

International Competition Network

Antitrust Enforcement in Regulated Sectors Working Group

**Subgroup 1: Limits and constraints facing antitrust authorities
intervening in regulated sectors**

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ANTITRUST ENFORCEMENT IN REGULATED SECTORS

CHAPTER 1

POSSIBLE CONFLICTS BETWEEN ANTITRUST AND REGULATION: WHAT ARE THE SOLUTIONS?

Introduction

A conflict between regulation and antitrust arises when regulation restricts competition (for instance, by establishing entry barriers or by fixing minimum prices) and such restrictions are not justified by the need to attain objectives of general interest. Which rules prevail? The answer to this question has to be based on an assessment of the relation between competing norms in a given legal system.

In almost all circumstances rules introducing restrictions to competition will be binding, also with respect to the antitrust provisions. In order to introduce greater competition the only possibility is to change the restrictive rules. In very limited and exceptional circumstances and only in a few jurisdictions, when there is a conflict between antitrust provisions and regulation, antitrust rules would prevail. Moreover, legal systems differ in terms of the legal categories that are applied in order to get to such a result.

The purpose of the present section is twofold: first it investigates the legal instruments developed by the different systems to ensure the prevalence of antitrust laws when in conflict with regulatory measures; second, it discusses when is it that antitrust laws should prevail over conflicting norms. At this stage reference is made in particular to the European and the US experiences. The discussion in Seoul should allow us to extend the analysis to other jurisdictions, especially to developing countries.

Definition of conflict between rules

Normative antinomies can be tentatively defined as prescriptive provisions mandating mutually contradicting conduct. Antinomies arise where regulatory measures impose upon market players a conduct that is forbidden under antitrust law, for example where a statute requires undertakings to operate a price cartel in a given market¹. On the contrary, whenever regulatory measures do not go as far as preventing undertakings from engaging in autonomous non-restrictive behaviour in the market, there is no antinomial relation with antitrust laws, for the latter remain applicable to conduct that is not pre-determined by regulatory measures. For instance, if the effect of a statute is to suggest, encourage, strengthen or facilitate an anti-competitive behaviour, without positively imposing it, the applicability of antitrust laws to the actual conduct would –

¹ There is no actual conflict between antitrust and other regulatory provisions when the latter eliminate every scope for competition in the market without requesting undertakings to adopt a conduct conflicting with antitrust rules (e.g. legislation which directly sets prices).

in principle - be always possible, irrespective of any assessment as to the legitimacy of the concurring regulation.

In fact, the case law shows the readiness of the courts to apply antitrust prohibitions in the presence of regulatory measures that facilitate or encourage the very same forbidden conduct (arriving short of imposing it). In *Vlaamse Reisbureaus*², the European Court of Justice held that a national law strengthening an agreement aimed at weakening price competition, by giving it permanent effect, extending it to non-participating undertakings and providing penalties, would not prevent the application of antitrust law to the firms who were part to that agreement. Similarly, in *Stichting Sigaretten Industrie*, the European Court of Justice upheld the Commission's decision, whereby article 81(1) of the Treaty (which prohibits anticompetitive agreements) was considered applicable to agreements concluded by some Dutch tobacco producers which allegedly fell in line with the objectives exposed by Government representatives at meetings convened with the producers. More recently, similar arguments were used in Italy by the Regional Administrative Tribunal for Latium to dismiss the appeal filed by two major tobacco producers against a decision of the Italian Competition Authority, holding that the Government had not effectively eliminated their responsibility in pricing decisions and that margins of autonomy were left to the undertakings concerned. In the US, in the case *Eugene Dietzgen Co. v. Federal Trade Commission*, the court rejected the plaintiff's claim that the conduct at stake was an attempt to carry out the President's wishes, because "no official, whether he be the President or any other official, could lift the bar of either the Sherman Act or the F.T.C. Act"³.

The case law confirms that autonomous firms behavior is in principle fully subject to competition law⁴. Should some uncertainties arise because a regulator or a Minister suggested a restrictive behavior to a firm or because there was a wrong inference that a specific law or regulation could indeed be applied to the specific circumstances, this should not lead to conclude that such restrictive behavior is in fact not prohibited. An open issue is whether the prohibited behavior deserves a fine or a penalty and how severe they should be.

Generally, the case law also shows that courts are willing to reduce potential clashes between antitrust laws and regulation to a minimum. Although courts are reluctant to construe the regulatory law to provide an implied exemption from the application of antitrust laws, they may find such an implied exemption when the court is satisfied that the State has left no scope for the application of competition rules because it has left no room for autonomous decisions by market participants. Courts may also imply an exemption when regulatory law explicitly permits, but does not require,

² Judgment of the Court of 1 October 1987. *ASBL Vereniging van Vlaamse Reisbureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten*. 3, 311/85. *European Court reports 1987 Page 0380*.

³ *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.2d 321, 329 (7th Cir.), cert. denied, 323 U.S. 730 (1944).

⁴ Sometimes compliance with antitrust provisions may be possible, but such compliance may not be consistent with the objectives pursued by regulation. In such cases, undertakings may argue that the regulatory scheme should be understood to act as granting an implied exemption from antitrust provisions. US Federal Courts rarely accept this argument. The general rule is that, to obtain an exemption from antitrust provisions, one must get it directly and explicitly from the legislature, not from the Courts.

conduct that the antitrust laws prohibit. In the US, for example, courts have found implied immunity where the federal regulatory agency was charged with considering competition (along with other objectives of general interest) and permitted conduct that would violate the federal antitrust laws.

Prevalence of antitrust rules over regulation: is it conceivable?

There will be cases where a law or a regulation requires undertakings to fix prices, to limit production, to share markets (in principle in contrast with the prohibition of anticompetitive agreements) or provides single dominant undertakings with privileges, for example granting market exclusivities, or imposing unilateral conduct which in principle may be in conflict with the provisions on abuse of dominance/monopolization. Is it always the case that such laws or regulations constitute an exemption of the antitrust laws or are there instances where antitrust rules continue to have primacy?

