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**THE RELATIONSHIP BETWEEN ANTITRUST  
AND REGULATION IN THE US AND IN THE EU:  
AN INSTITUTIONAL ASSESSMENT**

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# THE RELATIONSHIP BETWEEN ANTITRUST AND REGULATION IN THE US AND IN THE EU: AN INSTITUTIONAL ASSESSMENT

Amedeo Arena \*

## Abstract

Drawing inspiration from the 1998 OECD survey on the relationship between regulation and antitrust, this paper seeks to examine that relationship in the US and the EU, having particular regard to the role played by their distinctive constitutional and institutional arrangements. Part I will address the horizontal relationship between US federal antitrust law and federal regulation, focusing both on express statutory exemptions and judge-made antitrust immunities, as well as the vertical relationship between federal antitrust and state regulatory schemes, taking into account the doctrines of federal preemption and of state action. Part II will assess the relationship between antitrust and regulation in the EU, having particular regard to EU antitrust exemptions, the influence of regulatory goals on EU antitrust law, and the impact of EU antitrust law on EU and national regulatory schemes. Part III will conceptualize the findings of Parts I and II in terms, respectively, of a threefold supremacy of EU antitrust over regulation and, as to the US, of a shift from express statutory exemptions to a generalized judicial alternativism and of an overall deference *vis-à-vis* State sovereignty. Finally, a comparative analysis of select aspects of the relationship between antitrust and regulation in the two systems will be carried out and the potential for prospective convergence will be assessed.

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## INTRODUCTION

In June 1998 the Competition Committee of the Organisation for Economic Co-operation and Development (OECD) held a roundtable on the relationship between regulators and competition authorities. A lengthy report was released, including submissions by OECD member countries and by the European Commission on the different allocations of responsibilities, the overlaps that had arisen, and the solutions that had been devised.<sup>1</sup> While country reports, such as those prepared by the United States (US) and by Member States of the European Union (EU), carried out a comprehensive analysis of the respective roles of antitrust authorities and regulators within their jurisdiction, the European Commission submitted a brief document, consisting of five pages, entitled “Anticompetitive practices authorized, tolerated or required by public powers”.<sup>2</sup> Apart from a passing reference to the directives adopted by the Commission in the field of telecommunications, no reference was made in that document to regulation at the EU level.

The basic assumption underlying this work is that the relationship between antitrust and regulation is remarkably more complex and multifaceted. In the EU, just like in the US, there is not only a vertical tension between central (respectively, EU and federal) antitrust provisions and State regulation, but also a horizontal interplay between said antitrust rules and regulatory frameworks enacted at the central level. While comparative assessments to date have focused on specific substantive aspects of the two systems, the aim of this work is to identify the patterns of the relationship between antitrust and regulation in the US and in the EU, having particular regard to the role played by those two systems’ distinctive constitutional and institutional arrangements.

To this end, Part I of this work will first address the horizontal relationship between US federal antitrust law and federal regulation, focusing both on express statutory exemptions and judge-made antitrust immunities. Attention will then be shifted to the vertical relationship between, on the one hand, federal antitrust law and, on the other hand, state antitrust and regulatory schemes. This will call for an examination of the doctrines of federal preemption and of state action.

Part II will examine the relationship between EU antitrust and regulatory schemes laid down both at the EU and Member State level. First, regard will be had to EU antitrust exemptions, insofar as exempted matters are often subject to regulation either at the EU or the national level. Second, attention will be given to the influence of regulatory considerations on EU antitrust law, having

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<sup>1</sup> OECD, *Relationship between Regulators and Competition Authorities*, June 29, 1999.

<sup>2</sup> *Id.*, at 277-281.

particular regard to how the latter, on some occasions, is applied in a “differential” manner in order to accommodate regulatory goals. Third, an assessment of the impact of EU antitrust law on EU and national regulation will be carried out, having regard, on the one hand, to the primacy that EU antitrust rules generally enjoy over anticompetitive national regulation, on the other, to how Article 106(2) TFEU can permit derogation from Articles 101 and 102 TFEU in order to achieve general interest aims pursued by EU or national regulatory schemes.

Part III will, at the outset, conceptualize the findings of Parts I and II. As to the former, regard will be had to the evolutionary trends in the normative, teleological, and topical supremacy of EU antitrust over regulation at the EU and national level. With reference to the US system, instead, the focus will be, as to the horizontal dimension, on the gradual shift from individual express exemptions to a generalized judicial alternativism and, as to the vertical dimension, on dual federalism and state sovereignty. Finally, a comparative analysis of select issues will be carried out and the potential for prospective convergence will be assessed.

## I. ANTITRUST AND REGULATION IN THE US

In the US system, there are two levels of regulation that might conflict, or work side-by-side, with federal antitrust: one is federal regulation other than antitrust; another is state regulation, including both state antitrust law at variance with federal antitrust and state sectoral regulation having anticompetitive effects.

This situation calls for rules on integrating or prioritizing federal antitrust law with federal and state regulation. As to the horizontal dimension of this relationship, express statutory exemptions and to judge-made antitrust immunities come into play. The vertical relationship between federal antitrust and state regulation, instead, is shaped by the state action defense and, albeit to a lesser extent, by doctrine of federal preemption.

A number of institutional factors underlie those arrangements. One is state sovereignty: in US dual federalism, each state has the sovereign right to order its own affairs<sup>3</sup> and to develop a variety of solutions to problems, rather than being forced into uniformity.<sup>4</sup> Another is the breadth of federal attributions: according to the Supreme Court, powers delegated by the Constitution to the Federal Government must be regarded as comprehensive and complete:<sup>5</sup> in particular, federal prerogatives in the field of interstate commerce are paramount<sup>6</sup> and plenary<sup>7</sup> and may legitimately be employed to address concerns about regulatory capture and administrative efficiency.

### 1. The Horizontal Tension: Repeal of Antitrust Law by Regulation

In the US, the core antitrust provisions are laid down in two Acts of Congress: the Sherman Act (1890)<sup>8</sup> and the Clayton Act (1914).<sup>9</sup> Antitrust law has the same rank in the hierarchy of legal sources as regulatory schemes, which therefore can repeal the antitrust statutes,<sup>10</sup> thus giving rise to the so-called antitrust immunities or exemptions.<sup>11</sup>

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<sup>3</sup> See, e.g., *Home Owners' Loan Corp. v. Arians*, 21 N.J. Misc. 339 (Dist. Ct. 1943); *Kelly v. State*, 139 Tex. Crim. 156 (1940).

<sup>4</sup> *Addington v. Texas*, 441 US 418 (1979).

<sup>5</sup> *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 US 186 (1911).

<sup>6</sup> *Ammex Warehouse Co. of San Ysidro, Inc. v. Department of Alcoholic Beverage Control for State of Cal.*, 224 F. Supp. 546 (S.D. Cal. 1963), judgment aff'd, 378 US 124 (1964).

<sup>7</sup> *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 US 93(1994).

<sup>8</sup> 15 USC. §§ 1-7.

<sup>9</sup> 15 USC. § 17.

<sup>10</sup> As in other legal orders, it is a well-established principle in US law that the legislature has the power both to enact new laws and that to repeal existing legislation. *District of Columbia v. John R. Thompson Co.*, 346 US 100 (1953); *People ex rel. Eitel*

Repeal of a statute by a later one can be either express or implied. The former is, at least at the conceptual level, quite clear-cut, insofar as the Congress explicitly sets out its intention to abrogate antitrust law.<sup>12</sup> Nonetheless, it would be mistaken to assume that the scope of federal statutory exemptions from antitrust law coincides with that of regulated industries. Some sectors are immune from antitrust rules as well as from regulation due to the lack of adequate regulatory oversight.<sup>13</sup> Other sectors are exempted from antitrust not so much to accommodate regulation, but to facilitate a desirable market outcome.<sup>14</sup> In yet other instances, the relevant subject-matter is governed both by regulation *and* antitrust law: this typically occurs when regulatory statutes include antitrust-specific “saving clauses”, such as the one contained in the 1996 Telecommunications Act.<sup>15</sup>

More problematic is the issue of implied repeal.<sup>16</sup> The key question is whether the Congress, by passing a given statute, had the intention of repealing an earlier one.<sup>17</sup> In this respect, courts have generally taken a narrow view, holding that, in order to be effective, an implied repeal intent must appear “clearly”<sup>18</sup>, “manifestly”<sup>19</sup>, and “with cogent force”.<sup>20</sup> Antitrust law is no exception, as implied repeal has only been established in cases where there was “a plain repugnancy between the antitrust and regulatory provisions.”<sup>21</sup>

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*v. Lindheimer*, 371 Ill. 367 (1939). Courts have also acknowledged that one legislature cannot curtail the power of subsequent ones to repeal earlier legislation. *State ex rel. Boynton v. Kansas State Highway Commission*, 139 Kan. 391 (1934).

<sup>12</sup> See, generally, Louis Altman and Malla Pollack, *Callmann on Unfair Competition, Trademarks and Monopolies*, §4:4 (4th ed., 2009); William C. Holmes *Antitrust Law Handbook* (New York, 2009), Chapter 8; Lawrence A. Sullivan and Warren S. Grimes, *The Law of Antitrust: an Integrated Handbook* (2nd ed., St. Paul, 2006), Chapter XIV.

<sup>13</sup> See Holmes, *supra*, at § 8:6 (“In cases such as these . . . the immunity is made express by legislative fiat”).

<sup>14</sup> See, e.g., *id.*, at § 4:4 (noting that the newspaper industry cannot be properly classified as regulated merely because of the Newspaper Preservation Act of 1970, 15 USC.A. §§ 1801 to 1804, since that statute sets out an exemption for joint operating agreements, but, unlike actual regulated sectors, it does not provide for direct supervision by a regulatory agency).

<sup>15</sup> Sullivan & Grimes, *supra*, at 755 (giving the examples of agricultural collectives and joint newspaper operating agreements).

<sup>16</sup> Section 601(b)(1) of the Telecommunications Act of 1996 reads as follows: “nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.” 110 Stat. 143, 47 USC. § 152.

<sup>17</sup> See, generally, Eric C. Surrence, J.D., Glenda K. Harnad, J.D., *American Jurisprudence* (2nd ed., 2009) § 280.

<sup>18</sup> *Posadas v. National City Bank of New York*, 296 US 497 (1936); *US v. Tackett*, 113 F.3d 603 (6th Cir. 1997); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553 (1998); *State v. Wilton R. Co.*, 89 N.H. 59 (1937).

<sup>19</sup> *Rodriguez v. US*, 480 US 522, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987); *Patten v. US*, 116 F.3d 1029 (4th Cir. 1997); *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029 (Fla. 2001); *Bergan Mercy Health System v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

<sup>20</sup> *Watt v. Alaska*, 451 US 259, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981); *Patten v. US*, 116 F.3d 1029 (4th Cir. 1997); *Haubrich v. Johnson*, 242 Iowa 1236, 50 N.W.2d 19 (1951).

<sup>21</sup> *Haubrich v. Johnson*, 242 Iowa 1236, 50 N.W.2d 19 (1951); *Board of Ed. of Benton County v. State Educational Finance Commission*, 243 Miss. 782, 138 So. 2d 912 (1962); *State v. Wilton R. Co.*, 89 N.H. 59, 192 A. 623, 111 A.L.R. 52 (1937).

<sup>22</sup> *US v. Philadelphia Nat. Bank*, 374 US 321, 350–351 (1963). See also *Credit Suisse Securities (USA) LLC v. Billing*, 551 US 264, 275 (2007) (“This Court’s prior decisions . . . make clear that, when a court decides whether securities law precludes antitrust law, it is deciding whether, given context and likely consequences, there is a ‘clear repugnancy’ between the securities law and the antitrust complaint—or as we shall subsequently describe the matter, whether the two are ‘clearly incompatible’”).

Therefore, both direct and implied repeal contribute to frame the horizontal relationship between antitrust and regulation in the US system. It is thus to those doctrines that this work now turns.

### **i) Federal Statutory Exemptions from Antitrust Law**

According to a recent survey, approximately 20 percent of the US economic activities are to some degree exempted from antitrust law.<sup>22</sup> Federal statutory antitrust exemptions can be divided into proper “exemptions”, which entail immunity from antitrust rules, and “pseudo-exemptions”, which merely imply a differential application of antitrust law. The “exemptions” category can be split up into two sub-categories: “full exemptions”, which exempt a given activity from *all* antitrust rules, and “partial exemptions”, which grant exemption only from *certain* antitrust rules.

Full exemptions are, for the most part, a creature of their time, a period ranging from the 1907 Bankers’ Panic to the mid-1940s. Indeed, only five of them are still in force.<sup>23</sup> In view of the broad scope of those immunities, in all five instances the legislature provided for oversight of the exempted sectors through a regulatory scheme enforced by a governmental agency, commission, or board.<sup>24</sup> In some cases, however, the scope of regulation turned out to be narrower than that of antitrust immunity. For example, the Secretary of Commerce is supposed to police fishermen’s agreements against excessive pricing, yet apparently it has never engaged in any real regulatory oversight.<sup>25</sup>

Turning to the nineteen partial exemptions currently in force,<sup>26</sup> the discrepancy between the scope of the exemption and that of regulatory oversight is even greater, possibly because those

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<sup>22</sup> Altman & Pollack, *supra*, at 4:4. (the 20 percent figure the Authors mention, however, also includes sectors not subject to antitrust laws by judicial exemption).

<sup>23</sup> The McCarran-Ferguson Act (1945) for the insurance sector, 15 USC. §§ 1011-1015; the Shipping Act (1916) concerning ocean shipping conferences, 46 USC. App. §§ 1701-1721; the Capper-Volstead Act, 7 USC. § 291, Section 6 of the Clayton Act, 15 USC. § 17, and the Agricultural Marketing Agreement Act, 7 USC. § 608b covering agricultural cooperatives, farmers, and processors; the Fishermen’s Collective Marketing Act, 29 USC. §§ 101-113, granting a similar exemption to fishermen; and Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, 29 USC. §§ 101-113, dealing with the activities of labor unions.

