which is important.[23]

The US Third Restatement of Foreign Relations Law addresses the issue of the foreign sovereign compulsion in section 441.[24] Contrary to the court in *Texaco Maracaibo* it generally recognises the defence only when the compulsion was 'embodied in binding laws or regulations subject to penal or other severe sanctions'.[25] It is explicitly acknowledged that the defence is not available when the state's orders are given in the form of guidance, informal communications, or the like. It is fair to conclude that the Restatement would not allow recognising compulsion in a case factually similar to *Texaco Maracaibo*, thus limiting its general availability. Moreover, the real threat of penal or other 'severe sanctions' is crucial and the danger of termination of the business, by revocation of the necessary license, is provided as an example thereof. The loss of future opportunities does not meet the standard.[26] In the case of contradictory commands of two states, preference is given to the law of the state where the act is to

defendant would not be in contempt of the judgment for doing anything outside the US which was required by, or for not doing anything outside the US which was unlawful under the laws where he was incorporated or doing business. *United States* v *General Electric Co.* (GE Incandescent Lamp), 115 F.Supp. 835, 878 (D.N.J. 1953). In the *Oil Cartel* case it was provided that not only the conduct required by foreign law would be exempt, but also conduct pursuant to 'request or official pronouncement of policy' of the foreign state (subject to 'the risk of present or future loss of the particular business in the foreign state). *United States* v *Standard Oil Co.* (N.J.), 1969 Trade Cas. (CCH) P72,742, 72,743 (S.D.N.Y. 1968). *Compare* Waller, et al.., see supra note 2, at 95-96; W.L. Fugate, *Foreign Commerce and Antitrust Laws* § 3.19 (Aspen Publishers, 5th ed, 1997).

20 Waller, et al, see supra note 2, at 79; 1995 Antitrust Enforcement Guidelines for International Operations, see supra note 6, at 3.32; B.E. Hawk, 'Special Defenses and Issues, Including Subject Matter Jurisdiction, Act of State Doctrine, Foreign Government Compulson and Sovereign Immunity', 50 Antitrust L. J. 562, 571 (1981).

21 Waller, et al, see supra note 2, at 81.

22 Id. at 79.

23 See infra Part 2, at p 151. Some scholars claim that recognizing the fairness rationale of the foreign state compulsion implies finding its origin in the state action doctrine. See J Leidig, 'The Uncertain Status of the Defense of Foreign Sovereign Compulsion: Two Proposals for Change', 31 Va. J. Int'l L. 321, 328 (1991).

24 American Law Institute, Restatement of the Law (Third): Foreign Relations Law of the United States § 441 (American Law Institute Publishers, 1987):
(1) In general, a state may not require a person (a) to do an act in another state that is prohibited by the law of that state or by the law of the state of which he is a national; or (b) to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.
(2) In general, a state may require a person of foreign nationality (a) to do an act in that state even if it is prohibited by the law of the state of which he is a national; or (b) to refrain from doing an act in that state even if it is required by the law of the state of which he is a national.

25 Id. at § 441 cmt. c.

26 Id. at § 441 cmt. c, n. 3.

be performed.[27] At the same time, in cases where the conduct at stake has direct effects in both the territorial state and the state of nationality, the preference is not as strong.[28]

Similar to the Restatement,[29] the 1995 Antitrust Enforcement Guidelines of the DOJ and FTC[30] consider the threat of penal or other severe sanctions indispensable for the applicability of the compulsion defence. The issue of the form of compulsion is not discussed, therefore it may be that informal pressure suffices. However measures short of compulsion will not be able to fall within the scope of the defence.[31] No strict limits are recognised with respect to territorial reach of the doctrine, nevertheless it is clarified that the defence is available 'normally only' in cases, where the compelled conduct was accomplished 'entirely' within the compelling state's territory.[32] It is pointed out that in cases, where the conduct occurs in the US, the defence is not available. The Guidelines also clarify that the defence does not apply in cases falling within the Foreign State Immunities Act's commercial activity exception.[33] Therefore, it is considered that the defence is not applicable to the commercial dealings of a state.

As Crampton[34] points out the Guidelines narrowed down the applicability of the doctrine in comparison with the Guidelines issued in 1988.[35] The older document did not talk about sanctions but 'the imposition of significant penalties or to the denial of specific substantial benefits'.[36] Moreover, the 1988 Guidelines noted that the defence will not be *generally* available if the conduct took place wholly or primarily in the US.[37]

The compulsion defence is weakened when so-called blocking statutes are involved,[38] i.e. legislation prohibiting providing foreign authorities with documents and information, subject to sanctions, when this would impair home state essential

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27 Id. at § 441 cmt. a.

28 Id. at § 441 cmt. b.

29 Comparing these documents one should keep in mind that the Restatements, however extremely influential in practice, are the effect of a private codification of law in particular fields (*de lege lata*) undertaken by the American Law Institute, whereas the DOJ and FTC Guidelines express the view of the government agencies on the matter. For more on the Restatements see http://www.ali.org/index.cfm?fuseaction=projects.main.

30 1995 Antitrust Enforcement Guidelines for International Operations, see supra note 6, at § 3.32, 2.

31 Id.

32 Id. at § 3.32, 3.

33 Id. Compare Waller, see supra note 6, at § 8:25.

34 PS Crampton, 'The 1995 US Antitrust Enforcement Guidelines for International Operations: A Foreign Perspective', 1 IBLJ 99, 103-04 (1996). For analysis of the 1988 Guidelines see 'Report: Analysis of Department of Justice Guidelines- International Operations- Antitrust Enforcement Policy', see supra note 10, at 996-98.

35 1988 Antitrust Enforcement Guidelines for International Operations, see supra note 10.

36 Id. at § 6, 2.

37 Id. at § 6, 3.

38 SW Waller, 'Redefining the Foreign Compulsion Defense in U.S. Antitrust Law: The Japanese Auto Restraints and Beyond', 14 Law & Pol'y Int'l Bus. 747, 780-81 (1982).

interests.[39] The Restatement notes that while the compulsion generally entitles the defendant to be completely freed from liability, when blocking statutes are involved 'a variety of adverse inferences are permissible' and the statutes 'need not be given the same deference (…) as differences in substantive rules of law.'[40] Waller points out that blocking statutes constitute a form of negative compulsion, and are 'usually not geared to advancing any affirmative policy' of a foreign state.[41] Such restrictions are in any case not absolute. The efforts of a defendant to secure, domestically, permission to comply with foreign discovery orders will in practice play a role.[42] The courts are likely to engage in a balancing exercise in cases raising this issue.[43]

It is worth noting that in the early eighties, the US car industry faced a significant crisis, unable to cope with the import competition, especially from Japanese cars. This led to the introduction of a system of oversight and reporting by the Japanese authorities so as to limit exports. The issue of possible application of US antitrust was identified at the very onset by both governments as a possible obstacle to the approach of addressing the problem.[44] Japanese authorities unilaterally set export quotas for individual companies, by means of *de jure* non-binding directives, and imposed a reporting obligation to monitor exports. In case of non-adherence with the policy the Japanese government intended to introduce export licensing, subject to fines, penalties and other sanctions.[45] The US Attorney General in its answer to the Japanese letter on the matter provided that the DOJ considered that the adopted measures did not give rise to the violation of US antitrust laws, as the companies compliance with the export limitations were compelled by the Japanese governments, acting within its sovereign powers.[46] The DOJ assurance was rather surprising, especially taking into consideration that the sanctions for noncompliance with the Japanese scheme *were* only *promised to be introduced* if the issue arose.[47] This last issue of the form by which the compulsion is achieved is of practical importance. As Waller puts it, 'to put a premium on the form

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[39] Blocking statutes were enacted in many countries in response to the expansive extraterritorial application of US antitrust. Compare RE Price, 'Foreign Blocking Statutes and the GATT: State Sovereignty and the Enforcement of the US Economic Laws Abroad', 28 Geo. Wash. J. Int'l L. & Econ. 315 (1994).

[40] American Law Institute, see supra note 24, at § 442, n. 5.

[41] Waller, see supra note 38, at 780-81.

[42] American Law Institute, see supra note 24, at § 442, n. 5. Compare In re Westinghouse Electric Corp. Uranium Contracts Litigation, 563 F.2d 992, 998 (10th Cir. 1977).

[43] American Bar Association, Section of Antitrust Law, *Obtaining Discovery Abroad* 61-62 (ABA Section of Antitrust Law, 2nd ed, 2005).

[44] For an in-depth analysis of this case in the broader trade context and with the special regard to the foreign state compulsion as a defence in antitrust see Waller, see supra note 38.

[45] 'Correspondence Between the U.S. Attorney General and Ambassador of Japan on U.S. Antitrust Laws and Japan's Restraints on Automobile Exports', reprinted in U.S. Import Weekly (BNA) (May 13, 1981), at M-1.

[46] Opinion of the United States Attorney General Addressed to Ambassador Yoshio Okawara of Japan (May 7, 1981), 1981-1 Trade Cas. (CCH) 63,998. Compare Brief for the United States as Amicus Curiae Supporting Affirmance, Matsushita Electric Industrial Co. v. Zenith Radio Corp. (Matsushita), No. 83-2004 (U.S. Jun. 17, 1985).

[47] Compare Waller, see supra note 38, at 812.

rather than on the degree of government involvement is to ignore the realities of a complex business world'.[48] This is particularly so as the way the compulsion is framed may reflect different styles of governing, rather than the actual involvement of a particular state.[49]

The issue of the foreign state compulsion was also raised in *Matsushita*, another case involving Japanese defendants: TV manufacturers were accused of price fixing and market allocation. The defendants alleged that the unlawful conduct was compelled by the Japanese authorities, as a part of its trade policy. While the district court did not address this issue after finding that the plaintiffs lacked the required injury for standing, the Court of Appeals noted that 'a government-mandated export cartel arrangement fixing minimum export prices would be outside the ambit of section 1 of the Sherman Act',[50] yet it remained unconvinced that the conduct at stake was government-mandated. It *inter alia* observed that it was possible that the Japanese government provided just 'an umbrella under which the defendants gained an exemption from Japanese antitrust law', and then subsequently fixed prices themselves.[51] It also found no evidence supporting the claim that other aspects of the conduct at stake, regarding market allocation, originated within the Japanese authorities.[52]

The decision of the Third Circuit met with criticism. Not only did the Japanese government, in a diplomatic note, in a straightforward way underline and explain its compulsion, but for some the evidence itself suggested likewise.[53] The Supreme Court granted certiorari. In its *amicus* submission the Japanese government supported the defendants, stating that the measures at stake 'came into existence pursuant of the direction of the Government of Japan (…) and constituted an integral aspect of [its] foreign economic and trade policy.'[54] The US government in its brief supported this position. It recognised, in general, that 'anticompetitive private conduct should not lead to liability in a private antitrust suit when that conduct is directed by a foreign sovereign.'[55] It advised that the Japanese statement should be accepted 'at face value; government's assertions concerning the existence and meaning of its domestic law generally should be deemed "conclusive."'[56] The Supreme Court did not, unfortunately,

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48 Id. at 794.

49 Compare Waller, see supra note 6, at § 8:19, n. 6.

50 In re Japanese Elec. Prods Antitrust Litig., 723 F.2d 238, 315 (3th Cir. 1983).

51 Id.

52 Id.

53 See, for example, JW Perkins, 'In Re Japanese Electronic Products Antitrust Litigation: Sovereign Compulsion, Act of State, and the Extraterritorial Reach of the United States Antitrust Laws', 36 Am. U. L. Rev. 721, 757-60 (1986).

54 Brief of the Government of Japan as Amicus Curiae in Support of the Petition for A Writ of Certiorari, Matsushita Electric Industrial Co. v. Zenith Radio Corp. (Matsushita), No. 83-2004, 3 (U.S. Jul. 6, 1984).

55 Brief for the United States as Amicus Curiae Supporting Affirmance, Matsushita Electric Industrial Co. v. Zenith Radio Corp. (Matsushita), *see supra* note 46, at 16.

56 Id. at 23. The support of the US reflected the change in its foreign policy and the outcome of the intergovernmental negotiations with Japan. Compare A. Ganjaei, 'Matsushita Electric Industrial Co., Ltd. v.

address the issue of compulsion after establishing that the alleged conduct did not cause injury to the plaintiffs.[57]

2. US DOMESTIC STATE ACTION DOCTRINE

The state action doctrine[58] is a defence available in US domestic antitrust cases for private anticompetitive conduct that was undertaken pursuant to and under supervision of a state of the US, as well as the conduct compelled by a state. It was recognised by the Supreme Court in *Parker* (therefore it is sometimes called the Parker doctrine), where it observed 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."'[59] The Parker doctrine holds that anticompetitive action by state governments and private conduct in compliance with it are immune from the liability under the Sherman Act.

In *Parker* the issue at stake was a Californian state-established regulatory scheme fixing prices of raisins. The case was brought by a producer who wanted to sell more raisins and at lower prices. While the Court found that the scheme, imposed by the state in its legislative authority and enforced with penal sanctions, was not prohibited under the Sherman Act, it also observed that 'a state does not give immunity to those who violate the Sherman Act by authorising them to violate it, or by declaring that their action is lawful.'[60] The doctrine was further clarified in *Midcal,*[61] where the Court introduced a two-prong test for private parties immunity under the state action doctrine: 'first, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.'[62] The case at stake concerned a Californian retail price maintenance scheme for wines, which while satisfying the first prong of the test, failed the second. Although the policy was clearly articulated, the state did not establish prices, review their reasonableness, or engage in any further examination of the program.[63]

The DOJ's Antitrust Division disagreed with the American Bar Association on the point whether the state action doctrine should be made applicable internationally, i.e.

Zenith Radio Corp.: The Death Knell for Predatory Price Fixing and the Avoidance of a Standard for the Foreign Sovereign Compulsion Defense', 15 Denv. J. Int'l L. & Pol'y 395, 407-08 (1986).

57 *Matsushita Electric Industrial Co.* v *Zenith Radio Corp.* (Matsushita), 475 U.S. 574, 598 (1986).

58 For more details on the US domestic state action doctrine *see* S. Semeraro, 'Demystifying Antitrust State Action Doctrine', 24 Harv. J.L. & Pub. Pol'y 203 (2000); J.E. Lopatka and W.H. Page, 'State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints', 20 Yale J. on Reg. 269 (2003). *Compare* the ABA Antitrust Section 'Committee Resources' at http://apps.americanbar.org/antitrust/at-committees/at-exemc/main-exemptions/state-action.shtml.

59 *Parker* v *Brown*, 317 U.S. 341, 351 (1943).

60 Id. at 351-52.

61 *California Retail Liquor Dealers Ass'n* v *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

62 Id. at 105.

63 Id. at 105-06.

'foreign government-regulated conduct', *ergo* the actions of foreign states and the private conduct pursuant to such actions and supervision of a foreign state. The ABA was in favour of such a solution. In its Report on the 1988 Draft Guidelines the ABA similar to the court in *Parker* found nothing in the legislative history of the Sherman Act indicating that it should apply to foreign government-regulated conduct. Moreover, it was pointed out that '(s)overeign foreign states, entitled as a matter of international law to equal status with the United States federal government, deserve at least as much respect for their regulatory actions as semi-sovereign states within our federal system.'[64] In the final version of 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 applying such a standard in an international context.[65] The ABA in response noted that its comments 'appear to have fallen on deaf ears'.[66] The 1995 Guidelines mention the doctrine only briefly in a footnote, distinguishing it from foreign sovereign compulsion. Yet, this distinction is somewhat ambiguous and not particularly enlightening: '(t)he state action doctrine applies not just to the actions of states and their subdivisions, but also to private anticompetitive conduct that is both undertaken pursuant to clearly articulated state policies, and is actively supervised by the state.'[67]

Were the Parker doctrine available also in cases involving foreign states and foreign companies, it would systematically solve a number of issues. First of all, it does not require compulsion as such to remove liability from private companies acting in accordance with a state prescription. Generally speaking it is sufficient that they act pursuant to a clearly established policy of a state, under its supervision. This is significantly less demanding standard to meet and it has the potential to better accommodate foreign regulatory frameworks where the role of formal law differs from the role it plays in free-market-economy jurisdictions. Particularly, it seems better equipped to handle regimes with more both direct and indirect state involvement in economic affairs. Making the state action doctrine available in the international context would bring more transparency into US antitrust. It would, arguably, contribute to development of the international trade law in this area, as parties affected by anticompetitive conduct unable to bring private actions in US courts would most probably lobby the US government to bring more actions in the WTO. Furthermore, it would also answer in the negative the outstanding question concerning the possibility

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[64] ABA Section of Antitrust Law & Section of International Trade and Practice, 'Report to the House of Delegates [on Draft Antitrust Guidelines for International Operations]', 57 Antitrust L. J. 651, 668-69 (1988).

[65] '(…) Given the complexity and novelty of foreign legal systems and the difficulty of obtaining foreign-located evidence, defendants would have many opportunities to attempt to evade legitimate application of the U.S. antitrust laws wherever there was an arguable foreign national policy underlying anticompetitive conduct. The use of an active supervision standard of the sort applied in state action cases would also require difficult inquiries into the foreign sovereign's conduct of its own affairs.' 1988 Antitrust Enforcement Guidelines for International Operations, see supra note 10, at § 6, 4, n. 179.

[66] Compare 'Report: Analysis of Department of Justice Guidelines- International Operations- Antitrust Enforcement Policy', see supra note 10, at 967-68.

[67] 1995 Antitrust Enforcement Guidelines for International Operations, see supra note 6, at n. 93.

of an antitrust suit in the US court against a foreign sovereign. This itself would be a very welcome development from the perspective of international relations and it seems, in light of its recent position in *RPP,* that the DOJ is in favour of settling sensitive transnational commercial disputes involving a foreign state, and not falling under the WTO regime, through international negotiations rather than in the courtrooms in the US.[68] Were the state action doctrine made applicable in an international context in antitrust cases, the avoidance doctrines would become largely irrelevant in this field.

It is worth noting that there may be parallels also between the US state action doctrine and the EU foreign sovereign defence known also under the state action doctrine name. The latter seems to apply also in situations where the regulatory framework in a particular state eliminates the competition.

3. THE COMPULSION IN THE EU: THE STATE ACTION DOCTRINE

In the EU context the European Commission and the Court of Justice recognised the foreign state compulsion as a defence, narrowly applied, in cases where companies were left with no margin of freedom for autonomous action allowing for competition. The terminology in this case is different than in the discourse in international law, as the defence is called the state action doctrine.[69] In most cases it was recognised as a jurisdictional rule. Although it was raised mostly in the intra-EU context, there is no reason why it could not be relied on by a non-EU company, in the case of extraterritorial application of EU competition law. In scenarios where no autonomous conduct can be found on the part of the undertakings involved in anticompetitive conduct, Articles 101 and 102 TFEU do not apply.[70] No distinction is drawn between private and public undertakings. What matters is the presence or the lack of the autonomous conduct on their side. In the latter case, when Articles 101 and 102 TFEU are inapplicable, in the EU context a member state compelling companies to act in an anticompetitive manner could be found in breach of its obligations under the TFEU.[71]

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[68] In this case, brought by US gasoline retailers against various producers of refined petroleum products for price-fixing of crude oil and refined petroleum products in conspiracy with OPEC, the US government in its *amicus* submission supported the defendants and argued that the case raised non-justiciable political questions ousting the jurisdiction of the court. See Brief of the United States as Amicus Curiae Supporting Affirmance, Spectrum Stores, Inc. v. Citgo Petroleum Corp., No. 09-20084 (5th Cir. Aug. 16, 2010). Compare Martyniszyn, see supra note 2, at 11-12.

[69] Compare: OECD, *Working Party No. 3 on Co-operation and Enforcement- Roundtable on the Application of Antitrust Law to State-Owned Enterprises- European Commission*, DAF/COMP/WP3/WD(2009) 42, 11-14 (Sept. 28, 2009), *available at* http://ec.europa.eu/competition/international/multilateral/antitrustlaw.pdf.

[70] For the sake of clarity I consistently refer to the EU competition provisions under their current numbering.

[71] The EU member states undertook an obligation under Art. 4(3) TEU (so-called 'loyalty clause') to facilitate the achievement of the Union's tasks. This provision prohibits EU member states to take any measures jeopardizing such endeavours, and read in conjunction with the Protocol 27 on the Internal Market and Competition, annexed to TEU and TFEU (providing that EU 'includes a system ensuring that competition is not distorted'), and with the substantive provisions of Article 101 and 102, offers additional basis for challenging anticompetitive measures, including legislation, of a EU member state. Yet this route has only been used once to date. See Case C-35/96, *Commission* v *Italy*, [1998] ECR I-3851. Pace identifies four types of scenarios in which the EU member state could be found in breach of Article 101 read in conjunction with

If the compelling state is not a member of the EU, the situation is more complicated and EU law seems not to offer a remedy.

