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Tóth, Tihamér

STATE SUPPORTED CARTELS

Pázmány Péter Katolikus Egyetem
Pázmány Péter Catholic University Budapest
http://www.plwp.eu

Tihamér Tóth

State supported cartels

I. Introduction

In September 2014 the EU Court of Justice[1] ruled that Italy infringed its EU law obligations by delegating the power to fix minimum tariffs of road haulage services for hire and reward by API, a committee composed of a majority of representatives of the economic operators. A couple of years ago, the Hungarian agricultural government actively encouraged the setting of minimum prices for water melon jointly by associations of producers and supermarket chains. Even though the Hungarian Competition Authority opened an investigation, yet it was soon terminated with reference to the lack of public interest. What happened was that in the course of the competition law procedure, the Parliament adopted an act introducing lenient rules for agricultural cartels with a retroactive effect.[2]

These recent cases show that State and private competition restrictions can be closely connected. Hybrid cases[3], involving agreements and decisions of undertakings that would be caught by antitrust rules and a corresponding state action give rise to various challenging legal issues. States, as part of their toolkit to shape economic policy, encourage, support or approve market conduct that would normally be condemned as a price or market sharing cartel. The State may also decide to authorize a chamber or other association to regulate market entry, quality of services or prices. In this paper I focus on how state involvement may impact on corporate or individual antitrust liability. The aim is to give an overview of those defenses which companies invoke to defend their cartel-like activities or abusive behavior whenever they acted under state influence, often manifesting in the form of a legislative or regulatory act.

The issues covered in this paper are closely linked to the theory and practice of *corporatism*. Several Western states employed corporatist elements to mediate conflict between businesses and trade unions.[4] Corporatist theory is also invoked when representatives of a profession seek

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

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

[3] By `hybrid cases` I refer to cases where there are two connected actions, one on the side of a state entity, another by an undertaking. In theory, both the state and the companies could be held liable.

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

state approval to self-regulate the activities of its members, allegedly serving the public interest, just like guilds it in the medieval centuries. Sauter notes that this system, usually associated with liberal professions, is attractive because the rules are enacted and enforced by experts, allowing for minimal formal state intervention at minimal cost. However, he also warns that the idea of collective representation is essentially antidemocratic, in as much as rules are adopted by private interest groups with semi-public functions instead of the vote of individual citizens represented by political parties.[5]

II. The shield of state action

II. 1. U.S and EU law on State action

State action or state compulsion involves an action by the state exercising its sovereign powers of law making or public administration. Whenever the State is acting through a public undertaking, normal competition rules apply. Both jurisdictions developed doctrines as judge-made law to exempt business conduct connected with state action from the reach of antitrust.[6] In the U.S., the Supreme Court has long held that anticompetitive action by state governments and private conduct[7] in compliance with that measure are immune from liability under the Sherman Act.[8] The state-action doctrine provides antitrust immunity if the state's intent to displace competition with regulation is "clearly articulated and affirmatively expressed as state policy".[9] For non-public actors the State should also put in place a mechanism to ensure that private interest do not interfere with the public ones. The test looks into whether the private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.[10]

Broadly speaking, EU law allows for several defenses in cases where undertakings, subject to various degrees of state influence, act anti-competitively. EU law requires exploring to what extent the state suppressed autonomous business decision making. First, the state may create a *regulatory environment* where undertakings cease to enjoy entrepreneurial autonomy. Some agricultural markets may come to one's mind, especially under the previous, more old-fashioned EU regulatory regimes. Should we really have such a command-state scenario, undertakings would not act as genuine market players at all, they would simply act like agents in implementing the rules set by the state. Any anti-competitive impact would be the direct result of the state measure, not be imputed to the undertakings. Second, a similar scenario would involve the state *compelling* a certain activity, for example setting the resale prices by legislation or ministerial decree. Again, lack of autonomous business decision may lead to full immunity under antitrust law. To make this complex story even more exciting, the immunity will not apply for the future activity of the undertakings only if a competition authority or a court gives a final ruling on the incompatibility of the underlying state measure under EU law.

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[5]Ibid, at p. 2.

[6]What is even more striking in the statute-based EU legal system is that EU Member States have consistently failed to codify this rule despite the numerous amendments of the founding Treaty.