<sup>24</sup> For instance, the Shipping Act entrusts the Federal Maritime Commission with oversight of industry conduct and endows it with regulatory powers. Likewise, the National Labor Relations Board has regulatory oversight over the matters exempted by Sections 6 and 20 of the Clayton Act and by the Norris-LaGuardia Act.

<sup>25</sup> Similarly, the Capper-Volstead Act grants the Secretary of Agriculture only limited regulatory oversight and does not provide for effective enforcement mechanisms.

<sup>26</sup> *See* the Natural Gas Policy Act (1978) as modified by the Natural Gas Wellhead Decontrol Act (1989), 15 USC. § 3364(e); the Anti-Hog Cholera Serum Act, 7 USC. § 852; the Defense Production Act, 50 USC. App. §§ 2158(j); the Collaborative Decision-making Pilot Program concerning airport congestion, 49 USC. § 40129; the Television Program Improvements Act (1990), 47 USC. § 303c(e); the Electric Wholesale Power Prices Act, 16 USC. § 824k(e)(1); the Charitable Gift Annuity Antitrust Relief Act (1995), 15 USC. §§ 37-37a; the ICC Termination Act (1995), 49 USC. §

exemptions authorize only specific conducts otherwise prohibited by antitrust law, thus mitigating the need for comprehensive regulatory oversight. The typical regulatory scheme set out in those statutes consists in an obligation to submit the agreements eligible for exemption to a regulatory authority. The intensity of the assessment carried out by the relevant authority, however, varies considerably. As per the Need-Based Educational Aid Act, coordination on need-based financial aid programs, for instance, is not subject to regulatory review at all.<sup>27</sup> Under the Defense Production Act, the allocation of markets for military materials in time of national emergency is subject to approval by the Secretary of Defense, which must withdraw the immunity if it establishes that the “action was taken for the purpose of violating antitrust law”.<sup>28</sup> Between those extremes, the ICC Termination Act provides for that the Surface Transportation Board must approve price-fixing agreements concerning the rates of household moves under a “public interest” standard,<sup>29</sup> in addition, the Board can require compliance with “reasonable conditions” to ensure that the agreement furthers transportation policy.<sup>30</sup>

Unlike full and partial exemptions, the eight pseudo-exemptions in force do not bring economic activities outside the scope of antitrust provisions to subject them to sector-specific regulation, but rather modify the substantive standards, the remedies, or the forum of “general” antitrust law, thus creating “special” antitrust rules.<sup>31</sup> While pseudo-exemptions are generally not accompanied by

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13703(a)(6); the Need-Based Educational Aid Act (2008), 15 USC. § 1, Note; the Webb-Pomerene Act, 15 USC. §§ 61-66, and the Export Trading Company Act, 15 USC. §§ 4001-4003; the Sports Broadcasting Act and the Professional Football League Merger Act, 15 USC. §§ 1291-1295; the Newspaper Preservation Act, 15 USC. §§ 1801-1804; the Agreement Relating to the International Telecommunications Satellite Organization “INTELSAT” (1971), 23 UST. § 3813, Article XV(c); the Small Business Act, 15 USC. § 638(d); the International Air Carrier Agreement Exemptions Act, 49 USC. §§ 41308, 41309, 42111; the Year 2000 Information and Readiness Disclosure Act, 15 USC. § 1, Note; the Pension Funding Equity Act (2004), Pub. L. No. 108-218, 118 Stat. 596 (2004); the Surface Transportation Act 49 USC. §§ 10501(b)(2), 10706.

<sup>27</sup> Id.

<sup>28</sup> 50 USC. App. § 2158(j)(4).

<sup>29</sup> 49 USC. § 13703(a)(2): “An agreement . . . may be submitted by any carrier or carriers that are parties to such agreement to the Board for approval and may be approved by the Board only if it finds that such agreement is in the public interest.”

<sup>30</sup> 49 USC. § 13703(a)(3).

<sup>31</sup> The first one concerns the standard of proof for price fixing claims in the railroad sector that are not covered by the partial exemption set out in the Surface Transportation Act, 49 USC. § 10706(a)(3)(B)(ii). As per the second pseudo-exemption, the Department of Transport has a special jurisdiction, concurrent with that of general antitrust enforcement agencies, to vet domestic agreements in the air transport sector, 49 USC. § 40109(c). Thirdly, the Soft Drink Interbrand Competition Act, 15 USC. §§ 3501-3503, provides for a (more lenient) assessment criterion for contracts between soft drink producers and bottlers creating exclusive sales territories. Similarly, as to mergers involving financial institutions, the Bank Merger Act and the Bank Holding Company Act, 12 USC. §§ 1828(c), 1849(b), introduce a “convenience and needs” corrective to the general substantive standard for merger review. Fifthly, pursuant to the National Cooperative Research and Production Act, 15 USC. §§ 4301-4306, registered joint research and joint production activities are assessed under special liability and market definitions standards and are not subject to treble damages claims. Sixthly, under the Standards Development Organization Advancement Act, Pub L. No. 108-237, 118 Stat. 661 (2004), standard

regulatory schemes, in some cases the “special” antitrust rules themselves can be regarded as regulatory *lato sensu*.

## ii) Judge-made Implied Antitrust Immunities and Regulation-Related Defenses

Along with statutory exemptions, another relevant source of antitrust immunities is the doctrine of implied repeal, according to which, in some cases, the content and scope of federal regulation can be regarded as implying a legislative intent to repeal antitrust laws. Courts generally disfavor implied antitrust immunities,<sup>32</sup> which can only be inferred where necessary to avoid an antinomy (“repugnancy”) between antitrust laws and a more recent federal regulatory instrument, or where the regulatory framework is so pervasive as to indicate a Congressional intent to replace antitrust rules with a regulatory scheme.<sup>33</sup>

The Supreme Court decision in *Otter Tail Power Co. v. US* is one of those cases where the level of conflict between regulation and antitrust was not sufficient to trigger implied repeal, so that antitrust and regulation operate side by side.<sup>34</sup> The Court dismissed the implied repeal argument on two grounds. In the first place, it noted that the legislative history of the Federal Power Act did not indicate a legislative intent to displace antitrust laws, as the Congress “rejected a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships.”<sup>35</sup> Secondly, the Court focused on the “public interest” standard governing the Federal Power Commission’s power to enjoin involuntary interconnection and found that antitrust considerations, albeit potentially relevant, were thus not determinative of the FPC’s assessment.<sup>36</sup> The Supreme Court, therefore, concluded that the Congress did not intend to substitute antitrust enforcement or to create an immunity therefrom.<sup>37</sup>

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development organizations are afforded rule of reason treatment and single damages liability. Seventhly, the Health Care Quality Improvement Act, 42 USC. §§ 11111-11152, sets out special substantive and procedural requirements for peer review procedures for medical practitioners. Finally, the Local Government Antitrust Act, 15 USC. §§ 34-36, eliminates treble damages liability for local governments found to have infringed antitrust law.

<sup>32</sup> *US v. Philadelphia Nat. Bank*, 374 US 321 (1963).

<sup>33</sup> *Credit Suisse Securities (USA) LLC v. Billing*, 551 US 264, 269 (2007); *US v. National Ass’n of Securities Dealers, Inc.*, 422 US 694 (1975), 730-735; *Gordon v. New York Stock Exchange, Inc.*, 422 US 659 (1975), 691.

<sup>34</sup> *Otter Tail Power Co. v. US*, 410 US 366 (1973).

<sup>35</sup> *Id.*, at 374.

<sup>36</sup> *Id.*, at 373.

<sup>37</sup> *Id.*, at 374-375.

Conversely, in *US v. National Association of Securities Dealers*<sup>38</sup> the Court found that regulation displaced antitrust law. On that occasion, the Supreme Court held that antitrust immunity could be inferred both from (i) the existence of regulatory provisions expressly authorizing agreements that would otherwise fall foul of antitrust law,<sup>39</sup> and (ii) a “sufficiently pervasive” exercise of regulatory authority by the relevant entity in respect of otherwise anticompetitive activities.<sup>40</sup>

The most relevant and recent authority on the application of the implied immunity doctrine in the field of antitrust is, however, the Supreme Court’s 2007 decision in *Credit Suisse Securities (USA) LLC v. Billing*.<sup>41</sup> In order to rule in favor of the immunity argument, the Court carried out an in-depth analysis of its earlier decisions concerning the regulated securities industry and enucleated their guiding principles.<sup>42</sup> As observed by some commentators,<sup>43</sup> moreover, the decision in *Credit Suisse* decision marks a clear shift in the Court’s perception of the relationship between antitrust and regulation: the approach in *Otter Tail* that antitrust law “complements” regulatory enforcement<sup>44</sup> was abandoned in favor of a finding that private antitrust enforcement must be discouraged in the presence of regulatory oversight, due to the risk of inconsistent outcomes.

The opinion in *Verizon Communications v. Trinko*<sup>45</sup> seems to suggest that regulation is relevant in interpreting the scope of antitrust law even when the doctrine of implied immunity is precluded by an express saving clause. The Court, in fact, applied the test whether the regulator *could* deal with the issue, not (only) whether it actually had: even though the express saving clause set out in the Telecommunications Act (1996)<sup>46</sup> precluded the Court from inferring implied antitrust immunity, it was the existence of a regulatory scheme that allowed the Court to reject both the refusal to deal

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<sup>38</sup> *US v. National Ass’n of Securities Dealers, Inc.*, 422 US 694 (1975).

<sup>39</sup> *Id.*, at 729 (noting that the application to the agreements concerned of the Sherman Act *per se* prohibition would have undermined the power entrusted to the Securities and Exchange Commission (SEC) to permit them).

<sup>40</sup> *Id.*, at 730-733 (“the investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities approved by the SEC.”)

<sup>41</sup> *Credit Suisse Securities (USA) LLC v. Billing*, 551 US 264 (2007).

<sup>42</sup> *Credit Suisse Securities*, 551 US at 275-276 (This Court’s prior decisions . . . make clear that, when a court decides whether securities law precludes antitrust law, it is deciding whether, given context and likely consequences, there is a “clear repugnancy” between the securities law and the antitrust complaint—or as we shall subsequently describe the matter, whether the two are “clearly incompatible.” Moreover, *Gordon* [422 US 659 (1975)] and *NASD* [422 US 694 (1975)] in finding sufficient incompatibility to warrant an implication of preclusion, have treated the following factors as critical: (1) the *existence of regulatory authority* under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities *exercise that authority*; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce *conflicting guidance, requirements, duties, privileges, or standards of conduct*. We also note (4) that in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an *area of financial market activity that the securities law seeks to regulate*.) (emphasis added).

<sup>43</sup> Holmes, *supra*, at § 8:6.

<sup>44</sup> *Otter Tail Power Co. v. US*, 410 US 366 (1973), 372.

<sup>45</sup> *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, US 398 (2004).

<sup>46</sup> Pub. L. 104-104, 110 Stat. 56.

claim and the applicability of the potential essential facilities doctrine. Moreover, the court went so far as to state that the existence of a regulatory scheme designed to address anticompetitive harm obviated the need for antitrust enforcement, an *obiter* Justice Breyer reiterated in his concurrence in *Linkline*,<sup>47</sup> where the Court turned its back also on price-squeeze claims. A possible reading of this line of cases lies in the unsympathetic attitude the Court has recently developed toward the application of Section 2 of the Sherman Act to dominant undertakings: the existence of a pervasive regulatory scheme, therefore, provided a rationale for curtailing the scope of monopolization claims.<sup>48</sup>

Under the “filed-rate” doctrine, antitrust does not apply to tariff-setting agreements approved by (“filed with”) a federal regulatory agency. The Supreme Court established that doctrine in *Keogh v. Chicago & Northwestern Railway, Co.*, where it held that a shipper could not bring an antitrust action against carriers in connection with tariffs paid because those tariffs had been filed and approved by the Interstate Commerce Commission.<sup>49</sup> Even though the filed-rate doctrine technically is not an antitrust immunity,<sup>50</sup> it shares with the latter the concern that antitrust law could yield outcomes at variance with those resulting from the application of the relevant regulatory scheme or agency’s decisions.<sup>51</sup>

## 2. The Vertical Tension: the State Action and Federal Preemption Doctrines.

As the US is a federal system, regulatory schemes can be enacted not only by the Congress, but also by state legislatures. This creates an additional tension between federal antitrust law and state regulation, because the latter may authorize or require conduct that falls afoul of the former. As a

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<sup>47</sup> *Pac. Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109, 1124 (2009) (“When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits”).

<sup>48</sup> Cf. Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: an Application to Patent Holdup*, 5 J. Competition L. & Econ. 469 (arguing that the Court’s attitude to displace antitrust in sectors subject to federal regulation should also be extended to those governed by state regulation, thus achieving “reverse preemption” of federal antitrust law).

<sup>49</sup> 260 US 156, 163 (1922). See, also, *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 US 409, 417 (1986) (dismissing antitrust damages claims brought by private shippers against an association of motor carriers that had collectively set their rates in accordance with joint tariff rates approved by the Interstate Commerce Commission); *Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 306-307 (3d Cir. 2004); *Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 418 (1st Cir. 2000); *County of Stanislaus v. Pacific Gas and Elec. Co.*, 114 F.3d 858 (9th Cir. 1997).

<sup>50</sup> See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 US at 422; see also *Wegoland*, 27 F.3d at 22 (“filed rate doctrine does not leave regulated industries immune from suit under the RICO or antitrust statutes.”). Defendants who engage in anticompetitive activities based on filed rates are “still subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief.” *Square D Co.*, 476 US at 422.

<sup>51</sup> *Texas Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503 (2005) (holding that it was up to the relevant governmental agency, rather than to courts, to determine whether the rates were discriminatory or unlawful)

consequence, private parties and public entities acting in pursuance of such state regulatory schemes could be charged with violations of the Sherman or the Clayton Act.