Ladbroke Racing[72] was the first case when the Court of Justice clarified the position of the EU competition law on the issue of compulsion. It noted that the core EU competition law provisions, Articles 101 and 102 TFEU, apply only to anticompetitive conduct of undertakings carried out on their own initiative. The court expressly noted that if the conduct is required by legislation, or if the legislation creates a legal framework eliminating competition on the part of the undertakings, then the restrictions of competition are not attributable to the undertakings.[73]

Van Bael suggests that compulsion as a defence had been already recognised by the Commission with respect to voluntary restraint agreements.[74] The Commission noted that Article 101 does not apply to export agreements imposed on firms in non-member states by their governments, apart from scenarios when there was an agreement or concerted practice among firms independent thereof. At the same time, it was underlined that Article 101 applies in cases when the government only authorised the export agreements, *ergo* does not force their creation.[75] In its decision in *Ball-Bearings*,[76] the Commission explicitly recognised that the state (in this case a non-EU member state) compulsion removed the measures outside the scope of applicability of the prohibition, which still remained applicable to any anticompetitive measures undertaken by the companies themselves, on top of the compelled conduct.[77] It also again pointed out that the mere authorisation of the conduct by state authorities does not make the provisions of Article 101 inapplicable.[78] Similarly, in its decision in *Aluminium Imports*[79] the Commission noted that even if a government supported a contract in violation of

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the loyalty clause. This would happen when a state would (a) require adoption of anticompetitive agreement (compel them), (b) reinforce their effects, (c) encourage/ favour their adoption, (d) deprive 'its own rules of the character of legislation by delegating to private economic operators responsibility for their decisions affecting the economic sphere'. L.F. Pace, *European Antitrust Law: Prohibitions, Merger Control and Procedures* 157-58 (Edward Elgar, 2007).

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

73 Id. at 33.

74 I. Van Bael and Van Bael & Bellis (eds), *Competition Law of the European Community* 48 (Kluwer Law International, 5th ed, 2010).

75 European Commission, Third Report on Competition Policy 27, 20, n. 3 (Office for Official Publications of the European Communities, 1974).

76 Decision 74/634/EEC of the Commission, of 29 November 1974, IV/27.095, *Ball-Bearings*, OJ L 343, 19 (Dec. 21, 1974).

77 Id. at 23, § II, 1(b).

78 Id. at 23, § II, 1(c).

79 Decision 85/206/EEC of the Commission, of 19 December 1984, IV/26.870, *Aluminium Imports from Eastern Europe* (Aluminium Imports), OJ L 92, 1 (Mar. 30, 1985).

the competition law, this does not alter the position of the companies involved, therefore it is not a valid defence.[80]

If a state supports, encourages, or in any other way tries to convince an undertaking to engage in an anticompetitive conduct, the latter is left with no defence. In a similar vein in *Wood Pulp*[81] a US export cartel attempted to rely on such a defence, claiming that it was a duly registered and officially recognized export association. The court noted that the US legislation (the Webb Pomerene Act) only exempts export cartels from the scope of application of US antitrust, but does not require their creation.[82]

To be recognized as a defence state compulsion does not have to be achieved by formal law. In *Asia Motors III*[83] the court recognised that even in the absence of any binding regulatory provisions imposing the conduct in question, Article 101 will not be applicable if the conduct was unilaterally imposed by the authorities through the exercise of 'irresistible pressure'.[84] The term was not defined by the court, but it was illustrated by a threat to adopt measures likely to cause substantial losses for the undertaking involved. This needs to be proven on the basis of objective, relevant and consistent evidence.[85]

The lack of evidence to support the allegation of compulsion was an issue in *Stichting Sigarettenindustrie*.[86] The case dealt with various anticompetitive agreements in the tobacco business in the Netherlands. The applicants claimed that the Dutch authorities 'decisively influenced' the agreements and that they threatened to take otherwise unspecified 'measures' in case the applicants conduct did not comply with expectations.[87] Yet this claim was not supported by any evidence. The Commission was of the view that the documents available did not show that the agreements at stake were concluded 'with the approval or at the instigation' of the Netherlands, who denied such an allegation. The court established that the authorities held meetings with the undertakings involved and, in this forum, they were to '[indicate] certain objectives they wished to see achieved'.[88] Yet, there was no evidence proving that the 'objectives' were to be achieved by the conclusion of the anticompetitive agreements found in violation of the competition law.[89]

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[80] Id. at 10, 10.1, 10.2.

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

[82] Id. at 20.

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

[84] Id. at 65.

[85] Id. at 61-65.

[86] Joined cases 240, 241, 242, 261, 262, 268 and 269/82, *Stichting Sigarettenindustrie and others* v *Commission of the European Communities* (Stichting Sigarettenindustrie), [1985] ECR 3831.

[87] Id. at 38.

[88] Id. at 40.

[89] Id.

The exclusions from the scope of the applicability of Article 101 apply restrictively.[90] Therefore, if despite the existence of national legislation or other state-driven means severely limiting competition, there is still scope for effective competition the provisions of Article 101 apply. This issue was raised in *Strintzis Lines*.[91] The Commission fined shipping companies operating ferry services between Greece and Italy, after finding infringement of Article 101. The applicants claimed *inter alia* that the legislative and regulatory framework as well as the official policy decisively restricted their autonomy, by obliging them to contact each other to consult and negotiate the crucial parameters of their policy, including prices.[92] The court recalled that Articles 101 and 102 apply only to anticompetitive conduct engaged in by an undertaking on their own initiative,[93] and it found that the companies enjoyed autonomy, and were therefore subject to the rules on competition.[94] It also reaffirmed, referring *inter alia* to *Ladbroke Racing*, that if the conduct at stake was required by the national legislation, or if a legal framework was such as to eliminate any possibility of competition, then Articles 101 and 102 do not apply.[95] Similarly, findings from *Asia Motors III* (irresistible pressure notion) were reaffirmed.[96] In the instant case the question was whether the cumulative effect of the regulatory framework and the state policy 'robbed' the parties involved of their autonomy in adopting a tariff policy on the investigated routes, removing any possibility of competition between them.[97] The court answered in the negative, finding that the undertakings enjoyed autonomy in setting pricing policy, and that there was no 'irresistible pressure' forcing them to conclude tariff agreements.[98]

In *CIF* the Court of Justice suggested different underpinnings of the doctrine.[99] Here the Italian consortium of match manufacturers, called into existence by domestic legislation, allocated production quotas among companies. The price itself was fixed by the state. Membership of the consortium was obligatory for all producers. The Italian competition authority found the legislation in breach of Article 101 read in conjunction with the loyalty clause. It also established that the consortium itself and its members infringed Article 101. The court distinguished here two periods of time: until the membership in the consortium was obligatory, and after it became voluntary. So long as it was obligatory and the legislation prevented companies from engaging in autonomous conduct, the principle of legal certainty was not to be violated and the

[90] Joined cases 209 to 215, 218/78, *Heintz van Landewyck SARL and others* v *Commission of the European Communities* (Van Landewyck), [1980] ECR 3125, 130, 33.

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

[92] Id. at 123.

[93] Id. at 119.

[94] Id. at 135.

[95] Id. at 119.

[96] Id. at 122.

[97] Id. at 124.

[98] Id. at 138-41.

[99] Case C-198/01, *Consorzio Industrie Fiammiferi* (CIF), [2003] ECR 1-8055.

companies cannot be exposed to any penalties for their past conduct, which was required by the law concerned.[100] Therefore it was not a lack of infringement, *ergo* inapplicability of Article 101, as in the earlier case law, but in fact the principle of legal certainty that shielded defendants.[101] The court also recognised that the national competition authority has a duty to disapply the anticompetitive law. Once such a decision is taken, it is binding upon the companies, who stop being shielded and their future conduct is liable to be penalised.[102] Moreover, the court underlined that the defence is not applicable when the legislation merely encourages or makes it easier to engage in anticompetitive conduct,[103] yet it may be a mitigating factor at the penalty-setting stage.[104]

Recently in *Deutsche Telekom* the court noted, referring to *Ladbroke*, that when anticompetitive conduct is required by a state, or if a state eliminates any possibility for competition among undertakings, Articles 101 and 102 do not apply, as the restriction of competition is not attributable to the autonomous conduct of the undertakings involved.[105] It pointed out that 'the possibility of excluding anticompetitive conduct from the scope of Articles [101 and 102] on the ground that it has been required (…) by existing national legislation or that the legislation has precluded all scope for any competitive conduct on their part has thus been accepted only to a limited extent by the Court of Justice.'[106] Therefore it seems clarity is missing whether the court considers Articles 101 and 102 inapplicable in case of state compulsion, or if it considers it a defence shielding the undertakings involved from liability, as it suggested in *CIF*.

As de la Torre points out it is unclear what are the consequences of the defence in case of actions for damages.[107] In *CIF* the court pointed out that the companies acting under such compulsion are shielded from 'all the consequences of an infringement (…) vis-a-vis public authorities and *other economic operators* [emphasis added]',[108] yet in the preceding paragraph the court mentioned only 'any penalties, either criminal or administrative'.[109] At the same time, if the companies are shielded from damages, in the intra-EU context it is possible to bring an action for damages against a state, under the *Francovich*

[100] Id. at 53.

[101] Compare F.C. de la Torre, 'State Action Defence in EC Competition Law', 28 World Competition 407, 417 (2005); Pace, see supra note 71, at 166-67.

[102] CIF, see supra note 99, at 54-55.

[103] Id. at 56.

[104] Id. at 57.

[105] Case C-280/08 P, *Deutsche Telekom AG* v *European Commission*, [2010] ECR 0000, 80.

[106] Id. at 81, referring *inter alia* to Stichting Sigarettenindustrie and CIF.

[107] de la Torre, see supra note 101, at 419.

[108] CIF, see supra note 99, at 54.

[109] Id. at 53.

principle.[110] It provides for a member state liability for losses caused to private parties as a result of a violation of EU law for which the state is responsible.

The EU state action doctrine can be seen either as a jurisdictional rule, rendering Articles 101 and 102 inapplicable to anticompetitive conduct compelled by a state, or as a defence on merits. It potentially fully frees undertakings from liability. It is applicable to explicit compulsion, as well as to scenarios when the state leaves companies no room for competitive conduct. This can be achieved explicitly through legislation, or by less legally obvious but similarly compelling means, where a state places an 'irresistible pressure' on the party to act in an anticompetitive way, under the threat of substantial losses, or other serious, but not necessarily penal sanctions. Compared to the US doctrines of foreign state compulsion and domestic state action, the EU state action doctrine seems to be less demanding than the former (for example, by not requiring such a presence of such a severe sanctions for non-compliance), but stricter than the latter (by, for example, requiring the parties to show that they were left with no margin for autonomous competitive conduct).

4. RECENT DEVELOPMENTS IN THE US[111]

The recent line of US case law involving Chinese export cartels heralds a revival of the reliance on the foreign state compulsion defence, the contours of which are not well defined. These new cases together with the related trade dispute within the WTO show that the law in this area calls for further clarification, leading potentially to better identification of liability for anticompetitive conduct. China, due to its economic and legal systems and its increasing importance in international trade provides new, legally challenging scenarios. One practitioner bluntly characterised any possible successful reliance by Chinese cartelists on foreign state compulsion defence as 'a declaration of war on the market system.'[112]

The foreign compulsion defence was recently invoked in *Vitamin C*.[113] Four Chinese manufacturers and their trade association were accused by US purchasers of fixing prices and limiting exports, *ergo* creation of an export cartel. The allegations themselves were not challenged. Instead, the defendants brought a motion to dismiss the case,

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[110] See TC Hartley, *The Foundations of European Union Law* 248-55 (Oxford University Press, 7th ed, 2010); A Kaczorowska, *European Union Law* 365-84 (Routledge-Cavendish, 2nd ed, 2010). In a scenario when the companies are found in breach of competition law for limiting the competition further than required by the compelling legislation, it may be difficult, in terms of damages, to distinguish between theirs and the state responsibility. Compare de la Torre, see supra note 101, at 425.

[111] This part draws on another text, where these recent developments are discussed in the context of export cartels. See M Martyniszyn, 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', (2012) 15(1) J. Int'l Econ. L. 181.

[112] See A Longstreth, 'U.S. Courts Confront China's Involvement in Price Fixing', Reuters Legal (Mar. 11, 2011), available at http://www.reuters.com/article/2011/03/11/us-china-vitaminc-idUSTRE72A4XH20110311.

[113] In re Vitamin C Antitrust Litigation, 584 F. Supp. 2d 546 (E.D.N.Y. 2008).

arguing that they their conduct was compelled by the Chinese authorities.[114] At an early stage the defendants' motion was denied as the court found the evidence too ambiguous.[115]

The Chinese government placed considerable importance on the case and submitted its first ever *amicus* brief in front of a US court.[116] In the brief the Chinese authorities argued that the trade association (the Chamber of Commerce) operated under its direct and active supervision, fulfilling governmental functions. In 1997 China introduced a system of strict control of vitamin C production, carried by a specially created body in the Chamber. The right to export vitamin C was limited solely to its members. They were obliged to 'voluntarily adjust their production outputs' and to 'strictly execute [an] export coordinated price set by the Chamber and [to] keep it confidential', under a threat of revocation of the membership or ultimately cancellation of the export license. The Chinese defendants backed by the authorities claimed that they were compelled to export at a set price, and even though the price itself was not set by the authorities they were unable to export at a non-conforming price.[117]

The court considered that the Chinese submission was entitled to substantial deference, but it was not to be regarded as conclusive evidence on compulsion, especially as it was directly contradicted by the documentary evidence.[118] The plaintiffs argued that there was no law or regulation compelling a price or price agreement at issue. The evidence demonstrated that the defendants at least once set the price by hand voting during a meeting. Moreover, it was argued that despite setting the minimum price, the defendants were undercutting each other.[119] This part of the evidence suggested a complex interplay between the defendants and the involved institutions, clouding the degree of their independence with respect to price decisions.[120]

As the court noted, in contrast to cases like *Texaco Maracaibo*, in this case the parties contested both the origin and the very fact of compulsion. Because of the non-transparent Chinese legal system, commonly relying on ministerial regulations, it was unclear 'whether defendants were performing governmental function, whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens'.[121] Moreover, the court observed that a situation in which the defendants first formed the cartel and thereafter asked for the state recognition was also conceivable, but it refrained from commenting on the

[114] The defendants invoked also other state-related defences, such as the act of state and international comity, but the core of the defence rested on claim that the Chinese government required them to fix prices id. at 550-52.

[115] Id. at 559.

[116] Id. at 552.

[117] Id. at 552-54.

[118] Id. at 557.

[119] Id. at 555.

[120] Id. at 556.

[121] Id. at 559.

availability of the defences raised in this case. Ultimately, the records were considered too ambiguous 'to foreclose further inquiry into the voluntariness of defendants' actions' and the motion to dismiss was denied.[122]

After further discovery the district court, in a well-crafted 72-page opinion, denied the defendants a motion for summary judgment based on the foreign compulsion defence.[123] It recognised that the defence[124] is applicable when a foreign party is placed 'between the rock of its own local law and the hard place of U.S. law', yet it found 'no rock and no hard place', *ergo* no compulsion, in the instant case.[125] In general terms, it noted that the defence applies only when the refusal to comply would lead to 'the imposition of penal or other severe sanctions',[126] and in any case it does not cover conduct 'going beyond what the foreign sovereign compelled'.[127] The court found the defence non-applicable in cases, where the compulsion was procured by the defendant.[128] It disagreed with the court in *Animal Science*[129] which found the foreign sovereign compulsion defence applicable if the defendants were compelled to abide with the set minimum prices, considering it irrelevant how the minimum prices came about.[130] The *Vitamin C* court noted that if the defendants in *Animal Science* were not compelled to reach minimum price agreements in the first place, the fact that such agreements were enforced would not suffice to make the foreign state compulsion defence applicable.[131] Furthermore, although not dispositive the compulsion seems unlikely in a scenario, like in the instant case, when 'defendants enthusiastically embrace a legal regime that encourages, or even 'compels,' a lucrative cartel that is in their self-interest.'[132]

As the case developed it transpired that the earlier Chinese regulatory framework changed significantly in 2002 (the case concerned conduct between December 2001 and December 2008). The membership in the relevant Chamber's body became voluntary and it was no longer necessary in order to export.[133] Thus, the sanctions for

[122] Id. The court dismissed the complaint with a leave to replead. The plaintiffs added new defendants in a second amended complaint and they were offered an opportunity to make allegations against them.

[123] In re Vitamin C Antitrust Litigation, No. 06-MD-1738 (E.D.N.Y. Sept. 6, 2011).

[124] The defendants raised also the doctrines of the act of state and the international comity, but the court found that these claims were in essence dependent on the establishment the compulsion in the instant case. Id. at 33-34, 39-42.

[125] Id. at 2.

[126] Id. at 35, citing 1995 Antitrust Enforcement Guidelines for International Operations, see supra note 6, at § 3.32, 2.

[127] Vitamin C Ib, see supra note 123, at 35, citing Waller, see supra note 6, at § 8:23, n. 6.

[128] Vitamin C Ib, see supra note 123, at 41, n. 33.

[129] For discussion of this case see infra notes 148-166 and the accompanying text.

[130] Vitamin C Ib, see supra note 123, at 36. See infra note 154 and the accompanying text.

[131] Id.

[132] Id. at 41, n. 33, 46-47. The court called coercion in such a context a 'paper tiger', borrowing a Mao Tse-Tung metaphor.

[133] Id. at 11-12.

noncompliance altered: the termination of the membership under the new regime played a different role as it was not indispensible for the sake of exportation.[134] In fact it seems there were no penalties for failing to follow the new 'self-discipline' system.[135]

Moreover, in 2004 one of the cartel members deflected and refused to participate in a planned production stoppage and, as the other cartel member general manager described it 'unilaterally tore[d] up the agreement [on the shutdown]'.[136] When the cartel scheduled another stoppage, it considered the chances of the previously deflecting member partaking as 'not great'.[137] Although it was argued that the deflecting company was penalised for its behaviour and forced to participate in the next shutdown, the court did not find any documentary evidence supporting these claims.[138]

The court refused to defer to the Chinese authorities interpretation of Chinese law, particularly in its 2009 statement.[139] The court noted it did not 'read like a frank and straightforward explanation of Chinese law' but rather 'a carefully crafted and phrased litigation position.'[140] Besides, China's position was contradicted both by the factual record[141] and by China's representations to the WTO.[142] The court reached a conclusion that China's assertion of compulsion was 'a post-hoc attempt to shield defendants' conduct from antitrust scrutiny.'[143]

The court referred also to the on-going WTO trade dispute in a similar context (China is accused of introducing minimum price requirements for certain raw materials), where the panel found that the actions undertaken by the relevant Chamber of Commerce (setting and coordination of export prices) were attributable to China.[144] The court did not find its interpretations of Chinese law altered by the panel's findings, especially as the only regulation possibly indicating compulsion concerned only the minimum price requirement so as to avoid the below-cost pricing and related anti-dumping challenges, and it was itself not relied upon by the Chinese authorities to establish compulsion in the instant case.[145]

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[134] Id. at 12, 55.

[135] Id. at 53-55.

[136] Id. at 12.

[137] Id. at 22-23. In the end the latter joined, but allegedly due to its own technical problems. *Id.* at 23.

[138] Id. at 23-24, 67-68.

[139] The 2009 statement 'conspicuously' did not cite any of the sources (laws, regulations) supporting the broad assertions about the regulatory regime in place. Furthermore, it made no distinction between the 1997 and 2002 regimes, which clearly differed. Id. at 46.

[140] Id.

[141] Id. at 47.

[142] Id. at 15-16, 46.

[143] Id. at 47.

[144] WTO Panel Report, *China- Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, adopted Jul. 5, 2011, 7.1096. See infra notes 170-176 and the accompanying text.

[145] Vitamin C Ib, see supra note 123, at 58-60.

Furthermore, even if the 2002 regime and the related regulations introduced the minimum price requirement coupled with sanctions for non-compliance, the court was not convinced that the authorities would interfere if the price and output levels were set at the point allowing avoiding anti-dumping actions and below-cost pricing.[146] It noted that setting the prices above that level exceeded the scope of any compulsion and would not be immunised.[147]

While *Vitamin C* was ongoing two similar antitrust cases were brought in the US courts against Chinese export cartels: *Animal Science*[148] and *Resco*.[149] In *Animal Science* the plaintiffs, US companies, brought a class action against a number of Chinese exporters of magnesite-based products for alleged price-fixing in violation of the Sherman Act. The defendants brought a motion to dismiss the complaint, *inter alia* on the foreign state compulsion defence basis.[150]

Discussing more generally the characteristics of compulsion, the district court 'distilled' from *Mannington* a three-points test whereby the defendant invoking compulsion should show:[151] (a) 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', (b) a direct link between the entity's powers and the defendant, allowing the entity to compel the defendant, subject to a significant negative repercussions for non-compliance, and (c) the compulsion is the fundamental force causing the defendant's act, challenged as a violation of US law. Moreover, the court noted that the compulsion does not have to stem from a black-letter law, underlining that a formal law as such is not a condition *sine qua non* of the compulsion.[152] Furthermore, it pointed out that the 'non-compulsory connotations to an American ear' of the literal translation of foreign government directions should not automatically qualify them as non-mandatory.[153] Besides, the court underlined that defendants' participation in the 'coining' of the governmental prescript, does not exempt them from compulsion. Therefore, in principle, it confirmed availability of the defence even if a party participated in the creation of the compelling act.[154] Later the court in *Vitamin C* explicitly disagreed with this holding.[155]

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[146] Id. at 60. This was corroborated by the Chinese counsel representations as well as by the Chinese submission in the WTO proceedings. Id. at 61-62, referring to Panel Report, see supra note 144, at 7.998.