The examination of different national systems reveals that several legal instruments are available to ensure the prevalence of antitrust laws and avoid unjustified derogations. In the following paragraphs, a few macro-categories will be identified, namely hierarchy, liability and competence, leaving aside, for the moment, the issue of when and to what extent antitrust laws can or should prevail over conflicting regulatory measures.

First of all, the prevalence of antitrust laws over anticompetitive regulations can be guaranteed by referring to the system of legal sources. Legal sources are conventionally ranked in a hierarchical system. The core is the law enacted by Parliament, which is the primary legal source. There are also secondary sources, for instance statutory instruments whose legitimacy depends upon their conformity with a primary source. Finally super-primary sources, like a Constitutional Charter, enjoy primacy over any other source of law.

If the legal system confers upon antitrust laws a super-primary rank, antitrust laws have the legal force to prevail over conflicting regulatory measures enacted by Parliament or by the Government. Indeed, according to the general theory of the law, the hierarchical criterion *lex superior derogat inferiori* is the main instrument to resolve all normative antinomies.

In the European Union, legal clashes between EC antitrust rules and national regulatory measures requiring undertakings to adopt conduct that is contrary to these rules are solved by reference to the criterion of hierarchy between legal sources. According to a well established case law of the European Court of Justice, EC law enjoys a super-primary rank vis-à-vis national law. The primacy of Community law requires any provision of national law that contravenes a Community rule (including antitrust provisions) to be disapplied by national Courts, regardless of whether the contrasting rule was adopted before or after the Community provision⁵.

⁵ In a recent judgment of the European Court of Justice, the CIF judgement, the Court clarified that, as a matter of legal certainty, although anti-competitive State regulation has to be disapplied and company behavior is subject to the antitrust law, past conduct, although it can be prohibited, cannot be sanctioned. Sanctions can be applied only for the future, i.e. only after undertakings can no longer claim that they are obliged by the law to act in breach of the Community competition rules.

The possibility to resort to the hierarchical criterion in order to ensure the prevalence of antitrust laws is not an exclusive feature of federal legal systems. As a matter of principle, a national legislator may confer a constitutional relevance to competition rules, thus quashing the immunity from antitrust review that may be granted by potentially conflicting regulations.

In the European Union there is an additional instrument, which is only available to Community institutions, to solve conflicts between EC antitrust law and national regulatory measures hindering its objectives. Under article 10 of the Treaty of Rome, Member States are bound by a general duty of co-operation and loyalty, whereby they are required, *inter alia*, to abstain from any measure that could jeopardise the attainment of the goals pursued by the Treaty. A specification of the general clause outlined in article 10 is found in article 86(1), which applies in the case of public undertakings and undertakings to which member States grant special or exclusive rights, to prevent member States from enacting or maintaining any measure in contrast with the rules in the Treaty. A breach of the obligations imposed upon the States by the mentioned articles entails the liability of the State, which could also be penalised. With specific reference to antitrust law, the European Court of Justice – since the *Inno/Atab* case⁶ – has consistently held that the combined effect of articles 10, 81 and 82 of the Treaty implies that a Member State is not allowed to introduce or maintain measures, even of a legislative or regulatory nature, which could deprive the competition rules applicable to undertakings of their effectiveness. For instance, a Member State would be infringing EC law if it were to require or favour the adoption of agreements, decisions or concerted practices contrary to article 81 or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private concerns responsibility for enforcing a public policy (*Ahmed Saeed* case⁷).

The scope of State liability for breach of EC antitrust rules in connection with the overriding duty to co-operate is much wider than the scope of normative antinomies between antitrust rules and State regulations. According to State liability, the State can be held responsible for infringing EC law also for its failure to repeal laws or regulations that do not prevent antitrust enforcement, since they do not preclude undertakings from engaging in autonomous conduct. Furthermore, the State can also be held responsible for infringing EC law for its failure to repeal regulations which only favour restrictive behavior, even though that behavior may then be fully under the responsibility of the undertakings concerned. In fact establishing the liability of the State for encouraging or facilitating anti-competitive behaviour, which the undertakings is not obliged to follow under the law, is not instrumental to solving an antinomy; rather, it raises a political point as to the balance to be achieved when applying EC law to strike down State regulations bearing an adverse effect on competition.

A third possibility to resolve conflicts between legal norms in favour of antitrust laws is based on competence, i.e. the power of a given body to enact a legal discipline in a certain domain. In some legal systems, the legislative power on some subject matters or to some effect is reserved to an institution or requires special formalities. If the power to introduce statutory restraints of trade is accordingly restricted, this would provide a

⁶ European Court of Justice, *Inno/Atab*, November 16 1977, case 13/77.

⁷ European Court of Justice, *Ahmed Saeed*, April 11 1989, case 66/86

sound basis to disregard derogation to antitrust laws introduced by incompetent regulators.

Applicability of antitrust rules to conduct permitted by regulation

The behaviour of market operators which is expressly requested by the regulator is exempted from the application of antitrust laws. However, the same conclusions cannot be reached when the regulatory measures at stake do not request the concerned undertakings to do something but they merely seem to authorise the conduct allegedly in breach of antitrust laws. As a general interpretative rule, exceptions to antitrust laws are not easily inferred by the courts, who need to be conveniently satisfied that the regulator validly intended to grant antitrust immunity to some conducts. Thus, in the majority of cases, permission of a given behaviour under a specific regulatory regime cannot entail per se that the requirements of antitrust laws need not be complied with by the regulated subjects.

When the regulation does not state or does not clearly imply the intention to shield the conduct in point from antitrust enforcement that the uncertainty may arise. However, in those circumstances, it is far from simple for private actors to persuade a Court that their anti-competitive conduct is in fact authorised under some sectoral not explicit regulatory regime.

For example, antitrust laws would still be applicable to the behavior of an association of undertakings fixing tariffs for the services supplied by the associated firms, although this was done pursuant to a regulatory mechanism established by the State, which allowed such price fixing or even requested the association to determine a common tariff, without establishing which level it should be⁸.