One of the basic assumptions of US dual federalism is that, although the federal government and the states exist within the same territorial limits, each is simultaneously supreme within its sphere,<sup>52</sup> and is required to exercise its powers so as not to interfere with those attributed to the other (the so-called “principle of non-interference”).<sup>53</sup> The powers which are delegated by the Constitution to the federal government are, accordingly, comprehensive and complete, and do not require implementation by states.<sup>54</sup> By the same token, each state has broad powers to order its own affairs and govern its own people:<sup>55</sup> as the Supreme Court put it in *Addington*, the very essence of federalism is that the states must be free to develop a variety of solutions to problems, not be forced into a common, uniform mold.<sup>56</sup>

In areas of federal competence, however, Congress can regulate certain matters directly and “preempt” state regulation contrary to federal enactments.<sup>57</sup> The doctrine of federal preemption stems from the Supremacy Clause set out in the Federal Constitution,<sup>58</sup> according to which, in areas where federal government has power to act, federal legislation takes precedence over competing exercises of lawmaking power by states when Congress so intends.<sup>59</sup> Hence, state enactments that are at variance with a valid act of Congress are void<sup>60</sup> since Congress is empowered to “preempt” state legislation.<sup>61</sup> Conflicts between state and federal law can be established by every court, including the US Supreme Court, but are not to be sought where none clearly exist.<sup>62</sup>

A formal application of the preemption doctrine, however, would entail significant risks of encroachment on state sovereignty. In the first place, most state enactments, such as those

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<sup>52</sup> See, e.g., *Carter v. Carter Coal Co.*, 298 US 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936); *United States v. Sprague*, 282 US 716, 51 S. Ct. 220, 75 L. Ed. 640, 71 A.L.R. 1381 (1931).

<sup>53</sup> See, e.g., *Pacific Co. v. Johnson*, 285 US 480, 52 S. Ct. 424, 76 L. Ed. 893 (1932); *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash. 2d 652, 171 P.2d 838, 168 A.L.R. 539 (1946). See also *Mayo v. US*, 319 US 441 (1943) (holding that no state may interfere with the free and unembarrassed exercise by the federal government of all powers conferred upon it).

<sup>54</sup> See *Atlantic Coast Line R. Co. v. Riverside Mills*, 219 US 186 (1911); *US Nat. Bank of Omaha, Neb. v. Pamp*, 77 F.2d 9 (C.C.A. 8th Cir. 1935).

<sup>55</sup> See, e.g., *Cook v. City of Delta*, 100 Colo. 7 (1937); *Home Owners' Loan Corp. v. Arians*, 21 N.J. Misc. 339 (Dist. Ct. 1943); *Kelly v. State*, 139 Tex. Crim. 156 (1940).

<sup>56</sup> See *Addington v. Texas*, 441 US 418 (1979).

<sup>57</sup> *Ibid.*, at 145 (“[W]here Congress has the authority to regulate private activity under the Commerce Clause, it may, as part of a program of ‘cooperative federalism,’ offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”).

<sup>58</sup> US Const. Art. VI, § 2

<sup>59</sup> *US v. Gillock*, 445 US 360 (1980).

<sup>60</sup> *Perez v. Campbell*, 402 US 637 (1971).

<sup>61</sup> *Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 US 493 (1989).

<sup>62</sup> See *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 US 440 (1960).

authorizing or encouraging concerted pricing practices, would either directly clash with federal antitrust law or else stand as an obstacle to the accomplishment of the aims thereby pursued by the Congress, thus triggering preemption and the ensuing displacement of state regulation.<sup>63</sup> Moreover, unlike the horizontal relationship between federal antitrust and federal regulation, where the Court is able to fine-tune its assessment, preemption analysis offers only a binary choice: if an antinomy is established, federal antitrust law governs the matter.<sup>64</sup>

For the sake of a well-balanced federalism, the Supreme Court in *Parker v. Brown* introduced the so-called state action doctrine, paving the way for a broad antitrust exemption covering all anticompetitive conducts authorized or required by state laws.<sup>65</sup> The doctrine of state action, which will be dealt with in the first place, logically precedes, thus displacing, preemption analysis: if antitrust law does not apply, it cannot preempt state laws.<sup>66</sup> However, the doctrine of preemption still has a role to play in cases where the requirements for exemption under the state action doctrine are not met. It will be thus examined further below.

### **i) The State Action Doctrine**

The state action doctrine, albeit commonly referred to as an “immunity” from federal antitrust claims, is in fact a judicial determination that the Congress did not intend to create a mechanism to challenge anticompetitive state policy by adopting the Sherman and Clayton Act.<sup>67</sup>

As mentioned above, that doctrine was introduced as an alternative to the traditional preemption scrutiny in cases involving a conflict between federal antitrust and state regulation. Interestingly, *Parker v. Brown* itself was also a preemption case. The Court rejected the preemption claim, holding that, by empowering the Secretary of Agriculture to establish a federal marketing program, the Congress had impliedly authorized displacement of the Sherman Act by a comparable state program, at least until the Secretary remained inactive.

While this holding alone would have sufficed to dismiss the case, the Court instead laid the foundations for a broader exemption, encompassing not only state “regulation”, but state “action”

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<sup>63</sup> Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: an Integrated Handbook* (2006), 800.

<sup>64</sup> Id.

<sup>65</sup> *Parker v. Brown*, 317 US 341, 351 (1943) (“In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress”)

<sup>66</sup> Sullivan & Warren, *supra*, at 798-799.

<sup>67</sup> Id.

in the wider sense.<sup>68</sup> On that occasion, an antitrust suit sought to enjoin Mr. Brown, an officer and agent of the state of California, from enforcing a state statute. The Court held that a state is not a “person” who can violate the Sherman Act and that Congress should not be assumed to deprive states of the right to control their agents. Unbeknownst to the Court, those holdings would have subsequently be relied upon to create a broader doctrine encompassing action by private parties authorized or required by states.

It was not immediately clear that the state action doctrine was to replace the preemption analysis in cases involving the relationship between federal antitrust and state laws. Eight years after *Parker*, in *Schwegmann Bros. v. Calver distillers Corp.*,<sup>69</sup> the Court dealt with a challenge under the Sherman Act brought against certain state statutes concerning resale price maintenance agreements. Remarkably enough, on that occasion the Court did not apply the state action exemption laid down in *Parker* and concluded that states could not permit restraints of interstate commerce inconsistent with the Sherman Act. To a degree, this can be seen as a way to place some limits on permissible state action: instead of finding that the state law (requiring the posting of liquor prices and the poster to charge the posted prices) was preempted, the Court held that the private parties would be exposed to federal antitrust because of the limits of state power in immunizing from federal law.

The state action doctrine remained dormant for two more decades, until the Court applied it in *Goldfarb v. Virginia State Bar*.<sup>70</sup> In its analysis of the case, concerning lawyers’ fee-setting agreements, the Court did not perform a preemption scrutiny but turned directly to the issue of state action. Since the agreements concerned were not “compelled by the state acting as sovereign”,<sup>71</sup> the Court held that the lawyers’ price-fixing cartel was not covered by the exemption.

On a more general level, it is interesting to note that, rather than establishing what activities qualify as “state action” (functional approach), US courts have focused on the person or entity invoking the exemption (institutional approach), adjusting the burden of proof accordingly.

At bottom of the scale lie the state legislature and judiciary: their conduct is *per se* exempted, without any further scrutiny. For instance, in *Hoover v. Ronwin* the Supreme Court held that a bar testing program administered by the supreme court of a state qualified as such for antitrust

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<sup>68</sup> *Parker v. Brown*, 317 US at 352 (“The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . . the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter’s words and history, it must be taken to be a prohibition of individual and not state action.”)

<sup>69</sup> 341 US 384 (1951).

<sup>70</sup> 421 US 773 (1975).

<sup>71</sup> *Id.*, at 791.

exemption.<sup>72</sup> The Supreme Court, instead, reserved decision as to whether the states' executive branches are covered by the exemption.<sup>73</sup> Some Circuits, however, took the view that state-level executive departments also qualify for exemption, provided that they do not act *ultra vires*.<sup>74</sup>

Municipalities, local government entities and political subdivisions of the state can be placed somewhere in the middle of the scale. Those defendants, in particular, bear the burden of proving that their conduct was a foreseeable consequence of “a clearly articulated policy of the State itself,” approved either by a state legislature or by the state Supreme Court.<sup>75</sup> Unlike private parties, however, such defendants do not have to show the existence of active supervision by a higher level state entity, as the Court held in *Town of Hallie v. City of Eau Claire*.<sup>76</sup>

Private parties, in turn, can be placed at the top of the scale. They bear the twofold burden of proving that their conduct was permitted or required by the state as a matter of “clearly articulated and affirmatively expressed state policy” and that it was subjected to “active state supervision” to ensure consistency with state policy and to prevent abuse.<sup>77</sup> The rationale underlying the higher standard of proof applicable to private parties was clearly illustrated by the Court in *Town of Hallie v. City of Eau Claire*: “Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.”<sup>78</sup>

## ii) The Doctrine of Federal Preemption

If the requirements of the state action doctrine are not met, then the relevant state regulatory

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<sup>72</sup> 466 US 558, 104 (1984).

<sup>73</sup> *Id.*, at 568.

<sup>74</sup> *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 875–876 (9th Cir. 1987) (“We conclude that state executives and executive agencies, like the state supreme court, are entitled to Parker immunity for actions taken pursuant to their constitutional or statutory authority, regardless of whether these particular actions or their anticompetitive effects were contemplated by the legislature.”)

<sup>75</sup> *Southern Motor Carriers Rate Conference, Inc. v. US*, 471 US 48, 63 (1985).

<sup>76</sup> 471 US 34, 47 (1985) (“Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function”).

<sup>77</sup> *F.T.C. v. Ticor Title Ins. Co.*, 504 US 621, 631 (1992); *Patrick v. Burget*, 486 US 94, 100–101 (1988); *Southern Motor Carriers Rate Conference, Inc. v. US*, 471 US 48, 57 (1985); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 US 97, 105 (1980).

<sup>78</sup> 471 US 34, 47 (1985).

scheme can be subjected to the traditional preemption analysis. The outcome of that analysis, however, depends largely on the content of state regulation and its effects on competition.

The first, most clear-cut, scenario is that of direct conflict: state law either demands (as in *Calvert*)<sup>79</sup> or validates (as in *Midcal*)<sup>80</sup> a conduct prohibited by federal antitrust law. On these occasions, courts generally follow the “general” preemption approach: as for any other federal statute, there is a presumption that Congress intended to displace state laws incompatible with federal antitrust rules.<sup>81</sup> Possibly, the only deviation from the general model is in the language: it has been observed, indeed, that in some cases the Court merely applied federal antitrust law, without dwelling on the constitutional justification (i.e. the supremacy clause in the US Constitution) for doing so.<sup>82</sup>

The Ninth Circuit’s recent decision in *Costco Wholesale Corp. v. Maleng*, however, seems to suggest that the “direct conflict” element of the preemption analysis has a specific meaning in cases involving federal antitrust law:

A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. (citation omitted) In other words, to be struck down, the regulation or restraint must effect a per se violation of the Sherman Act.<sup>83</sup>

By holding that displacement of state law can only occur on the basis of direct conflict preemption when the conduct required or authorized under the former constitutes a *per se* violation of the Sherman Act, the Court of Appeals apparently ruled out preemption where state laws are capable of being applied without conflict under the quick look or rule of reason standards. While the court gave no reasons for this choice, it has been suggested that, possibly, it did not want to interject the uncertainties associated with those two standards of review into the already complex issue of state statutory preemption.<sup>84</sup>

Substantially divergent from the general preemption model is the assessment of cases where state law has anticompetitive effects, but does not clash directly with federal antitrust law. According to the general approach, if a state law stands as an obstacle to the accomplishment and execution of the full objectives of the relevant federal statute, Congressional intention to preempt that law must

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<sup>79</sup> *Schwegmann Brothers v. Calvert Distillers*, 341 US 384 (1951).

<sup>80</sup> *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.* 445 US 97 (1980)

<sup>81</sup> *CSX Transp., Inc. v. Easterwood*, 507 US 658 (1993).

<sup>82</sup> Sullivan & Grimes, *supra*, at 814.

<sup>83</sup> 522 F.3d 874, 885–86 (9th Cir. 2008).

<sup>84</sup> Holmes, *supra*, at § 8:7

be presumed.<sup>85</sup> Conversely, in cases involving anticompetitive state laws, the Court took the opposite view, as the decision in *Rice v. Norman Williams Co.* clearly shows: unless there is a direct conflict, state law is not preempted “simply because . . . [it] may have an anticompetitive effect.”<sup>86</sup> The Court reached the same conclusion in *Fisher v. Berkeley*,<sup>87</sup> holding that a rent control ordinance authorized by a state statute cannot be challenged under federal antitrust law, in spite of its adverse effects on competition. These holdings do not create – as it may seem *ictu oculi* – a gap in the system of legal remedies: when state laws are overly and unnecessarily anticompetitive to achieve the goals they pursue and have spill over effects on the rest of the economy, Congress should pass a law restricting the scope of the authorized state regulation.

State law, however, is not always anticompetitive: in some cases, in fact, it pursues competition even more aggressively than federal antitrust. Should this divergence between federal and state law also result in the preemption of the latter by the former? Unsurprisingly, the Court has so far replied in the negative. *Exxon Corp. v. Governor of Maryland* is emblematic: while federal merger and monopolization rules only place some constraints on vertical integration and on the behavior of vertically-integrated firms, a Maryland statute went so far as to prohibit vertical integration by refiners altogether, thus excluding them from the retail market. The Court, nonetheless, rejected the preemption claim. Similarly, in *California v. ARC America Corp.*,<sup>88</sup> the Court dismissed the argument that the federal antitrust principle whereby only first purchasers from the violating monopolist or cartel can recover treble damages preempted state statutes conferring a state cause of action for treble damages also on downstream purchasers.

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<sup>85</sup> *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 US 877 (1986); *Louisiana Public Service Com'n v. F.C.C.*, 476 US 355 (1986).

<sup>86</sup> *Rice v. Norman Williams Co.*, 458 US 654, 659 (1982).

<sup>87</sup> 475 US 260 (1986).

<sup>88</sup> 490 US 93 (1989).