[147] Vitamin C Ib, see supra note 123, at 60.

[148] *Animal Science Products* v *China Nat. Metals & Minerals Import & Export Corp.* (Animal Science), 702 F. Supp. 2d 320 (D.N.J. 2010).

[149] *Resco Products* v *Bosai Minerals Group*, 2010-1 Trade Cases P 77,061 (W.D. Pa. 2010).

[150] The action was brought in 2005. Within the first two years the litigation concerned issues relating to the service of process. In 2008 the further proceedings took place. The complaint was repleaded, leading to the discussed court's opinion on the motions to dismiss.

[151] Animal Science, see supra note 148, at 394.

[152] Therefore parting from the position of the Restatement, following perhaps the implicit approach of the 1995 Guidelines. Compare supra notes 24-31 and the accompanying text.

[153] Animal Science, see supra note 148, at 425.

[154] Id. at 424-25, 38.

In *Animal Science* the court also addressed the issue of the weight of a foreign government submission.[156] It considered that a foreign state's brief warrants a high, 'nearly binding' degree of deference[157] and in the instant case it decided to treat the Chinese authorities interpretations as 'the final authority unless the Courts detect a Chinese legal provision or an alternative [ministry's] statement that clearly and convincingly establishes the incorrectness of these interpretations.'[158]

In the instant case the court faced a very similar problem to the one in *Vitamin C*. The relevant Chamber of Commerce, empowered to administer the export licenses, was involved in setting the minimum prices for the exported products. Having analysed the evidence the court reached a conclusion that the Chamber was a 'governmental appendage'.[159] It found also the existence of sufficiently severe possible punishment for non-compliance.[160] It noted, distinguishing the case from *Texaco Maracaibo*, that the government compulsion lasted for a long time and was achieved not by a particular act, but was rather created by a legal regime, employing 'various regulatory mechanisms producing a composite effect of a never-ceasing correlation between the minimum price requirement and punitive measures for non-compliance with it'.[161] In effect the court found that the Chinese authorities compelled the companies, forcing upon them 'a' minimum price.[162]

This said, two issues remained unresolved. Firstly, the price figures are to be established. If they were never set, or set but left unknown to the defendants and to the authorities enforcing the minimum price requirement, then from the practical perspective there are to be treated as equal to zero,[163] and any agreement to comply with a price above it is to be considered a private agreement, outside the scope of the state compulsion. Secondly, if the prices were set and known to the defendants, it is conceivable that the companies entered into supra-minimum price agreements. If so, such agreements, added on top of the compelled anticompetitive conduct, could be illegal under US antitrust rules, regardless of the authorities position in terms of their enforcement.[164] The complaint was dismissed as the court found that the plaintiffs failed to establish court subject-matter jurisdiction, but leave to amend the complaint

[155] See supra text accompanying notes 130-131.

[156] The issue concerned the amicus brief submitted in the *Vitamin C* case.

[157] Animal Science, see supra note 148, at 426.

[158] Id. at 429.

[159] Id. at 437.

[160] Id. at 441.

[161] Id. at 449.

[162] Id. at 462.

[163] The court established that 'a' price was compelled by the Chinese government. Two options remained: (1) the actual price ('the' price) could have never been set, or (2) it was set, but the defendants were never informed about it. In any of the scenarios, an agreement among defendants fixing price on any level would not allow them to rely on the defence. Id.

[164] Id. at 462-63.

was granted.[165] The plaintiffs declined this invitation and appealed. The Third Circuit vacated the district court decision on jurisdictional issues and the case was remanded for further proceedings on merits.[166]

In *Animal Science* the district court took a much more elaborate approach compared to *Vitamin C*, being much more sensitive to the peculiarities of the Chinese system, and the role of formal law in it. This development could bring more in-depth understanding of the Chinese regulatory framework as such, leading to a more just and consistent application of US law in such cases. It remains to be seen how the court addresses the issue of foreign sovereign compulsion on remand, especially in light of the intervening opinion in *Vitamin C*. Although in the latter case no compulsion was found, the court envisaged the possibility of the Chinese authorities compelling a minimum price at the level preventing foreign anti-dumping actions, and underlining that an agreement on a price above that level would move the agreement outside the realm of the defence.[167] It may well be that the court in *Animal Science* reaches such a conclusion in its future evaluation of the matter, as it was one of the scenarios it indicated.[168]

The issue of foreign government compulsion was also raised in *Resco*,[169] where a US company sued Chinese bauxite exporters for their alleged price-fixing in violation of the Sherman Act, in a similar context to the one in *Vitamin C* and *Animal Science*. Likewise, the foreign state compulsion doctrine was the pivot of the defence. In June 2010 the court decided to stay the proceedings in the anticipation of the outcome of the WTO trade dispute brought by the US against China, concerning export restrictions on various raw materials, including bauxite. The US raised, *inter also*, the issue of price requirements,[170] contending that these were Chinese government actions. While the outcomes of the WTO disputes are not binding upon US courts, the findings of the WTO panel may be helpful.

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[165] The complaint was dismissed with prejudice with regard to the claims based on the Foreign Trade Antitrust Improvements Act (FTAIA) 'effects' exception (the plaintiffs did not meet the 'jurisdictional bar' requiring the direct, substantial, and reasonably foreseeable effect on US commerce), but without prejudice to claims invoking court jurisdiction under the introductory clause of the FTAIA (making the FTAIA 'jurisdictional bar' inapplicable in cases where defendants are importers). Id. at 362-63, 83.

[166] The Third Circuit held that the FTAIA does not impose a jurisdictional bar (referring to adjudicative jurisdiction, *ergo* jurisdiction of the courts), but rather a substantive merit limitation. *Animal Science Products* v *China Nat. Metals & Minerals Import & Export Corp.*, 2011-2 Trade Cas. (CCH) P77,566 (3rd Cir. 2011).

[167] See supra text accompanying notes 146-147.

[168] See supra text accompanying note 164.

[169] Resco, see supra note 149.

[170] 'China also imposes quantitative restrictions on the exportation of the materials by requiring that prices for the materials meet or exceed a minimum price before they may be exported. Further, through its ministries and other organizations under the State Council as well as chambers of commerce and industry associations, China administers the price requirements in a manner that restricts exports and is not uniform, impartial, and reasonable.' *China- Measures Related to the Exportation of Various Raw Materials. Request for the Establishment of a Panel by the United States*, WT/DS394/7, 6 (Nov. 9, 2009). In December 2009 a single panel was established to examine the US complaint together with similar complaints brought against China by the EU and Mexico.

The panel found only six measures related to the minimum export price (MEP) requirement within its frame of reference, including charters or regulations of chambers of commerce which were referred to in *Vitamin C*.[171] The complainants argued that MEPs were enforced through a system of 'self-discipline' under the threat of penalties (imposed both on non-conforming exporters and on bodies granting licenses to non-conforming exporters).[172] It directed the panel's attention to proceedings in *Vitamin C*, *Animal Science,* and *Resco* and cited the Chinese *amicus* submission in *Vitamin C* establishing the state compulsion.[173] The panel found the measures at stake attributable to China[174] and challengeable under Article XI:I GATT.[175] Ultimately China was found in violation of its WTO obligations.[176] Interestingly, as already noted[177] the court in *Vitamin C*, which found no involvement of foreign state compulsion, expressly did not consider its interpretations of the Chinese law affected by the panel's findings.

China appealed the panel's findings.[178] The Appellate Body, after some delay,[179] recently delivered its report.[180] It found that the panel erred in finding that the section III of the complainants' panel requests, which dealt with the minimal price requirements, complied with requirements of Article 6.2 of the Dispute Settlement Understanding.[181] In the Appellate Body's view the requests, in the section III, did not

[171] Panel Report, see supra note 144, at 7.991, 7.995, 7.1001.

[172] Id. at 7.997.

[173] Id. at 7.1002, n. 1419.

[174] Id. at 7.1006.

[175] Id. at 7.1074.

[176] The panel considered the authority to determine the export prices and require exporters to adhere to them, under the thread of strict penalties or export license revocation, as potentially trade restrictive and found 'the very *potential* to limit trade' [emphasis in the original] sufficient to constitute a restriction prohibited under Article XI:1. Id. at 7.1081-7.1082. Article XI:1 of GATT: 'No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.'

[177] See supra notes 144-147 and the accompanying text.

[178] *China- Measures Related to the Exportation of Various Raw Materials. Notification of an Appeal by China under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review*, WT/DS394/11, WT/DS395/11, WT/DS398/10 (Sept. 2, 2011), available at http://www.worldtradelaw.net/na/ds398-10%28na%29.pdf.

[179] The report of the Appellate Body should be circulated within 60-90 days from the date when the appeal was notified. See Art. 17:5 of the Dispute Settlement Understanding. As China appealed on Aug. 31, the report was to be expected in Nov. 2011, yet due to the complexity of the matters involved, the Appellate Body informed that the report would be circulated by Jan. 31, 2012. Compare WTO Appellate Body, *China-Measures Related to the Exportation of Various Raw Materials*, WT/DS394/13, WT/DS395/13, WT/DS398/12 (8 December, 2011).

[180] WTO Appellate Body Report, *China- Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted Jan. 30, 2012.

[181] Art. 6.2 of the DSU provides: 'The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly* [emphasis added]. In case the applicant requests the

'provide sufficiently clear linkages between the broad range of obligations [referred to by the complainants] and the 37 challenged measures.'[182] Consequently, the panel's findings regarding claims identified under section III of the requests, including these concerning minimum price requirements, were declared 'moot and of no legal effect'.[183] It is rather unfortunate that the panel requests did not meet the DSU procedural requirements. This dispute was a rare opportunity to clarify the scope of the applicability of the WTO regime to cases involving state compulsion in particular and public cartels in general. While the Appellate Body report did not rule out such possibility, it brought us back to square one, with the substantive arguments in favour of such interpretation remaining valid and perhaps even somewhat reinforced by the panel's analysis, which although having no legal effect indicates how panellists could apply the WTO rules in similar circumstances. That said, the parties' submissions in this case will clearly prove useful in the final resolution of the antitrust actions pending in the US.

The recent antitrust cases show that the foreign state compulsion doctrine requires further clarification. The divergent views of the courts point out to the lacking clarity with regard to the applicable test. The problems of addressing the Chinese regulatory system suggest that the benchmark is perhaps set too high, further contributing to the rather poor predictability of the doctrine as a legal tool. The analysis employed in the panel report in the related trade dispute allows hope that the issue of state compulsion will be better addressed in the multilateral framework, which may be more attuned to significant regulatory differences. If state compulsion could be addressed in the trade framework, and if the courts in antitrust cases would align their opinions respectively, we could actually see a liability gap closed: in cases where reliance on the defence is unsuccessful, the liability would remain with the defendants; in cases where the reliance is successful, a government could be lobbied to seek a resolution at the multilateral level, benefiting from the binding nature of the WTO dispute settlement system. That said, one should keep in mind that remedies in both cases would be different, as no damages can be awarded in a trade dispute.

CONCLUSIONS

The foreign state compulsion doctrine remains important in competition law. Depending on the system it can be seen as a defence on merits (as in the US) or as a jurisdictional rule excluding the anticompetitive conduct from the applicability of substantive antitrust provisions (like in the EU). In either case it has the power to potentially fully free the defendants subject to state compulsion from liability, although the issue of the scope of the defence (limiting v. ousting liability) remains open. Fairness considerations offer strong underpinnings for the doctrine.

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establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.'

[182] Id. at 234-35.

[183] Id. at 235.

At the same time both in the US and in the EU reliance on the defence is hardly ever successful. The standard of what constitutes compulsion seems to be set too high. This is particularly visible in cases arising across different economic systems, like the recent Chinese export cartels challenged in the US, or the earlier US-Japanese friction. It is one thing to ask the court to address state involvement in a foreign but broadly similar system and a very different exercise to ask the judge to do the same in a legal and socio-economic context poles apart. The recent cases illustrate that different courts, even within the same jurisdiction, may take diverse approaches, leading to less predictability and potentially to international controversy.

It is telling that in the EU regime such transnational cases possibly involving foreign (non-EU) state compulsion are lacking. Although it may be explained in various ways, the lack of treble damages in private enforcement in the EU being probably one of the crucial arguments, it demonstrates that the European Commission is reluctant to address such concerns, involving foreign states, through extraterritoriality in competition law. The fact that *Vitamin C*, *Animal Science* and *Resco* are all private actions, and that the US administration brought its own case not against the companies for breach of antitrust, but against China in the WTO framework, raising *inter alia* issues being at the centre of the antitrust actions, shows that the US administration opted for multilateral means of addressing antitrust concerns. This is a welcome development, strengthening the international regulatory system. It supports an argument that antitrust concerns involving foreign state compulsion could be challenged under the WTO regime. From this perspective, it is disappointing that the Appellate Body in its report in *China- Measures Related to the Exportation of Various Raw Materials* did not provide guidance on the matter. Was the trade regime found applicable in such cases, the standard of foreign state compulsion in antitrust cases should be lowered, possibly to the level comparable to the one applicable to the US domestic state action doctrine. Such a step would offer more clarity in terms of who is liable in such context under antitrust laws, leading also to fewer controversies across jurisdictions. Otherwise, if multilateral means of addressing this issue do not present themselves in a foreseeable perspective and the reliance on the compulsion defence will not be successful in a number of similar cases, the international tension is bound to grow. In any case, the foreign state compulsion defence was recognised for a good reason and courts and competition authorities should not, by pushing the standard too high, rule it out, especially when the claims arise in a wider context on the verge of international trade and competition.

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Higher Education Institutions and EU Competition Law

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The European Union does not (yet) use the supranational method of integration in higher education and research. Instead, Member States have agreed on soft law mechanisms (Open Method of Coordination 'OMC' as part of the Lisbon Strategy) and extra-EU law modes (the Bologna Process). However, higher education institutions (HEIs) are not immune to the forces of directly applicable Treaty provisions, such as those on Union Citizenship, the free movement provisions and the provisions on competition law and state aid. The fact that the application of EU law can interfere with national policy concepts as regards HEIs has already been highlighted by recent cases in the field of Union Citizenship. As regards the free movement provisions, competition and state aid law, higher education and research in public institutions in the public interest were originally regarded as non-economic services rendering these provisions inapplicable. However, this is not a fixed concept; with increasing commodification of HEIs their activities can come into the ambit of these provisions and tensions could arise. Commodification is a topic discussed increasingly not only in academic literature, but also in the wider public sphere. The Browne Report and the creation of a consumer market for higher education in England was only the latest step in this direction. This paper gives insights into the competition law aspects of this developing area.

INTRODUCTION

European HEIs have increasingly been urged to move towards market principles. This development is particularly pronounced in England with the policy developments after the publication of the Browne report. However, in the discussion about tensions between public service provision at the national level and directly applicable provisions of EU law, the HEI sector has received little attention.

As in other public policy fields, the European Union does not (yet) use the supranational method of integration as regards HEIs. Instead, Member States have agreed on soft law mechanisms (OMC as part of the Lisbon Strategy) and extra-EU law modes (the Bologna Process). However, HEIs are not immune to the forces of directly applicable Treaty provisions, such as those on Union citizenship, the free movement provisions and the provisions on competition law and state aid. This has been highlighted by recent cases in the field of EU citizenship.

As regards the free movement provisions and competition and state aid law, higher education and research in public institutions in the public interest were originally

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regarded as non-economic services. These provisions were therefore not applicable to HEIs. However, it is clear that research with a commercial interest is regarded as an economic service and later case law and Commission practise shows that the definition of higher education as 'non-economic' is not a fixed concept. With increasing commodification of HEIs their main activities can thus come into the ambit of the above mentioned provisions and tensions could arise.

This paper will explore the competition law aspects in this regard. It will start by illuminating the background to the problem as sketched above using insights from political theory, history and educational studies. The main part will be based on legal doctrinal analysis. The question under which circumstances HEIs could be regarded as providing economic services will first be explored. This will be followed by an analysis of the competition law problems which could arise as a result of this for HEIs. The findings will then be integrated in a conclusion.

THEORETICAL BACKGROUND

The EU integration project started mainly as economic integration which was hoped would then lead to welfare, peace and stability automatically.[1] The economic dimension of European integration is thus better institutionalised and supported by hard law than the social dimensions of European integration. Even though the latter is not expected to just happen as a side effect of economic integration anymore, it is more often pursued by policy coordination through the OMC ('soft law') than by creating binding legislation using the supranational method. At the same time, however, the directly applicable Treaty provisions insert influences on national public service provision causing tensions between economic EU law and national public service concepts.[2]

This could also lead to unforeseen consequences for HEIs.[3] Given that European integration started as economic integration, HEIs have not played a role in the European project initially,[4] as their economic value was not apparent at the time.

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[1] Article 2 EEC originally stated that: 'The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of the member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it'. See further on the interrelation of economic and social integration Schiek, 'Re-embedding economic and social constitutionalism: Normative perspectives for the EU' in Schiek, Liebert & Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon,* Cambridge, CUP, 2011, p 33 seq.

[2] This has been widely discussed in literature. See, for example, the contributions to the edited collections: Schiek, Liebert & Schneider, *European Economic and Social Constitutionalism after the Treaty of Lisbon,* Cambridge, CUP, 2011; Neergaard, Nielsen & Roseberry, *Integrating Welfare Functions into EU Law - From Rome to Lisbon,* Copenhagen, DJØF, 2009; de Búrca, *EU Law and the Welfare State - In Search of Solidarity,* Oxford, OUP, 2005; and, Dougan & Spaventa, *Welfare and EU Law,* Oxford/Portland, Hart, 2005.

[3] Unless otherwise indicated the term 'HEIs' is used for public HEIs, as this paper aims to look at constraints on HEIs as one manifestation of EU law constraints on public services.

[4] See on the development of EU education policy Hummer, 'Vom "Europäischen Hochschulraum" zum "Europäischen Forschungsraum". Ansätze und Perspektiven einer europäischen Bildungs- und Forschungspolitik', in Prisching, Lenz & Hauser (eds), *Bildung in Europa - Entwicklungsstand und Perspektiven*, Wien, Verlag Österreich, 2005, and Walkenhorst, 'Explaining change in EU education policy' (2008) 15 (4) Journal of European Public Policy 567.

However, the free movement provisions already 'spilled over'[5] into one aspect concerning HEIs, namely diploma recognition. The free movement of persons required that a common approach in this area had to be found and a set of Directives[6] has been adopted in this respect.

The shift towards a service and knowledge society[7] and increasing globalisation required further cooperation regarding higher education and research; the two main activities of HEIs.[8] However, the Member States seemed reluctant to do so at the supranational level.[9] The competences given to the Union in the field of education are only complementary; the main competences remain with the Member States.[10] Regarding research the Union and the Member States now share competence. This is, however, only a result of the Treaty of Lisbon and thus a rather recent development.[11] The Member States instead used the OMC as part of the Lisbon strategy[12] (a soft law mechanism) and the Bologna process[13] (an extra EU mode) to achieve cooperation. In particular the Bologna process, however, was heavily criticised, despite some

[5] 'Spill-over' is a concept of neo-functionalism, a theory of European integration. Neo-functionalism assumes that eventually a full union will be the end state of regional integration. However, the main focus of the theory is the process of integration. According to it, integration in one area will have certain insufficiencies, which, when fixing them, lead to 'spill-over' into other areas. See further on neo-functionalism Schmitter, 'Neo-Neofunctionalims', in Wiener & Diez (eds), *European Integration Theory,* 1st ed (discontinued in 2nd ed), Oxford, OUP, 2004, and Niemann & Schmitter, 'Neofunctionalism', in Wiener & Diez (eds), *European Integration Theory,* 2nd ed, Oxford, OUP, 2009.

[6] The original regime of directives has by now been replaced by Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 'on the recognition of professional qualifications'.

[7] A development endorsed by the Lisbon Strategy the aim of which is to create 'the most competitive and dynamic knowledge-based economy in the world'. See Lisbon European Council 23 and 24 March 2000 Presidency Conclusion available on http://www.europarl.europa.eu/summits/lis1_en.htm. The Lisbon strategy has been re-launched as the Europe 2020 Strategy in 2010. See European Council Conclusions EUCO13/10 CO EUR 9 CONCL 2, 17 June 2010.

[8] On the aims and purposes of HEIs throughout history see Wissema, *Towards the Third Generation University* Cheltenham/Northampton, Edward Elgar, 2009, Scott, 'The Mission of the University: Medieval to Postmodern Transformations' (2006) 77(1) The Journal of Higher Education 1.

[9] See further Garben, 'The Bologna Process: From a European Law Perspective' (2010) 16(2) ELJ 186 who argues that the competences for supranational integration as regards HEIs could have been seen in Article 115 TFEU, despite the limited competences for the policy areas of higher education and research.