The rationale is that if the State wholly relinquishes to private economic operators the powers of public authorities, the adoption of a common price still constitutes an infringement of antitrust laws (EC case Customs Agents National Council⁹). In order to exclude the application of antitrust provisions to the conduct of private undertakings, the State must reserve to itself the final decision-making power, either by setting the prices itself or by sanctioning proposals submitted by the delegated subjects, so that price fixing cannot be deemed the mere result of an autonomous anti-competitive behaviour (EC case Arduino¹⁰). In such cases, antitrust authorities maintain only a competition advocacy power.

EC and US practices are very similar in this respect. In the US¹¹ the hypothetical association of undertakings setting prices would be immune from antitrust enforcement only if it were expressly delegated to do so by a clearly articulated State policy and the

⁸ Of course, if an association of undertakings sets prices for the services supplied by its members, it would be of little use for it to demonstrate that this was done pursuant to a suggestion by a regulator or a Minister which informally advocated for such price fixing: antitrust laws would still be fully applicable to the association's behaviour.

⁹ European Court of Justice, *Commission v Italy*, June 18 1998, Case C-35/96

¹⁰ European Court of Justice, *Arduino*, February 19 2002, C-35/99.

¹¹ In the US legal system the situation is slightly complicated by the interaction between federal antitrust laws and the legislation, enacted at State level, which would entrust private operators with the power to determine fees.

State maintained and effectively exercised the power to actively supervise the implementation of its policy by the association (case California Retail Liquor Dealers Association v. Midcal Aluminium Inc.)¹². In such a case, there is no effective clash between the regulatory regime and antitrust laws: market conduct does not fall under antitrust law because there are no autonomous decisions by market participants and all behavior originates from the choice of the policy maker. In all other circumstances the US practice is very similar to the EC one.

Of course, in all of our jurisdictions there are rules and regulations contrary to competition principles (not necessarily to antitrust provisions). Policy makers may even decide to introduce a regulatory regime which eliminates any form of competition. For instance, the law may set prices and contractual conditions for providing certain goods or services. In such cases, since there is no conduct by market participants that falls under antitrust law, there is no scope for antitrust enforcement. Antitrust authorities maintain only a competition advocacy power.

Very similar conclusions should be drawn where a law exempts certain conduct or sectors from the application of antitrust laws. Also in these cases there is no concurring application of conflicting regulatory regimes: the anti-competitive conduct which is mandated or authorised is not regulated by antitrust laws, as a result of an explicit legislative choice to derogate from the principles of a generally applicable antitrust law. Express exemptions constitute the external limits to antitrust enforcement. Again, in this case antitrust authorities only maintain a competition advocacy power.

¹² Most of the quoted cases have been decided in the US under the state action doctrine. Although this is not the exact subject of regulation and possible pre-emption, there are significant overlaps, as to the extent that the anti-competitive conduct of undertakings can validly be cloaked by state regulation.

ANNEX

ANTITRUST ENFORCEMENT IN REGULATED SECTORS

EUROPEAN UNION POLICY REGARDING ANTI-COMPETITIVE BEHAVIOUR BY MEMBER STATES

Introduction

State intervention in the economy is sometimes necessary and justified in order to correct market failures or ensure the provision of public goods and services. In the European Union (“**the EU**”), it is largely up to Member States to decide the degree to which they want to intervene in their own economies. There are, however, some types of intervention that could prevent the creation of a single EU market or distort competition at the EU level. The latter type of public interventions raises concerns and the legal order of the EU hence limits the powers of Member States to engage in such interventions.

The Treaty establishing the European Community (“**the EC Treaty**”)¹³, as amended, is based on ‘four freedoms’: the free movement of goods, persons, services and capital. As it has long been recognised that state barriers would constitute the most prominent obstacle to a functioning common market in Europe, the EC Treaty granted certain instruments to the executive body of the EU, the European Commission (“**the Commission**”), to uphold these freedoms and combat legislative and regulatory obstacles to cross-border exchanges between different Member States.

Article 86

Article 86 of the EC Treaty is one of the legal bases of the EU’s liberalisation efforts. This article provides that state-owned companies, or other companies to which Member States grant legal monopolies or other special rights, are subject to the EC competition rules. The EC Treaty thus subjects all companies, be they state or privately owned, to the EC competition rules. Paragraph 3 of Article 86 specifically empowers the Commission to address directives and decisions to Member States to ensure their compliance with EC competition rules.

The Commission has used Article 86 to suppress the worst barriers that States can create for competition: the monopolisation of entire sectors through legislation. It interpreted Article 86 as prohibiting Member States to maintain legal monopolies in those sectors where they were no longer necessary to provide an appropriate service to consumers. The Court of Justice has since 1991 confirmed this interpretation as well as

¹³ The Treaty establishing the European Economic Community was signed in Rome on 25 March, 1957 and entered into force on 1 January, 1958. It has been amended several times, most notable by the Treaty on the European Union (signed in Maastricht on 7 February, 1992) which changed the name of the European Economic Community to “the European Community” and the Treaty of Amsterdam (signed on 2 October, 1997) which amended and renumbered the EC Treaty. The Treaty of Nice (signed on 26 February, 2001) merged the Treaty on the European Union and the EC Treaty into one consolidated version.

the authority of the Commission to issue directives which impose a duty on Member States to liberalise State-monopolised sectors.¹⁴

This is precisely what the Commission did in the telecommunications sector. Several liberalisation directives adopted by the Commission since 1988¹⁵ have fully transformed this sector: in only ten years the telecommunications sector was transformed from State monopolies in almost every single Member State to full liberalisation. Since then the abolition of monopoly rights has driven innovation and increased consumer benefits throughout Europe. As an example: over the past five years, prices of long-distance and international phone calls have fallen by over 45% in Europe.

The liberalisation of the telecommunications sector in Europe would, however, have been less successful without the parallel imposition of sector-specific regulation. The last generation of the regulatory framework for electronic communications, which applies as from July 2003, adapts this telecom-specific framework to the concepts of competition law. The aim is to progressively phase out this specific framework in line with the improving market structure. It is envisaged that in the not too distant future most of this sector would operate under the exclusive scrutiny of EC competition rules.