## II. ANTITRUST AND REGULATION IN THE EU

In the European Union (“EU”) legal order, the core antitrust provisions are laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”),<sup>89</sup> prohibiting, respectively, anticompetitive agreements between undertakings, decisions by associations of undertakings, and concerted practices, as well as abuse of dominant position by one or more undertakings. Articles 101 and 102 TFEU are part of a broader framework on competition policy, which also includes competition rules applying to Member States, *viz.* the rules on State aids set out in Articles 107, 108, and 109 TFEU. In order to avoid confusion and to provide a meaningful comparison with US antitrust law, only “competition rules applicable to undertakings” will be taken into account.

By virtue of their rank as primary sources of EU law, Articles 101 and 102 TFEU cannot be repealed by secondary legislation, including that laying down sector-specific regulation. In contrast, the legality of legislative acts at variance with Articles 101 or 102 TFEU can be challenged before the European Court of Justice (“ECJ”) under Article 263 TFEU. Articles 101 and 102 TFEU, moreover, take precedence over national laws,<sup>90</sup> can be relied upon before national courts<sup>91</sup> and administrative bodies,<sup>92</sup> which are required to construe national law consistently with those Treaty provisions and to set aside incompatible national rules.<sup>93</sup>

While this cursory overview seems to imply the unconditional supremacy of EU antitrust law both over EU and national regulation, a number of factors point in the opposite direction. In this connection, regard will be had, in the first place, to areas exempted from Articles 101 and 102 TFEU, which often fall within the scope either of EU or national regulatory frameworks. Secondly, the influence of regulatory considerations on antitrust law will be examined. Antitrust rules, indeed, coexist with several other EU competences and goals: this sometimes results, both in law and in fact, in a “differential application” of antitrust rules so as to accommodate other considerations and objectives. Thirdly, this work will turn to the impact of EU antitrust law on EU and national

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<sup>89</sup> The EU rules on “concentrations”, instead, are set out in secondary legislation. Merger control was introduced by Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 73, 20.3.1990, p. 35 and is currently governed by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1–22.

<sup>90</sup> Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 ECR (English Special Edition) 585.

<sup>91</sup> Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, 1962 ECR (English Special Edition) 1.

<sup>92</sup> Case 103/88, *Fratelli Costanzo SpA v Comune di Milano*, 1989 ECR 1839.

<sup>93</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, 1978 ECR 629, paras 22 and 23.

regulation. Article 106(2) TFEU, in granting a conditional derogation<sup>94</sup> from competition rules to undertakings entrusted with the operation of Services of General Economic Interest (SGEIs), limits the supremacy of EU antitrust law and paves the way both to national and EU regulation. National regulatory schemes, however, are progressively being replaced by EU regulation, which in turn is strongly influenced by competition goals and standards.

It is thus apparent, that unlike the US system, the vertical and horizontal dimensions of the relationship between antitrust and regulation are often intertwined. Interestingly, the complexity of the substantive framework governing that relationship is counterpointed by the simplicity of its institutional architecture, whose keystone is the European Commission. That institution, indeed, not only enforces antitrust rules, but significantly contributes to their development both by issuing soft-law instruments and by exercising its (quasi)exclusive power of legislative initiative. This affords the Commission a significant “first-mover advantage” in shaping the relationship between antitrust and regulation both in its horizontal and vertical aspects.

## 1. Exemptions from EU Antitrust Law

The outer limits of EU antitrust law are defined, first and foremost, by its addressees, i.e. undertakings. Ever since *Höfner*, the ECJ defined that notion as “every entity engaged in an *economic activity*, regardless of the legal status of the entity and the way in which it is financed”.<sup>95</sup> In determining whether a given entity pursues an economic activity, the ECJ has favored what Advocate-General Jacobs describes as “a functional approach”, in that the assessment “focuses on the type of activity performed, rather than on the characteristics of the actors which perform it”.<sup>96</sup>

However, the notion of “economic activity” does not define the scope of EU antitrust law exhaustively. In some cases, the ECJ relied on other criteria to exclude certain activities from the scope of EU antitrust law. Moreover, some antitrust exemptions, such as that concerning labor and

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<sup>94</sup> EU legal texts refer interchangeably to Article 106(2) TFEU as a “derogation” or as an “exemption”. See, e.g. Communication from the commission on the application of state aid rules to public service broadcasting, OJ C 257, 27.10.2009, 1–14, para 37 (“The Court has consistently held that Article [106] provides for a *derogation* and must therefore be interpreted restrictively.”) (emphasis added); Id., para 50 (“In order to benefit from the *exemption* under Article [106], the public service remit should be entrusted to one or more undertakings by means of an official act.”) (emphasis added).

<sup>95</sup> Case C-41/90 *Höfner and Elser v. Macroton GmbH* 1991 ECR I-1979 para 21; Case T-61/89 *Danske Pelsdyravlereforening v. Commission* 1992 ECR II-1931 para 50 (emphasis added). The Court seems to reject definitions focusing on the “commercial” rather than on the “economic” nature of the activity, such as the one under Article 1 of Protocol 22 EEA or the one suggested by AG Mischo in *Case 118/85*, *above*.

<sup>96</sup> Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband v. Ichthyol Gesellschaft Cordes* [2003] ECR I-2493 AG opinion para 25.

collective bargaining, have little bearing on the relationship between antitrust and regulation. The following analysis will thus employ a thematic approach.

### i) The “Acquisition” Exemption

The acquisition exemption was laid down in *FENIN*, where the ECJ held that the nature of the activity consisting in purchasing goods or services must be determined according to whether their subsequent use amounts to an economic activity.<sup>97</sup> To the extent that this exemption covers purchases made by undertakings entrusted with the operation of Non-Economic Services of General Interest, it may be currently regarded as part of the EU’s commitment not to interfere with national regulation in those sectors, as per Article 2 of Protocol no. 26 attached to the Treaty of Lisbon.<sup>98</sup>

Moreover, purchases by the State, regional or local authorities, and “bodies governed by public law” may be covered by the EU regulatory framework governing public procurement,<sup>99</sup> which requires the acquiring entities to ensure transparency, non-discrimination etc. Therefore, the acquisition exemption may be considered as an attempt to accommodate concurrent regulation at the EU level.

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<sup>97</sup> Case T-319/99 *FENIN v. Commission* 2003 ECR II-357, para 36. *See also* Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband v. Ichthyol Gesellschaft Cordes* [2003] ECR I-2493 (holding that the purchase of medical equipment by the Spanish Health System could not be regarded as an economic activity because the purchased commodities were used in the context of an activity of purely social nature, i.e. the provision of public healthcare).

<sup>98</sup> Protocol no. 26 on Services of General Interest Attached to the Treaty of Lisbon, Article 2 (“The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.”)

<sup>99</sup> *See* Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240 (applying to public contracts concluded between economic operators and “contracting authorities” defined so as to include “the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law”; a “body governed by public law”, according to the directive, “means any body: (a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; (b) having legal personality; and (c) financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law; or subject to management supervision by those bodies; or having an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.”) *See also* Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1–113.

## ii) The “Official Authority” Exemption, Including National Security

Core state functions involving the exercise of official authority can be regarded as ontologically incompatible with the notion of economic activity. The ECJ took this view in *Eurocontrol* and *Selex*, where that an international organization responsible for air traffic control was deemed to carry out “tasks in the public interest”<sup>100</sup> and its activities were found to be “connected with the exercise of powers . . . which are typically those of a public authority” and thus “not of an economic nature”.<sup>101</sup> Equally, in *Calì*, a private law entity, was found to perform “a task in the public interest which forms part of the essential functions of the State . . . connected . . . with the exercise of powers . . . which are typically those of a public authority” and thus of a “non-economic nature”.<sup>102</sup>

Another instance of exercise of official authority is national security, a sector that is generally intensively regulated at the national level. Article 346(1)(b) TFEU sets out a general exemption from all the provisions of the Treaties for measures by Member States necessary for the protection of their essential security interests connected with the production of or trade in arms, munitions and war material. That provision played an important role in sheltering mergers between defense companies from review by the Commission. In *British Aerospace/GEC Marconi*, the parties to the concentration were allowed to notify only the non-military aspects of the deal (totaling 2.5% of their overall turnover).<sup>103</sup> In more recent cases, however, the Commission took a stricter approach.<sup>104</sup>

## iii) The “Regulatory Activity” Exemption

For the purposes of the antitrust exemption for “regulatory activity”, regulation comes into play not

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<sup>100</sup> Case 364/92 *SAT Fluggesellschaft v. Eurocontrol* [1994] ECR I-43 para 27 For a definition of ‘official authority’ see the AG Tesaurò’s opinion at para 9.

<sup>101</sup> *Id.*, at 30; *Selex*, above, at 71.

<sup>102</sup> Case C-343/95 *Diego Calì e Figli S.R.L. v. Servizi Ecologici Porto di Genova S.p.A. (SEPG)* [1997] ECR I-1547 paras 22-23.

<sup>103</sup> Case No IV/M. 1438 *British Aerospace/GEC Marconi*.

<sup>104</sup> Case COMP/M.1797, *Saab/Celsius*, IP/00/118.

as a set of national *legal rules* at variance with higher-ranking EU antitrust rules,<sup>105</sup> but rather as a potentially anticompetitive *conduct* carried out by an undertaking.

Several cases can be taken to illustrate the application of the exemption at hand. In *Byys*, the Court took the view that national rules freezing the prices of products were not agreements, decisions or concerted practices within the meaning of Article 101 TFEU.<sup>106</sup> In *Bodson*, the ECJ ruled that the latter provision does not apply “to contracts for concessions concluded between communes acting in their capacity as public authorities and undertakings entrusted with the operation of a public service.”<sup>107</sup> Most recently, the ECJ held in *MOTOE* that the power to give consent to applications for authorization to organize motorcycling events does not constitute an economic activity.<sup>108</sup>

In the hotly debated *Wouters* case,<sup>109</sup> the ECJ held that a regulation adopted by the Bar of Netherlands prohibiting multi-disciplinary practices did not infringe Article 101(1) TFEU insofar as the Dutch Bar “could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession,” as organized in that Member State. That holding was reaffirmed in *Meca-Medina* in respect of anti-doping rules.<sup>110</sup> Cases such as *Wouters* and *Meca-Medina* are relevant to the present analysis as they show the ECJ’s willingness to acknowledge that, on some occasions, EU antitrust rules must be displaced *because* a national regulatory framework is in place.

Akin to the regulatory activity exemption is the one covering agreements setting rates and other terms, negotiated by boards or other state-nominated bodies including individuals linked to the undertakings affected by those decisions. If it is established that those individuals acted in the public interest as independent experts, rather than as representatives of the undertakings concerned, the latter can escape responsibility under EU antitrust law.

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<sup>105</sup> This will be examined further below.

<sup>106</sup> Case 5/79, *Procureur général v Hans Byys, Han Pesch and Yves Dullieux and Denkavit France SARL*, 1979 ECR 3203, paras 29-31.

<sup>107</sup> Case 30/87, *Corinne Bodson v SA Pompes funèbres des régions libérées*, 1988 ECR 2479, para 18.

<sup>108</sup> Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, 2008 ECR I-4863, para 46. Interestingly, ELPA, the entity entrusted with the power to give consent to applications for authorization to organize motorcycling events, also organized those events itself – an activity that was regarded as economic. The power conferred by Greek law, therefore, placed ELPA at an obvious advantage over its competitors, as it could in fact deny other operators access to the relevant market. The Court accordingly held that ELPA fell within the scope of Articles 102 and 106 TFEU, which in turn precluded the national rule empowering ELPA to give consent to applications for authorization to organize motorcycling events.

<sup>109</sup> 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, interveners: Raad van de Balies van de Europese Gemeenschap*, 2002 ECR I-01577

<sup>110</sup> Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission*, 2006 ECR I-06991.

This exemption, that was first invoked (and rejected) in *BNIC*,<sup>111</sup> has been interpreted very narrowly by the ECJ, which appears to be willing to apply it only if it establishes that board members are not bound by orders or otherwise influenced by the undertakings concerned<sup>112</sup> and that those members are duty-bound to act in the general interest rather than in that of individual undertakings or of the relevant industry sector.<sup>113</sup>

#### iv) The “State Compulsion” and “Regulatory Elimination of Competition” Defenses

The ECJ has consistently held that Articles 101 and 102 TFEU apply only to anti-competitive conduct engaged in by undertakings on their own initiative.<sup>114</sup> Accordingly, undertakings may escape antitrust responsibility if they can show that their anticompetitive conduct is required under national legislation<sup>115</sup> or it results from the exercise of an “irresistible pressure” by a Member State<sup>116</sup> or a non-EU country,<sup>117</sup> such as the threat of measures that would cause substantial economic harm to the undertaking concerned.

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<sup>111</sup> Case 123/83, *Bureau national interprofessionnel du cognac v Guy Clair*, 1985 ECR 391.

<sup>112</sup> See, e.g. Case C-185/91, *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG.*, 1993 Page I-05801, para 17 (establishing that the a German Tariff Board was made up of experts “who are not bound by orders or instructions from the undertakings or associations” concerned); Case C-153/93, *Bundesrepublik Deutschland v Delta Schiffahrts- und Speditionsgesellschaft mbH*, 1994 ECR I-02517, para 16 (“the members of the freight commissions, while not described as experts in tariff matters . . . hold an honorary office and are not bound by orders or instructions”). But see Case C-35/96, *Commission v. Italy (custom agents)*, 1998 ECR I-3851, para 41 (noting that the members of the board were “the representatives” of Italian custom agents).

<sup>113</sup> See Case C-185/91, *Reiff*, para 18 (noting that Tariff Boards were required to fix the tariffs having regard to “the interests of the agricultural sector and of medium-sized undertakings or regions which are economically weak or have inadequate transport facilities”). See also Joined cases C-140/94, C-141/94 and C-142/94, *DIP SpA v Comune di Bassano del Grappa, LIDL Italia Srl v Comune di Chioggia and Lingral Srl v Comune di Chioggia*, 1995 ECR I-3257, para 17 (“as expressly indicated in that law, the members appointed or nominated by traders’ organizations are present as experts on distribution problems and not in order to represent their own business interests, and in drawing up its opinions the municipal committee is to observe the public interest”); Case C-153/93, *Delta*, para 17 (establishing that the law “does not allow the freight commissions to determine tariffs on the basis solely of the interests of carriers and shippers, but . . . requires them to take into account the interests of the agricultural sector and of medium-size businesses or of areas which are economically weak and have poor transport services”). But see Case C-35/96, *Commission v. Italy (custom agents)*, para 43 and Case T-513/93, *Consiglio Nazionale degli Spedizionieri Doganali v Commission*, 2000 ECR II-01807, para 54 (noting that “there is no rule in the national legislation in question obliging, or even encouraging, the members of [the boards] to take into account public-interest criteria”).