[10] Articles 165-166 TFEU are basically giving the Union the competence to pass educational programmes in support of national policies.

[11] Article 4 TFEU made research a shared competence. The details of the common research policy are foreseen in Article 179-190 TFEU. The Union can, next to the Framework Programmes (which are an older development originally based on Article 235 EEC (now Article 352 TFEU), which allowed the EEC to 'take the appropriate measures' when deemed necessary to achieve the Community's goals), now also pass legislation to achieve the European Research Area following the ordinary legislative procedure (Article 182(5) TFEU). Research and technological development became a Union objective and the free circulation of 'researchers, scientific knowledge and technology' is to be achieved (Article 179(1) TFEU).

[12] On HEIs and the Lisbon strategy see Van der Ploeg & Veugelers, 'Higher education reform and the renewed Lisbon strategy: role of member states and the European Commission' (2007) 1901 CESifo Working Paper.

[13] Further on the Bologna process see Eurydice, *Focus on Higher Education in Europe 2010: The impact of the Bologna Process,* Brussels, Eurydice, 2010.

successes.[14] This unpopularity may make further integration in this respect at the supranational level even more unlikely.[15]

However, that does not prevent 'spill-over' from directly effective EU law. The general tendency of the European integration project has shifted from a focus on the 'European Social Model' towards a more neo-liberal endeavour.[16] In this neo-liberal phase the application of directly effective Treaty provisions on ever more public services has taken place and we have seen, first, the utilities sector and, later, other areas of welfare provision falling into the ambit of EU law, with partly negative consequences for the Member States' social models.[17]

In the HEI sector the cases of Austria and Belgium are prominent examples of such influences.[18] The Court decided that these Member States had to abolish provisions requiring non-residents to fulfil additional requirements for university access, while own residents only had to be in possession of a secondary school diploma, as this would infringe EU citizenship. The 'free and open access' policy for their own residents had, however, been chosen, as the percentage of population with tertiary education was comparably low in these Member States. After abandoning the provision, a disproportionate number of foreign students registered for studies, in particular in medical subjects,[19] which then raised concerns regarding the health systems in the

[14] On the successes see Van der Ploeg and Veugelers (n 12) p 22 with further references. See further regarding criticism e.g. Garben (n 9), Hummer (n 4) pp 52 & 78 seq, Banscherus et al., *Der Bolongna-Prozess zwischen Anspruch und Wirklichkeit*, Coburg, Leutheusser Druck, 2009, pp 11 seq, 78 seq and foreword by Keller p 7, Cippitani & Gatt, 'Legal Developments and Problems of the Bologna Process within the European Higher Education Area and European Integration' (2009) 34 (3) Higher Education in Europe 385, p 391.

[15] This conclusion is based on social constructivist thinking. Social constructivism, another approach in European integration theory, explains European integration by focussing on the actors in the European social space who influence the space and vice versa. Thus a negative assessment of the Bologna process, which the general public often regards as an EU measure, might make a common strategy increasingly unlikely. Further on social constructivism see Risse, 'Social Constructivism and European Integration', in Wiener & Diez (eds), *European Integration Theory*, 2nd ed, Oxford, OUP, 2009.

[16] This is an assumption of critical political economy, also an approach in European integration theory. Critical political economy explains integration with economic reasons. It argues that the first phase of European integration was the logical choice for the war deprived economies of the Member States and the European social model was seen as a competitive advantage. Beginning with the Bretton Wood Crisis this model was later followed by a more neo-liberal approach which was then deemed necessary. Further on critical political economy see Cafruny & Ryner, 'Critical Political Economy', in Wiener & Diez (eds), *European Integration Theory,* 2nd ed*,* Oxford, OUP, 2009.

[17] On the inclusion of public services into internal market law see Chalmers, Davies & Monti, *European Union Law,* Cambridge, CUP, 2010 p. 1013 seq, Neergaard, 'Services of general economic interest under EU law constraints', in Schiek, Liebert & Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon,* Cambridge, CUP, 2011 p 174 seq, and Steyger, 'Competition and Education', in de Groof, Lauwers & Dondelinger (eds), *Globalisation and Competition in Education,* Nijmegen, Wolf Legal Publishers, 2002.

[18] Cases C-147/03 *Commission vs Austria,* C-65/03 *Commission v Belgium.*

[19] See on numbers regarding Austria e.g. Mandl, 'Deutsche NC-Flüchtlinge - Österreich darf auf die Piefkebremse treten' (2007) Spiegel online 18th October 2007 http://www.spiegel.de/unispiegel/studium/0,1518,512303,00.html (accessed 12th October 2011) and regarding Belgium the opinion of Advocate General Sharpston in case C-73/09, *Bressol,* para 20. On numbers for both countries with further references see Damjanovic, '"Reserved areas" of the Member States and the ECJ: the case of higher education' in Micklitz & De Witte (eds) *The European Court of Justice and the Autonomy of the Member States,* Cambridge, Intersentia, 2012, 162.

future.[20] In the case *Bressol*[21] the Court later allowed the concerns regarding the health system as a justification for the newly introduced quota system in Belgium. However, these cases show how, in special circumstances, unrelated provisions of EU law can 'spill-over' significantly into national policies regarding HEIs.

At the same time, the nature of European HEIs has recently increasingly developed towards commodification.[22] The Browne Report[23] and the creation of a consumer market for higher education in England were only the latest steps in this direction.

THE ECONOMIC NATURE OF HEIS

The assumption in internal market and competition law has thus far been that higher education and research conducted in public HEIs in the public interest are not economic services in the meaning of the Treaty. These provisions would therefore not be applicable to these activities, as Article 56 TFEU requires a 'service' which is 'normally provided for remuneration' and the competition law provisions only apply to 'undertakings'. The latter has been defined by the Court as 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[24] It further defined an economic activity as every activity that consists of 'offering goods or services on a market'.[25]

In *Humbel*,[26] a case considered under the free movement provisions, the Court decided that public education was not a service in the meaning of the provisions, as education systems are generally 'funded from the public purse' without a profit-oriented goal, but rather in the pursuit of satisfying the Member States' obligations towards their 'population in the social, cultural and educational fields'. Insignificant fees 'in order to make a certain contribution to the operating expenses of the system' do not change this assessment. In *Wirth*[27] the Court confirmed that this was also applicable for higher education unless such education is taking place in HEIs which are 'financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit'. Following the Courts reasoning in the free movement cases it can be assumed that HEIs originally would have also been regarded as conducting a typical

[20] See also on these cases Reich, 'Herkunftsprinzip oder Diskriminierung als Maβstab fuer Studentenfreizuegigkeit?' (2009) 18 EuZW 637, and Rieder, 'Case C-147/03, *Commission of the European Communities v Republic of Austria*' (2006) 43 CML Rev 1711.

[21] Case C-73/08 *Bressol.*

[22] See further on the changing nature of HEIs and, in particular, on the recent developments e.g Wissema (n 8), Scott (n 8), Deiaco, Holmen & McKelvey, 'From social institution to knowledge business', in McKelvey & Holmen (eds), *Learning to compete in European Universities*, Cheltenham/Northampton, Edward Elgar, 2009, Palfreyman & Tapper, 'What is an 'Elite' or 'Leading Global' University?', in Palfreyman & Tapper (eds), *Structuring Mass Higher Education* New York/London, Routledge, 2009.

[23] Browne et al., *Securing a sustainable future for higher education,* 2010, www.independent.gov.uk/browne-report, accessed 9th September 2011.

[24] See Case C-41/90 *Höfner,* para 21.

[25] See Case 118/85 *Commission v Italy,* para 7.

[26] See Case 263/86 *Humbel,* para 14 seq.

[27] Case C-109/92 *Wirth,* para 13 seq.

government activity which does not fall into the ambit of competition law. The Commission indeed adopted this reasoning in Decision 2006/225/EC.[28]

As the caveat in *Wirth* shows, the definition of (higher) education as non-economic is not absolute. Indeed, in newer case law a variety of educational activities have been defined as economic services. The case *Neri*[29] concerned a private HEI which provided university courses in cooperation with a British university. This HEI also had a branch in Italy. The question in the case was whether Italian rules not recognising the diplomas given by this HEI were infringing the freedom of establishment, which would require the higher education service provided to be a service in the meaning of the free movement provisions in the first place. The Court decided that the 'organisation for remuneration of university courses is an economic activity'.[30] This case was also not an isolated decision. In the case *Schwarz*[31] private schools and in the case *Jundt*[32] teaching activities conducted by an individual for a HEI in another Member State have been regarded as economic services. Regarding competition law HEIs would be conducting an economic activity if they offered services on a market. This does not require the HEIs to actually make a profit. Neither can their public character prevent the classification as undertaking. All that matters is the (potentially) economic nature of the service. Thus it very much depends on the way a system is organised; if it is organised as a market and private for-profit providers (potentially) compete with them, HEIs are more likely to be classified as 'undertakings'.[33] Therefore the Commission pointed out in Decision 2006/225/EC:

> 'that the concept of economic activity is an evolving concept linked in part to the political choices of each Member State. Member States may decide to transfer to undertakings certain tasks traditionally regarded as falling within the sovereign powers of States. Member States may also create the conditions necessary to ensure the existence of a market for a product or service that would otherwise not exist. The result of such state intervention is that the activities in question become economic and fall within the scope of the competition rules'.[34]

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[28] See Commission Decision 2006/225/EC 'on the aid scheme implemented by Italy for the reform of the training institutions' (para 41 seq).

[29] Case C-153/02 *Neri*.

[30] Case C-153/02 *Neri* para 39. It is to be noted here that the tuition fees concerned only amounted to € 2,065.83 per annum and were thus in comparison to the amount of tuition fees which English students will have to pay not even that high.

[31] Case C-76/05 *Schwarz*.

[32] Case C-281/06 *Jundt*.

[33] See also Swennen, 'Onderwijs en Mededingsrecht' (2008/2009) 4 Tijdschrift voor Onderwijsrecht en Onderweisbeleid 259, p 265 seq, 275 seq, Steyger (n 17) p 277 seq.

[34] See above (n 28) para 50. This has also been reinforced in Commission Communication 'on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest' (2012/C 8/02) para 28.

Regarding research in HEIs the Commission in its 'Community framework for state aid for research and development and innovation'[35] made clear that it considers 'that the primary activities of research organisations are normally of a non-economic character'. It refers in particular to research 'for more knowledge and better understanding', 'the dissemination of research results' and internal, not-for-profit technology transfer. The Commission further explains, however, that activities 'such as renting out infrastructures, supplying services to business undertakings or performing contract research' are economic in nature.[36]

It is therefore apparent that with further commodification of HEIs, their major activities can fall under the free movement provisions and competition and state aid law. In the following section it will be analysed what consequence competition and state aid law can have for HEIs. Of course, the possibility of exemption as services of general economic interest (SGEIs) under Article 106(2) TFEU remains in such cases. However, the placing in the market of such services can in itself be regarded as problematic as it might change the nature of such services. The character of Article 106(2) TFEU as an exemption means that 'there has to be a good reason for setting aside competition and what that exactly could be is still not clearly defined'.[37] Thus not all constellations will necessarily be exempted. Additionally, this will require a more market oriented way of operation in order to avoid going beyond the proportionality requirement of Article 106(2) TFEU.

POSSIBLE PROBLEMS ARISING FROM EU COMPETITION LAW FOR HEIS

Market Definition

As will be seen below the application of the competition rules often depends on the share an undertaking holds in the relevant market. Therefore a few observations regarding market definition seem in order before moving to the competition law provisions themselves. To establish the market, the relevant product and geographical market has to be defined. The Commission focuses on 'demand substitution' when defining markets. 'Supply substitution' only plays a role in cases where an undertaking can easily switch between the products it produces, even if these products are not interchangeable from a 'demand substitution' perspective. Other considerations are only taken into account at a later stage. In establishing 'demand substitution' the Commission uses the SNIP (small but significant and non-transitory increase in price) test. All products which are an alternative if such an increase in price would take place are within one product market and all regions from which the consumers would be willing to receive the product, would be in the same geographical market.[38]

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[35] Commission 'Community framework for state aid for research and development and innovation' 2206/C 323/01 para 3.1.1.

[36] Para 3.1.2. of the framework (n 35). One might assume that a similar distinction would be drawn in the field of the free movement provisions.

[37] Neergaard (n 17) p 194.

[38] Commission Notice 'on the definition of the relevant market for the purposes of Community Competition law' OJ 1997, C372/5, para 7 seq.

For the product market as regards HEIs this would mean that research and teaching are not in the same market. Furthermore, undergraduate and post-graduate education would be in a different market. Considering 'supply substitution' undergraduate and postgraduate taught education might, however, be considered to be in the same market, as it might be easy for the HEIs to switch between the two. Postgraduate research education, however, would have to be considered as an own market, as not all HEIs even have the right to issue doctoral degrees[39] and the position between student and researcher inherent to postgraduate research students[40] might also require significant office and laboratory space, which would make a switch less easily conductible. Furthermore, the different subjects are to be considered as separate markets. However, problems in this respect might lie in the details. One might, for example, wonder if a specialised course in international law belongs to the same market as legal education in general and if very specific research constitutes an own market. If such specialisation leads to separate markets the market shares of the HEIs in question would be likely to be very high. Another aspect to take into account here, would be activities in different languages, in particular as regards education. The market for courses in Lithuanian would surely have to be differentiated from the market for courses in Spanish. Finally, some Member States have different types of HEIs which might constitute different markets, as, for example, degrees of a more vocational character (e.g. Fachhochschulen in Germany) do not necessarily qualify for postgraduate research degrees at universities. Even in England, where the divide has officially been abandoned, prestige questions might lead to the approximation as separate markets for courses provided by pre and post 1992 HEIs. Concerning the geographical market one might assume that this is narrower for undergraduate education than for postgraduate education, as undergraduate students might prefer to stay closer to their parents' homes. Thus the market might only comprise one Member State or even just a region within one Member State. On the other hand, the cases of Austria and Belgium mentioned above indicate that in some situations the market penetrates national borders. As regards research, the market is even more likely to be international.[41]

These considerations show that market definition is a complex exercise and it is not possible to describe the markets as regards HEIs in general terms. Instead it very much depends on the individual case to determine what exactly the market is.

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[39] In Germany, for example, only universities usually have the right to issue doctoral degrees. See, for example, the provision regarding this in the federal state of Bremen; § 65 (1) Bremisches Hochschulgesetz (Bremen HEIs Act 2007). Being a federal republic, the federal states mainly regulate the HEI sector in Germany.

[40] While PhD researchers are mainly regarded as students in some Member States (e.g. in England), they are regarded more as academic staff in others. The latter is, for example, the case in the Netherlands where the academic place for a PhD researcher is usually a salaried position. See VSNU (vereniging van universiteiten - association of universities in the Netherlands), 'Doctoral education' (2011) http://www.vsnu.nl/Focus-areas/Research/Doctoral-education-.htm accessed 20th September 2011.

[41] See also on market definition in the context of HEIs Amato & Farbmann, 'Applying EU competition law in the education sector' (2010) 6(1-2) IJELP 7 and Greaves & Scicluna, 'Commercialization and competition in the education services sector - Challenges to the education service sector from the application of Articles 101 and 102 TFEU' (2010) 6(1-2) IJELP 13 p 16 and 20 seq.

ARTICLE 101 TFEU - THE PROHIBITION OF COLLUSION HARMING COMPETITION

Article 101(1) TFEU prohibits any collusion between undertakings which has as its 'object or effect the prevention, restriction or distortion of competition', if it is of a Union dimension. For the latter to be the case the collusion has to 'affect trade between Member States' appreciably[42] and it has to have an appreciable effect on competition.[43]

For HEIs this would mean that any cooperation regarding prices for research or tuition fees could come under the scrutiny of the provision. While there has not been a case on HEIs under EU law yet, the Office of Fair Trading (the UK's competition Authority, OFT) already found that private schools had established a cartel. The schools had exchanged confidential price information over an extended period of time and were thus fined with £10,000 each for 'participating in an agreement and/or concerted practice having as its object the prevention, restriction or distortion of competition in the relevant markets for the provision of educational services'.[44] The Dutch competition authority (Nederlandse Mededingsautoriteit, NMa) recently started investigations into a possible price fixing cartel of two universities based in Amsterdam. Dutch universities are allowed to set their prices themselves since the Wet Versterking Besturing (Strengthening Administration Act) entered into force in 2010. The NMa is now investigating whether the Universiteit Amsterdam and the Vrije Universiteit Amsterdam fixed their prices for second bachelor and/or master degrees except for medical subjects.[45] According to 'de Volkskrant' there have even been minutes of common discussions between the universities to this end which have been included in a writ by the student organisation Stichting Collectieve Actie Universiteiten (Foundation Collective Action Universities, SCAU).[46] This writ apparently started the investigations.[47] Price fixing was also the issue in a case regarding a German music

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[42] This has been interpreted widely, though. The closing of a national market (Case 8/72 *Vereeniging van Cementhandelaren* para 29) as well as potential effects (Case 56/65 *Maschinenbau Ulm* [1966] ECR 235, 249) fall under this criterion. See further on this criterion Commission Notice 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty' (OJ 2004, C101/81).

[43] Case 5/69 *Völk* para 7. The Commission deems that generally not to be the case if the market share is below 10% in horizontal and 15% in vertical cases. See Commission Notice 'on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)' (OJ 2001, C368/07) section II 7 seq.

[44] OFT Decision CA98/05/2006 from 20th November 2006 available on http://www.oft.gov.uk/OFTwork/cartels-and-competition/ca98/decisions/schools. The OFT applied the national equivalent to Article 101(1) TFEU; s 2(1) Competition Act 1998. See also on the case Greaves and Scicluna (n 41) p 13, 21 seq, Amato and Farbmann (n 41) p 10 seq, and Swennen (n 33) p 277.

[45] See NMa Press Release, 'Bedrifsbezoeken NMa bij Amsterdamse universiteiten' (2011) http://www.nma.nl/documenten_en_publicaties/archiefpagina_nieuwsberichten/webberichten/2011/20_11_bedrijfsbezoeken_nma_bij_amsterdamse_universiteiten.aspx accessed 12th October 2011.

[46] de Pous, 'Amsterdamse universiteiten gedaagd om prijsafspraken' (2011) de Volkskrant 1st September 2011, http://www.volkskrant.nl/vk/nl/4884/Bezuinigingen-in-het-hoger-onderwijs/article/detail/2880822/2011/09/01/Amsterdamse-universiteiten-gedaagd-om-prijsafspraken.dhtml accessed 14th October 2011.

[47] Dijkstra, 'Amsterdam Universities fix prices: how to prevent this from happening?' (2011) http://www.rug.nl/kennisdebat/onderwerpen/actueel/universitiesFixPrices, accessed 14th October 2011, Myklebust & O'Malley, 'NETHERLANDS: Dawn raids over 'illegal' tuition fees' (2011) University World

school. The public music school had set maximum prices which the self-employed teachers teaching in this music school were able to charge, in order to keep prices low and make music education accessible for everybody. A teacher wanting to charge higher prices challenged the arrangement. The Bundesgerichtshof (German Federal Court of Justice, BGH) considered the self-employed teachers as well as the school as undertakings engaged in price fixing.[48] While in the first case it is unclear whether the application of competition law had positive or negative social consequences as such and in the second case the student organisation is trying to use competition law to prevent excessive pricing, the latter case indicates that negative social consequences can in fact arise from the application of competition law, as the low prices in this case were meant to achieve equal access for everybody. As public market regulation can also be challenged under Article 4(3) TFEU in conjunction with Article 101(1) TFEU,[49] one might even wonder if in certain circumstances governmental provisions setting fees or caps on fees could be challenged.

Cooperation of HEIs in a common body which leads to the foreclosure of the market could be problematic. For example, it might be conceivable that bodies allocating study places could not limit themselves to national HEIs anymore, as this would foreclose the market for new entrants. The press[50] has already reported on the exclusion of Maastricht University from the British Universities and Colleges Admission Service. In the article it was said that Maastricht University was planning to challenge the denial under 'European Union law for discriminating against Maastricht'. It is not entirely clear which provision of EU law was meant. However, one would assume that this refers to the free movement provisions. It would also be conceivable, though, that such situations could be challenged under Article 101(1) TFEU. Depending on which status such a body had, it could be regarded as a decision by an association of undertakings, a vertical cartel[51] or an infringing governmental regulation. The opening of such arrangements, however, could lead to additional costs and thus to constraints for the systems.

Another area that could lead to conflicts with Article 101(1) TFEU is cooperation between HEIs in which they agree to each specialise in specific areas, as this could be regarded as market division. Thus joint course agreements could, in principle, fall under Article 101(1) TFEU. Research cooperation could also be regarded as collusion if it is taking place with a view to exploit the results and limits competition. The latter might be the case if further limitations beyond the research cooperation are attached to it, if the individual undertakings were close to achieving the result of the cooperation

News 7th September 2011, http://www.universityworldnews.com/article.php?story=20110907191951868, accessed 23rd September 2011.