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

[8]*Parker v. Brown* 317 U. S. 341 (1943). The Supreme Court held at 351that `(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.`

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

[10]*Patrick v. Burget*, 486 U.S. 94, at 101(1988).

As far as this first category of state measures eliminating business autonomy is concerned, the ECJ clarified its position in *Ladbroke Racing*.[11] The judges noted that the EU antitrust rules of Articles 101 and 102 TFEU apply only to anticompetitive conduct of undertakings carried out on their own initiative. The court explained that if the conduct is required by the legislation, or if the legislation creates a legal framework eliminating competition on the part of the undertakings[12], then the restrictions of competition are not attributable to the undertakings.[13] This requires the EU Commission or national competition authorities and courts to analyze the wording of national legislation to check whether undertakings are prevented from engaging in autonomous conduct leading to an anti-competitive outcome.

Being an exception to the general rule, the standard will be set at a fairly high level. *Strintzis Lines* proves that the hurdle is high for companies to avoid liability[14]. The European Commission imposed fines for collusion among ferry service companies operating between Greece and Italy. The companies argued that the regulatory framework and the official policy substantially restricted their autonomy of conduct. They were obliged to contact each other to negotiate the parameters of their policies, including prices. Yet, the ECJ found that the undertakings still enjoyed some *autonomy* in setting their prices, there was no `irresistible pressure' on them to conclude tariff agreements.

The ECJ did not elaborate on the inherent conflict between the principle of supremacy of EU law and legal certainty, also a central concept of the European legal order. Which law shall one follow? The law, often in the form of a statute of my country, or the vague case law based European norm? Proponents of European federalism argue that even if a Member State measure obliges companies to establish a cartel, undertakings should disobey the national rules. The principle of supremacy of European competition rules enshrined in the founding Treaty shall win the battle. EU-sceptics would defend national rules recalling the principle of legal certainty. The ECJ had to deal with this issue more in depth in the Italian *CIF* case involving the regulatory framework of the Italian match industry.[15]Italian match makers argued that their market quota allocation practice raising entry barriers to other European companies was the result of government regulation. The Court ruled that a national competition authority can indeed investigate the conduct of undertakings in a case even if the cartel is the consequence of unlawful domestic legislation.[16] Such legislation must be put aside not only by national judges, but also by national regulatory and competition authorities.[17] Yet, balancing general principles

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

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

[13]Ibid, 33.

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

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

[16]As noted previously, EU rules prohibit Member States from adopting measures that would make EU competition rules inefecctive. Consequently, both the private and public actions can be held unlawful.

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

of EU law, primacy[18]and legal certainty, the ECJ admitted that this duty to put aside anti-competitive law cannot expose the undertakings concerned to any criminal or administrative penalties in respect of past conduct if the conduct was *required* by the law.[19] The primacy of EU law prevails, however, for the future. This means that once the national competition authority's decision finding of an infringement of Article 101 TFEU and disapplication of the anti-competitive national law becomes definitive, the companies involved are no longer shielded by national law.[20] Put it differently, their autonomy is re-established, released from the imperative will of the state.[21]

A second category of state action is when the state measure merely *authorizes or promotes* a given activity. Here, undertakings will be held liable, but could invoke state action as a significant mitigating circumstance when it comes to levying fines on them.

Another defense for a private entity involved in rule making or administration is to point out the *public nature* of its activity. The scope of EU competition rules covers only economic activities. Public measures even with an economic impact fall outside the reach of competition rules. Even if the implementation of environment protection rules or the surveillance of air space is entrusted to corporations, their action will be immune from antitrust rules. For chambers established by a statute, or for hybrid commissions with both public officials and representatives of corporations on their board, the blurring distinction between what is public and private will be an essential part of their defense. The composition of these bodies, the factors they are required to take into account, and the veto or supervisory rights of the government are all crucial elements.