<sup>114</sup> Case 41/83, *Italy v Commission*, 1985 ECR 873, paras 18 to 20; Case C-202/88 *France v Commission*, 1991 ECR I-1223, para 55; Case C-18/88, *RTT v GB-Inno-BM*, 1991 ECR I-5941, para 20, and Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing*, 1997 ECR I-6265 para 33.

<sup>115</sup> Joined Cases C-359/95 P and C-379/95 P *Ladbroke*, para 33.

<sup>116</sup> Case T-387/94, *Asia Motor France SA and others v. Commission*, 1996 ECR II-961, para 65.

<sup>117</sup> See Third Report on Competition Policy (1974), para 20.

The burden of proof for this defense is rather high:<sup>118</sup> an undertaking must show that it was “deprived of all independent choice in its commercial policy”<sup>119</sup> or that the regulatory scheme suppressed “any margin of autonomy” on its part.<sup>120</sup> Furthermore, undertakings must demonstrate that the restrictive effects on competition “originate solely in the national law” rather than in their own conduct.

It is settled case-law that the fact that the anticompetitive conduct of undertakings was known, permitted or even encouraged by national authorities or under national law is not enough to preclude the application of antitrust law.<sup>121</sup> In the case of dominant undertakings, this doctrine proved to have far-reaching implications. In *Deutsche Telekom*,<sup>122</sup> for instance, the incumbent telecoms operator, as a defense against a margin-squeeze claim, had argued that its prices had been submitted to and approved by the relevant German National Regulation Authority (NRA), which had also reviewed the compatibility of those rates with Article 102 TFEU. The CFI, in turn, noted that the Commission is not bound by the decisions of national authorities in the application of EU antitrust law,<sup>123</sup> rejected the state compulsion defense insofar as Deutsche Telekom could influence the level of its retail charges,<sup>124</sup> and went so far as to state that actually the special responsibility arising from its dominant position implied a positive obligation to submit applications for adjustment of its charges so as to avoid margin-squeeze.<sup>125</sup>

Conversely, the undertaking invoking the State compulsion defense is not required to show that national legislation or measure requiring the anticompetitive conduct is at variance with EU law.<sup>126</sup> However, if national courts or administrations establish such an antinomy, they are required to set aside national law incompatible with Articles 101 and 102 TFEU.<sup>127</sup> Once this occurs, other

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<sup>118</sup> Joined Cases 240/82, 241/82, 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission*, 1985 ECR 3831, paras 27 to 29, and Case T-387/94 *Asia Motor France*, paras 60 and 65.

<sup>119</sup> Case T-228/97, *Irish Sugar Plc v. Commission*, 1999 ECR II-2969, para 129.

<sup>120</sup> Case T-387/94, *Asia Motor France*, para 63.

<sup>121</sup> Case T-37/92, *Bureau Européen des Unions des Consommateurs and National Consumer Council v Commission*, 1994 Page II-00285. See also Case 229/83 *Leclerc v Au Blé Vert* 1985 ECR 1 and Case 231/83 *Cullet v Leclerc* 1985 ECR 305; Case T-7/92 *Asia Motor France v Commission* 1993 ECR II-669.

<sup>122</sup> Case T-271/03, *Deutsche Telekom AG v. Commission*, 2008 ECR II-477.

<sup>123</sup> *Id.*, para 120 (citing Case C-344/98, *Masterfoods and HB*, 2000 ECR I-11369, para 48)

<sup>124</sup> *Id.*, para 107 (Deutsche Telekom role in the determination of the charges was taken by the CFI as a proof that the restrictive effects on competition associated with the margin squeeze “did not originate solely in the applicable national legal framework”, citing Case T-513/93, *Consiglio nazionale degli speditzionieri doganali v. Commission*, para 61)

<sup>125</sup> *Id.*, para 122.

<sup>126</sup> Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbrooke Racing*, 1997 ECR I-6265 paras 31-33; Case T-228/97, *Irish Sugar Plc v. Commission*, para 130.

<sup>127</sup> Case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato*, 2003 ECR I-08055, operative part.

undertakings can no longer rely on the State compulsion defense to escape responsibility in respect of conduct subsequent to the decision to disapply the national legislation.<sup>128</sup>

Similar to the State compulsion defense is the one concerning the regulatory elimination of competition: if national regulation eliminates any possibility of competitive activity, then it is conceptually impossible for undertakings to prevent, restrict or distort competition contrary to Articles 101 or 102 TFEU.<sup>129</sup> Apparently the only case in which this defense has been successful is *Suiker Unie*,<sup>130</sup> whose legal context was, however, rather extraordinary: Italian law had as its object and effect “to match supply exactly with demand and thereby remove a vital element of normal competition”.<sup>131</sup> In contrast, the ECJ rejected this defense where national regulation merely restricted the scope of competition, holding that, in those circumstances, undertakings are *a fortiori* required not to eliminate the residual level of competition.<sup>132</sup>

## 2. Regulatory Influences on EU Antitrust Law

### i) The Aim of Undistorted Competition and its Relationship with Other EU Objectives

EU antitrust law does not exist in a legal vacuum, but cohabits with a plurality of other EU goals and competences. It is thus no wonder that antitrust provisions are often expressly or impliedly employed to pursue objectives which are not purely antitrust-related.

The aim of ensuring undistorted competition in the internal market was set out in the Article 3(1)(g) TEC ever since 1957. If regard is had to the blueprint of the Treaty of Rome, the so-called Spaak report, it is clear that competition policy is closely related to the establishment of the internal market, which is the keystone of the whole EU framework.<sup>133</sup>

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<sup>128</sup> Id.

<sup>129</sup> Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, *Coöperatieve Vereniging “Suiker Unie” UA and others v Commission*, 1975 ECR 1663, paras 67-72; Case T-513/93, *Consiglio Nazionale degli Spedizionieri Doganali v Commission*, 2000 ECR II-01807, para 58; Case T-387/94, *Asia Motor France SA and others v. Commission*, 1996 ECR II-961, para 61; Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbrooke Racing*, 1997 ECR I-6265 para 33; Case T-228/97, *Irish Sugar Plc v. Commission*, para 130; Case T-228/97, *Irish Sugar Plc v. Commission*, 1999 ECR II-2969, para 130.

<sup>130</sup> Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, *Suiker Unie*, above.

<sup>131</sup> Id., para 67.

<sup>132</sup> Joined cases 209 to 215 and 218/78, *Heintz van Landenryck SARL and others v. Commission*, 1980 ECR 3125, paras 131-132; Joined Cases 240/82, 241/82, 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others v Commission*, 1985 ECR 3831, para 29; Case T-513/93, *Consiglio Nazionale degli Spedizionieri Doganali v Commission*, 2000 ECR II-01807, para 72.

<sup>133</sup> Messina Conference Intergovernmental Committee, *Report of the Heads of Delegation to the Ministers of Foreign Affairs*, Brussels, April 21, 1956 (also known as “The Brussels Report on the General Common Market” or the “Spaak Report”).

Following the Treaty of Lisbon, the “undistorted competition” wording was moved to Protocol no. 27 on the Internal Market and Competition attached to that Treaty, stipulating that the notion of internal market set out in Article 3 TEU “includes a system ensuring that competition is not distorted”. Several commentators are of the opinion that, as a result, the goal of undistorted competition has been downgraded.<sup>134</sup> However, it could be argued that, just like in the past the Court has referred to goals set out in protocols to construe and to flesh out provisions of the Treaties,<sup>135</sup> the ECJ might merely replace the references to Article 3(1)(g) TEC with references to the Protocol on the Internal Market and Competition.

Most importantly, the Treaty of Lisbon might have an impact on the relationship between antitrust and regulation, namely by rendering the former more permeable to the policy goals pursued by the latter. Riley made a convincing case that the removal of Article 3(1)(g) TEC and the provision of social and economic development objectives in the new Article 3 TEU, could lead the Commission and National Competition Authorities (NCAs) to review mergers under a broader industrial policy standard.<sup>136</sup> By the same token, it could be argued that the said amendments of the Treaties may be relied upon to apply a genuine rule-of-reason approach to Article 101(1) TFEU so as to encompass non-antitrust aims, to flesh out the four pro-competitive factors under Article 101(3) TFEU, or to justify the imposition of more onerous “regulatory” obligations on dominant firm as per Article 102 TFEU.

## ii) EU Exclusive Competence on Competition Matters

Antitrust seems to enjoy a special rank as an EU competence. Article 3(b) TFEU characterizes “the establishing of competition rules necessary for the functioning of the internal market” as an

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<sup>134</sup> See, e.g., Alan Riley, *The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law*, 28(12) *European Competition Law Review* 703-707 (opining that the repeal of Article 3(1)(g) EC will water down State aid review, weaken the pressure for market liberalization, and undermine the development of competition law and of the competitiveness of EU itself). Nikolaos E. Farantouris, *La “fin” de la concurrence non faussée après le traité réformateur*, 524 *Revue du Marché commun et de l’Union européenne* 41-47 (questioning whether the goal of undistorted competition will be referred to in the same way and with the same frequency, following its relocation “extra muros”).

<sup>135</sup> See Case T-442/03, *SIC - Sociedade Independente de Comunicação, SA v Commission*, 2008 ECR II-01161, paras 200-201 (relying on the protocol on the system of public broadcasting in the Member States attached to the Treaty of Amsterdam to justify a broad definition of the public service broadcasters’ remit).

<sup>136</sup> Alan Riley, above, at 707 (“The development of a stronger industrial policy approach to merger clearance and support for industrial champions as indicated above does clearly seem to be one of the aims of Sarkozy’s excision of Art.3(1)(g).”)

exclusive EU competence. This means that, as explained in Article 2(1) TFEU, only the EU can adopt legally binding acts, while Member States can legislate only if so empowered by the EU or for the implementation of EU acts.

In this respect, Schütze opined that the drafters have fallen victim to an “ontological fallacy” as the rules “necessary to the functioning of the internal market”, including “competition rules” as per Article 3(b) TFEU, by definition do not require the exclusion of all national lawmaking.<sup>137</sup> It could be argued, however, that the drafters merely wanted to refer to competition law “at the EU level” (i.e. to “EU competition law”) and did so by mentioning the feature that distinguishes it from national competition law: the relevance to the functioning of the European internal market. The Treaty of Lisbon, in this connection, appears to be but the last (yet finally successful) attempt to enshrine EU antitrust law as an exclusive competence in the text of the Treaties. It was the European Parliament that first tried its hand at it in 1984 with the Draft Treaty Establishing the European Union, which however never entered into force.<sup>138</sup> In 1992 it was the turn of the European Commission, with its Communication on the principle of subsidiarity.<sup>139</sup> Finally, Article I-13(1)(b) of the shipwrecked Constitutional Treaty reflected verbatim the wording of the current Article 3(b) TFEU.

### **iii) The institutional convergence and the development of sector-specific antitrust rules**

Another important factor in the relationship between antitrust and regulation is the convergence of institutional tasks in the European Commission, which arguably affords it a significant “first-mover” advantage in shaping the relationship between antitrust and regulation introduced by EU secondary legislation. On the one hand, the Commission can submit proposals for regulatory schemes employing antitrust law concepts and methodologies, as in the case of the 2002 Regulatory Framework for Electronic Communications. On the other one, both by way of legislative proposals and of soft law documents, the Commission can adapt general antitrust rules for the specific regulatory needs of certain sectors.

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<sup>137</sup> Robert Schütze, Lisbon and the Federal Order of Competences: a Prospective Analysis, 33(5) *European Law Review* 709, 712.

<sup>138</sup> See Article 48 of the Draft Treaty: (“The Union shall have exclusive competence to complete and develop competition policy at the level of the Union[.]”)

<sup>139</sup> Communication of the Commission to the Council and the European Parliament, *The principle of subsidiarity*, October 27, 1992, SEC (92) 1990 final, para 7.

This is the case, for instance, of the coal and steel sector. Until July 2002, it was subjected to the antitrust provisions set out in the European Coal and Steel Community (ECSC) Treaty, which differed appreciably from the ones laid down in the TFEU.<sup>140</sup> Following the expiry of the ECSC Treaty, the Commission issued a communication<sup>141</sup> clarifying that it does not intend to initiate proceedings against agreements previously authorized under the ECSC regime.<sup>142</sup> Similarly, the objectives of the Common Agricultural Policy (CAP) set out in Article 39 TFEU are potentially in conflict with those pursued by Articles 101 and 102 TFEU. That sector, indeed, has been covered by several antitrust exemptions, recently narrowed by Regulation 1184/2006.<sup>143</sup> Moreover, the Commission issued notices on the application of antitrust rules to postal services<sup>144</sup> and to telecommunications;<sup>145</sup> the EU legislature, in turn, passed sector-specific block exemption regulations for insurances<sup>146</sup> and motor vehicles,<sup>147</sup> shipping consortia,<sup>148</sup> as well as for research and development<sup>149</sup> and specialization agreements.<sup>150</sup>

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<sup>140</sup> For a brief but effective survey of the specificities of the ECSC antitrust regime, see Alison Jones & Brenda Sufrin, *EC Competition Law* (Oxford, 2006) 109, footnote 103.

<sup>141</sup> Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, 2002 OJ C-152/5.

<sup>142</sup> *Id.*, paras 28-29.

<sup>143</sup> Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, OJ L 214, 4.8.2006, p. 7-9. The Commission, nonetheless, is of the opinion that that sector does not require specific antitrust exemptions and is lobbying for their elimination. *See* [http://ec.europa.eu/competition/sectors/agriculture/overview\\_en.html](http://ec.europa.eu/competition/sectors/agriculture/overview_en.html).