48 BGH Judgement 23/10/1979 in (1980) 82 GRUR 249. See further on the case Kroitzsch, 'Anmerkungen BGH 23/10/1979 KZR 22/78 'Berliner Musikschule" (1980) 82 (4) GRUR 251, and Swennen (n 44) p 277.

49 Case 13/77 *INNO v ATAB,* para 30 seq.

50 Grimston & Winch, 'Maastricht University is fighting for a listing in order to attract British students' (2010) The Sunday Times 24/10/2010, p 4.

51 See Case 107/82 *AEG,* para 35 seq, on distribution networks which are not open to everybody fulfilling the qualitative criteria being considered as vertical agreements.

individually or if the exploitation abilities of the parties are unduly limited.[52] In Member States where public funding is decreasing such common research or teaching arrangements might, however, be the only possibility for certain HEIs to survive.

Article 101(1) TFEU also prohibits the limitation of markets. This could possible lead to problems when HEIs or governmental regulations limit study places or research output. In particular the demand for study places is often higher than the places available[53] which might encourage students to challenge such a situation. Again, the systems might, however, not be able to accommodate more students and retain their public or, in some Member States, free of charge character.

Any collusion caught by Article 101(1) TFEU is automatically void under Article 101(2) TFEU unless it can be exempted under Article 101(3) TFEU; if it provides for efficiency gains which allow the consumer 'a fair share' of the gain, it is necessary to achieve these gains, and does not eliminate competition. The Commission seems to follow a rather narrow approach as regards these criteria taking mainly economic considerations into account.[54] Since Regulation 1/2003,[55] which decentralised competition law, prior notification is not necessary for an exemption. Yet, the Commission still issues block exemption regulations (BERs) to provide guidance on which kind of collusion it generally deems to be exempted some of which might be helpful for HEIs. The specialisation BER[56] allowing undertakings to specialise and receive products from competing undertakings might, for example, provide an exemption for joint course agreements. However, the exemption is only applicable to undertakings with a combined market share below 20%. It also does not apply to price fixing, limitation of outputs and market division (which are hardcore restrictions). The research and development BER[57] exempts all vertical agreements[58] and horizontal agreements of a common market share below 25%, if 'the parties have full access to the final results'. Certain hardcore restrictions are, however, excluded. The technology

[52] See further Lübbig & Schroeder, '§8 Einzelfragen', in Wiedemann (eds), *Handbuch des Kartellrechts*, 2nd ed, Munich, Beck, 2008, para 120 seq.

[53] See, for example, the cases of Belgium and Austria mentioned above (n 18). As regards the problem of insufficient numbers of study places to satisfy all applicants in England see e.g. Richardson, 'Thousands "to miss out on university degree"' (2010) BBC News 1st February 2010 http://news.bbc.co.uk/1/hi/education/8487354.stm accessed 9th February 2010.

[54] See, for example, Commission White Paper 'on the modernisation of the rules implementing Articles 85 and 86 of the EC Treaty' Programme No 99/027 (OJ 1999, C132/01) para 57, and Commission Communication 'Guidelines on the application of Article 81(3) of the Treaty' (OJ 2004, C101/08) para 42. See also Monti, *EC Competition Law*, Cambridge, CUP, 2007 chapter 4 in particular pp 89 seq, 102 seq and 122 seq, and Jones & Suffrin, *EC Competition Law,* 4th ed, Oxford, OUP, 2011, p 244 seq. With a focus on HEIs see Greaves and Scicluna (n 41) p 20.

[55] Council Regulation 1/2003/EC of 16 December 2002 'on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty' Article 1(2).

[56] Commission Regulation 1218/2010/EU of 14 December 2010 'on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements'.

[57] Commission Regulation 1217/2010/EU of 14 December 2010 'on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements'.

[58] 'Agreements' also refers to tacit collusion and decisions of associations of undertakings in the research and development BER (ibid Article 1(1)(b)).

transfer BER[59] provides an exemption for technology transfer relating to the manufacture of contractual products in cases where the common market share is below 20% in horizontal and the individual market share below 30% in vertical cases. Certain hardcore restrictions and some other restrictions are, again, excluded. Finally, all vertical collusion below a market share of 30% of the individual undertaking is generally exempted by the vertical agreement BER[60] except for certain hardcore restrictions. It would depend on the individual case in how far HEIs can utilise these exemptions.

ARTICLE 102 TFEU - ABUSE OF A DOMINANT MARKET POSITION

Article 102 TFEU prohibits dominant undertakings abusing their market position. An undertaking is assumed to be dominant if it possesses a market share of more than 50% in the relevant market. However, this assessment might change if barriers to entry are low. The abuse lies in the anti-competitive behaviour of the dominant undertaking. The concept of abuse and dominance are closely linked, as certain behaviour might only be regarded as abusive if it is conducted by a dominant undertaking. Like Article 101 TFEU, Article 102 TFEU only applies if there is an effect on intra-Union trade.

Problems could, for example, arise for HEIs from this provision (given that they hold a dominant market position in the relevant market) if, due to their public position, they are able to hold their prices at a low level. Private competitors might try to challenge this as predatory pricing. Again, there is no case law regarding HEIs under EU law in this respect. The NMa, however, had to deal with a case similar to the German music school case mentioned above. In this case the private competitors of public music schools had accused the public schools of predatory pricing. The NMa denied the case as the prices of the public schools were foreseen in national legislation and the NMa had no authority to review this.[61] This would be different at the EU level. Such legislation could be challenged under Article 106(1) TFEU in conjunction with Article 102 TFEU.[62] Thus whether prescribed by national legislation or not, low tuition fees as well as low prices for research contracts could be challenged under Article 102 TFEU which might be counter-productive to the public service aim pursued by public HEIs.

MERGER CONTROL

EU merger control is not to be found in a Treaty provision, but in secondary legislation. According to the Merger Regulation,[63] mergers can be prohibited if they would lead to a significant impediment to effective competition and are of a EU dimension.

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[59] Commission Regulation 772/2004/EC of 27 April 2004 'on the application of Article 81(3) of the Treaty to categories of technology transfer agreements'.

[60] Commission Regulation 330/2010/EU of 20 April 2010 'on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices'.

[61] Besluit bk005-9801available at www.nmanet.nl/Images/0005BEMP_tcm16-97472.pdf. See also on the case *Swennen (*n 44) p 275.

[62] Case 18/88 *RTT,* para 23 seq, C-49/07 *MOTOE,* para 50.

[63] Council Regulation 139/2004/EC of 20 January 2004' on the control of concentrations between undertakings (the EC Merger Regulation)'.

If due to decreasing public funding HEIs decide to merge, the Merger Regulation might apply to them and can lead to a prohibition of the planned merger. Again, there are, so far, only national cases available in this respect. The OFT has dealt with two mergers in the sector already. The first concerned the merger between the City College Manchester and the Manchester College of Arts and Technology. In this case the market shares of the colleges were, however, too low to justify further investigation.[64] The second merger concerned the University of Manchester, the Victoria University of Manchester and the University of Manchester Institute of Science and Technology. Here the OFT did investigate, but decided that these HEIs were only partly to be regarded as competitors and that the merger would not limit competition significantly enough, in those parts where they were, to prohibit the merger.[65] The cases illustrate, though, that HEIs have not only been regarded as undertakings, but have also been investigated at the national level and, in other cases, envisaged mergers might be prohibited.

ARTICLE 107 TFEU - ILLEGAL STATE AID

Any advantages imputable to the state, which are given selectively to undertakings, distort competition and have an effect on intra-Union trade, are illegal under Article 107(1) TFEU. The Commission, however, applies a *de minimis* clause excluding small amounts (€200,000 over three fiscal years) of state aid from the provision.[66] Article 107(1) TFEU has led to difficulties in the details; on the one hand, state aid should be prohibited and on the other hand, the state must be in the position to invest its money and commission public services for its population. For the former the 'private investor principle' is used; if the state acts like a private investor the investment does not constitute state aid. For the latter the Court has clarified its approach in the case *Altmark*[67] which was then followed by Commission legislation and guidelines laying down further details.[68] The commissioning of a service is, accordingly, not state aid, if it clearly defines the public service obligation, the compensation has been calculated transparently in advance, is not excessive and the estimated costs themselves are reasonable. The latter should normally be established by a public procurement procedure. The *Altmark* judgement and the following legislation led to Article 106(2) TFEU playing a less significant role for state aid. While the *Altmark* criteria have originally been used strictly, the General Court gave the Member States slightly more

[64] Case ME/3080/07 available at http://www.oft.gov.uk/OFTwork/mergers/decisions/2007/City. See also on the case *Swennen (*n 44) p 277.

[65] Case ME/1613/04 available at http://www.oft.gov.uk/shared_oft/mergers_ea02/uompublish.pdf. See also on the case *Swennen (*n 44) p 277.

[66] Commission Regulation 1998/2006/EC of 15 December 2006 'on the application of Articles 87 and 88 of the Treaty to de minimis aid'.

[67] See case C-280/00 *Altmark*.

[68] Commission Decision 2012/21/EU of 20 December 2011 'on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest', 'European Union framework for State aid in the form of public service compensation' (Commission Communication 2012/C 8/03), Commission Directive 2006/111/EC of 16 November 2006 'on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings' and a Communication on SGEIs and state aid (above n 34).

leeway in *BUPA*[69] when it came to the definition of the public service obligation. This has been interpreted in literature as respecting the primary responsibility of the Member States in areas such as health.[70] It might thus also be a relevant precedent for a less strict approach as it comes to HEIs, at least in the field of education.

Problems with this provision could arise for HEIs if they conduct research or teaching activities as undertakings (thus in an economic way) and do not use 'full economic costing'. In that case even the use of the public infrastructure could be regarded as illegal state aid, unless rent at the full market price is paid for using the facilities.[71] If the HEI passes the savings on to private undertakings it conducts the service for, it could be regarded as provider of state aid. This might even go as far as requiring the state to commission all teaching and research activities which are qualified as economic in nature in a public procurement procedure to avoid coming in conflict with the *Altmark* principles. The consequence would then be a similar system as the English National Health Service system for secondary care where private provision is well advanced.[72]

Exemptions from Article 107(1) TFEU are provided in Article 107(2) and (3) TFEU and the Commission also issued specific legislation in this respect. Article 107(2) TFEU concerning aid for particular consumers, aid for the aftermath of natural catastrophes and aid in the German States which were disadvantaged due to the former division of Germany, is not particularly relevant for HEIs. Article 107(3) TFEU provides exemptions for: (a) aid given to promote the development of economically deprived regions, (b) to conduct a 'project of common European interest' or to provide help in case of economic disturbances, (c) 'to facilitate the development of certain economic activities or of certain economic areas', (d) 'to promote culture and heritage', and (e) other kinds of aid if these have been specified in a Council decision. Here it might be conceivable that HEIs could fall under one of the criteria mentioned in paragraph (b)-(d), but that would depend on the individual case.

Additionally, secondary legislation concerning research and development might provide for exemptions for HEIs. The General BER[73] contains a section on research and development activities. These are exempted from Article 107(1) TFEU if the state aid does not exceed €20M per project with an aid intensity of 100% as regards fundamental research, €10M per project with an aid intensity of 50% as regards industrial research

[69] See case T-289/03 *BUPA*.

[70] Hatzopoulos, 'Services of General Interest in Healthcare: An Exercise in Deconstruction?', in Neergaard, Nielsen & Roseberry (eds), *Integrating Welfare Functions into EU Law - From Rome to Lisbon*, Copenhagen, DJØF Forlag, 2009.

[71] See also Huber & Prikoszovits, 'Universitäre Drittmittelforschung und EG-Beihilfenrecht' (2008) 19(6) EuZW.

[72] For a competition law analysis of this, in particular of the position of third sector providers in this respect, see Wendt & Gideon, 'Services of general interest provision through the third sector under EU competition law constraints: The example of organising healthcare in England, Wales and the Netherlands', in Schiek, Liebert & Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon,* Cambridge, CUP, 2011.

[73] Commission Regulation 800/2008/EC of 6 August 2008 'declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation)'.

and €7.5M per project with an aid intensity of 25% as regards experimental development (Article 6, 30 seq). The amounts double for EUREKA projects and there are also special provisions for research in the fisheries and agriculture sector. However, this always has to be transparent aid with clear eligible costs. The regulation also contains a passage on exemptions for training activities. This, however, refers only to trainings of employees not to general education in HEIs. Furthermore, it provides exemptions for small and medium sized enterprises (SMEs). The threshold in the definition of an SME with a maximum of 250 employees will, however, usually be too low for HEIs to fall under this exemption. The previously mentioned Research and Development Framework[74] in section 4 and 5 lies out guidance on how the Commission will apply Article 107(3)(b) and (c) to state aid for research and development activities. It does not per se exempt any such activities, however. They still have to be notified. Finally, the SGEIs Decision[75] exempts smaller aid (€15M per annum) in the form of public service compensation.[76] Again, it depends on the individual case in how far HEIs can utilise these exemptions.

CONCLUSION

This paper aimed to illustrate some constraints which could arise from EU competition law for HEIs as one, thus far largely unexplored, area of tensions between economic and social integration. It has been shown that due to the increasing commodification of HEIs their main activities, teaching and research, could increasingly be regarded as economic services and that would allow the internal market and competition law to 'spill-over' into these areas.

Some examples of possible tensions of national policy concepts with EU law have been discussed. These are by no means exclusive. There might be other areas where problems could arise. The result of any such tensions would be that HEIs would have to operate in an even more commercial way and adhere to 'full economic costing' and separate accounting for economic and non-economic services. With such an approach it might be questionable if certain subjects can even survive. Additionally, the possibility of fines can cause further constraints. If an HEI would infringe competition law and thus have to pay a fine, this would either mean that they would have to cut costs in other areas which could reduce quality and/or quantity or they would have to pass on the costs to students or research clients.[77]

Article 106(2) TFEU, of course, still offers an exemption for SGEIs. However, this might not be applicable in every case and it would still require a more commercial approach towards university management in order to satisfy the proportionality

[74] See above (n 35).

[75] See above (n 68).

[76] There are also a variety of procedural rules, rules for specific kinds of aid and transparency rules which might lead to a particular assessment of an aid scheme in particular circumstances dealing with which, however, would go beyond the scope of this paper. See for a 'Compilation of State aid rules in force' http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html accessed 13th September 2011.

[77] Similar Greaves and Scicluna (n 41) p 21, 24.

requirement. Even if EU institutions might possibly be more reluctant to become involved in this area of main responsibility of the Member States, as the *BUPA* judgement possibly suggests, the national competition authorities (NCAs) are mostly responsible for the enforcement of competition law after decentralisation. In the national cases evaluated here the NCAs have, however, been rather active.

In conclusion one might wonder, if it would not be more advisable to work on the side of social integration and find a common European approach towards HEIs at the supranational level. A shared competence and a clear strategy could help to avoid tensions with seemingly unrelated provisions of EU law in this area and help HEIs to fulfil their missions in the public interest.

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The Objectives of the Competition Policy of the CARICOM Single Market and Economy and Their Importance to the Development of a Coherent and Comprehensive Body of Substantive CSME Competition Rules

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The Revised Treaty of Chaguramas (RTC), which entered into force on 1 January 2006 between 15 Caribbean States, aims at establishing the Caribbean Community (CARICOM) including the CARICOM Single Market and Economy (CSME). A vital element of the RTC is the establishment of the CARICOM's competition policy and law as well as a system for enforcement of competition law at both Community and national levels. At the time of writing, CSME competition policy and law are at the nascent stage and therefore a discussion relating to the objectives of CSME competition law and policy is essential bearing in mind that their determination is vital to the framing of a coherent body of substantive competition law. This article first, identifies the possible objectives of CSME competition policy and law by examining the relevant provisions of the RTC and second, suggests their ranking with a view to achieving the wider political and economic goals set out by the RTC. The article posits that two objectives should be given priority in the enforcement of CSME competition law: first, the objective of creating and maintaining the CSME and second, the objective of protecting consumers.

I. INTRODUCTION

The first comprehensive attempt of Caribbean States at regional integration took place in 1973 when four Caribbean States: Barbados, Jamaica, Guyana and Trinidad and Tobago signed the Treaty Establishing the Caribbean Community and Common Market (CARICOM) at Chaguaramas. Subsequently 11 more Caribbean States became Contracting Parties to that Treaty. The 1973 Treaty of Chaguaramas provided for the free movement of the factors of production and for the co-ordination of many policies. It was described by Professor Duke Pollard as 'little more than an optical illusion in terms of positive enforceable rights and legally binding obligations'.[1] Revision was necessary in order to deepen regional economic integration and to respond to the challenges of globalization. This need was acknowledged by the Heads of Government of the Member States of the CARICOM in 1989 at a Conference held in Grand Anse which decided to establish the CARICOM single market and economy. As a result, the 1973 Treaty of Chaguaramas was replaced by the Revised Treaty of Chaguaramas

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1 Pollard, 'Governance Structure of the Caribbean Community', 4. A paper presented at the inaugural seminar of the Caribbean Academy for Law and Court Administration held from 6 to 10 December 2010 in Trinidad and Tobago.

(RTC), which entered into force on 1 January 2006, establishing the Caribbean Community including the CARICOM Single Market and Economy.

One of the vital elements of the RTC is the inclusion, under its Chapter Eight, Part One, of competition policy and law as areas of competences of the CARICOM. Chapter Eight also provides for the establishment of a system for enforcement of competition law. This system comprises the CARICOM Competition Commission (CCC), which was inaugurated on 18 January 2008, the Caribbean Court of Justice (CCJ), which was established on 16 April 2005, and national competition authorities. At the time of writing the enforcement system is in the process of construction and no decision of the CCC or the CCJ has been delivered in competition matters.

Identification, and more importantly, the ranking of the objectives of CSME competition policy with a view to establishing which of them are the most important to the achievement of the general objectives of the CSME is essential to the framing of a coherent body of substantive competition rules. Indeed, Chapter Eight of the RTC and, in particular its Part One which concerns rules of competition, will be interpreted in the light of those objectives, which CSME competition policy will strive to achieve whilst not forgetting the wider political and economic goals set out by the RTC. Accordingly, on some occasions, conduct of enterprises[2] operating within the CSME will be regarded as lawful or unlawful depending upon which of the objectives of the CSME competition policy is being given priority. This point is well illustrated when one compares US antitrust law with EU competition law. For example, the priority given by the EU competition authorities (i.e. the European Commission, and European Court of Justice (ECJ)), to the objective of integrating the markets of the Member States and thus creating an internal market has resulted in some business conduct of firms being condemned under EU law whilst the same conduct is perfectly lawful under US antitrust law.

There is no doubt that Chapter Eight RTC will be interpreted in the light of the objectives of the CSME. This is supported by the statement made by the CCJ in *Trinidad Cement Limited (TCL), TCL Guyana Incorporated (TGI) v The State of the Co-operative Republic of Guyana*,[3] in which the CCJ recognized that the RTC is, in many instances, ambiguous, unclear and imprecise, and that this is to be expected bearing in mind that it constitutes a compromise of conflicting national interests and divergent perspectives. In the above case, the CCJ explained that in interpreting the RTC it intends to have recourse to Article 31 of the Vienna Convention on the Law of Treaties. That article states 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose'.

The CCJ has said that it does not intend to place undue reliance on a literal approach to the interpretation of the RTC and that it will give preference to the teleological method

[2] The concept of "enterprise" is defined in Article 1 RTC as meaning "any person or type of organisation, other than a non-profit organization, involved in the production of or the trade in goods, or the provision of services".

[3] [2009] CCJ 1 (OJ).

which focuses on object and purpose whilst paying attention to such factors as the intention of the Contracting Parties, the historical context, the subsequent conduct of the contracting parties, etc. Obviously, in the context of the RTC, the teleological approach is the most appropriate as it will infuse common sense and flexibility into the interpretation of a very complex treaty. Indeed, literal interpretation of the provisions of the RTC relating to competition law is inappropriate for many reasons.

First, the provisions of the RTC on competition law are written sparsely and contain general admonitions. Even when Article 177 RTC provides a non-exhaustive list of anti-competitive arrangements and abuses it requires the enforcement authority to specify the elements of those offences. This can only be done in the light of the objectives of CSME competition law.

Second, many words used in the RTC can have many meanings depending on the objectives that CSME competition law intends to attain. For example, 'promotion of competition', may be understood as referring to the maintenance of economic opportunities for small and medium sized undertakings, or as the promotion of consumer welfare in the economic sense, or as the imposition of a limitation on concentration of economic power, or as referring to the protection of competitors or as promoting economic freedom and ensuring fairness.

Third, in competition law proscribed conduct can rarely be discerned from a literal interpretation of the words used in the RTC. This is because their meaning is often deeply embedded in economic concepts such as those of 'a market' or 'consumer welfare'. Further such concepts can have various meanings depending upon which economic theory is used to interpret them. Therefore, not only does the meaning of the relevant economic concepts have to be defined but also the methods of applying them. This can only be done in the light of the objectives which the CSME seeks to attain.