This category of cases often involves unilateral actions potentially infringing Article 102 TFEU, or cartel-like rules setting by associations. In the eighties of the last century when mostly publicly owned undertakings provided telecommunication services, these entities, often enjoying public law status, often combined rule-making with the provision of services. For example, the ECJ rejected the application of the Italian government against a Commission decision finding the activities of British Telekom (BT) unlawful under the equivalent of today's Article 102 TFEU.[22] BT was at that time a statutory corporation established under the British Telecommunications Act and owned by the state. As holder of the statutory monopoly on the running of telecommunications systems in the United Kingdom, BT had a duty to provide various telecommunication services. BT also had the right to exercise rule-making powers setting charges and conditions by means of schemes published in official gazettes. Some of these schemes were designed to prevent private message forwarding-agencies to enter the monopolized market of BT. The Commission argued that the schemes performed the same

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

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

[20]Para 55.

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

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

function as contractual terms, and were freely adopted by BT without any intervention on the part of the United Kingdom authorities.

There were other cases where the Court did not hesitate to refuse challenges against high fees qualify the activity as public in nature. *Eurocontrol* involved the charging of an allegedly abusive fee for the provision of services involving the supervision of air space. Since the ECJ held that these by their nature connected with the functions of public authority, the competition rules of the treaty designed to address restrictions arising from economic activities could not be applied.[23] Eurocontrol was a public body, regulated by international agreements, which was not the case for an undertaking registered in Italy as a private corporation, providing environment protection services in the international port of Genoa for a fee. In *Diego Cali* the ECJ held that SEPG was entrusted with duties that belong to the sphere of public authority, therefore, its `clients` could not challenge the fees under antitrust rules.[24]

In addition to pointing out the intensity of state intervention or the public nature of activity, undertakings and their associations may also argue that their rule-making activity was *necessary for the proper functioning* of their business or profession. *Wouters* was the first case where the ECJ acknowledged that there are restrictions adopted by an association of undertakings which can be justified under Article 101 (1), instead of the efficiency based exemption provisions enshrined in Article 101 (3).[25] This judge-made law realizes that there are restrictions that do restrict free, autonomous market conduct without directly related to efficiencies, and yet they are necessary to the proper functioning of a market.[26]Under this *Wouter*-formula,undertakings would not dispute the autonomous or economic nature of their activity. Rather, the emphasis is on the unavoidable necessity of the restriction. The state is involved by establishing a chamber like this and authorizing it to adopt rules governing the market activity of its members. In fact, these rules, often intended to maintain the integrity of a profession, could have or should have been adopted by the government itself.

And finally, for the sake of completeness, I shall mention Article 106 (2) TFEU which provides a specific exception for undertakings which perform a *service of general economic interest* from infringing the competition rules. This is not a frequently used defense, it is hard to prove all the elements of this provision. The undertaking should be expressly entrusted with an activity that involves a genuine public service. The second part of the test is that without infringing the competition rules the undertaking would not be able to fulfill its mission laid down by the Member State.[27] And finally, this restriction of competition should not go against the interests of the common market.

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

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

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

[26]The only problem is that the text of Article 101 does not foresee such a category of exemption. Arguing that a restriction like this amounts to an anti-competitive restriction that is justifiable because of its necessity is an extremely vague and somewhat contradictory effort to circumvent the textual limitations of EU competition rules. I suggest that a somewhat less contradictory approach would have been to label these cases as having neither an anti-competitive aim or an effect. A restriction that is absoluatly necessary to the rules of the game is not really a restriction of autonomous business conduct, but a pre-requisite for that market to exist.

[27] Due to space constraints, we will not deal with this unique category of defense in details in this paper.

I should note that under EU law, the form of the manifestation of the state will does not seem to matter. It is certainly much more straightforward to prove state compulsion if a legislative or regulatory act is present, but it is not a pre-requisite to prove the relative innocence of the undertaking concerned. In *Asia Motors III.* the ECJ held that Article 101 should not be applicable if the conduct was imposed by the authorities through the exercise of `irresistible pressure'.[28]

II. 2. Foreign state compulsion

Foreign state compulsion can be seen as a specific form of the state action doctrine. This is when the sovereign is a foreign state, in many instances closely linked to a public undertaking. Actions of a third country may also lead to immunity, yet the bar seems to be fairly high in practice.[29] Unlike the EU`s approach on autonomous economic activity or the US`s federalism based state action doctrine, this exception recalls international law principles like non-intervention and comity.[30] The foreign state compulsion defense may provide safe harbor for a corporation or individuals who participated in otherwise unlawful anti-competitive conduct ordered by a foreign sovereign.