<sup>144</sup> Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services OJ C 39, 06.02.1998, p. 2-18.

<sup>145</sup> Notice on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles. OJ C 265, 22.8.1998, p. 2-28. *Cf.* Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165, 11/07/2002 p. 6-31.

<sup>146</sup> Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector OJ L 53, 28.2.2003, p. 8-16

<sup>147</sup> Commission Regulation 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector.

Official Journal L 203, 01.08.2002, pages 30-4.1.

<sup>148</sup> Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) OJ L 256, 29.9.2009.

<sup>149</sup> Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ L 304, 05.12.2000, p. 7.

<sup>150</sup> Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, OJ L 304, 05.12.2000, p. 3. *See also* Giuliano Amato, *Antitrust and the Boundaries of Power* (Portland, 1997) 63-64 (noting that the recognition of product rationalization as an aim eligible for exemption under Article 101(3) in the context of the specialization agreements block exemption reflects industrial policy rather than antitrust considerations).

#### iv) The “Differential” Application of Antitrust Rules in the Light of Sector-Specific Regulatory Goals

Apart from the formal adoption of sector-specific antitrust regimes, regulatory influence over antitrust law also occurs at a less visible level, by way of a “differential” application of the general antitrust rules, which are sometimes stretched or relaxed as needed to accommodate concerns of a regulatory nature.<sup>151</sup>

This is facilitated by the internal organization of the European Commission. Even though antitrust policy enforcement is entrusted to the Competition Commissioner and Directorate-General, the principle of collegiality requires that all formal Commission decisions, including those concerning antitrust matters, be adopted by the whole College of Commissioners by simple majority voting, as per Article 250 TFEU. It is possible – indeed, it is likely – that, at least in some cases, the final antitrust decision is the result of a compromise between antitrust goals and other policy considerations, for instance of an industrial or social nature.

As to agreements, decisions and concerted practices, the potential role of public policy and regulatory considerations in the context of paragraphs 1 and 3 of Article 101 TFEU is a vexed question. The CFI in *Métropole* expressly refused to follow a rule-of-reason methodology in the interpretation of Article 101(1) TFEU, a view endorsed by the Commission in its 1999 White paper on the modernization of antitrust rules.<sup>152</sup> Nonetheless, according to several commentators,<sup>153</sup> rulings such as *STM*,<sup>154</sup> *Gottrup-Klim*,<sup>155</sup> *Wouters*<sup>156</sup> and *Meca-Medina*<sup>157</sup> not only imply that a weighting against pro-competitive effects under Article 101(1) is possible, but that also the existence of regulation can be taken into account in that balancing exercise.<sup>158</sup>

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<sup>151</sup> See, generally, Amedeo Arena, *La nozione di servizio pubblico nel diritto dell'integrazione economica: la specificità del modello sovranazionale europeo* (Naples, 2011) 142-146.

<sup>152</sup> White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty - Commission programme No 99/027 COM(1999) 101, April 1999.

<sup>153</sup> Alison Jones & Brenda Sufrin, *EC Competition Law* (Oxford, 2006) 258-268.

<sup>154</sup> Case 56-65, *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.)*, 1966 ECR (English Special Edition) 235.

<sup>155</sup> Case C-250/92, *Gottrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovareselskab AmbA*, 1994 ECR I-5641.

<sup>156</sup> Case C-309/99 *Wouter v. Algemene Raad Van de Nederlandse Orde Van Advocaten*, 2002 ECR I-1577.

<sup>157</sup> Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission*, 2006 ECR I-6991.

<sup>158</sup> See Giorgio Monti, Article 81 EC and Public Policy, 2002 Common Market Law Review 1057, 1087-1088 (opining that *Wouters* gives strong indications in favor of the application to antitrust law of the “European-style rule of reason” developed in the field of free movement); but see Richard Whish, *Competition Law* (London: 2003) 121-122 (arguing that *Wouters* constitutes a case of “regulatory ancillarity” as opposed to the “commercial ancillarity” established in other cases).

The wording of the four conditions set out in Article 101(3),<sup>159</sup> in turn, by virtue of a teleological interpretation, can accommodate non-economic EU goals set out in provisions of the Treaties and of the Protocols.<sup>160</sup> Actually, the TFEU contains some provisions, the so-called flanking policies, that expressly require that the definition and implementation of all EU law take account of factors such as environmental protection,<sup>161</sup> employment,<sup>162</sup> culture,<sup>163</sup> health,<sup>164</sup> consumer protection,<sup>165</sup> industrial policy.<sup>166</sup> The ECJ in *Metro*, indeed, held that the stability in the labor market could be regarded as contributing to “improving in the production . . . of goods and services” within the meaning of Article 101(3).<sup>167</sup> Similarly, the CFI in *Métropole* ruled that “the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article [101](3)”.<sup>168</sup>

Article 102 TFEU, in turn, has been occasionally employed as a regulatory device along with regulatory schemes to unbundle network industries. While regulatory *ex ante* obligations are generally regarded as more far-reaching than those arising *ex post* from the “special responsibility” of dominant undertakings, cases such as *Deutsche Telekom* suggest that also under Article 102 TFEU incumbent operators may be required to go to great lengths.<sup>169</sup> Some commentators<sup>170</sup> opined that the application of the essential facilities doctrine in the maritime transport sector was closely related to the liberalization of that market by way of regulation:<sup>171</sup> once special and exclusive rights are abolished, duty to supply obligations can be imposed under Article 102 TFEU to further encourage competition in downstream markets. The Commission expressly acknowledged this combined

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<sup>159</sup> See Jones and Sufrin, *EC Competition Law*, above, at 271 (noting that Article 101(3) TFEU enables the Commission “to authorize agreements which: (1) lead to an improvement in the production of goods or services; (2) lead to an improvement in the distribution of goods or services; (3) promote technical progress; and/or (4) promote economic progress.”) (footnotes omitted).

<sup>160</sup> Case T-17/93, *Matra Hachette v. Commission*, 1994 ECR II-595, para 139 (holding that “exceptional circumstances”, such as the agreement’s impact on public infrastructures and on employment, can be taken into consideration albeit “only supererogatorily”).

<sup>161</sup> Article 11 TFEU.

<sup>162</sup> Article 147(2) TFEU.

<sup>163</sup> Article 167(4) TFEU.

<sup>164</sup> Article 168(1) TFEU.

<sup>165</sup> Article 169(2) TFEU.

<sup>166</sup> Article 173(3) TFEU.

<sup>167</sup> Case 26/76, *Metro-SB-Grossmärkte GmbH v. Commission (no. 1)*, 1977 ECR 1857, para 43.

<sup>168</sup> Cases T-528, 542, 543 and 546/93, *Métropole Télévision SA v. Commission*, 1996 ECR II-649, para 118.

<sup>169</sup> Case T-271/03, *Deutsche Telekom AG v. Commission*, 2008 ECR II-477 (holding that the incumbent operator should have applied to national regulation authorities in order to prevent margin-squeeze)

<sup>170</sup> See Jones and Sufrin, *EC Competition Law*, above, at 542.

<sup>171</sup> See *Sealink/B&I Holyhead: Interim Measures*, 1992 5 CMLR 255; *Sea Containers Ltd v. Stena* 1994 OJ L 15/8; *Port of Rodby* 1994 OJ L 55/52; *Morlaix*, 1995 5 CMLR 177

strategy in its 1998 Notice on the Application to Access Agreements in the Telecommunications Sector.<sup>172</sup>

Moreover, regulatory considerations may deprive some of the conducts potentially prohibited under Article 102 TFEU of their “abusive” character. In *Hilti*,<sup>173</sup> for instance, a company holding a dominant position in the market for nail guns tried to justify exclusionary practices carried out against producers of compatible nails claiming that those practices were necessary to protect consumers from the dangers associated with the use of inferior products. Neither the Commission nor the General Court found that reasoning credible.<sup>174</sup> Some commentators suggested, however, that if a company pursued genuine public interest goals on the basis of public service obligations formally imposed by a public authority, instead of acting in its own interest and in an autonomous way as in the case of *Hilti*, exclusionary conduct by that company may be regarded as legitimate,<sup>175</sup> as in the case of a network operator that, acting in accordance with national regulations, refused to grant access to the network to companies unable to meet the required technical and safety standards.<sup>176</sup>

### **3. The Impact of EU Antitrust Law on Regulation**

#### **i) Normative Supremacy and Derogability of EU Antitrust Law**

As to the normative relationship between EU antitrust and national regulation, the ECJ has consistently held that even though Article 101 and 102 TFEU are, in themselves, concerned only with the conduct of undertakings, those articles, read in conjunction with the duty of sincere cooperation,<sup>177</sup> require Member States not to introduce or maintain in force measures, even of a

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<sup>172</sup> Notice on the Application to Access Agreements in the Telecommunications Sector, 1998 OJ C 265/2, para 4 (stating that the advantages brought about by liberalization and harmonization legislation “must not be jeopardised by restrictive or abusive practices of undertakings: the Community’s competition rules are therefore essential to ensure the completion of this development.”)

<sup>173</sup> Case T-30/89, *Hilti AG v. Commission*, 1991 ECR II-01439.

<sup>174</sup> *Ibid.*, para 118 (“it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products”).

<sup>175</sup> Gareth Davies, ‘What does Article 86 EC actually do?’, in Markus Krajewski, Ulla Neergaard & Johan van de Gronden (eds.), *The Changing Legal Framework for Services of General Interest in Europe: Between Competition and Solidarity* (Asser Press, 2009), 51-67, at 62.

<sup>176</sup> Amedeo Arena, *La nozione di servizio pubblico*, above, at 146.

<sup>177</sup> The principle of “sincere cooperation” is expressly set out in Article 4(3) TEU. Most of the case law concerning its application to anticompetitive national legislation, however, contains references to the slightly different wording of Article 10 TEC, repealed by the Treaty of Lisbon.

legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.<sup>178</sup> Furthermore, Articles 101 and 102 TFEU are directly applicable.<sup>179</sup>

Several corollaries stem from those two propositions. First, national courts and administrative authorities, including NCAs, must set aside national regulatory schemes that hamper the enforcement of EU antitrust law.<sup>180</sup> Moreover, Member States must not authorize or require undertakings to infringe EU competition law.<sup>181</sup> In particular, pursuant to Article 106(1), they are required not to take actions so that an undertaking is “led to infringe” Article 102 TFEU,<sup>182</sup> is “induced” to do so,<sup>183</sup> or “cannot avoid”<sup>184</sup> violating that provision.

Another constituent element of the relationship between EU antitrust law and regulation is the conditional exemption set out in Article 106(2) TFEU, whereby firms entrusted with the operation of a Service of General Economic Interest (SGEI) can be exempted from the rules of the Treaty, notably from those on competition, insofar as the application of those rules would obstruct the performance of the tasks assigned to those firms.

The basic assumption underlying this provision is that since the market does not create sufficient incentives for the provision of certain public goods, it is necessary to regulate their supply.<sup>185</sup> This

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<sup>178</sup> See Case 13/77 *GB-Inno-BM* 1977 ECR 2115, para 31; Case 267/86 *Van Eycke* 1988 ECR 4769, para 16; Case C-185/91 *Reiff* 1993 ECR I-5801, para 14; Case C-153/93 *Delta Schiffahrts- und Speditionsgesellschaft* 1994 ECR I-2517, para 14; Case C-96/94 *Centro Servizi Spediporto* 1995 ECR I-2883, para 20; Case C-35/99 *Arduino* 2002 ECR I-1529, para 34; and Case C-198/01, *Consortio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato*, 2003 ECR I-08055, para 45.

<sup>179</sup> See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25, recital no. 4 (“The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty.”)

<sup>180</sup> Case C-453/99 *Courage v. Bernard Crehan*, 2001 ECR I-6297; Case C-198/01, *Consortio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato*, 2003 ECR I-8055.

<sup>181</sup> Case 66/86, *Ahmed Saeed*, para 48; Case 311/85 *Vereniging van Vlaamse Reisbureaus v Sociale Dienst van de plaatselijke en gewestelijke Overheidsdiensten*, 1987 ECR 3801, para 25.

<sup>182</sup> Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforisis and Sotirios Kowelas and Nicolaos Avdellas and others*, 1991 ECR I-2925, paras 37-38.

<sup>183</sup> See Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services, OJ L 256, 26.10.1995, p. 49–54, recital no. 11 (“A Member State is, however, not allowed to maintain a legal monopoly where the relevant undertaking is compelled or induced to abuse its dominant position in a way that is liable to affect trade between Member States.”). See also Case C-141/02 P, *Commission v. T-Mobile Austria GmbH*, 2005 Page I-01283.

<sup>184</sup> Case C-41/90 *Höjner and Elser*, 1991 ECR I-1979, para 27; Case C-18/88 *GB-Inno-BM*, 1991 ECR I-5941, para 20; Case C-242/95 *GT-Link*, 1997 ECR I-4449, paras 33-34; and Case C-203/96 *Dusseldorp and Others*, 1998 ECR I-4075, para 61.

<sup>185</sup> See Communication from the Commission, Services of general interest in Europe, COM/2000/0580 final, para 14 (“Services of general economic interest are different from ordinary services in that public authorities consider that they need to be provided even where the market may not have sufficient incentives to do so. . . . [I]f the public authorities

can take the form of public service or universal service obligations, special or exclusive rights or even State aids: these practices are *prima facie* prohibited, but they can be allowed to the extent necessary to ensure the provision of the relevant public service. Such a proportionality assessment rests with the European Commission.