The first part of this article focuses on the identification of the objectives of CSME competition policy. In the second part an attempt is made to suggest the ranking of those objectives at this time when competition law is in its nascent stage in the CSME. The legal implications for enterprises carrying out their economic activities within the CSME (or outside the CSME in a situation where such activities have detrimental effect on trade between the Member States of the CARICOM) of the suggested hierarchy of objectives on the interpretation and application of the substantive competition rules, contained in Chapter Eight of the RTC, are also assessed.

II. OBJECTIVES OF CSME COMPETITION POLICY

Competition policy can be defined as comprising measures and instruments used by governments (or regional integration organisations such as the European Union (EU) or the CARICOM) to influence conditions of competition that exist in a market. This may include well-motivated articulation of competition issues in industrial policy, trade policy, investment policy, service policy and consumer policy as well as enactment of competition law. R Whish rightly points out that competition policy does not exist in a

vacuum but 'is an expression of the current values and aims of society and is susceptible to change as political thinking generally'.[4]

Competition law is a vital part of competition policy. Competition law has been defined by A Jones and B Sufrin as being 'concerned with ensuring that firms … operating in the free market economy do not restrict or distort competition in a way that prevents the market from functioning optimally'.[5] More specifically competition law prohibits arrangements between firms which restrict competition, abuses of market power by dominant firms and the creation of anti-competitive mergers. In the light of the above definition of competition policy it is clear that competition policy has a broader scope than competition law in that competition policy encompasses all aspects of government action (or of the actions of a supranational organization such as the EU) that affect the conditions under which firms compete in a particular market and that competition law is a servant of competition policy. Business conduct which competition law allows or prohibits will very much depend on the objectives pursued by the relevant competition policy.

Examination of the RTC reveals that CSME competition policy may pursue many objectives. It is submitted that they can be divided into three categories: the overarching objectives set out in the Preamble to the RTC, the general objective expressly stated in Article 169(1) RTC, and the specific objectives laid down in Article 169(2) RTC.

A. The overarching objectives

Preambles to legislative acts or international treaties, although non-binding, are usually an important source of inspiration for courts in the interpretation of the substantive provisions of such instruments. The Preamble to the RTC is no exception. It is good guidance for determining the intention of the Contracting Parties to the RTC. Indeed, it contains statements made by them elucidating the objectives of the RTC. Those statements, in fact, encapsulate the overarching objectives that the Contracting Parties seek to attain.

In recital 1 of the Preamble the Contracting Parties, recalling the declaration of Grand Anse and other decisions of the Conference of Heads of Government, agree on their commitment to deepening regional economic integration through the establishment of the CARICOM Single Market and Economy (CSME) in order to achieve sustained economic development based on international competitiveness, co-ordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States.

The objective of creating a unified market and economy is vital taking into account that the *reason d'être* of the CARICOM is to establish the CSME through which other general objectives stated in Article 6 RTC can be achieved. Therefore, it can be assumed that any policy, including competition policy, should be formulated in such a way as to

[4] Whish, *Competition Law*, 5th ed, London: LexisNexis, 2003, 17.

[5] Jones & Sufrin, *EU Competition Law*, 4th ed, Oxford: OUP, 2011, 1.

ensure the creation and maintenance of the CSME. The achievement of this objective is enhanced by recital 6 which states that optimal production by economic enterprises requires the removal of barriers to the free movement of capital, labour and technology in the CSME. The importance of creating a fully integrated market is further emphasized in recital 9 which states that such an integrated and liberalised internal market 'will create favourable conditions for sustained, market-led production of goods and services on an internationally competitive basis'. Accordingly, any business conduct which jeopardises the establishment and the proper functioning of the CSME should be regarded as anti-competitive.

Recital 5 of the Preamble may be relevant to the identification of the objectives of the CSME competition policy as it states that the Contracting States are conscious of the need to promote in the Community the highest level of efficiency in the production of goods and services especially with a view to maximising foreign exchange earnings on the basis of international competitiveness, attaining food security, achieving structural diversification and improving the standard of living of their peoples.

It is submitted that recital 5 suggests that efficiency in the economic sense should be one of the main objectives of CSME competition policy. Recital 12 of the Preamble recognizes 'the potential of micro, small and medium enterprise development to contribute to the expansion and viability of national economies of the Community and the importance of large enterprises for achieving economies of scale in the production process'. The interpretation of recital 12 is not easy. Does it mean that CSME competition policy should protect small and medium sized enterprises from competitive pressures? However, recognition of the importance of large enterprises makes any assumption that small and medium sized enterprises should be shielded from competition for their own sake rather doubtful. Perhaps, recital 12 implies that small and medium sized enterprises should only be protected when they are as efficient as large enterprises, i.e. in a situation where large enterprises are not competing on merits but are using anti-competitive business conduct to eliminate smaller rivals or erect barriers to entry to the relevant market.

Recital 21 states that the contracting parties are conscious that 'disadvantaged countries, regions and sectors will require a transitional period to facilitate adjustment to competition in the CSME'. It is submitted that the impact of this recital on CSME competition policy is that special exemption from the application of CSME competition law will be granted to disadvantaged countries, regions and sectors. This is confirmed in Article 183 RTC which imposes an obligation on the Council for Trade and Economic Development (COTED), a body of the CARICOM, to develop and establish rules on competition within the CARICOM, including special rules for particular sectors, and gives COTED the power to exempt any sector, or any enterprise or group of enterprises from the application of CSME competition law if public interest so requires.

Recital 23 is restated in Article 169(1) RTC which sets out the main objectives of CSME competition policy (see below).

Recital 24 states that the Contracting parties are convinced that 'the application and convergence of national competition policies and the cooperation of competition authorities in the Community will promote the objectives of the CSME'. Recital 24, therefore implies that national competition policies are expected to follow CSME competition policy or, at least, not hinder the achievements of the objectives of CSME competition policy.[6]

B. The general objective of CSME competition policy set out in Article 169(1) RTC.

The goal of CSME competition policy is set out in Article 169 (1) RTC which states that: 'The goal of the Community Competition policy shall be to ensure that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct'

If looked at superficially it would seem that the CSME competition policy has only one objective, i.e. that of ensuring that benefits expected from the creation of the CSME are not endangered by anti-competitive business conduct. The issue that arises in this context is how to identify the expected benefits. In doing this the relevant recitals of the Preamble to the RTC, in particular recital 1 which refers to the objective of achieving an integrated market and economy within the CARICOM States, and Article 6 RTC which sets out the general objectives of the Community, may be of assistance. One can argue that the 'general objectives' are to be understood as the benefits mentioned in Article 169(1) RTC. If this reasoning is accepted then it can be submitted that for the purposes of competition policy the following objectives set out in Article 6 RTC are of relevance:

(a) improved standards of living and work;

(b) full employment of labour and other factors of production;

(c) accelerated, co-ordinated and sustained economic development and convergence;

(d) expansion of trade and economic relations with third States;

(e) enhanced levels of international competitiveness;

(f) organization for increased production and productivity;

(g) the achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third States, groups of States and entities of any description.

The above quoted objectives suggest that CSME competition policy will be used to serve social, employment, industrial and trade policies. If this occurs it will, however, be detrimental to the coherence of competition policy and difficult, if not impossible, to implement in practice given that the various objectives of the CSME are likely to

[6] This is expanded upon in Article 170 RTC on Implementation of Community Competition Policy.

conflict with each other. For example, a merger[7] may lead to the loss of employment and thus be contrary to Article 6(b) RTC but, at the same time, may enhance the level of international competitiveness of the new enterprise and contribute to the expansion of trade and economic relations with third States in accord with Article 6(e) and (f) RTC.

It is submitted that the relationship between competition policy objectives and other objectives mentioned in Article 6 RTC should be that of mutual support. Each should contribute to the development of the other and there should be no conflict between them. For example no sound industrial or trade policy can be achieved without the support of a competition policy. However, in some areas, where a conflict is likely to arise, e.g. employment policy, the best approach would be to exclude the latter from the scope of application of competition law. This approach is evident in Article 168 RTC which states that rules of competition do not apply to, inter alia, arrangements for collective bargaining on behalf of employers or employees for the purpose of fixing terms and conditions of employment. Further, the definition of an 'enterprise' contained in the RTC makes clear that non-profit making entities are not enterprises and are therefore excluded from the scope of CSME competition law. Indeed, the objectives of the excluded areas are best advanced by using policies other than competition policy (See Part III, A).

C. The specific objectives of CSME competition policy as laid down in Article 169(2) RTC

Whilst the RTC sets out multiple objectives within its competition policy, Article 169(2) RTC focuses on the specific objectives which are normally pursued by competition law in a free market economy. Paragraph 2 of Article 169 RTC states that in order to achieve the general goal of the Community competition policy set out in Article 169(1) RTC the Community shall pursue the following objectives:

(a) the promotion and maintenance of competition and enhancement of economic efficiency in production, trade and commerce;

(b) subject to this Treaty, the prohibition of anti-competitive business conduct which prevents, restricts or distorts competition or which constitutes the abuse of a dominant position in the market; and

(c) the promotion of consumer welfare and protection of consumer interest.

Each of the above mentioned objectives is examined below.

[7] The RTC contains no provisions on merger control. However, following a meeting of representatives from the CARICOM Member States held on 24 October 2010 in Barbados, an agreement was reached that merger review provisions should be enacted at both the Community level and at national levels. See 'Merger Review to be Implemented in the CSME', (2011) 15 Competition Matters, Jamaican Fair Trading Commission, 4.

1. The promotion and maintenance of competition and enhancement of economic efficiency in production, trade and commerce.

Article 169(2)(a) RTC sets out two objectives. One is to promote and maintain competition and the other is the enhancement of economic efficiency in production, trade and commerce. Each is of them is commented upon separately below.

a. The objective of promotion and maintenance of competition

The words 'promote' and 'maintain' taken together mean that one of the objectives of competition law will be to ensure that competition is maintained and encouraged within the CSME, i.e. that CSME competition law has as its objective the protection of competition. It is important to note that the objective of protecting competition is common to all systems of competition law but its meaning differs depending upon the objectives that the particular competition law aims to achieve. Therefore, in order to avoid confusion the meaning of the words 'the promotion and maintenance of competition' under the RTC needs to be clearly established.

In the EU until the reform of EU competition law,[8] commenced in 1999, the objective of protecting competition was understood as 'the protection of individual economic freedom of action as a value in itself, or vice versa, the restraint of undue economic power'.[9]

This approach was inspired by the ordoliberal school of thought which was born in Germany in the1930s and further developed by scholars associated with the University of Freiburg during the Nazi regime in Germany.[10]

The ordoliberal influence on the interpretation of EU competition law, mainly on Article 101of the Treaty on the Functioning of the European Union (TFEU) (which prohibits anti-competitive agreements, decisions and concerted practices) and on Article 102 TFEU (which prohibits abuses by dominant firms) was that these Articles were not interpreted in the light of the objective of achieving economic efficiency, but as requiring that private power must be limited and controlled by the EU enforcement authorities in the interest of creating free and fair political and social order.[11] The result of this, as A Jones and B Sufrin emphasised, was that 'EU law has often been

[8] On this topic see: Gerber, 'Fifty Years of European Community: Two Forms of Modernization in European Competition Law', (2008) 31 *Fordham Int'l L.J*, 1235.

[9] Möschel, 'Competition Policy from an Ordo Point of View', in Peacock and Willgerodt (eds) *German Neo-Liberalism and the Social Market Economy*, London, Macmillan, 1989, 149.

[10] Ordoliberalism was a political and economic philosophy which served as the base for the post World War II recovery of Germany and the era of a Wirtschaftswunder or 'wonder economy' in Germany. Although Ordoliberalism defended capitalism it assigned a crucial role to the state which was expected to create an appropriate legal environment for the economy and to maintain a healthy level of competition by taking active measures to foster competition. In particular, the state was to ensure that monopolies and oligopolies would not acquire power which would not only negate the advantages offered by the market economy but also undermine good government given that strong economic power could be transformed into political power. See: O'Donoghue and Padilla, *The Law and Economics of Article 82*, Oxford, OUP, 2006, 9.

[11] Gerber, *Law and Competition in the Twentieth Century Europe: Protecting Promotheus*, Oxford, Clarendon Press, 1998, 244-51.

interpreted and applied to protect competitors themselves rather than the competitive process, to favour small and medium-sized enterprises, to keep markets open and to achieve "fairness"'.[12]

b. The objective of enhancement of efficiency in production, trade and commerce.

The reason why competition must be promoted and maintained is that competition is good for firms and is good for consumers. So far as competitors are concerned, when they compete with each other, instead of colluding, they are encouraged to innovate given that the market rewards those who introduce new and better products and are under pressure to achieve the lowest level of costs and prices in order to meet consumer needs more efficiently than their rivals. For consumers competition is good because it preserves consumer choice and allows the purchase of products at the lowest price.

According to economists the process of competition creates three efficiencies in the market, i.e.

- Productive efficiency. This occurs when the economy is utilizing all of its resources efficiently by producing maximum output from minimum input, i.e. goods and services are produced at the lowest cost possible and, as output would decrease, price would be restored to the competitive level.
- Allocative efficiency. This occurs when there is an optimal distribution of goods and services, i.e. when goods are produced in the quantities desired by consumers.
- Dynamic efficiency. This is concerned with how well a market delivers innovation and technological progress. A firm is dynamically efficient if it can respond quickly to changing economic circumstances. Dynamic efficiency leads to lower costs, or new products or improved products.

On a market in which the three efficiencies are maximized there is no need for competition rules because the market is perfectly competitive and cannot be improved by the application of competition rules.[13] It achieves economic efficiency in that it maximises the aggregate consumer and producer's welfare.

Monopolies and oligopolies are regarded as neither productively efficient because they can reduce the output to make greater profit nor allocatively efficient as they are less sensitive to consumer's demand than monopolistically competitive firms. However, many economists argue that such firms are dynamically efficient as they are the only ones that can allocate the supra-normal profits they gain, to research and development and thus in the long-run bring innovation that benefits consumers.[14] A counter-argument is that monopolies have no incentive to innovate. As to monopsonies, they are productively inefficient, because they cause production to fall below the competitive

[12] See n 5 above, 44.

[13] Pindyck & Rubinfeld, *Microeconomics*, 7th ed, London, Person Prentice Hall, 2009, 271-274.

[14] Schumpeter, *Capitalism, Socialism and Democracy,* 3rd ed, New York, Harper, 1962.

level. In both a monopoly and a monopsony there is a dead-weight loss of consumer and producer surplus.

In the Caribbean context, economic conditions deriving from the small size of economies of Caribbean islands, and historical circumstances which are responsible for unequal distribution of wealth result in markets in the CSME being dominated by monopolies and oligopolies. On the one hand, small economies are constrained by lack of economies of scale in production, export, distribution and infrastructure. For that reason dominance may be inevitable and more efficient than fragmentation of the relevant market which may result in waste of resources and loss of international competitiveness. On the other hand, business profitability should be an important factor in the enforcement of competition law in the CSME because of the limited availability of investment capital. Indeed, in the Caribbean, profits are both a source of, and an incentive for, investment given high interest rates on loans, poorly developed capital markets, and limited public resources to provide investment subsidies or even tax credits. For many economists, for example, J. Brodley, dynamic efficiency "provides the single most important factor in the growth of real output in the industrial world".[15] He posits that dynamic efficiency is far more important than static efficiency, i.e. allocative and productive efficiency. Singh argues that in small economies dynamic efficiency, rather than static efficiency should be given priority[16] whilst Dhanjee considers that:

> 'there is little empirical evidence that, in developed countries, large firm size or higher concentration are generally associated with innovation activity – but it is not clear whether this would necessarily be the case in developing countries which, in any event import a higher proportion of the technology they use than do the larger developed countries'.[17]

He suggests that in the Caribbean context, the giving of priority to dynamic efficiency over static efficiency should depend on the type of innovation, and whether the matter is one of its creation, introduction into a country, or diffusion.

In the light of the above, Article 169(2)(a) RTC poses a great challenge to the enforcement of CSME competition law. It requires the determination of which of the three efficiencies should be given priority in seeking the attainment of the objectives of the CSME given that the attainment of all three efficiencies is almost impossible. Making the determination involves the assessment of both the trade-off between allocative and productive efficiency and the trade-off between static efficiency and dynamic efficiency. For a decision to be made on the matter of which efficiency is more

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[15] J Brodley, 'Proof of Efficiencies in Mergers and Joint Ventures', *Antitrust Law Journal*, 64 (1966): 581. Criticism by Prof J Brodley of the enforcement of US antitrust law in the 1980s has been acknowledged and incorporated into a new approach to different types of efficiencies and their respective contributions to wealth creation and resource distribution by the US FTC.

[16] Singh, Multilateral Competition Policy and Economic Development – A Developing Country Perspective on the New European Community Proposals, UNCTAD /DITC/CLP/2003/10.

[17] Dhanjee, The Tailoring of Competition Policy to Caribbean Circumstances: Some Suggestions, (2004) Caribbean Dialogue, 40

crucial to the achievement of the objectives of competition law it is necessary to decide whose welfare competition law wants to maximise, that of society as a whole or that of consumers (see below).

2. The prohibition of anti-competitive business conduct which prevents, restricts or distorts competition or which constitutes the abuse of a dominant position in the market.

The objective of prohibiting anti-competitive business conduct is impossible to achieve without first identifying what business conduct should be regarded as such. This can only be done in the light of the objectives which CSME competition law intends to attain.

3. The objectives of the promotion of consumer welfare and protection of consumer interest.

Article 169(2)(c) RTC sets out the two objectives mentioned in this subheading. Each is examined below.

a. The promotion of consumer welfare.

It is important to clarify the meaning of 'consumer welfare' in particular in the light of its usage by the economists from the Chicago School. Professor Bork, one of that School's most eminent representatives defined the meaning of 'consumer welfare' as follows: consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare is, in this sense, merely another term for the wealth of the nation.[18]

Professor Bork's usage of the expression 'consumer welfare' differs from that used in traditional economics in which consumer welfare means consumer surplus i.e. the difference between the amount that a consumer is willing to pay for a product or service relative to its market price. A consumer surplus occurs when the consumer is willing to pay more for a given product than the current market price. The concept of consumer welfare is a means of measuring the aggregate benefit that consumers obtain from buying a product or service in a market.

Bork's interpretation of 'consumer welfare' in traditional economics means 'total welfare' or 'social welfare' both of which refer to the aggregate of consumer surplus and producer surplus.[19] Any increase (decrease) in total surplus is reflected in an increase (decrease) in social welfare (also referred to as the total welfare standard).

Economists are divided as to which standard, the total welfare standard or the consumer welfare standard, should be applied in the enforcement of competition law. Some, in particular those associated with the Chicago School, prefer the total welfare

[18] Bork, *The Antitrust Paradox, A Policy at War with Itself*,, NY, Basic Books, 1978, 107-08.

[19] Producer surplus refers to producer's gross profit on the product, see Motta, *Competition Policy Theory and Practice*, Cambridge, Cambridge University Press, 2004, 18.

standard, others, such as J Brodley, are in favour of the consumer welfare standard. According to Brodley:

> 'if consumer welfare is to serve as an operational principle of antitrust law, it must refer to the direct and explicit economic benefit received by the consumers of a particular product as measured by its price and quality. Using the more precise language of economics, consumer welfare can be defined as consumer surplus.[20]

The above definition of consumer welfare entails that any conduct which reduces consumer welfare should be condemned as anti-competitive.

Some economists argue that it does not matter which standard is applied because the distinction between the two standards is blurred given that many businesses are owned by shareholders, many of which are pension funds. As a result, the maximisation of total welfare equates to the maximisation of consumer welfare.

Notwithstanding the above, in economics the distinction between the total welfare standard and the consumer welfare standard is important because the choice of welfare standard affects the entire assessment of efficiencies. The matter to be considered when the choice is being made is whose welfare the competition law wants to maximize, i.e. that of consumers or that of society as a whole.

If the consumer welfare standard is applied competition law is concerned with the transfer of surplus from producers to consumers. Therefore, any business conduct which prevents wealth transfer is anticompetitive. An example of this occurs where a monopoly charges consumers monopoly prices instead of competitive prices. The consumers suffer loss in the form of a wealth transfer to the monopolist. When the consumer welfare standard is applied competition law prohibits business conduct which allows producers to capture consumer surplus.

The total welfare standard is only concerned with loss of efficiency and takes no account of the redistributory effects of efficiency gains, i.e. it is not concerned as to whether wealth is shifted to consumers or to producers so long as society as a whole benefits. Therefore, competition policy based on the total welfare standard will focus on efficiencies and does not require the transfer of efficiency benefits directly to consumers. For example, a merger between two competitors may increase efficiency in that it may reduce the cost of production and thus increase the total welfare but, at the same time it may create a monopoly and thus decrease consumer welfare in that consumers will have to pay higher prices for the product in question. Such a merger will be allowed under the total welfare standard but not under the consumer welfare standard. A further matter is that the consumer welfare standard has no concern for competitors, unless the business conduct of an offending firm also harms consumers. This is not the case when the total welfare standard is applied bearing in mind that the

[20] Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress', (1987) 62 *NY University Law Review* 1020, at 1033.

aggregate welfare is the surplus of all producers, including competitors, and all consumers.[21]

The RTC does not define the concept of consumer welfare. Therefore, it is uncertain whether it refers to the total welfare standard or the consumer welfare standard as defined in traditional economics. Further, it does not specify the method for applying those standards.

b. The protection of consumer interest.