Both U.S. and EU case law require compulsion, the defendant will not prevail if only the advice, support, or encouragement by the foreign government can be established.[31] The Antitrust Enforcement Guidelines of the DOJ and FTC from 1995 consider the threat of penal or other severe sanctions indispensable for the recognition of the compulsion.[32] It is pointed out that in cases, where the conduct occurs in the U.S., the defense is not available.

The ECJ was also confronted with arguments relying on irresistible pressure by foreign governments. Yet, this pressure has never been so intense to eliminate corporate liability. In *Aluminium imports*,[33] concerning anticompetitive agreements with very broad membership between mostly primary manufacturers of aluminum, a decision adopted shortly before the fall of the Berlin Wall, the EU Commission noted that even if a government *supported* a contract in violation of the competition law, this does not alter the position of the companies involved. EU competition law does not make a distinction between private and public undertakings, both are subjects of competition rules, even if the latter can be used as a tool to pursue public policy.[34]

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

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

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

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

[32] Antitrust enforcement guidelines for international operations, April 1995, point 3.32, available at: https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations

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

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

In *Wood Pulp,* an U.S. export cartel attempted to rely on this defense.[35] The ECJ noted that the US legislation, in this case the Webb Pomerene Act, exempts only export cartels from the scope of application of US antitrust, but does not require their creation.

III. Specific scenarios involving state actions

III.1. Self-regulation by chambers and other associations of undertakings

The potential competition law issues attached to the functioning of associations of undertakings are of manifold. The state may authorize them to adopt rules regulating entry, advertisement or even prices. This can be done with or without subsequent state approval. Even if these associations do not defend their case by a reference to direct state involvement, they may argue that their activity was necessary to serve the public interest. A well-organized cartel can also be seen as a form of self-regulation with the aim to eliminate risk and rivalry. Will the legal evaluation change if the State empowers an association of undertakings to set certain rules of the game for themselves? In cases that come under this heading the State exercises 'soft' intervention, i.e. not doing more than creating or authorizing the creation of the association. It is then the association, the chamber of undertakings itself that adopts anti-competition action, presumably serving other public policy goals.

As to the public or private nature of rulemaking by association, the ECJ summarized the point of attribution of liability in *Wouters*. According to this, undertakings are exempt from the reach of antitrust

> "… when it (*the Member State*) grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings." [36]

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

This rule of reason option was also considered and elaborated upon by the ECJ in *API* relating to the Italian regulation of road haul tariffs. The Court explained that in order to properly assess the objectives and effects of a decision the overall regulatory and economic context should be

[35] *A. Ahlström Osakeyhtiö and others v Commission of the European Communities (Wood Pulp)*, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 [1988] ECR 5193, para 20.
[36] *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 97. (on rules imposed by the Dutch Bar restricting the establishment of joint offices with accountants).

taken into account.[37] The Court applies a proportionality test[38] here, verifying whether the restrictions imposed by the rules at issue in the main proceedings are limited to what is necessary to ensure the implementation of legitimate objectives.[39] Yet, the Court was confident that the minimum fees set by the commission, and also the legislation approving those fees, were not justified by a legitimate objective. The Court acknowledged that preserving road safety can be a legitimate public interest objective, but refused to accept the argument that road safety would call for setting minimum prices.[40] The Court pointed out that a mere reference in a general manner to the protection of road safety, without establishing any link whatsoever between the minimum operating costs and the improvement of road safety is not sufficient. Furthermore, the measures in question go beyond what is necessary. The rules would not enable carriers to prove that, although they offer prices lower than the minimum tariffs fixed, they nevertheless comply fully with the safety provisions in force. In addition, there are a number of EU and national regulations protecting road safety, which constitute more effective and less restrictive measures.[41]

What is striking with this reasoning is that the ECJ did not even mention the option of Article 101 (3) to justify the anti-competitive rules. Rather, it relied on its case law developed under the free movement provisions relating to goods, services and establishment which relate to Member State measures hindering trade between EU countries. In other cases the Court was more restrictive, quickly dismissing argument of companies that their restrictions imposed would pursue public interests.[42] The protection of public interest is not the task of entrepreneurs but belongs to the hard core competence of the state.