On the basis of Article 86, the Commission has further adopted a series of more refined directives that ensure the respect of competition rules by state-owned undertakings. For instance, they oblige state-owned undertakings to have transparent accounts in order to enable the Commission to identify the precise nature of their cost and revenue allocation as well as their financial relationship with the States which control them. A string of decisions has equally been addressed to Member States or local authorities whose legislation were hampering sound competition between postal companies and mail preparation firms¹⁶, was setting up discriminatory landing fees for locally established airline companies¹⁷ or was establishing discriminatory discounts on pilotage fees in some of Europe's most important ports¹⁸.

¹⁴ See *Telecommunications Directive Terminal Equipment (French Republic v Commission of the European Communities)*, ECJ 19 March 1991, 1991 ECR I-1223; *Stichting Antennevoorziening Gouda (Mediawet II)*, ECJ 25 July 1991, 1991 ECR I-04069; *RTT v GB-Inno*, ECJ 13 December 1991, 1991 ECR 05941; *Corbeau*, ECJ 19 May 1993, 1993 ECR 02533

¹⁵ See for instance Regulation (EC) No 2887/2000 of the European Parliament and of the Council on unbundled access to the local loop, as well as Commission Directives 1999/64/EC to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities; 1996/19/EC with regard to the implementation of full competition in telecommunications markets; 1996/2/EC with regard to mobile and personal communications; 1995/51/EC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services; 1994/46/EC with regard to satellite communications; 1990/388/EEC on competition in the markets for telecommunications services; 1988/301/EEC on competition in the markets in telecommunications terminal equipment.

¹⁶ See Directive 97/67/EC, 1998 OJ L 15/14; Commission decision 61 /1999 *Aid to business parcel activities of Deutsche Post AG*

¹⁷ Commission decision of 28 June 1995, *Brussels National Airport*, OJ L 216, 12 September 1995. See *28th Report on Competition Policy*, point 110

¹⁸ See *GT-Link A/S/De Dansk Statsbaner*, ECJ 17 July 1997, 1997 ECR I-04449, Commission decision of 21 October 1997, *Port of Genova*, OJ L 301, 5 November 1997

Article 81 and 82

The basic competition rules remain an essential element to secure the results of previous liberalisation efforts. Competition authorities should guarantee that growth and innovation are not obstructed by monopolisation or other private anti-competitive practices. The Commission has in this respect recently acted, under Article 82 of the EC Treaty, against the exclusionary pricing strategies by *Deutsche Telekom AG* (in the form of a margin squeeze for access to the ‘last mile’)¹⁹ and against *France Télécoms's* internet subsidiary *Wanadoo* (for predatory pricing of retail asymmetric digital subscriber line (ADSL) services)²⁰. Such action is a key complement to the liberalisation efforts of the Commission and it will continue to challenge monopolisation in all of the newly liberalised markets.

Merger control

If a merger makes entry into the historic supply area of a former monopolist less likely, it risks strengthening the incumbent's dominant position and limit the benefits that, otherwise, could have been obtained through liberalisation. Such concerns were raised, for instance, in the merger between French incumbent *Electricité de France* and an electricity supplier active on the main border region between Germany and France, *EnBW (Energie Baden-Württemberg)*²¹. Due to its strategic geographic position, *EnBW* was one of the most likely entrants into the French market. The merger was eventually only approved by the Commission because the merging parties made significant commitments, including the organisation of electricity auctions amounting to 30% of the volume of the eligible French market in order to facilitate market entry in France.

The loyalty clause (Article 10)

Commission policy directed against government-imposed monopolies or private practices attempting to secure continued benefits from historic monopolies constitutes, however, only one aspect of the action against undue government restraints. The Commission is also concerned by actions by governments that replace or strengthen private anti-competitive behaviour. It is a pyrrhic victory to break a cartel if its members subsequently successfully lobby for the relevant authority in the Member State to set prices collectively.

The European Court of Justice (“**the ECJ**”) has, with this concern in mind, created a doctrine designed, in essence, to tackle certain types of state measures reinforcing cartels. It is apparent that classical competition rules are exclusively addressed to undertakings. Nevertheless, according to the ECJ, these antitrust rules on restraints of trade or monopolisation should be read in conjunction with the ‘loyalty clause’, contained in Article 10 of the EC Treaty, which obliges Member States to

¹⁹ Commission decision of 21 May 2003, *Deutsche Telekom AG*, OJ L 263, 14 October 2003, p 9-41.

²⁰ Commission decision of 16 July 2003, *Wanadoo*, COMP/38.233

²¹ Case No COMP/M.1853, *EDF/EnBW*.

abstain from measures which would jeopardise the attainment of the objectives of the EC Treaty. The ECJ concluded that Member States are prohibited from introducing measures which may deprive the competition rules of their useful effect by requiring or encouraging anti-competitive conduct, reinforcing the effects of such conduct, or delegating to private traders responsibility for taking key decisions affecting the economic sphere.

An example of Commission action in this respect is the *CNSD* case²², which concerned the so-called ‘liberal professions’. In this case, the Commission successfully brought Italy before the ECJ for encouraging, through its legislation, price-fixing amongst its customs agents. The ECJ considered, in essence, that Italy had failed to comply with its ‘loyalty’ obligation not to undermine article 81 of the EC Treaty by adopting and maintaining in force a law which required the professional association of Italian customs agents to adopt compulsory tariffs for their members.

In its recent judgement in the *Conorzio Industrie Fiammiferi* case²³, concerning Italy once again, the ECJ has taken an additional step forward in the application of EC competition rules to measures implemented by Member States. In this case, an Italian law establishing a professional body of national match manufacturers was examined. The legislation required, or at least facilitated, a system of production quotas structured by this association. In its judgement the ECJ, relying on the supremacy of EU law, declared that a national competition authority in a Member State, confronted with a measure adopted by its own state which violates EC competition policy, is bound to disregard the national measure and stated that:

*“The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities, which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied.”*²⁴

State aid control (Article 87)

Another major instrument that the EC Treaty puts at the disposal of the Commission to remove distortions to competition created by governments, is the policy of State Aid control. All efforts of competition policy enforcement to ensure that companies do not distort competition and trade within the EU would be to no avail if Member States were not restricted in providing subsidies to companies; in particular subsidies intended to bail out firms in economic difficulties or to attract inward investments.