Article 168 RTC states that one of the objectives of CSME competition law is the protection of consumer interest. Consumers and their interests are normally protected by consumer protection laws the main objective of which is to ensure the ability of consumers to choose freely and effectively among the options available to them in terms of suppliers or brands available to purchase by shielding them from unfair, deceptive and fraudulent practices by businesses such as misleading advertising, double-ticketing, etc.

Both competition law and consumer protection law have the common goal of providing consumers with access to a wide range of competitively priced goods and services in the market place. Convergence of the objectives of competition law and consumer protection laws has, in some jurisdictions, resulted in entrusting enforcement of both to one and the same body, e.g. in the US the Federal Trade Commission, and in Barbados, the Barbados Fair Trading Commission. However, although competition law and consumer protection law share the same goal, the approaches to achieving that goal differ. Competition law focuses on the promotion of consumer welfare in the economic sense, whilst consumer protection law ensures that consumers have the necessary information to make informed choices. Obviously, consumers are the beneficiaries when consumer welfare is maximized.

The protection of consumers' interests in a way compatible with, or even superior to the existing approaches, is examined in Part III B below.

III. THE PRIORITISATION OF OBJECTIVES OF CSME COMPETITION LAW

The rules on competition contained in the RTC are general and imprecise. The same can be said of US Anti-trust provisions and the main articles of the TFEU on competition. The US Supreme Court has described the language of the US anti-trust law as having 'a generality and adaptability comparable to that found … in constitutional provisions'.[22] This is one of the reasons why the US anti-trust provisions have remained unchanged for many years. The same can be said about the provisions on competition law set out by the EU. They have remained exactly the same for more than 50 years, i.e. since the entry into force of the treaty of Rome establishing the

[21] Obviously, when the harm to competitors is offset by the gain to the offending firm, then producer surplus will not be diminished.

[22] *Appalachian Coals, Inc v US*, 288 U.S. 344, 359-60 (1933)

European Economic Community. This is despite the fact that the Treaty of Rome has been amended many times, most recently by the Treaty of Lisbon which entered into force on 1 December 2009. The fact that no changes to treaties or statutes have been necessary can be explained by the fact that it is the interpretation of those provisions that is vital for the development of a coherent body of substantive competition rules. Indeed, in the EU and in the US the interpretation of competition law provisions has, with time, evolved in such a way as to reflect the changing objectives that the US government or the EU have sought to attain. This shows that it is imperative for CSME competition law to clearly assert what objective or objectives it wishes to pursue. This is vital for businesses which need to know with certainty what business conduct will be regarded as anti-competitive so that they can adjust their business strategies accordingly. Further, as Professor Bork stated: 'only when the issue of goals has been settled it is possible to frame a coherent body of substantive rules'.[23]

It can be seen from Part II of this article that many objectives, economic and non-economic, are mentioned in the RTC, including its Preamble. However, no competition law can pursue multiple objectives at the same time because various objectives of competition law conflict with each other and further this would lead to inconsistent application of competition law. Therefore, the prioritization of objectives of competition law is necessary. In the context of Caribbean integration, it is submitted that CSME competition policy should pursue two objectives, first, the objective of creating and maintaining the CARICOM Single Market and Economy and second, the objective of protecting consumers.

A. The creation and maintenance of the CSME

The main objective set out in the RTC is the creation and maintenance of the CARICOM Single Market and Economy. The issue of whether CSME competition policy should be only about economics or whether it should support the objective of maintaining the CSME is debatable. At a national level, many States have decided that their national competition laws should focus on economic objectives and those broader policy objectives, such as industrial policy, regional development, the protection of the environment, and other public interests objectives, should be promoted through other instruments and laws. In this respect a survey conducted in 2003 by the Organisation for Economic Co-operation and Development (OECD) on the objectives of competition law and policy showed that when a country reaches a certain level of development it renounces the use of competition laws to promote broader policy objectives including public interest objectives. The survey emphasized two reasons for the increasing exclusion of non-economic objectives from the objectives of competition law, first, that broadly specified policy objectives can be ambiguous and as such used by strong private groups such as producers or workers to serve their own interests. Second, it has been recognized that non-competition policy mechanisms are

[23] See n 18 above, 50.

more appropriate than competition law to achieve non-competition policy objectives.[24] In particular:

> 'restricting competition in an attempt to achieve broader policy objectives will have inevitable anti-competitive side effects, e.g. granting protected monopoly profit to a firm or firms. There is no reason to suppose that the State will have the capacity, even if it has the will, to control the extent and distribution of such side effects. In summary, restrictions on competition may be ineffective and socially wasteful'.[25]

It is submitted that CSME competition policy differs from national competition policies in that the CARICOM is not a State and therefore the objectives of its competition policy have direct relevance to the achievement of the goals for which it was established. The example of the European Union is instructive. EU competition law has been critical to the development and success of the internal market of the EU. The effectiveness of the prohibition of obstacles to the free movement of goods, people, labour and capital addressed to the Member States would have been devoid of any practical effect if firms were allowed to create private barriers to trade between Member States. The ECJ in *Établissements Consten Sarl and Grundig-Verkaufs-GmbH v Commission*[26] held that:

> 'an agreement …which might tend to restore the national division in trade between member states might be such as to frustrate the most fundamental objectives of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers'.[27]

Since the judgment of the ECJ in the above case it has been accepted that the fundamental objective of EU competition law is to ensure that business conduct does not partition the EU along national borders. On many occasions the ECJ and the European Commission have emphasised that the creation and maintenance of the internal market is the most important objective of EU competition law.[28] Although, with the reform of EU competition law new objectives have been set, i.e. the promotion of economic efficiency and consumer welfare,[29] this does not mean that market integration is no longer relevant. The objective of market integration has not been abandoned. The 2000 Commission Guidelines on Vertical Restraints provide that

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[24] OECD Global Forum on Competition, The Objectives of Competition Law and Policy, Note by the Secretariat, 29-Jan-2003, CCNM/GF/COMP(2003)3, 4.

[25] CCNM/GF/COM/WD(2003)17, at Para.1.2.

[26] Joined Cases 56 & 58/64, [1966] ECR 299.

[27] Ibid, paras 56 and 58-64.

[28] For example, see the IX Commission Annual Report on Competition Policy which stated that the first objective of competition law is to maintain open and unified the internal market, The European Commission, Brussels, 1979.

[29] See The White Paper on Modernisation of Rules Implementing Articles 81 and 82 of the EC Treaty [1999] OJ C132/1.

> 'the protection of competition is the primary objective of EC competition law, as this enhances consumer welfare and creates an efficient allocation of resources. In applying the EC competition rules, the Commission will adopt an economic approach which is based on the effects on the market. Market integration is an additional goal of EC competition law. Market integration enhances competition'.[30]

Further, the 2009 Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty [Article 102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings[31] provides that the Commission may intervene with regard to 'certain behaviour that undermines the efforts to achieve an integrated internal market'.

It can be said that nowadays in the EU the objective of market integration runs in parallel with the objective of the promotion of consumer welfare and efficient allocation of resources. When these two objectives clash it seems that, despite the Commission's policy statements which appear to assign a secondary role to the objective of market integration, the ECJ will support the objective of market integration rather than the objective of the enhancement of efficiency and consumer welfare. This conclusion is drawn from a recent judgments of the ECJ in *GlaxoSmithKline Services Unlimited v Commission,*[32] concerning the so called dual pricing schemes under which an undertaking operating on the pharmaceutical market had intended to charge different prices for pharmaceutical products depending on the destination of their supplies thereby reducing the scope for arbitrage (i.e. preventing parallel trade) and leading to the partition of the internal market.

In the above case, the ECJ decided that the General Court in *Glaxo-SmithKline Services Unlimited v Commission*[33] made an error in law when it ruled that the agreement at issue, which clearly intended to limit parallel trade in pharmaceutical products or to partition the internal market, could be regarded as restricting competition by 'object' in so far as it may be presumed to deprive final consumers of the advantages of effective competition in term of supply and price. This meant that the General Court required the Commission to establish that the restriction had to be to the detriment of final consumers in order to be regarded as restricting competition by 'object'. The ECJ held that there was no need to look at the effect of the agreement on consumers, i.e. there was no need for the Commission to carry out extensive effect analysis in respect of dual price arrangements in a situation where it could be inferred from the context and the circumstances of the agreement that its object was to partition the internal market. In this respect the ECJ held:

> 'The Court has, moreover, held in that regard, in relation to the application of Article 81 EC [Article 101 TFEU] and in a case involving the pharmaceuticals sector, that an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to

[30] [2000] OJ C291/1, para. 7.

[31] [2009] OJ C45/2, para. 7.

[32] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P, [2009] ECR I-9291

[33] Case T-168/01, [2006] ECR II-2969.

> frustrate the Treaty's objective of achieving the integration of national markets through the establishment of a single market. Thus on a number of occasions the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of that article of the Treaty'.[34]

In the light of the EU's experience relating to the interpretation and application of the integrated market objective, it is submitted that the following practical consequences of the priority given to that objective will be likely to occur if it is adopted by the CARICOM countries.

First, under Article 177 RTC, which is similar in substance to Article 101 TFEU, not only anti-competitive horizontal agreements, but also vertical agreements, will be of concern to the enforcement of CSME competition law as they may result in the partition of the Community along national borders. It is important to note that Article 177 RTC does not expressly state that it applies to both horizontal and vertical agreements. In support of its application to vertical agreements it can be said that the various prohibitions refer to 'agreements between enterprises' and not 'agreements between *competing* enterprises'.

Second, if the integrated market objective is adopted by the CARICOM States any business conduct aimed at partitioning national markets according to national borders will constitute an infringement of CSME competition law (although such conduct may be justified under Article 177 (4) RTC). Further, if the EU's approach to the distinction between an 'infringement by object' and an 'infringement by effect' is accepted by the CSME competition authorities then any conduct which is contrary to the integrated market objective will be regarded as anti-competitive by its object and thus amount to a per se infringement of competition law. The similarity between Article 177(1) RTC and Article 101(1) TFEU which both expressly state that any anti-competitive conduct which has as its 'object or effect' the restriction of competition is prohibited, suggests that CSME competition law is likely to recognise the distinction between the 'object' and 'effect' of anti-competitive conduct.

Under EU competition law a distinction is made between the 'object' and the 'effect' of anti-competitive conduct. In *Société Technique Minière v Maschinenbau Ulm GmbH*,[35] the ECJ stated that the terms 'object' and 'effect' are to be read disjunctively. As a result, when the European Commission establishes that an agreement, decision or concerted practice has as its object the restriction of competition it is not required to assess whether that agreement, decision or concerted practice has restrictive effects on competition. The restriction of competition by object creates a rebuttable presumption that the conduct has anti-competitive market effects. Not only actual but also potential

[34] See n 32 above, para 61.

[35] Case 56/65, [1966] ECR 235.

anti-competitive effects are sufficient to trigger the application of the presumption. In *T-Mobile Netherlands BV,*[36] the ECJ stated that:

> 'the distinction between "infringements by object" and "infringements by effect" arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition'.[37]

As a result, when the restriction of competition is an inevitable consequence of an agreement, decision or a restrictive practice, it will be regarded as having anti-competitive object irrespective of whether it has actually restricted competition or whether it has only the potential to have negative effect on competition. Obviously, any restriction which results in the partition of the internal market is anti-competitive by object, i.e. a per se breach of competition law.

Third, if any conduct aimed at the partitioning of the CSME is regarded as an infringement of competition law by object, this will obviously facilitate the CCC's task from the evidentiary perspective.

Fourth, the priority accorded to the integrated market objective may result in the condemnation of a welfare enhancing business practice. For example, imposition of discriminatory prices by a dominant undertaking without any legal or economic justification is an abuse under Article 102 TFEU. In *United Brands v Commission*,[38] United Brands (UB), a multinational US corporation, shipped bananas from its own plantations in South America to Rotterdam and Bremerhaven using its own fleet. In both ports unloading costs were almost identical. From those ports bananas were sold to distributors from different EU Member States, on a 'free on rail basis' at prices which differed substantially. UB explained that it fixed the prices taking into account what the market in a particular Member State would bear. The ECJ held that United Brands' prices were discriminatory because bananas unloaded in two Community ports on practically identical terms as regards costs, quality and quantity were sold to the customers at prices which differed considerably – by between 30 and 50 percent – from one Member State to another, although the services offered were identical in each case. The ECJ rejected the explanation submitted by UB and stated that differences in prices can only be justified on the basis of objective criteria such as differences in transport costs, taxation, customs duties, labour wages, and so on. Therefore, justification based on adverse distribution consequences is not acceptable under EU law. However, from an economic perspective, charging a uniform price in both Member States would result in a situation where consumers in a low income Member State would not be able to purchase the product at all and consumers in a high income Member State would gain nothing because they would be required to pay the same high price. Therefore, the prohibition of price discrimination would lead to the reduction of sales and consequently to a reduction of consumer welfare. It is to be noted that under US

[36] Case C-8/08, [2009] ECR I-4529.

[37] Ibid, para 29.

[38] Case 27/76, [1978] ECR 207.

antitrust law, which is not concerned with the objective of market integration, price discrimination is not an offence.

Fifth, some sectors of economy are particularly prone to the imposition of restrictions on parallel importers resulting in the partition of the internal market, e.g. the pharmaceutical sector or the car distribution sector. These sectors should be regarded by the CCC as priority enforcement targets. In order to ensure that competition is not distorted in those sectors the CCC should be proactive and should carry out extensive investigations.

Sixth, the European Commission considers that any anti-competitive conduct which results in the partition of the internal market constitutes a 'very serious' infringement of EU competition law and therefore merits the maximum permissible fine. This fining policy applies not only to cartels and dominant undertakings abusing their market power but also to parties to vertical agreements which result in the partition of the internal market.[39] It is submitted that a similar approach should be taken by the CCC.

Seventh, the market integration objective entails that when an agreement or business conduct is confined to one Member State it may, nevertheless, be of concern to EU competition law if it reinforces the compartmentalisation of the internal market[40] and thus affects trade between Member States. In this respect, the ECJ condemned vertical agreements, even though they were not oriented towards import or export, as being capable of affecting trade between Member States[41]. In *Raiffeisen Zentralbank Österreich AG and Others v Commission (The Lombard Club)*,[42] the General Court held that in a situation where an agreement/concerted practice covers the whole of the territory of a Member State, there is a strong presumption that it, by its very nature, has the effect of reinforcing the compartmentalisation of national markets, and thus is capable of affecting trade between Member States. In this case Austrian credit establishments involved in a cartel did not rebut this presumption, given that almost all Austrian banks were involved and their agreement covered a wide range of banking products and services, in particular deposits and loans. Thus it was capable of affecting trade between Member States.

In the context of Article 102 TFEU in *Manufacture Française des Pneumatiques Michelin v Commission (Michelin I)*[43] the General Court found that a loyalty rebate system confined to one Member State affected trade between Member States as it foreclosed competition from other Member States.

Eighth, the market integration objective is of the utmost importance in relation to a merger policy. On the one hand, mergers facilitate market integration in that firms from

[39] COMP/35.587 *PO Video Games*, COM/35.707 *PO Nintendo Distribution* and COMP/36.321 *Omega – Nintendo* [2003] OJ L255.

[40] Case 8/72 *Vereeniging van Cementhandelaren* [1972] ECR 977; Case 246/86 *Belasco* [1989] ECR 2117.

[41] *Brasserie Fire Insurance* (D) [1985] OJ L35/20 confirmed by the ECJ in *Case* 45/85 *Verband der Sachversicherer v Commission* [1987] ECR 405.

[42] Joined Cases T-259–264/02 and T-271/02, [2006] ECR II-5169

[43] Case T-203/01, [2003] ECR II-4071.

different Member States, by means of mergers and acquisitions, acquire a Community dimension and thus increase not only their Community competitiveness but also compete effectively on international markets. On the other hand, mergers may adversely affect the structure of the relevant market at the Community level by creating, or strengthening, a dominant position which would allow a newly merged firm to exploit consumers and may ultimately affect the fundamental values of a democratic society. For example, a merger under which all press would be controlled by one firm would affect the fundamental principle of democracy which requires the preservation of the plurality of the press. Indeed, as AP Jacquemin and HW de Jong stated: 'Private power can cross economic boundaries and poses the threat of an "extra market" power which can change the rules of the game in favour of the dominant corporations'.[44] Further, the application of the market integration objective to merger reviews would not only be fundamental to the achievement of the CSME but also would protect the Caribbean region from the transformation by dominant firms of their economic power into political power, would ensure that sensitive sectors (e.g. the oil industry) are not controlled by foreign powers and would support the industrial, social and other policies set out by the RTC. Finally the 2007 financial and economic crisis shows that tighter merger control is required to avoid situations where a firm becomes so powerful that its collapse has repercussions on the entire economy of a country, a region, or the global market.

The market integration objective may sometimes result in the prohibition of business conduct which is economically sound, and consumer welfare enhancing. Notwithstanding this, it is submitted that the achievement of a single market and economy in the Caribbean region should be given priority over other economic objectives. Even economists who are critical of the market integration objective in the EU do not suggest that its importance in the EU should be diminished or disregarded. Instead, they suggest that 'assessing the impact of commercial practices against the objective of the EC Treaty [the Lisbon Treaty] can be made both more transparent and more coherent by considering each goal separately'.[45]

B. The protection of consumers

The interests of consumers should be at the forefront of any competition policy. However, the traditional approach based on the efficiency model has some deficiencies which a new approach, advocated by Averitt and Lande, appears to avoid.

The advocated new approach encompasses the efficiency model but goes beyond it. Averitt and Lande propose a 'consumer choice' approach as the unique goal of competition law,[46] i.e. competition law should ensure optimal consumer choice. According to them, the efficiency standard, which is based on an analysis of price and demand, i.e. it focuses on how prices co-ordinate the amounts produced and consumed

[44] AP Jacquemin & HW de Jong, *European Industrial Organisation*, London, Macmillan, 1997, 198-9.

[45] Bishop & Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, 3rd ed, London, Sweet and Maxwell, 2010, 8.

[46] Lande, 'Consumer Choices as the Ultimate Goal of Antitrust', (2001) 62 UPitt LRev, 503.

in a perfectly competitive market, is inadequate to deal with non-price competition. Averitt and Lande describe the consumer choice approach as follows:

> 'It [the consumer choice approach] suggests that the role of antitrust should be broadly conceived to protect all the types of options that are significantly important to consumers. An antitrust violation can, therefore, be understood as an activity that unreasonably restricts the totality of price and non-price choices that would otherwise have been available'.[47]

Averitt and Lande consider that the consumer choice approach is superior to the price and efficiency paradigms because it recognizes that consumers do not just want competitive prices, they also want options.[48] According to them, the 'consumer choice' approach not only includes all the benefits of the application of the efficiency paradigm but goes beyond it as it truly promotes innovation, focuses on benefits and consequences of business conduct on consumers, is easy to understand and apply, and ensures better synergy between competition law and consumer protection law.

As to the methodology of the new approach, Averitt and Lande acknowledge that it is more complex to apply than the efficiency standard in that it would require a new layer of inquiry to be added to the traditionally used efficiency standard to reflect a new focus on consumer choice. However, such inquiry would only be required in a limited number of cases (around 5 %) and, as a result most cases would continue to be assessed in accord with the traditionally used efficiency standard. An inquiry would not be unduly difficult in terms of gathering the relevant information and in terms of its incorporation into the Herfindahls measure.[49]

The objective of preserving consumer choice has been acknowledged as one of the objectives of US Antitrust law.[50] Commissioner Rosch, from the US Federal Trade Commission in his speech before the American Bar Association's Antitrust Section in April 2010[51] endorsed the 'consumer choice approach' advocated by Averitt and Lande, as the goal of antitrust law. He pointed out the two main benefits flowing from the application of the 'consumer choice' approach, first, it 'provides a means that is still tethered to a demonstrable standard to analyze anticompetitive conduct in dynamic industries where there is intense non-price competition' and second, it brings the US closer to how the EU assesses anticompetitive business conduct.

It is submitted that the consumer choice approach is worth consideration by the enforcement authorities. It certainly shows the inadequacy of the currently used price

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[47] Averitt and Lande, 'Using the "Consumer Choice" Approach to Antitrust Law', (2007) *Antitrust Law Journal*, 182.

[48] Ibid, 178.

[49] Ibid, 237- 248.

[50] In *FTC* v *Indiana Fed'n of Dentists*, 476 U.S. 447, 459, 106 S.Ct.2009, 90 L. Ed 445 (1986) the Courts stated that a horizontal agreement that limits 'consumer choice by impeding the "ordinary give and take of the market place", cannot be sustained under the Rule of Reason'.