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

III.2. Regulatory committees

Whenever market parameters like prices are not set by the free play of supply and demand, but by some combination of market players and state officials, there is always a danger of a disguised cartel behind the regulatory process. Usually, there is a top down and a bottom up

[37] Ibid, para 47. Quoiting the *Wouters* judgment the ECJ noted that It has to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

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

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

[40] Ibid, para 50-57.

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

[42] See Hilti (the dominant company unsuccessfully arguing that tying the purchuse of cartidge nails to the machine itself is required to protect the safety and health of users).

approach. By the first I mean when the government creates a committee to be in charge of the regulation and invites representatives of market players to contribute. In my view, situations like this, when the State sets up the consultation mechanisms and takes the initiative, there is less likelihood of a disguised cartel. The second category refers to associations, chambers created by the market players themselves, which, in co-operation with state authorities, take up self-regulatory duties.[43] These institutions are at the borderline of public and private law. Their actions are at the borderline of anti-competitive decisions, or agreements.

According to the case-law of the EU, committees including representatives of enterprises may propose prices to be set by the State, provided that the committee members decided not only in their private interests, but also public interest must be taken into account, and the State has the power to alter or override the committee's proposal.

In *Centro Servizi Spediporto*[44] the ECJ held that, where legislation of a Member State provides for road-haulage tariffs to be approved and brought into force by the State on the basis of *proposals* submitted by a committee, where that committee is composed of a majority of representatives of the public authorities and a *minority* of representatives of the economic operators concerned and in its proposals must observe certain public interest criteria, the fixing of those tariffs cannot be regarded as an agreement. Three years later, the ECJ specified in *Librandi*[45] that there is no cartel agreement even if the representatives of economic operators are in majority on the committee, provided that the tariffs are fixed with due regard for the public-interest criteria defined by law and the public authorities take the final decision considering the observations of other public and private bodies.

Criticizing the ECJ, Damien Gerard observed that the Court's jurisprudence lacks consistency, there is no clearly articulated and consistently applied test.[46] The reason for that might be that most of the cases decided by the Court focused on the liability of Members States in connection with an allegedly anti-competitive private conduct. The Court was obviously cautious not to put an unbearable and unjustified burden on Member States, so tried to navigate wisely to emphasize those factors that helped to legitimize the state measure.[47]

The most recent *API* judgment gives an example for anti-competitive state regulation involving a cartel-like conduct in the Italian road transport sector. The Osservatorio adopted a series of tables fixing the minimum operating costs of road transport undertakings for hire and reward.

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

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

[45]C-38/97, EU:C:1998:454

[46]Damien Gerard: EU Competition policy after Lisbon: time for a review of the „state action doctrine"?, available at: http://ssrn.com/abstract=1533842).

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

The Osservatorio was composed principally of representatives of professional associations of carriers and customers.[48] Furhermore, decisions of the Osservatorio were approved by a majority of its members, without a State representative having a right of veto.[49]Those tables were set out in a ministerial a couple of days later. [50]

What is interesting and also worrying at the same time, is a subsequent note by the ECJ. The Court emphasized that the activity of the Osservatorio would also fall outside the cartel prohibition if its members were to act as 'experts' who are independent of the economic operators concerned, being required to set tariffs taking into account their own business interests, but also the public interest and the interests of undertakings in other sectors or users of the services in question.[51] Can one imagine that a gathering of persons affiliated with various competing undertakings, empowered to adopt regulatory decisions, without or even with some public officials being present, would be able to forget about where they come from and where they are going back after the meeting? Can they genuinely represent the diverging interest of other market players?

III.3. Lobbying for regulation

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

European law makes a fine distinction between cases where companies genuinely recommend government officials a certain way of conduct and scenarios where undertakings conclude an

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

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

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

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

anti-competitive agreement beforehand, and then seek state approval or support, i.e. by making their agreement compulsory for every market participant. An agreement among competitors setting the same price would be a naked competition restriction, whereas agreeing on a common plan to lobby the government to set the same price by way of regulation is exempt from the reach of EU competition law.