Subsidies or ‘tax holidays’ granted within one Member State in order to stimulate employment or avoid bankruptcy will often harm the competitors of the beneficiary of such state aid incorporated in other Member States. Such state interventions on the market by one Member State often have interstate ‘spill-over’ effects, which force upon the citizens of other Member States substantial disadvantages.

²² *Consiglio Nazionale degli Spedizioneri Doganali (Commission vs Italy)*, ECJ 18 June 1998.

²³ *Conorzio Industrie Fiammiferi (CIF)*, ECJ 9 September 2003.

²⁴ *Ibid* at paragraph 49.

It is for these reasons that Article 87 of the EC Treaty provides for the Commission to enforce a widely phrased ban on all state aid having an effect on interstate commerce. Prior notification to, and approval by, the Commission of such state intervention on the common market is mandatory. State aid will, in practice, only be approved by the Commission if it serves certain clear objectives such as research and development, employment, training, protection of the environment, regional development or the development of small and medium-sized businesses *and* if it avoids causing undue distortions of competition in the common market.

The EU's policy on state aids may be best illustrated through some examples. The first example concerns the 'tax breaks' which governments are sometimes tempted to use, particularly to attract mobile businesses. In such cases, the Commission would normally only intervene when a tax system is discriminatory, in that it favours only certain specific enterprises or certain well determined economic activities (for instance firms in specific underdeveloped regions or a specific industry like the textile industry). A reduction of the general corporate tax rate in one Member State will, on the contrary, normally not be regarded as a state aid.

A second example is the complex forms of support that Member States sometimes provide to companies, be they active at the local, regional or national level. In recent years the Commission has been investigating different types of guarantees which Member States provided for the debts of some of their companies, thus protecting them from bankruptcy. A case in point is the guarantees by the German government in favour of the German *Landesbanken*, where the Commission found that these guarantees constitute a substantial competitive advantage vis-à-vis commercial banks. In particular, these banks were able to borrow on far more favourable terms than private banks on the basis of their triple A rating. After the Commission had thoroughly investigated this issue and had instituted formal procedures, Germany accepted to phase out these guarantees²⁵. As a result of this action fair competition is ensured between all the banks, private and public, operating on the markets concerned.

Another form of state aid would be the entry by a Member State into the equity of a private company under conditions in which a private investor would not have entered. The recent *Alstom* case provides a good example: In August 2003, France informed the Commission of its intention to implement certain measures in support of the *Alstom* engineering group, which produces, amongst other things, high speed trains. Included in these measures was a commitment by the French government to irrevocably subscribe to 50% of an imminent capital increase worth €600 million. The measures were to be put into effect immediately without France awaiting clearance by the Commission. This constituted a violation of the obligation of a Member State to notify aid for approval by the Commission prior to its award.

In the middle of September 2003, the Commission initiated a formal investigation. It considered issuing an injunction suspending France's participation in the capital increase because of the irreversible structural effects of such an action. The Commission, however, gave France five days to renounce implementing this measure. France agreed, within the deadline, to replace the measure with debt instruments which

²⁵ An understanding was reached between the German Authorities and the Commission on 17 July 2001 in terms of which Germany will phase out these guarantees to the *Landesbanken* by mid 2005.

will not have an irreversible effect on the market. France also agreed to subject its planned entry in *Alstom's* equity to prior authorisation by the Commission. Subsequent to this settlement, the Commission has started an analysis of the overall aid package, on the basis of the criteria set out in the guidelines for rescue and restructuring aid. The analysis focused particularly on the adequacy of the restructuring plan to restore *Alstom's* viability and on the need for compensatory measures to counterbalance the distortions of competition created by the aid.

Conclusion

The state aid rules of the EU have a similar rationale to the provisions set out in the Agreement on Subsidies and Countervailing Duties under the GATT²⁶, even if they are, in some respects, stricter. The supervisory functions of the Commission and the European Courts, however, go much further than those of the WTO institutions. For instance, in the EU, the basic principle regarding state aid is 'approval prior to implementation', compared to a more lenient 'notification after implementation' procedure under the WTO system.

Despite the much higher degree of federal integration existing in the US, it is interesting to note that the EU has more power to limit the anti-competitive behaviour of its Member States than the US federal institutions. Whereas in the US, a state acting as sovereign is immune from antitrust scrutiny in accordance with the 'state-action doctrine', governments of EU Member States has a duty to act in accordance with EC competition policy and organs of state should, as stated in the *Conorzio Industrie Fiammiferi* case, 'disapply' national legislation which contravenes Community law.

²⁶ The Agreement on Subsidies and Countervailing Measures forms part of the General Agreement on Tariffs and Trade, 1994 (GATT) which falls under the institutional framework created by the Agreement Establishing the World Trade Organization (WTO) signed by ministers of member countries in Marrakesh on 15 April 1994.

ANTITRUST ENFORCEMENT IN REGULATED SECTORS

ACCOMMODATING REGULATORY APPROACHES IN AN ANTITRUST UNIVERSE: THE U.S. EXPERIENCE IN HARMONIZING ANTITRUST WITH LAWS THAT RESTRAIN COMPETITION

All who read this paper are undoubtedly aware that the United States is a constitutional federal system. Our written Constitution gives to the national Congress the power to “regulate Commerce . . . among the several States” and to “make all Laws which shall be necessary and proper” to execute that power.²⁷ The combination of those powers led Congress to pass a panoply of antitrust laws that require that competition be the rule for U.S. business enterprises and U.S. economic markets that significantly affect interstate commerce. The Constitution also provides that valid federal laws are “the Supreme Law of the Land . . . any Thing in the Laws of any State to the Contrary notwithstanding.”²⁸

At the same time, the states enjoy residual powers to legislate governing matters that affect their citizens. As all who read this paper are also undoubtedly aware, the general legislative power is often exercised – either at the national or state level – to restrain trade in pursuit of some overriding objective. For example, a state may require lawyers to be licensed, a restraint on competition in providing legal services, in order to assure consumer welfare and the integrity of the legal system. Or the federal government may enact a conservation law that restricts output and raises price in certain industries in order to achieve overarching goals of public health and environmental protection.