[51] See: Rosch, 'Rewriting History, Antitrust Not as we Know it Yet', available at http://ftc.gov/speeches/rosch/100423rewritinghistory.pdf

and efficiency models in the enforcement of competition law. Further, it properly deals with non-price restraints and emphasises the value of dynamic efficiency.

It is also submitted that the protection of consumer interests, as an objective of CSME competition law, may be pursued by novel approaches, not necessarily copied from elsewhere, but appropriate to local conditions.

The local conditions are that all CSME countries are developing countries and thus suffer the usual constraints deriving from underdevelopment. Most of them are small, highly vulnerable economies with: limited availability of investment capital; excessive dependency on external sources for food and energy; a volatile rate of growth of GDP; limited natural resources; high transportation costs; and a limited range of exportable goods, i.e. bananas, sugar and tourism. Some of them have additional problems with the enforcement of law against smuggling, corruption, informal society, organised crime, etc.

The small size of most CSME countries, which prevents them from exploiting economies of scale, combined with the historical circumstances results in CSME markets being not only highly concentrated, but also in a high concentration of company management and ownership in the hands of relatively few individuals, most of whom are mainly descendents of the plantocracy, or foreign. Therefore, even if a firm has no market power in the relevant product market its owner is sufficiently powerful to prevent new entrants into, or to eliminate existing competitors in that market given his/her overall superior financial and economic resources in other markets, either vertically related or totally unrelated. Further, those who have wealth are often in a key position in the government. Additionally, business culture is based on family relations and networks, and in some CSME countries there is no legislation protecting consumers.[52] These factors alone lead to exploitation of consumers and necessitate the taking of a new radical approach to the protection of consumers in the CSME. From the above it can be seen that consumer protection policy and competition policy should enhance each other[53] and be used to create a fair, efficient, and accessible CSME consumer market.

IV. CONCLUSION

The objectives of CSME competition policy have not yet been defined. Starting on a blank canvass has advantages. First, the CARICOM countries have the opportunity to create the ideal competition law enforcement system or at the least, a system which would not repeat mistakes made by more mature systems such as those of the US and the EU. Second, CSME competition law can easily incorporate the newest forms of economic thinking such as the consumer choice approach or elements of behavioural

[52] See T Stewart, 'The Role of Competition Policy in Regional Integration: The Case of the Caribbean Community', SALISES, UWI, available at http://sta.uwi.edu/salises/workshop/csme/paper/tstewart.pdf (accessed 20/1/12).

[53] On the interface between consumer protection and competition law, see Model Law on Competition (2010) - Chapter VIII, UNCTAD TD/RBP/CONF.7/L.8

economics,[54] or some new approach appropriate to local conditions, in the enforcement of competition law.

It is important to note that in the choice of the economic principles or of an economic theory to be applied in the enforcement of competition law it is necessary to take account of the local conditions. Therefore, the protection of consumers may require a strongly interventionist approach to the enforcement of CSME competition law on the part of the CARICOM. Indeed, in highly concentrated markets market forces cannot always be relied upon to regulate and wear down market power. In this respect, competition policies appropriate for a very large economy, as is the case of the US, where economies of scale do not limit the number of competitive alternatives available to most buyers, may not be appropriate to small economies with non-tradable goods and services[55].

Whichever objective or objectives the CARICOM states decide to embrace as appropriate to the requirements of the CSME, it is vital that the economic principles and theories to be applied to attain them are transparent, appropriately theorized and explained to all concerned, including businesses, consumers, law enforcement authorities and courts.

[54] See Ginsburg and Moore, 'The Jevons Colloquium: Behavioral Economics in Consumer Protection and Competition Law: The Future of Behavioral Economics in Antitrust Jurisprudence', (2010) 6 Competition Pol'y Int'l, 89.

[55] On this topic see: Gal, *Competition Policy for Small Market Economies*, Harvard, Harvard University Press, 2003.

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The *Murphy* Judgment: Not Quite Full Time for Football Broadcasting Rights

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The *Murphy* judgment of the Court of Justice of the European Union has been heralded, in legal and journalistic coverage, as a ground breaking and potentially far-reaching decision. However, it is questionable to what extent this is correct. The judgment represents an application of a consistent body of established Union competition case-law and policy to a new sector. Although it is unclear what effect this judgment will have on football licensing models in Europe, it does appear, at present, that there are commercial challenges presented by the judgment to ensure the compatibility of exclusive territorial licensing agreements with competition law.

On 4 October 2011, the Court of Justice of the European Union ('CJEU') delivered its judgment in the *Murphy* case.[1] The Judgment has been widely scrutinised, with commentators arguing that it may 'substantially change'[2] broadcasting licences for the transmission of Premier League games in Europe. However, even if the licensing model does change this does not necessarily mean the Judgment is controversial or incorrect. On the contrary, the CJEU appears to have passed judgement consistently with both its own case-law and Union policy. This paper seeks to explore the competition law issues raised through an analysis of both law and policy.

I. BACKGROUND

The English Football Association Premier League ('FAPL') licenses the broadcasting rights for the transmission of English Premier League football matches. The licensing agreements are awarded through an open and competitive tender process on a Member State territory basis. Thereafter, FAPL contracts with the successful tenderers (the 'broadcaster'). The agreements subject to examination by the CJEU in this case appear to have required the broadcaster:

- not to exploit their rights outside of their territory;
- to encrypt their transmissions in order to prevent viewings outside of their territory; and
- not to sell decoder cards outside of their territory.

* LL.B. (Birmingham); Licence en Droit (Orleans); BCL (Oxon). The views expressed in this paper are personal and do not reflect the views of any other individual or organisation. Any errors are my own. I am grateful to Patrick Harrison and Ken Daly for their comments on an earlier draft of this paper.

1 Cases C-403 & 429/08 *Football Association Premier League and others v QC Leisure and others*, and *Karen Murphy v Media Production Services* [2011] ECR I-0.

2 *Premier League broadcast tactics ruled off-side by ECJ* (Lexology 14/10/11).

The case concerns actions brought by FAPL in the English High Court after discovering that pubs in the UK had been using Greek decoder cards. FAPL appeared to argue that the supply of the decoder cards was in violation of the exclusivity provisions entered into between FAPL and the Greek broadcaster. The High Court referred a number of questions to the CJEU, including the compatibility of the exclusive territorial licensing agreements with Union competition law.

On 3 February 2011, Advocate-General Kokott delivered her opinion[3] on the legal test that should apply to exclusive territorial licensing agreements under Article 101(1) TFEU and the circumstances that should be taken into account in deciding whether the contractual restrictions contravene the prohibition imposed by Art 101(1) TFEU. In the Opinion she concluded that an 'object' analysis was appropriate since the agreements in question granted absolute territorial protection which is incompatible with the internal market.[4]

II. JUDGMENT OF THE CJEU

In respect of the competition law aspects of the Judgment, the CJEU concluded:

- Exclusive territorial licensing agreements are not anti-competitive 'in principle'.[5]
- However, an exclusive territorial licensing agreement will have an anti-competitive object if it contributes to the partitioning of the internal market and makes inter-state market penetration more difficult.[6]
- The agreements in this case did not qualify for exemption under Art 101(3) TFEU.

III. ANALYSIS

A. Should exclusive territorial licensing agreements be restrictions by object?

It is a longstanding principle of Union competition law that for an agreement to infringe the Treaty it must have as its object or effect the prevention, restriction or distortion of competition in the internal market.[7] An agreement that restricts competition by 'object' is one that has an anti-competitive objective with the result that it is unnecessary to prove that the agreement produces anti-competitive effects on the market.[8] In such cases, the Commission need only show that the relevant restriction was agreed and that its objective was the distortion of competition. In *GlaxoSmithKline*,[9] the CJEU held that a finding of restriction by 'object' does not require evidence that

[3] Op cit, n 1.

[4] Paragraph 248 of the Opinion.

[5] Paragraph 138 of the Judgment.

[6] Paragraph 139 of the Judgment.

[7] Article 101(1) TFEU.

[8] Case 29/83 *Compagnie Royale Asturienne des Mines SA v Commission* [1984] ECR 1679; Case 56/64 *Consten & Grundig* [1966] ECR 299.

[9] C-501/06 *GlaxoSmithKline v Commission* [2009] ECR I-9291.

final consumers are deprived of the advantages of effective competition.[10] On the contrary, only if a restrictive agreement does not have as its object the distortion of competition, is an 'effects-based' analysis required. In an 'effects-based' analysis, the Commission is under an obligation to prove that the agreement produces anti-competitive effects in the market given the surrounding factual and legal context.

The Judgment recognises that the mere fact a right holder has granted an exclusive right to broadcast licensable material (such as the rights held by FAPL) in a territory does not 'justify the finding that such an agreement has an anti-competitive object'.[11] The CJEU concludes, therefore, that a right-holder may 'in principle' grant exclusive territorial broadcasting rights.[12] This conclusion stems from an application of previous case-law.[13]

Further, this approach appears consistent with Union competition policy as detailed in the Vertical Block Exemption ('VBE')[14] and the accompanying vertical guidelines.[15] Neither purports to prohibit exclusive territorial arrangements. On the contrary, the Commission recognises the efficiencies associated with exclusive distribution.[16]

Therefore it is possible to argue that the approach of the CJEU towards exclusive licensing agreements is consistent with Union policy.

B. Should agreements conferring absolute territorial protection be restrictions by object?

It is established case-law that agreements which pursue the aim of partitioning the internal market are regarded as restrictions of competition by 'object'.[17] The reason for this clarity is simple: the European Union has the overriding objective of creating an internal market[18] in which competition must not be distorted.[19] It is evident from the Judgment that the court is concerned with the unity of the EU legal order and as such

[10] Ibid, paras 63 & 64. This is consistent with the approach in case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529. At para 36, the CJEU concluded that a restriction by object does not require a direct connection between the agreement and consumer prices.

[11] Paragraph 137 of the Judgment.

[12] Paragraph 138 of the Judgment.

[13] Case C-262/81 *Coditel SA v Cine-Vog Films* [1982] ECR 3381.

[14] Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010, L102/1.

[15] Guidelines on Vertical Restraints, OJ 2010, C130/01.

[16] Paragraph 164 of the Guidelines on Vertical Restraints.

[17] See Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235; Case 56/64 *Consten & Grundig* [1966] ECR 299; C-468/06 *Sot. Lelos kai Sia v GlaxoSmithKline* [2008] ECR I-7139; C-501/06 *GlaxoSmithKline v Commission* [2009] ECR I-9291.

[18] Article 3(3) TEU.

[19] Protocol 27 to the TFEU.

free movement questions pervade the analysis of the competition issues. This is visible in the single market objective that was a strong policy concern in this case.[20]

Single market ideas also form part of the basis of the VBE. The VBE permits exclusive distribution and may be available in respect of agreements that place restrictions on active cross-border selling.[21] However, the VBE will not be available to those agreements that place restrictions on passive cross-border selling, since such restrictions may be argued to be incompatible with the single market objective. Restrictions on passive sales confer absolute territorial protection and may, therefore, compromise the single market objective since the Union may become fragmented along national lines.

As noted in section I, the FAPL exclusive territorial licensing agreements in this case appeared to contain three potentially anti-competitive components. It may be possible to argue that the first two clauses (non-exploitation of rights outside of the allocated territory and encryption on transmissions) do not on their face have the aim of excluding, restricting or distorting competition. On the contrary, as the CJEU appears to suggest, as stand-alone clauses these would not merit the 'object' tag (i.e. an 'effect' analysis would be reserved to them).[22] Such clauses neither grant absolute territorial protection nor restrict consumer choice.[23] However, the apparent obligation not to supply decoding devices outside the allocated territory (together with the other provisions) was found to have an anti-competitive object[24] since, in the Court's view, it gave rise to absolute territorial protection.[25] As such, the Judgment appears to conclude that the aim of the arrangement was to restrict passive sales, which is described as a hardcore restriction of competition under the VBE[26] and has constituted an 'object' restriction in previous judgments.[27] As a result, the approach adopted by the CJEU seems consistent with previous case law.

Further, although of course not binding on the CJEU or able to cast any doubt on its approach, a brief comparative overview of the UK and US competition law regimes appears to suggest that there is a consistent analytical approach in the analysis of such restrictions.

1. The UK approach

Section 60 of the Competition Act 1998 provides that any questions arising in relation to the Chapter I prohibition (the UK equivalent of Article 101 TFEU) in UK

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[20] Paragraph 247 of the Opinion; paragraphs 139 and 142 of the Judgment; see also speech by Barnier of 10 November 2011 as reported in Mlex article 'ECJ's TV-rights ruling doesn't demand pan-EU broadcasting licences, says Barnier'.

[21] Article 4(b).

[22] Paragraph 141 of the Judgment.

[23] Comparable with the facts of Case 56/65 *Société Technique Minière.*

[24] Paragraph 141 of the Judgment.

[25] This has the effect of rendering the position more consistent with the facts in Case 56/64 *Consten & Grundig.*

[26] Article 4(b).

[27] For instance see C-439/09 *Pierre Fabre Dermo-Cosmétique SAS* [2011] ECR I-0.

competition law should 'so far as is possible' be examined consistently with the approach adopted at EU level 'having regard to any relevant differences'. In the UK Office of Fair Trading's (the 'OFT') 'Opinion on Newspaper and Magazine Distribution'[28] it notes that agreements that partition markets, including those that confer absolute territorial protection by preventing passive sales, may constitute restrictions by 'object' under EU competition law.[29] However, arguments were put to the OFT that, since the approach at EU level is premised on the single market objective,[30] there is a relevant difference for the purposes of UK competition law. Therefore, the argument runs, clauses that confer absolute territorial protection (thereby partitioning markets) should not be subject to an 'object' analysis for the purposes of UK competition law. However, there are a number of points that may be made concerning this argument. First, the OFT provides, similarly to the Judgment, that restrictions on parallel trade may be classified as either restrictions by object or by effect, dependant on whether it gives rise to absolute territorial protection (for instance, the prevention of passive sales from one part of the UK to another). This appears to be consistent with the analytical approach of the Judgment which concluded that the clauses in question were regarded as restrictions by object since they tended to restore the divisions in national markets, thereby frustrating the establishment of a single market, through prohibiting (or limiting) the cross-border provision of broadcasting services.[31] Second, it may be possible to question the extent to which there is no single market objective in UK competition law, given that this objective stems from the TFEU to which the UK is a signatory state. As a result, the analytical framework under UK law appears similar to that provided by the Judgment.

2. The US experience

Further, there also appears to be consistency between the US analytical approach to exclusivity arrangements and the Judgment.[32] It was established in *Continental T.V. Inc v GTE Sylvania Inc*[33] that exclusive distribution agreements should be subject to a rule of reason analysis. There is nothing in such a finding that is analytically inconsistent with the approach of the CJEU in the Judgment. As noted, the CJEU held that exclusive territorial licensing agreements are 'in principle' permissible under EU competition law; though in this case the agreement was found to restrict competition by object. Equally, Mr Justice White in *Continental* appears to accept that even in the US, in exceptional circumstances where there is absolute territorial protection, economic power enjoyed by the undertaking and no consumer benefits, a *per se* approach may be adopted.[34] As

[28] OFT 1025, October 2008.

[29] Ibid, paragraph 4.9.

[30] Ibid, paragraph 4.11-4.12.

[31] Paragraph 140 of the Judgment.

[32] For an overview see Thomas, 'Vertical Restraints on Sales Territory or Location as Violative of Section 1 Sherman Act – post-GTE Sylvania cases' 92 A.L.R. Fed. 436.

[33] (1977) 433 US 36.

[34] Thomas, 'Vertical Restraints on Sales Territory or Location as Violative of Section 1 Sherman Act – post-GTE Sylvania cases' 92 A.L.R. Fed. 436 at paragraph 2b.

noted, the CJEU appears to adopt a similar approach in that exclusivity arrangements are regarded as subject to an 'effects' analysis unless they are considered, by the court, to have the object of partitioning the internal market, to the detriment of consumers.

C. Should Article 101(3) TFEU have been a valid defence?

It was concluded by both the Advocate-General[35] and the CJEU[36] that the criteria for Art 101(3) TFEU were not satisfied. However, it is interesting that both the Advocate-General and the CJEU reserve the same treatment to the Art 101(3) TFEU question as proposed for the 'objective justification' defence in relation to the free movement question.[37] As noted, it appears to the author to be correct that Art 101(3) TFEU should not have applied to these agreements based on the limited facts as presented and recorded in the Judgment since: (i) there appear to be less anti-competitive alternatives available (as recognised by the CJEU concerning the 'closed period' rule);[38] (ii) there appear to be limited consumer benefits; and (iii) there may be an elimination of effective competition. Further, it is rare that agreements that are found to restrict competition by object, such as those in this case, are able to satisfy the criteria of Article 101(3) TFEU.

It could be argued that the approach adopted by the CJEU of assimilating Art 101(3) TFEU and the justifications for impeding free movement rules is questionable. However, on the facts, the CJEU was considering competition policy issues based on the achievement of the single market and thus it seems justifiable to consider similar factors under Art 101(3) TFEU as were raised as 'objective justifications' for restrictions on free movement (though it may be questionable whether it is the role of the court to assess commercial agreements against a policy objective, instead of against the precise tests set out in under Art 101(3) TFEU).[39] Finally, such an approach may be justified since the 'objective justifications' raised did, on the facts, overlap with potential Art 101(3) TFEU arguments.[40]

IV. CONSEQUENCES

A. Pan-European licences

Prior to the Judgment, and based on the AG's opinion, it was suggested that - if territorial licensing was prohibited - the FAPL would have been required to move to a pan-European licensing model. This solution may have had the odd effect of eliminating all competition. Moreover, it is questionable whether FAPL would opt for a pan-European licensing solution since its revenues may be too significantly reduced for

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35 Paragraph 250 of the Opinion.

36 Paragraph 145 of the Judgment.

37 The 'objective justifications' raised were that it was necessary to grant exclusivity to ensure appropriate remuneration for FAPL, protection for broadcasters and to encourage public attendance at football stadia.

38 Paragraph 123 of the Judgment. The 'closed period' rule refers to a contractual requirement that there will be no live transmission of 3pm Saturday football by all broadcasters.

39 Ken Daly, 'A Bosman Moment for Online Content Delivery' (Mlex April-June 2011).

40 Namely, indispensability, consumer benefit and efficiencies.

this to be commercially attractive. Further, there may be operational difficulties in pan-European licensing to the extent that a broadcaster may not be present in all Member States. As such, the beneficiary of such a licence may face costs establishing its operations on a pan-European basis or may choose not to do so. As a result, a pan-European licensing solution may have the further counter-intuitive effect of reducing the number of EU consumers able to watch Premier League football. However, the Judgment does not appear to require such a model.[41] As such, the potential difficulties and negative effects noted have not been realised.

B. Contractual amendments

The difficulty with the arrangements examined in the case is that they seemed to grant absolute territorial protection. As noted, the VBE is, potentially, applicable to agreements that place restrictions on active sales. By analogy, the licensing agreements could be amended to prohibit active sales (for instance by restricting direct marketing and advertising) in exclusively-reserved territories. However, this does not fully address the commercial challenges presented by the Judgment.

Further both the CJEU[42] and Advocate-General[43] appear to suggest that express provisions on 'closed periods' (i.e. the prohibition of the live transmission of 3pm Saturday football) may address the concerns raised by the FAPL concerning reduced attendances at football stadia.[44] However, while this may have the effect of creating broadcasting agreements in which transmission rights are identical, it does not address the commercial challenges presented by the Judgment, since 'closed periods' do not address the fundamental reason why the likes of Mrs Murphy use Greek broadcasters: price. In this regard, the Judgment is clear: right holders are not able to prevent the passive sale of football transmissions. Notwithstanding, FAPL may be able to deter publicans (particularly UK publicans) from obtaining subscriptions from outside of their territory through the use of protected works. The CJEU concluded that the transmission of broadcasts of protected works in pubs (such as graphics, music and highlights) constitutes a communication to the public pursuant to the Copyright Directive, thus requiring specific and separate authorisation from FAPL. As such, FAPL may continue to rely on its rights relating to the protected works in its transmissions of matches to grant authorisation – or not – to broadcasts. However, it is unclear whether (if at all) this protection will allow it to overcome all of the challenges presented by the Judgment. It will be interesting to see how the German Bundesliga proceeds with its forthcoming sale of broadcasting rights.[45]

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41 See Speech by Barnier of 10 November 2011 as reported in Mlex article 'ECJ's TV-rights ruling doesn't demand pan-EU broadcasting licences, says Barnier'.

42 Paragraph 123 of the Judgment.

43 Paragraph 210 of the Opinion.

44 Paragraph 122 of the Judgment.

45 Blitz, 'Warning of Own Goal in TV Rights Victory', Financial Times, 5 October 2011.

V. CONCLUSION

This paper has explored the competition aspects raised by the CJEU's *Murphy* judgment. While not a novel area of law, the application of established case-law to a new sector has opened an interesting debate. However, the CJEU's approach does appear consistent with its previous decisions and Union policy. Although it is unclear what effect the Judgment will have on football licensing models in Europe, it does appear, at present, that there are commercial challenges presented by the Judgment to ensure the compatibility of exclusive territorial licensing agreements with competition law.