As far as the U.S. is concerned, *Noerr-Pennington* established a specific exemption for individuals and corporations.[52] This approach is based on the respect of the institutions of representation and *the right of petition*. Antitrust rules are meant to govern economic activity. Actions by companies targeting government officials are characterized as political activity, even if they eventually will have economic effects.
Lobbying is beyond the reach of antitrust on both sides of the Atlantic. However, this may not serve as a disguise of a genuine cartel conduct, existing before and without relevance to the subsequent lobbying activity. Representatives of undertakings have a narrow path to walk.[53]

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

U.S. law is driven by the *Keogh* judgment prohibiting a private plaintiff from pursuing an antitrust action seeking treble damages where the plaintiff claimed that a rate submitted to, and approved by, a regulator resulted from an antitrust violation.

In *Ticor* the Court ruled that where prices or rates are initially set by private parties, subject to veto only if the State chooses, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate setting scheme. [54] The mere potential for state supervision is not an adequate substitute for the State's decision. While most rate filings were checked for mathematical accuracy, some were unchecked altogether. Absent active supervision, there can be no state-action immunity for what were otherwise private price-fixing arrangements.

In the EU, if a tariff is set by the state, even if it had anti-competitive or exploitative effect, it would not be caught by competition law, save that the undertaking offered these tariffs for

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

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

[54] 38 Stat. 719, 15 U.S.C. 45(a)(1). Title insurance involves insuring the record title of real property for persons with some interest in the estate, i.e. owners. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers.

approval without having applied them in the past. The conclusion could be different, when the dominant undertaking had applied an unfair price as a result of its autonomous business decision and sought state approval in the second phase. This rubber stamping action by the state could be held to infringe the *effet utile* rule, thus the legal shield would disappear, the dominant company could be held liable. Yet, if the state does not automatically transform the private price offer into a public tariff, but gives it serious consideration, than EU competition law would not be applicable either on the public or on the private action.

III. 5. Regulated industries

When free competition is replaced with regulation, then competition laws may become redundant, since there will be no competition in the form of independent business decisions to be protected. One issue is however, how intense this regulation should be to eliminate corporate responsibility. An interesting subsection of cases relate to challenging the fees of companies active in the regulated sectors. Another issue is to ask how clearly do these sectors specific rules state whether and to what extent antitrust rules ought to be set aside?[55]

In the U.S., where regulatory statutes are silent in respect to antitrust, courts must determine whether these rules implicitly preclude the antitrust laws' application. The *Gordon* Court took into account the following factors: (i) the existence of regulatory and supervisory authority under the securities law; (ii) evidence that the regulatory authority did in fact exercise its authority; and (iii) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting results.[56]

Regulation interfering with competition rules is not only an issue in telecommunication and energy. Agriculture is also heavily regulated. The ECJ dealt with this issue in *Suiker Unie*[57]. The common organization of the sugar market provided that each Member State shall fix, on the basis of the quantity allocated to it for each factory or undertaking producing sugar in its territory, a basic quota and a maximum quota. The Court acknowledged that this restriction together with the relatively high transport costs is likely to have a not inconsiderable effect on one of the essential elements in competition, namely the supply, and consequently on the volume and pattern of trade between Member States.[58] However, the common market regulation did not fix consumer prices and, consequently, producers were allowed some freedom to determine themselves the price at which they intend to sell their products.[59] Neither did EU rules preclude competition on quality. The Court thus ruled that regulation left in practice a residual field of competition, and that this field comes within the provisions of the rules of

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

[56]*Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659

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

[58] *Id*., para 17.

[59] *Id*., para 21.

competition.[60] It follows that whenever market regulation leaves some room for autonomous business conduct a collusion among market player will be caught by EU competition rules.