Tensions and conflicts arise when the federal antitrust statutes, with their values of competition, are laid beside other state or federal legislation that seeks to restrain trade. U.S. courts have devised doctrines to resolve those conflicts, sometime accommodating both approaches, while sometimes choosing one over another. Because of the dual federal-state nature of U.S. sovereignty, those doctrines differ depending on whether the regulatory regime is imposed by state or national legislation. The purpose of this short paper is to describe the various judicially-created doctrines that have been deployed in the United States to accommodate, harmonize, and reconcile the antitrust laws with various regulatory statutes that rest upon policies that do not fully embrace the values of competition. We describe those doctrines as they stand today, not as they have evolved over time. This should not obscure the fact that other doctrines, other means of accommodation, other rules of decision have been proposed or adopted at various times.

²⁷ U.S. Constitution, Art. I, Sec. 8, cl. 3, 18.

²⁸ U.S. Constitution, Art. VI, Sec. 2.

I. Accommodating Federal Antitrust Laws with State-imposed Restraints of Trade

A. Direct constitutional controls – Federal courts have held that, even absent any federal antitrust legislation, some state or municipal laws that restrain trade are unconstitutional because they usurp the constitutional grant of power to Congress to “regulate Commerce . . . among the several States.” The general principle is that state legislation that discriminates against interstate commerce or that very substantially burdens commerce among the several states is unconstitutional unless it is narrowly tailored to serve an extremely important state interest. Thus, the Supreme Court of the United States has held that a state cannot legislate that only trash collected within its state can be hauled to landfills within that state, because that rule discriminates against interstate commerce.²⁹ (Put another way, that law is inconsistent with the “common market” that the U.S. constitution created among the states in 1787.) Nor can a state unduly limit the length of commercial trucks that ride, inside the state’s borders, on its interstate highways, even if those regulations are applied evenhandedly to in-state and out-state truckers, because such a rule unduly burdens commerce that moves through several states.³⁰

In both of the above cases, the Supreme Court of the United States invalidated state statutes that enacted restraints of trade. The state laws prevented market outcomes that would have otherwise occurred in freely functioning private markets. The Supreme Court overturned both of those laws not because they conflicted with antitrust law, but because they were, in the Court’s view, inconsistent with the U.S. commitment to an integrated, national economy (or common market).³¹ Thus, in the United States, constitutional interpretation is to some extent a force for resolving apparent conflicts between legal norms preferring competition and others that impose restraint.

B. Statutory preemption and limits on statutory preemption – the “state action doctrine”³² – In most cases, however, where state or municipal authorities adopt legislation that restrains trade (either directly or by purporting to enable someone else to restrain trade) in pursuit of some other objective there is no discrimination against or any extreme burden on interstate commerce. For example, suppose that doctors in a locality set a minimum fee for admission to an out-patient doctor-controlled clinic, but

²⁹ City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

³⁰ Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).

³¹ The modern U.S. Supreme Court has shown no hesitation to strike down state laws that discriminate against interstate commerce. The Court has been more hesitant to wield the power to declare that a law unduly burdens commerce because of the perception that this involves more extensive judicial oversight of legislative policy choices than does the non-discrimination principle.

³² This short section of this short paper merely describes generally prevailing law on this subject in the United States. A vast literature contains more searching examinations of the many decisions concerning the “state action doctrine” and the policy influences underlying it. See, for example, Federal Trade Commission, Office of Policy Planning, Report of the State Action Task Force (Sept. 2003) and E.R. Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667 (1991) and the many cases and commentators cited and discussed therein. This paper borrows liberally from, and without detailed citations to, both the Report of the State Action Task Force and Elhauge article.

argue that their conduct in setting that fee was permissible under state law. That action surely does not unduly burden commerce, in the constitutional sense. But does not the “supreme” federal (national) law, the antitrust law, prevail? Not necessarily. For another example, suppose that a state law requires that, before one may practice law, one must have a lawyer’s license (admission to the bar). Because, in many or most cases, occupational licensing would be a restraint of trade under federal antitrust laws and because the Constitution, as described above, makes all valid federal law paramount to state laws, one might think the state law erecting an entry barrier to the legal profession must be judged according to whether it comports with the federal antitrust laws – and might well fail to pass antitrust review. This is not necessarily so, either.

In a string of decisions, the Supreme Court has engrafted what is known as the “state action doctrine” onto the federal antitrust laws. This judge-created doctrine grants immunity from federal antitrust liability for certain private or state actors, as described below, for conduct that would otherwise violate (or be judged against) the national antitrust laws.³³ This can be equally well described as a limit on the preemptive force of the antitrust laws or a limit on the substantive scope of those laws. The principal purpose for recognizing this immunity is the belief that, by passing the national antitrust laws, Congress most assuredly meant to reach private behavior that restrains trade or displaces market forces and did not mean to saddle state law with an unremitting policy favoring competition in all markets at all times. The Court believed that both Congress and state legislatures could legitimately determine that sometimes competitive processes produce outcomes that are undesirable from a wider social perspective and enact legislation accordingly.

The immunity provided varies with the source of the state rule and the status of the party implementing that rule, so that the “state action doctrine” is actually a multi-tiered set of immunities.³⁴ Today, these immunities exist along a continuum. From the highest degree of immunity to the least, they are:

1. State acting as sovereign – At one extreme on the state action continuum, if the restraint is the direct act of a sovereign state authority – the state legislature, the state supreme court, or (probably) the governor – then it is immune from federal antitrust condemnation without further inquiry.³⁵ So, for example, were the state supreme court to draft and administer by itself the rules for admitting attorneys, the occupational licensing restraint that one may not practice law in the state without permission of the state’s supreme court would be immune from antitrust review. Or were the state legislature to prescribe a minimum fee for admission to out-patient clinics, that would be immune as well.