Member States are also free to define what services they regard as SGEIs, subject to review by the Commission in case of manifest error. However, for Article 106(2) to apply, the general interest mission needs to be *clearly defined*<sup>186</sup> and must be *explicitly entrusted* through an act of public authority (including contracts).<sup>187</sup> This is necessary not only to improve transparency and legal certainty, but chiefly to allow the Commission to carry out its proportionality assessment.<sup>188</sup>

## **ii) From De-Regulation to Re-Regulation: Liberalization and Harmonization Directives.**

The EU provisions concerning SGEIs remained dormant for a long time.<sup>189</sup> Public utilities have been, for at least the first quarter of century since the Treaty of Rome, mostly exempted from free movement and competition provisions.<sup>190</sup> The picture starts to change in the 1980s: the Commission's White Paper *Completing the Internal Market*,<sup>191</sup> complemented by the introduction of majority voting in several key areas by the Single European Act (1986), constituted the basis for several significant liberalisation initiatives.<sup>192</sup>

At this stage, EU regulation typically took the form of *liberalization* directives adopted on the basis of Article 106(3) TFEU aimed at eliminating existing special or exclusive rights. Some Member States questioned the Commission's power to adopt such directives before the ECJ, but to no

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consider that certain services are in the general interest and market forces may not result in a satisfactory provision, they can lay down a number of specific service provisions to meet these needs in the form of service of general interest obligations.”)

<sup>186</sup> Cf. Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 312, 29.11.2005, 67–73, recital no. 8.

<sup>187</sup> Case C-159/94 *EDF* 1997 ECR 1232, para 34.

<sup>188</sup> Communication *Services of general interest in Europe*, above, para 22.

<sup>189</sup> Erika Szyszczak, *State Intervention and the Internal Market*, in Takis Tridimas and Paolisa Nebbia (eds.), *European Union Law for the Twenty-First Century* (Oxford, 2004) 219.

<sup>190</sup> Giulio Napolitano, *Towards a European Legal Order for Services of General Economic Interest*, 11(4) *European Public Law* 566 (2005).

<sup>191</sup> White Paper from the Commission to the European Council, *Completing the Internal Market*, COM (85) 310 final, 12 June 1985.

<sup>192</sup> Francesco Munari, *La disciplina dei cd. servizi essenziali tra diritto comunitario, prerogative degli Stati Membri e interesse generale*, 2002 *Il Diritto dell'Unione Europea* 40, 40-41.

avail.<sup>193</sup> Liberalization directives, however, were often not enough to ensure a workable competition, as the utilities markets remained subject to the dominant influence of incumbent operators.

In sum, EU regulation, at least at first, had essentially a de-regulatory aim. Many feared that EU directives and regulations were exclusively concerned with opening up the markets for public utilities, leaving no room for broader social and political considerations, thus determining the end of the *service public* tradition, which played an important role in many Member States.<sup>194</sup> To address these concerns, the Commission issued its first Communication on Services of General Interest<sup>195</sup> emphasising the necessity to strike a balance at the EU level between market integration and the general interest objectives entrusted to SGEIs.

This was achieved chiefly by way of the adoption, on the basis of Article 114 TFEU, of several sector-specific *harmonization* directives.<sup>196</sup> Harmonization, as Weatherill put it, implies a “regulatory bargain” between conflicting interests.<sup>197</sup> Indeed, these directives contained, on the one hand, “public service”<sup>198</sup> or “universal service”<sup>199</sup> obligations aimed at protecting users and at pursuing other general interest goals, on the other hand, they set out other *ex ante* obligations such as “third

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<sup>193</sup> See, e.g., Case C-202/88, *France v. Commission*, 1991 Page I-01223; Joined cases C-271/90, C-281/90 and C-289/90, *Spain, Belgium and Italy v. Commission*, 1992 ECR I-5833 (rejecting the claims brought by some Member States that the Commission had acted *ultra vires* in adopting directives 88/301/EEC and 90/388/EEC)

<sup>194</sup> Napolitano, *Towards a European Legal Order for Services of General Economic Interest*, above, at 566.

<sup>195</sup> Commission Communication COM (96) 443 Services of General Interest in Europe, 1996 OJ C 281/3 4.

<sup>196</sup> See, e.g., Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176, 15.7.2003, p. 37–56; Directive 2005/89/EC of the European Parliament and of the Council of 18 January 2006 concerning measures to safeguard security of electricity supply and infrastructure investment OJ L 33, 4.2.2006, p. 22–27; Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21.1.1998, p. 14–25; Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33–50.

<sup>197</sup> Stephen Weatherill, ‘Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market’, in Catherine Barnard & Joanne Scott (eds), *The Law of the Single European Market* (Hart Publishing, 2002), 41–73.

<sup>198</sup> See Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports, OJ L 14, 22.1.1993, p. 1–6, Article 9(b) (“A Member State may reserve certain slots at a fully coordinated airport for domestic scheduled services . . . on routes where *public service obligations* have been imposed under Community legislation.”) (emphasis added).

<sup>199</sup> The 2002 Regulatory Framework on Electronic Communications included a directive specifically devoted to the definition and implementation of public service obligations. Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51–77. See also Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21.1.1998, p. 14–25, Article 3(1) (“Member States shall ensure that users enjoy the right to a *universal service* involving the permanent provision of a postal service of specified quality at all points in their territory at affordable prices for all users”).

party access”<sup>200</sup> or “direct line” obligations,<sup>201</sup> designed to complete the unbundling process initiated by the liberalization directives.

As a rule, harmonization directives did not establish European regulators,<sup>202</sup> but rather, in line with the EU model of executive federalism, they entrusted National Regulation Authorities (NRAs) with the task to define the relevant markets, to identify undertakings enjoying significant market power, and to subject them to *ex ante* obligations. In order to ensure uniform implementation of EU regulation, moreover, the Commission often issued guidelines and notices addressed to NRAs. In some sectors, such as that of electronic communications, these documents are detailed and are strongly influenced by antitrust law concepts and methodologies.<sup>203</sup>

It is thus fair to say that the latest EU sector-specific regulation is re-regulatory in nature, insofar as it aims not only to create a Europe-wide market for public utilities, but also to set the level of protection of non-economic interests, thus laying down a comprehensive set of principles to be implemented and enforced at the national level.

As a result, national regulatory powers are significantly constrained. For instance, while Member States retain their right to impose public service and universal services obligations beyond those laid down in EU regulation, they can only do so subject to the (sometimes onerous) conditions set by the EU legislature.<sup>204</sup> Moreover, the doctrine of Union preemption precludes Member States from enacting provisions in a field occupied by EU law, that hinders the achievement of the aims pursued

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<sup>200</sup> See, generally, Bent Iversen et al., *Regulating Competition in the EU* (Copenhagen:2008) 540-545 (distinguishing third party access obligations between “negotiated” and “regulated” ones and providing several examples in EU sector-specific regulation)

<sup>201</sup> *Id.*, at 545-546.

<sup>202</sup> There are, however, some exceptions, such as the European Aviation Safety Agency (*see* Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ L 79, 19.3.2008, p. 1–49) and the Body of European Regulators for Electronic Communications (*see* Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337, 18.12.2009, p. 1–10). In other sectors, instead, the EU legislature set up comitology committees to ensure uniformity in the implementation of EU regulatory standards. *See, e.g.* 2001/546/EC: Commission Decision of 11 July 2001 setting up a consultative committee, to be known as the “European Energy and Transport Forum”, OJ L 195, 19.7.2001, p. 58–60; Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ L 240, 24.8.1992, p. 8–14, Article 11 (establishing an “Advisory Committee” composed of the representatives of the Member States and chaired by the representative of the Commission).

<sup>203</sup> *See* Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services - Official Journal C 165 , 11/07/2002 p. 6-31.

<sup>204</sup> *See* Article 3 of Directive 2003/54/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, 2003 OJ L176/37.

by EU law, or that materially conflicts with EU law provisions.<sup>205</sup> This can be clearly seen in the recent judgment in *Commission v. Germany*, where the ECJ held that, by establishing the principle of non-regulation of new electronic communications markets, the German legislature had encroached “on the wide powers conferred on the NRA under the Community regulatory framework, preventing it from adopting regulatory measures appropriate to each particular case.”<sup>206</sup>

### III. FINDINGS AND COMPARATIVE ASSESSMENT

#### 1. The EU Model: the Gradual Decline of Antitrust’s Threefold Supremacy over Regulation

The EU system is *prima facie* characterized by a threefold supremacy of antitrust over regulation: normative, teleological, and topical. The analysis in Part II revealed, however, that as the EU evolves from an international organization concerned exclusively with market integration toward a supranational entity with wide-ranging aims and competences, antitrust and regulation become increasingly intertwined and the said supremacy gradually fades away.

##### i) Normative Supremacy

First, antitrust enjoys a normative supremacy insofar as the basic antitrust rules are set out in provisions of the TFEU, which take precedence over regulation introduced by EU secondary legislation as well as over incompatible national regulation. As far as the vertical dimension is concerned, EU antitrust provisions actually can be taken as a paradigm of Weiler’s EU “normative supranationalism” in that they share its three features: primacy over national law, direct effect, and preemption.<sup>207</sup>

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<sup>205</sup> The doctrine of Union preemption, albeit applied by the ECJ on a number of occasions, was referred to as such only in AG Colomer’s Opinion in Case C-478/07, *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH*, 2009 ECR I-07721, para 93. For scholarly contributions on the topic, see, generally, Eugene Daniel Cross, ‘Pre-emption of Member State law in the European Economic Community: A framework for analysis’ (1992) 29 *Common Market Law Review* 447; Robert Schütze, ‘Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption’ (2006) 43 *Common Market Law Review* 1023; Amedeo Arena, ‘The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen’, Jean Monnet Working Paper No. 3/10 (available at: <http://centers.law.nyu.edu/jeanmonnet/papers/10/100301.html>).

<sup>206</sup> Case C-424/07, *Commission v. Germany*, nyr, para 78.

<sup>207</sup> Joseph H. Weiler, *Community system: The dual character of supranationalism*, (1981) 1 *Yearbook of European Law*, 267-306.

The analysis in Part II showed, however, that EU antitrust law's normative supremacy is not absolute. There are indeed several matters lying outside the scope of EU antitrust but subject to regulation. In fact, some of those matters are exempted from EU antitrust law *because* they are governed by regulatory schemes, as in the case of the professional rules on multi-disciplinary partnerships in *Wouters* and of the anti-doping rules in *Meca-Medina*. There has also been a case, *Suiker Unie*, of “reverse preemption”, as the national regulatory scheme was regarded as so pervasive as to eliminate competition, thus precluding the application of EU antitrust law. These exemptions are, however, rather narrow.

Secondly, the ECJ case law has carved out an exemption for services provided in the exercise of official authority, which are regarded as non-economic and thus sheltered from the application of EU antitrust law. Similarly, participation in regulatory activity and in independent tariff boards is not caught by EU antitrust law. As Member States' right to provide, commission and organize non-economic services of general interest has been acknowledged in Article 2 of Protocol no. 26 attached to the Treaty of Lisbon, this category will probably expand in the near future.

Last but not least, EU antitrust law generally yields to public services, which are usually regulated at the national or at the EU level. This is achieved, on the one hand, by way of judicial exemptions such as that for acquisition, on the other, via the conditional derogation set out in Article 106(2) for SGEIs. The relationship between EU antitrust law and public utilities can be divided in three successive stages: exemption, liberalization and re-regulation. While the substantive aspects of this development will be examined in further detail when dealing with the teleological and topical supremacy of EU antitrust law, it is appropriate at this juncture to examine its normative aspects.

As non-economic goals are enshrined in provisions of the Treaties or of the Protocols, EU antitrust's normative primacy is watered down. On the one hand, those provisions may justify the adoption of further “differential” antitrust regimes, such as those currently in place for the carbon and steel sector, agriculture, transport, motor vehicles etc.. On the other hand, antitrust provisions themselves can be interpreted in the light of those goals: this would be entirely consistent with the principles governing treaty interpretation, as those aims, once enshrined in primary EU law, constitute the immediate context of the TFEU antitrust provisions. Even though EU antitrust law and regulation currently continue to apply side by side, it is submitted that the normative dimension no longer precludes the creation of areas covered exclusively by EU regulation, should the EU legislature so see fit.

## ii) Teleological Supremacy

The EU antitrust's teleological supremacy hypothesis holds that the goal of ensuring an undistorted competition has had a prominent role in the Treaty of Rome ever since its incipency and, even though it is presently laid down in Protocol no. 27 attached to the Treaty of Lisbon, it still remains an EU priority.

In this connection, it is noteworthy that the undistorted competition goal has always been inherently connected to that of the establishment of the internal market, which undoubtedly constitutes the kernel of the whole EU construct, as apparent from the Spaak Report. The ECJ has repeatedly held that private firms must not be allowed to restore the segmentation between national markets that rules on free movement (addressed to Member States) seek to abolish. Moreover, the efficiency gains brought about by the elimination of State barriers to trade, as per the theory of comparative advantage, are not dissimilar to those stemming from antitrust enforcement.<sup>208</sup>

Conversely, the non-economic goals pursued by regulation were enshrined in the Treaty only at a later stage. In the beginning, they were regarded as outer limits to the EU negative integration: public interest reasons allowed Member States to depart from EU rules on internal market (under Articles 36, 45(3), 52(1), 62 and 65(1) TFEU) and competition (as per Article 106(2) TFEU), but were not a basis for EU regulatory action.

As the establishment of the internal market gained momentum in the 1980s, non-economic goals were initially pushed back by negative and positive integration efforts, then were taken on by the EU legislature in the context of the latter, typically in the form of harmonization directives. The definition at the EU level of a harmonized level of protection for those goals, however, did not turn the EU into a full-fledged regulator: EU legislation set out a general framework embodying a regulatory bargain between market integration and non-economic objectives, but seldom established European regulatory agencies to pursue the latter. Accordingly, Member States, and notably NRAs, remained the primary regulators.

The third phase of this development has begun only recently. Non-economic goals, enshrined in several Treaty provisions, now constitute the primary aim of some items of EU legislation, rather than obstacles to be balanced against the internal market imperative. EU regulatory frameworks, it turn, are more detailed and, as discussed in the following section, entail broader preemptory effects *vis-à-vis* national regulation than their predecessors. Moreover, a number of European regulatory

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<sup>208</sup> See Okeoghene Odudu, *The Boundaries of EC Competition Law* (Oxford, 2006), 22.

organs and agencies have been established, such as the European Food Safety Authority, the European Maritime Safety Agency, the European Railway Agency, the European Aviation Safety Agency, FRONTEX (the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union), the European Galileo Navigation Satellite System Agency, and the Body of European Regulators for Electronic Communications.