The European approach gives more room for EU antitrust rules in sectors where there is a national regulator. One of the reasons lies in the supremacy of EU law, the other that there is no fear of generalist, non-expert judges or juries reaching flawed conclusion. According to EU case law, t is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that EU competition rules do not apply. In a situation like this the restriction of competition is not attributable to the autonomous conduct of the undertakings, but rather to the action of the government. This exception excluding the applicability of EU competition law provisions has been accepted only under exceptional circumstances.[61]

For example, the European Commission did not hesitate to impose fines on Deutsche Telekom for a margin squeeze even when the wholesale fees of the German incumbent were approved by the sector regulator.[62] It was argued that the regulation did not prohibit lowering retail prices, so the undertaking could have avoided squeezing its competitors out of the market. Cases like this demonstrate what the well-established EU case law on special responsibility of dominant undertakings implies.[63] They are obliged to preserve the residual competition that is still present on markets dominated by them. The ECJ also held[64] that the liability of the undertaking is not constrained just because the national regulatory authority may itself have infringed Article 102 TFEU in conjunction with the *effet utile* principle, and therefore that the Commission could have brought an action for failure to fulfill obligations against Germany.[65] EU law, being supreme in its nature to national law expressing the intentions of domestic law makers does not really care how clear the Member State measure is on this point. The rule is that Member States should not adopt measures that could restrict the full application of EU competition rules. The reason for that is not that competition policy is regarded as superior to other public policies, but rather that EU law is supreme to national laws, even legislation adopted by parliaments.

IV. The effect of state action on the liability of undertakings

It can be assumed that the if the state itself could be held liable for an anti-competitive regulatory measure that leads undertakings to anti-competitive behavior, than there is not much

[60] *Id*. para 24.
[61] See Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 19; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraphs 27 to 29; and Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 67).
[62] Commission Decision of 21 May 2003 (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG), OJ L 263, 14.10.2003.
[63] Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 57.
[64] Case C-280/08 P., *Deutsche Telekom AG v European Commission*, judgment of the Court of 14 October 2010., [2010] ECR I-09555., paragraph 91.

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[65] *Id*, at para 91.

need for antitrust to strike down on companies. On the other hand, if the state cannot be held liable for the anti-competitive outcome, than antitrust law should have a wider potential scope to deal with the issue through making the corporations responsible.

EU law seems to be stricter against Member State measures than U.S. law, respecting States' sovereignty as regards regulating their own economies. EU law has an Article 16 TFEU, addressing the issue of state measures relating to public undertakings, and those with exclusive or special privileges. There is also the more general case-law based *effet utile* doctrine which makes states responsible for their measures approving, encouraging, prescribing a cartel like conduct, including the unsupervised delegation of regulatory powers to industry actors. U.S. states cannot be held responsible for legislative or regulatory measures like these.

The practice of the EU Commission as regards hybrid cases seems to support this distinction. It has happened only once that the EU competition watchdog went both after the undertakings and the state itself. That famous case involved the tariff setting by Italian customs agents. A law authorized the country-wide association CNSD to adopt minimum and maximum tariffs that were subsequently approved by a ministerial decree. Here, the Commission addressed a decision to CNSD, the association of customs agents, and also sued Italy before the ECJ for infringing its obligation under the Treaty.[66] The ECJ had no doubts that even an association created by an act of Parliament can be seen as an association of undertakings for the purposes of Article 101 TFEU. It noted that neither were the members of CNSD appointed by government, nor were they obliged to take into account public interest.

The Commission prefers nowadays to challenge anti-competitive state regulation on the basis of the four freedoms, especially the free movement of goods and the free provision of services, or, under Article 37 TFEU regulating commercial state monopolies. Most of the European case law on anti-competitive state practices arose on the basis of competitors' challenges before national courts. The Commission did adopt a number of decisions addressing monopolies in the telecoms and postal sectors in the eighties, but it has not established a consistent enforcement policy since then. We can claim that the European *effet utile* rule is stricter than the U.S. state action doctrine in as much as it does not allow Member States to create cartel-like arrangements and justify them invoking important public interests going beyond competition policy. The consequence would be a wider liability for companies engaging in anti-competitive activities under public umbrella. However, we should add that other provisions of the TFEU, those relating to the free movement rules, can also be invoked against anti-competitive state actions, even more easily, without the need to prove the link with an Article 101 TFEU like cartel. These provisions do allow for a public interest defense taking into account other interests than undistorted free competition.[67] With that, more state interventions could be justified, so the

[66] C-35/96, *CNSD* [1995] ECR I-2883, paras 53-54.