³³ The issue can also arise in cases where a party challenges a state statute as inconsistent with, and therefore preempted by, federal antitrust law.

³⁴ Note that “immunity” from antitrust shields the behavior from condemnation under the antitrust laws. The absence of antitrust immunity does not mean that the behavior is necessarily illegal, only that it is subject to full antitrust scrutiny.

³⁵ See *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984).

2. Subordinate public entities: “clear articulation” – In the middle of the continuum, a somewhat more limited immunity applies to acts of government entities – such as municipalities or state agencies – that are subordinate to the top levels of state governments. Where these entities act in restraint of trade, they enjoy antitrust immunity if and only if “the challenged restraint [is one] clearly articulated and affirmatively expressed as state policy to replace competition with regulation.”³⁶ Thus, for example, were a municipality to limit the number of firms that could operate a cable television system in that town, that rigid barrier to entry would escape antitrust scrutiny only if the municipality had been authorized by a clearly articulated and affirmatively expressed state policy – presumably, an act of the state legislature – enabling that municipality to supplant competition in the provision of cable television services where necessary to achieve other, overriding objectives.³⁷ Otherwise, no antitrust immunity would attach.³⁸

Similarly, if a state law established a State Health Care Commission, staffed entirely by state employees, and told that Commission that, in order to avoid ruinous competition among clinics and to conserve scarce out-patient clinical resources, the Commission must set a minimum fee for all out-patient clinical admissions, the Commission’s conduct would be immune.

3. Private actors cloaked with state authority: “clear articulation” and “active supervision” – At the other extreme in the continuum of shielded behavior, immunity is much more limited where the restraint is imposed by private actors who claim, in turn, that their conduct was authorized by state law. In such cases, immunity is afforded only if that behavior is clearly authorized and actively supervised by the state.³⁹ Suppose, for example, that a group of private attorneys (e.g., “the state bar association”) controls attorney licensing in the state. For that horizontal restraint to be immune from antitrust scrutiny, the bar association must show first that this program of licensing was carried out subject to a clearly articulated and affirmative expressed state policy.⁴⁰ This policy must be expressed by the state as sovereign, not by one of its administrative

³⁶ Hoover v. Ronwin, 466 U.S. 558, 569 (1984).

³⁷ See Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982)(immunity denied because municipality relied merely on general state law granting home-rule to municipalities and could not point to a specific state law authorizing the displacement of competition in this market).

³⁸ This intermediate immunity clearly applies to municipalities and common state agencies, such as public utility commissions. Courts have not been fully consistent in determining whether quasi-governmental actors, such as hospital authorities or electrical cooperatives, qualify for this comparatively generous immunity or receive only that level of immunity afforded private actors and described in the following paragraph. This problem is addressed in Report of the State Action Task Force, supra, at 15-19.

³⁹ This two-prong test was enunciated in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

⁴⁰ If the bar association could show that it was in effect a state agency it would need only to satisfy this prong, as discussed in the preceding paragraph. For example, after a detailed review of the facts, one court held that the Oregon state bar operated as an instrumentality of the state supreme court and was therefore a state agency for purposes of the state action doctrine. Hass v. Oregon State Bar, 883 F.2d 1453 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990).

agencies.⁴¹ For example, the bar association may show that the state supreme court delegated to the bar association the authority, following certain standards, to control admissions to practice law. The private actor must meet a second requirement also, by showing that the state itself actively supervises the implementation of the state policy.⁴² Thus, even if the state supreme court clearly delegated licensing to the private bar association, there is no immunity if the state does not actively supervise the exercise of that delegated power (such as by providing judicial review of contested decisions).

The situation with respect to the hypothetical concerning doctor price-fixing is precisely parallel. If doctors establish identical minimum fees for admissions to their clinics, that behavior at the very least presumptively violates the antitrust laws. But suppose this were done pursuant to a clearly articulated state policy to avoid competition in clinic admission costs, that this state policy clearly assigned the responsibility for setting prices to the doctors and that the State actively supervised the doctors' choices – as by providing Commission or judicial review of their decisions subject to well-defined public interest standards. In such a case, the action of the “private” doctors is probably protected by the state action doctrine.

4. Private actors who act without cloak of a clearly articulated state policy to displace competition or without active state supervision of their pursuit of such a policy – We might call such persons “price fixers.” In any event, they wholly lack any immunity from the state action doctrine. Unless they somehow enjoy immunity from another source, their behavior is subject to plenary review under the national antitrust laws. Put another way, this is the group of actors that federal courts have determined Congress clearly meant to govern with the full scope and force of the national antitrust laws.

As the foregoing shows, the doctrine of state action immunity in U.S. antitrust law is complex and, at the margins, somewhat unclear in its application. Nonetheless, the core principles are easily stated: Federal courts, notwithstanding that national law is supreme to all state laws, have determined that it is not a province of national antitrust law to prevent the states from acting, within their own legislative sphere,⁴³ to make a decision to displace competition in certain markets or for certain purposes. So long as that decision is made at the highest levels of state government and implemented by state actors or by private actors “actively supervised” by the state, then federal antitrust law will not preempt that state law. Consequently, the vast bulk of state regulatory agency activity, and private firm behavior that conforms to that regulation, is exempt from federal antitrust scrutiny because of the “state action” doctrine. On the other hand, antitrust is not displaced just because a municipality would like to end competition among vendors – but has no authority from the state to do so. Nor is antitrust displaced just because some private firms, or the agency that regulates them, thought it might

⁴¹ See, e.g., *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 62-63 (1985).

⁴² For purposes of the “actively supervise” prong of the state action doctrine, the supervisor need not be the “State as sovereign” – i.e., the state legislature, supreme court or governor. A municipality or clearly designated state commission may exercise that supervisory power.

⁴³ Recall the constitutional doctrines forbidding any state laws that discriminate against interstate commerce or unduly burden its free flow, discussed above in Part I.A.

advance the goals of a regulatory agency if the firms set market prices – but with no oversight from any public agency. Thus, state “regulation” that operates by setting firms as watchdogs over themselves enjoys no immunity from antitrust scrutiny.