### iii) Topical Supremacy

Topical supremacy refers to the fact that the EU has an exclusive competence in the field of EU antitrust law, while most EU regulatory powers concern areas of shared competence between the EU and Member States. This has several implications.

The most apparent repercussion concerns the relationship with national lawmaking. As per Article 5(3) TEU, EU action in areas of exclusive competence is not bound by the principle of subsidiarity. In the field of EU antitrust, accordingly, only the EU can adopt legally binding instruments, while Member States can do so only if empowered by EU legislation, or to implement the latter. Conversely, in fields covered by EU regulation – such as environment, consumer protection, transport and energy – the EU shares its lawmaking competences with Member States and must abide by the principle of subsidiarity. It follows that, unlike antitrust, EU regulation must necessarily be a multi-level process. For instance, the 2002 regulatory framework on electronic communications does empower the Commission to define the relevant markets at the national level, but only to lay down guidelines to assist the NRAs in carrying out that task.

Another implication, closely related to the former one, concerns the substantive content of EU rules. Since EU antitrust is an exclusive competence, the entire body of rules in that sector must be enacted at the EU level. It is thus no wonder that EU legislation in the field of antitrust takes the form of directly applicable regulations or decisions laying down comprehensive and detailed legal frameworks. Conversely, regulation at the EU level is often enacted by way of directives, which set out some rules, but allow for national provisions that are stricter or more detailed (this is the case of the so-called “minimum harmonization”), that cover aspects of the regulated matter not addressed by the EU rules (“partial harmonization”), or that lay down more lenient regimes for transactions lacking any cross-border element (“optional harmonization”).

In sum, EU antitrust rules generally have broader preemptory effects than EU regulation. This can be seen in cases such as *Italian Matches*, where the ECJ held that EU competition law precluded

the application of anticompetitive national regulatory schemes.<sup>209</sup> Indeed, even when undertakings can escape responsibility under the State action doctrine, anticompetitive national measures must nonetheless be declared contrary to EU antitrust law, set aside, and can no longer be relied upon by other undertakings as a basis for a State action defense.<sup>210</sup>

Following the latest developments, however, also the topical supremacy of EU antitrust totters on its throne. The preemptory potential of EU regulation, in particular, has been catching up with that of EU antitrust. In several fields EU regulation has taken the form of directly applicable, comprehensive regulations that require no implementation at the national level. Cases such as *Commission v. Germany* seem to suggest that, when a EU regulatory framework in a given field is in place, regulatory experimentation at the national level not envisaged by the EU legislature is strongly discouraged.<sup>211</sup>

As the center of gravity of regulation is shifted from the national to the EU level, the need for concurrent application of EU antitrust rules becomes less pressing, while the necessity of preventing conflicting outcomes and requirements comes to the fore. While national regulators can be suspected of discriminating against out-of-state interests, the specter of protectionism surely does not haunt the rooms of European regulators, let alone of the Commission itself. Therefore, as suggested above, all the necessary conditions have been created for the EU legislature to provide for areas exempted from EU antitrust rules and covered exclusively by EU regulation.

## **2. The US Model: Antitrust and Regulation as Parts of National Competition Policy**

### **i) The Horizontal Dimension: from Statutory Antitrust Exemptions to Judicial Alternativism**

In the US system, antitrust provisions enjoy no special rank in the hierarchy of legal sources and no prominence as a federal competence or goal. They are regarded as a part of competition policy,

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<sup>209</sup> Case C-198/01, *Consortio Industrie Fiammiferi (CIF) v. AGCM*, 2003 ECR I-8055.

<sup>210</sup> *Id.*, at 51 (“it is of little significance that, where undertakings are required by national legislation to engage in anti-competitive conduct, they cannot also be held accountable for infringement of Articles 81 EC and 82 EC . . . . Member States’ obligations under Articles 3(1)(g) EC, 10 EC, 81 EC and 82 EC, which are distinct from those to which undertakings are subject under Articles 81 EC and 82 EC, none the less continue to exist and therefore the national competition authority remains duty-bound to disapply the national measure at issue”).

<sup>211</sup> Case C-424/07, *Commission v. Germany*, nyr, para 78 (holding that German provisions establishing a principle of non-regulation of new markets encroached on the powers conferred on the NRA under the Community regulatory framework on electronic communications).

along with intellectual property law, trade policy and regulatory regimes.<sup>212</sup> It is thus no wonder that many sectors are exempted from antitrust laws.<sup>213</sup>

In this connection, it is interesting to note that the role of statutory exemptions is slowly fading away. Only five “full” antitrust exemptions are currently in force and it seems that no more are going to be enacted. “Partial” antitrust exemptions and “pseudo-exemptions” are more frequent, yet they can be regarded as an accommodation of regulatory goals within a “differential” antitrust framework, rather than full-fledged exemptions. This development is possibly due to the de-regulation trend started in the 1970s, which has so far involved airlines, railroads, and trucking. Other sectors, such as telecommunications, have been re-regulated and subjected to market-friendly regulatory techniques. The withdrawal of regulation visibly enlarges the range for, and the potential significance of, antitrust law.<sup>214</sup>

Antitrust law, in turn, also appears to be shrinking. In this case, however, it is courts, rather than Congress, that are sounding the signal for retreat. This in part is due to reasons endogenous to the development of antitrust itself. Possibly due to the too easy availability of damages awards, courts have been growing weary of antitrust law as applied to dominant firms and have been looking for ways to reduce the scope of monopolization claims. The existence of a comprehensive regulatory framework in *Trinko* provided a solution on a silver platter and allowed the Court to dismiss the Section 2 Sherman claim irrespective of the express antitrust saving clause laid down in the Telecommunications Act of 1996. The Court’s language in *Credit Suisse*, arguably, suggests that, at least for the next few years, antitrust and regulation should be regarded as alternative, if not mutually exclusive, regimes.

## ii) The Vertical Dimension: Taking Dual Federalism Seriously

The vertical relationship between antitrust and regulation appears to be strongly influenced by the tenets of US Dual Federalism: state sovereignty must be preserved within the limits set by the federal Constitution.

The first corollary is the application of the doctrine of State action as an alternative to the general preemption scrutiny in cases involving anticompetitive legislation. Indeed, antitrust is not a field of

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<sup>212</sup> Lawrence A. Sullivan and Warren S. Grimes, *The Law of Antitrust: an Integrated Handbook* (2nd ed., St. Paul, 2006), 738.

<sup>213</sup> Altman & Pollack, *supra*, at 4:4. (the 20 percent figure the Authors mention, however, also includes sectors not subject to antitrust laws by judicial exemption).

<sup>214</sup> Sullivan and Grimes, *The Law of Antitrust: an Integrated Handbook*, above, 740.

exclusive federal competence. As the Sherman and Clayton act contain far-reaching provisions, the application of the supremacy clause could have implied, in the presence of a Congressional intent to preempt, the displacement of a large body of state legislation. The introduction of the state action defense, however, prevented such an encroachment on state sovereignty.

The institutional, rather than functional, approach adopted by courts in the application of that doctrine is no coincidence. The only relevant factor is the institutional connection of the defendant to the state: the stronger that link is, the lighter the burden of proof. In contrast, the nature of the activity compelled or permitted under national law is irrelevant. So are the aims and objectives pursued by state regulatory schemes. The explanation is simple: in accordance with the US dual form of government, federal antitrust cannot be used to second-guess state regulatory choices, even when they imply anticompetitive effects, unless they have significant externalities. Should state enactments cause a serious harm to interstate trade, they will be addressed through appropriate means, notably the commerce clause.

State sovereignty is also the guiding principle outside the broad scope of the state action doctrine, as preemption scrutiny is appropriately blunted so as not to encroach on state regulation. While the classic framework encompasses “field” and “obstacle” preemption, in the field of antitrust only “direct conflict” preemption seems to apply. The Ninth Circuit further narrowed that doctrine by holding that only a *per se* antitrust violation is enough to trigger the supremacy clause.

### **3. Conclusion: from Divergence to Convergence?**

As far as the relationship between antitrust and regulation is concerned, enumerating the divergences between the US and the EU would be a repetition of the conclusions of their respective analyses. The US and EU approaches are indeed so different as to preclude, in most cases, a meaningful comparison. This section will thus focus only on certain distinctive features of the two systems, with a view of understanding the reasons underlying those divergences and determining the potential for future convergence.

The first thought-provoking issue is the role of the state action doctrine in the two systems. It is plain to see that the US version of that defense is significantly broader than the EU one. First, the US defense covers both conduct required and permitted under state regulatory schemes, while the EU one only catches action that is required under national legislation or results from the exercise of an “irresistible pressure” by a Member State or a non-EU country. In the EU, undertakings must

show that the restrictive effects on competition “originate solely in the national law”, while in the US it is enough to prove that the anticompetitive conduct was part of a “clearly articulated and affirmatively expressed state policy” and was subjected to “active state supervision”. Moreover, the US approach is “institutional”, as the mere status as state legislature, judiciary or municipality triggers either the unconditional application of the exemption or a lighter burden of proof; the EU approach, instead, is “functional”, as public ownership or subjection to public law of the undertaking concerned are irrelevant.

The rationale underlying those divergent approaches is that the state action doctrine, in fact, serves different purposes in the two systems. In the US, as clarified above, it can be invoked by private or public entities, but it is in fact designed to safeguard state sovereignty. In the EU, instead, the state action doctrine is akin to a culpability requirement: undertakings cannot be held liable for conduct they did not engage in voluntarily and cannot be required to infringe national law in order to comply with EU antitrust law. It is thus no wonder that a judicial finding of state immunity has a different impact on subsequent cases in the two systems: in the US, all similar cases will also be exempted; in the EU, instead, the associated finding of incompatibility between EU antitrust law and the national measure concerned implies that the latter must be set aside and can no longer be relied upon by private parties to escape antitrust responsibility.

This begs the question of the relevance of the distinction between US dual federalism and EU cooperative federalism. In the US, the federal constitution entrusted the federal government with a number of wide-ranging competences from the beginning, while reserved others for states and for the people. When the federal government regulates a sector, it does not require the cooperation of states: cooperative federalism in the US is actually the exception and is often prompted by federal economic incentives. The Congress can enact comprehensive regulatory frameworks that can even preempt state legislation in entire fields. Moreover, federal regulatory schemes usually establish federal regulatory agencies. Antitrust is one among many federal policies, is enforced by specific federal agencies, and pursues its own goals. If the Congress intends to take on broader public policy considerations, it can always resort to regulation, if necessary also displacing antitrust law in that sector by way of a statutory exemption.

In the EU, the powers attributed to the EEC in 1957 were significantly narrower than those currently entrusted to the EU by the Treaty of Lisbon. The EEC’s initial goal was clear: the establishment of the internal market. The achievement of that objective, however, appeared as something of a chimera for the first 25 years: as noted by Weiler in its seminal 1981 work, the

Community, at least before the Single European Act, disposed of powerful normative instruments (normative supranationalism) but was deficient in adequate decision-making procedures to adopt them (decisional supranationalism).<sup>215</sup> Competition law constituted a relevant exception: Treaty provisions were directly applicable and the Commission had the power to autonomously adopt decisions and directives to implement them. Competition provisions were actually the greatest negative integration weapon in the Commission's arsenal at the time: if a national measure infringed free movement provisions, all the Commission could do was to initiate an infringement procedure; anticompetitive conduct, instead, allowed the Commission to impose sanctions directly against the undertaking concerned,<sup>216</sup> even if it was a public undertaking. It is thus understandable why competition law has been employed to pursue market integration also against Member States, whose regulatory schemes were often regarded as restrictive of intra-community trade, if not downright protectionist.

Regulation at the EU level was, and still is, more limited than its US counterpart. Even though a doctrine of Union preemption is slowly emerging,<sup>217</sup> the cooperative nature of EU federalism<sup>218</sup> and the principle of subsidiarity in fact require regulation to be a multi-level process. The necessary involvement of Member States, however, can jeopardize the uniform application of EU law and undermine the establishment of the internal market. This is one of the reasons why the Commission is unsympathetic to antitrust exemptions. The institutional factor is also paramount: as EU regulatory powers are usually less intense than EU antitrust enforcement ones, the Commission is understandably unwilling to relinquish its prerogatives.

The latest developments, however, seem to pave the way for a potential convergence between the US and the EU. The latter is evolving from a supranational organization pursuing market integration and undistorted competition to an entity with wide-ranging tasks and powers similar to those of the US federal government. While occasionally competition rules have been stretched or shrunk to accommodate regulatory goals, it is self-evident that this can only be accomplished to a certain extent. As the center of gravity of regulation is shifted from the national to the EU level, the need

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<sup>215</sup> Joseph H. Weiler, *Community system: The dual character of supranationalism*, (1981) 1 Yearbook of European Law, 267-306.

<sup>216</sup> For early cases resulting in the application of fines, see, e.g., Commission Decision 69/240/EEC, of July 16, 1969, Case IV/26.623 (Quinine Cartel), OJ L 192, 5.8.1969, p. 5-22; Commission Decision 69/243/EEC, of July 24, 1969, Case IV/26.267 (Dyestuff Cartel), OJ L 195, 7.8.1969, p. 11-17.

<sup>217</sup> See M. Waelbroeck, The emergent doctrine of Community pre-emption - Consent and redelegation, in Sandalow & Stein (eds), *Courts and Free Markets: Perspectives from the United States and Europe* (Vol. II, OUP, 1982), 548-580; Robert Schütze, Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption, (2006) 43 *Common Market Law Review* 1023.

<sup>218</sup> See Robert Schütze, *From dual to cooperative federalism: the changing structure of European law* (OUP 2009).

for a horizontal application of antitrust rules will probably subside. As non-economic goals are increasingly pursued through regulation, antitrust law will be able again to concentrate exclusively on efficiency and consumer welfare, as in the US. It is, instead, unlikely that Member States ever will be afforded the same leeway to enact anticompetitive legislation US States currently enjoy: the internal market is, arguably, too strong an imperative to be forsaken, at least in the near future.