[67]This relationship between competition and free movement rules is also emphasized by Damien Gerard, who suggests that the legality of assessing the leaglity of state measures limiting competition should be assessed under the internal market rules instead of the ill-equipped competition rules. Damien Gerard: EU Competition policy after Lisbon: time for a review of the „state action doctrine"?, available at: http://ssrn.com/abstract=1533842). One remark I would like to add is that this seems to be the policy of the EU Commission indeed. However, the Court has less freedom to make this policy choice, since its jurisprudence is largely driven by the questions posed by national courts. If the national litigation is centered around competition rules, than the Court has some difficulty in orienting national judges towards internal market rules.

room for legitimate anti-competitive behavior by undertakings may not be that narrow as if we considered only the competition rules of the Treaty.

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

V. Conclusion

In the EU, the internal market principle and the commandment of free, undistorted competition play a central role in uniting 28 different countries. In the U.S., the 50 states share a common history, born in wars, united by strong common interests, expressed in strong federal foreign, defense, monetary and fiscal policies, all these missing in Europe. Perhaps that is one of the reasons why European integration is much more sensitive on state imposed competition restrictions, imposing stricter conditions on Member States with an indirect impact on businesses.[68] It seems that competition policy protecting the functioning of the single European market is *superior* to industrial and other national policies, however clearly they are articulated and reviewed by Member States.

In state related competition restrictions the distinction made between economic activity and public actions is important. Whenever the entity involved in the anti-competitive action can be characterized as an *undertaking* for the purposes of EU competition rules, it will be subject to antitrust rules. Or, it would be more proper to say that whenever the activity is an *economic activity*, antitrust rules will apply, regardless of the public or private law status of the actors.

On both sides of the Atlantic, only commercial, economic conduct is caught by competition rules. For example, if the rules of the games are such that individuals do not act as representatives of corporations, but as experts, serving the public interest, under the control of public officials, than their gathering would not be regarded as a cartel meeting. Consequently, the rules on the composition and operation of bodies taking part in law making process are relevant. The ECJ takes into account the composition of these bodies, i.e. whether private representatives are in a majority, who chairs the meeting, what interests do the participants have to consider, and how are private members nominated. It is not an exhaustive list and the Court usually looks at all relevant factors before deciding on the existence of a market conduct falling under EU antitrust rules.

Second, not only the composition of these groups, but also the factors they are supposed to consider are relevant. If this is not regulated, it is likely that participants will follow their own private economic interests. There is a fair chance to act independently, i.e. not in a capacity of

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

an economic actor, but a wise professional, if the factors to be taken into account for regulating a tariff are well defined by the law.

Finally, the residual role retained by the state, usually a minister, is decisive in deciding whether the rules adopted fall into the category subject to antitrust or are exempt do the public nature of the rule making process. Of common concern is for both jurisdictions is the extent to which government authorities retain the final word in the regulatory process. Under the more formal approach represented by EU law, if the minister has the power to disregard or amend the agreement or decision put forward by a committee including representatives of the market, than EU competition law will not be applicable. The activity and the final work product of the commission will be considered as a mere proposal, not capable of having any legal or practical effect without the decision of the minister. The actual intervention history of the state does not seem to matter a lot. The potential for state veto is sufficient to grant immunity from the reach of competition laws. U.S. law is more demanding in this respect. If the supervision is merely formal, the state action doctrine's second condition will not be met, thus private anti-competitive conduct will not be immunized.

A crucial question is to what extent the state measure relating to an otherwise cartel-like private arrangement can genuinely protect public interest. Under certain circumstances, other public policy interest, like safety, consumer or environment protection may legitimize the restriction of economic freedom. In other cases, the reference to 'other public policies' covers nothing more than the particular interests of a group of market players. In EU competition law, unlike for the internal market law of free movements, there is no clear possibility to justify private or state actions infringing antitrust rules, but for the public service exemption of Article 106 (2) TFEU. In the U.S., Judge Kennedy's *North Caroline Dental Exeminers* opinion recalled that although federal antitrust law is a central safeguard for the free-market structures, there are other values regulated by State at the expense of the Sherman Act. State-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition.[69] The Court quoted *Ticor* warning that the immunity is not unbounded: "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'[70] This comes close to acknowledging the supreme nature of free markets and competition. Exceptions to the competition principle should be clearly expressed.

[69] Ibid, p.6-7.
[70] p. 636.