The state action doctrine can be said to rest on a variety or combination of judicial policies. To some extent, the doctrine rests on federalism principles – respect for state autonomy and authority. To some extent, the doctrine rests on a desire to avoid the appearance of judges, in the guise of enforcing federal antitrust law, insisting that economic and social policies prefer marketplace processes and outcomes in all cases. And to some further extent, the doctrine furthers a principle, derived from both antitrust and constitutional norms, that it should not be up to politically unaccountable private actors operating within a market to determine when marketplace outcomes are unacceptable.

II. Accommodating Federal Antitrust Laws with Other Federal Statutes

The U.S. antitrust laws are national laws, passed by Congress according to constitutional procedures. This is why antitrust law is among the “supreme Law of the Land” in constitutional terms. The same can be said, however, of all federal statutes. Federal laws regulating telecommunications carriers, securities markets, or banks, for example, are equal in stature to the federal antitrust laws. When tensions arise between regulatory statutes that seem to permit or even encourage joint behavior or mergers that might be questionable under antitrust law, how are these tensions resolved in U.S. law? Four principles predominate, although their precise application has varied from time to time:

A. Congress’s will prevails. – The national antitrust laws and the national regulatory statutes are creatures of Congress. They mean whatever Congress wants them to mean and conflicts between them must be ironed out according to the will of Congress, as best as that intent can be ascertained. So, if Congress has spoken clearly to the issue, its resolution governs. For example, in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), the Supreme Court was confronted with an antitrust challenge to a bank merger. The banks argued that a recent statute, the Bank Merger Act of 1960 repealed by implication the application of antitrust law to block bank mergers. The Court found that Congress had not intended such a result. But what if Congress has not clearly spoken? Then other principles come into play.

B. Full compliance is the norm. – Generally speaking, one must comply with both the dictates of the antitrust laws and the requirements of the regulatory regime. Thus, for example, mergers between telecommunications firms are subject to review under both federal antitrust law and the provisions of the Federal Communications Act. Telecommunications firms, then, may not merge unless they have cleared both antitrust and Federal Communications Commission review. Permission from one does not entail permission from the other. Denial by one is therefore sufficient, but legally does not constitute denial by the other. Of course, if there is a clear conflict – so that one federal statute commands an act that another one forbids and that conflict cannot be resolved by statutory interpretation – then the later expression of Congressional will governs. (See, for example, the case of Gordon v. New York Stock Exchange, discussed below, in which fear of conflict led the Court to imply an antitrust immunity.)

C. Exemptions from the antitrust laws are not lightly inferred. – Sometimes, compliance with antitrust may be possible, but difficult or arguably not consistent with the policies underlying the regulatory scheme. Firms may argue that the regulatory scheme should be understood to act as granting an implied exemption from antitrust. Federal courts rarely accept this argument. The general rule is that, to obtain an exemption from antitrust, one must get it directly and explicitly from the legislature, not from courts. The Philadelphia National Bank case, discussed above, is an example of the Court’s general refusal to find antitrust exemptions without express direction from Congress. Similarly, in an important case establishing the per se rule against price fixing, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940), the Court gave short shrift to the defendants’ claim that their conduct was “consistent with the general objectives and ends sought to be obtained under the National Industrial Recovery Act,” which was in place when the conduct began. This was because the conduct, illegal under the antitrust laws, “lack[ed] Congressional sanction.” Even though the Federal Energy Regulatory Commission has extensive powers over interconnection and interconnection prices, the Court refused to imply an antitrust immunity in a challenge to a refusal to interconnect and provide electricity in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). On very rare occasions, the Supreme Court will find an implied immunity. In Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) the plaintiffs challenged agreements by which New York Stock Exchange brokers fixed commission charges. These agreements were allowed under New York Stock Exchange rules, but the U.S. Securities and Exchange Commission had statutory authority to alter the rules and in fact exercised supervisory authority over them. On these facts, the Court found an immunity necessary to prevent conflicts between instructions from the Commission and from antitrust courts to the Exchange.⁴⁴

D. The doctrine of primary jurisdiction – An antitrust case may call into question the legality of behavior whose legality is also in dispute (or could be disputed) under the statute governing a federal regulatory regime. Under the doctrine of “primary jurisdiction,” the federal antitrust court may retain jurisdiction over the antitrust complaint while the agency is given a chance to consider the dispute. In the leading case of Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) the Supreme Court held that “deferral of an antitrust action pending administrative proceedings is proper when agency consideration of matters within the agency’s jurisdiction will materially aid the court in resolving the antitrust issue.”⁴⁵ Where that standard is not met, of course, deferral is not appropriate. For example, the judge who heard the seminal antitrust case that led to the break up of the Bell System monopoly in U.S. telephony

⁴⁴ A rather odd addition to the concept of implied immunities is the so-called “filed rate doctrine,” announced by the Supreme Court initially in Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922). That ancient precedent, which the Court refuses to revisit because Congress has not altered it, forbids purchasers to file antitrust complaints concerning prices fixed by suppliers, where those suppliers are rate regulated at the state or federal level and have duly filed their rates with the regulatory authority and those rates have not been disapproved by that authority.

⁴⁵ American Bar Association, Section of Antitrust Law, Antitrust Law Developments (Fourth), Vol. II, pp. 1128-29. The various iterations of this publication include an extensive and helpful treatment of the doctrine of primary jurisdiction.

and the introduction of competition in most telecommunication sectors⁴⁶ declined to stay the case pending proceedings at the Federal Communications Commission because he concluded that the legal issues the FCC might consider were different than those the antitrust complaint presented.

E. Overview – In sum, where tension exists between antitrust and federal regulatory policy, Congress determines whether one must give way and, if so, which. If Congress has not clearly spoken, then the predominant principle is simply that one must obey both the antitrust law and the regulatory law. On rare occasions, however, the courts may imply an antitrust immunity, usually to avoid a clear conflict between duties imposed on firms by antitrust and regulatory law. Alternatively, the doctrine of “primary jurisdiction” permits courts in proper cases to hold the antitrust claim in abeyance while controlling regulatory issues are resolved.

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⁴⁶ See United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).