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An Antitrust Tribute *Liber Amicorum* - Volume II

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Editors' Note

Nicolas Charbit
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Following the success of William E. Kovacic *Liber Amicorum*—Volume I published in 2012, the Institute of Competition Law is proud to release the second volume of this book within the European tradition of *Liber Amicorum*.

In witnessing the constant growth of antitrust regimes around the world and in recognizing the significant role played by William Kovacic in favoring the antitrust dialogue at the international level, this Volume II pays tribute to Professor Kovacic's outstanding career offering a unique combination of theoretical insights and practical knowledge of competition and antitrust law issues worldwide.

In this Volume II, thirty-seven prominent authors signed twenty-seven contributions that tackle some of the most stimulating and current topics in competition policy and antitrust laws.

PART I, entitled "**THE INTERNATIONAL DIMENSION OF COMPETITION POLICY**," includes twelve articles that offer a dynamic overview of international competition policy. Thus, **Jonathan Baker** reviews Kovacic's work on the design of antitrust enforcement institutions analyzing how antitrust norms exhibit continuity over the time; **Doris Hildebrand**, stemming from Kovacic's advocacy for convergence, discusses how the US/EU divide can be surpassed by superior norms; **Florian Wagner-von Papp** delineates a comparison between the US antitrust laws and EU competition law pointing out some thoughts on the importance of defining the relationship between antitrust law on the federal (or EU) level and antitrust laws on (Member) state level; **Jacques Steenbergen** offers some reflections on legitimacy, accountability and independence of competition authorities; **Maureen Ohlhausen** discusses the recommendations in the "FTC at 100 Report" for improving agency performance; **John Briggs** and **Donald Baker** suggest a critical revision of the US antitrust policy and administration to join the rest of the world; **Marc Winerman** steps into the past discussing the international issues arising when the FTC first opened its doors and even before; **Bruno Lasserre** highlights successes and challenges of the European Competition Network; **Wouter Wils** gives a retrospective

analysis of the EC Regulation 1/2013, after ten years since its enactment; **Ali Nikpay** tries to assess the OFT's performance by reference to the analytical framework set down by Kovacic on agency effectiveness; **Julían Peña** outlines the role of international cooperation in the development of competition law in Latin America; **Ian McEwin** delves into the existing connection between business, politics and competition law in Southeast Asia.

The fifteen articles of **PART II**, entitled “**COMPLEXITIES OF ANTITRUST RULES AROUND THE WORLD**”, guide readers through some of the intricacies in the application of antitrust rules in different countries around the world. In Part II, **John Terzaken** and **Molly Kelley** analyze the expanding role of behavioral remedies in cartel enforcements; **Damien Geradin** and **Laurie-Anne Grelier** offer some critical considerations on the EU Directive on Antitrust Damages Claims; **Omar Guerrero** and **Alan Ramírez** explore how effective criminal cartel provisions could be to deter cartel behavior; **Robert Marshall** and **Leslie Marx** discuss compliance with Section 1 of the Sherman Act from an economic perspective; **Caron Beaton Wells**, drawing on the Australian experience, tests effectiveness of a range of leniency policies; **Eleanor Fox** and **Merit Janow**, by examining the Vitamin C cartel case, set forth the main points at which trade and competition ought to meet; **Andy Chen** analyzes impacts and implications arising from the LCD cartel case for the Taiwanese competition policy; **Simon Roberts** reviews the approach of the South African Competition Commission to uncovering collusion in the construction sector and draws out some lessons for establishing new institutions; **Patrick Rey** and **Thibaud Vergé** outline vertical restraints treatment in the EU; **Andreas Mundt** conducts an insightful digression on some forms of vertical restraints vis-à-vis the rapid development of the Internet economy; **Daniel Crane** provides some analytical clarity on the legal rules governing predatory innovations claims; **Joseph Kattan** and **Chris Wood** explain the standard-essential patents and the related problem of hold-up; **Margaret Bloom** discusses convergence and cooperation in international merger control; **Joshua Wright** and **Jan Rybníček** advocate for a more committed consideration of the evolution of out-of-market efficiencies in the US and around the world; **George Cary** and **Elaine Ewing** consider what can the US/EU experience in the merger context tell us about convergence with MOFCOM.

Volume II, with its 27 papers, takes readers around the world providing them with provoking reflections, insightful thoughts, and learning experiences on competition policy and antitrust laws. This is the same world that Bill Kovacic has traveled so much to share knowledge and favor dialogue among different players in the international antitrust arena.

The editors would like to give their sincere thanks to the thirty-seven authors for their hours of labor in dedication to the Volume II of this Liber Amicorum and to Anna Pavlik and Jessica Rebarber for their precious editorial assistance.

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Comparative Antitrust Federalism and the Error-Cost Framework or: Rhetoric and Reality: You Protect Competitors, We Protect Competition – Except When We Protect Competitors

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Abstract

The aim of this contribution is threefold. First, it seeks to contribute to a more fine-grained comparison between US antitrust and EU competition law by (selectively) including state antitrust laws as well as laws that pursue objectives different from the antitrust laws but interfere with the aims of the antitrust laws, such as sale-below-cost statutes, car dealer and franchise statutes, or general contract law invalidating resale price maintenance agreements (“non-antitrust laws”).

Secondly, the paper highlights the degree to which such state antitrust laws and non-antitrust laws may interfere with the error-cost framework employed in antitrust law, which finely balances Type I and Type II errors.

Thirdly, as a consequence of the first two points, the paper seeks to raise awareness of the importance of clearly defining the relationship between antitrust law on the federal (or EU) level and antitrust laws as well as non-antitrust laws on the (Member) state level. Neither the US approach nor the current EU approach to this relationship are considered satisfactory.

* I would like to thank (in alphabetical order) Cédric Argenton, John Kallaughner, Giorgio Monti, Mel Marquis, Philip Marsden, Natalie St. Cyr-Clarke, Christopher Townley, Angela Zhang as well as the participants of the workshop at the European University Institute in Florence, Italy, and those at the MaCCI Annual Conference 2014, Germany, for very helpful comments. I am indebted to the editors of this volume for their patience, their willingness to accept last-minute changes, and smooth handling of the editorial process. Somewhat unusually for a *Liber Amicorum*, I also have to thank the friend to be honored, Bill Kovacic, for comments—as I explain below (*infra* text at and in note 3), I simply could not find a conference to present the working paper without Bill being present. I hope this did not ruin the surprise for him.

I. Introduction

When choosing a topic for a *Liber Amicorum*, one usually first has to do some research to find a more or less tenuous relationship between one's current research interests and those of the friend to be honored. With Bill Kovacic, such research is fortunately not necessary. He has written on every conceivable antitrust topic, and frequently in an international context. As a consequence, one can practically blindly choose a topic and jurisdiction, find the corresponding contribution by Bill Kovacic, and pretend to have thought long and hard about a fitting topic. It is much like painting a bull's eye around the bullet hole after shooting blindfolded at the barn door.

1. Shooting at the Barn Door: The Scope of the Contribution

This contribution will revisit modern antitrust concern with avoiding type I errors (false positives, rejecting a true null hypothesis) from a comparative US-EU perspective. There is, of course, no dearth of such comparisons in the existing literature. This contribution seeks to distinguish itself by going beyond the comparison between the federal antitrust rules in the US and the supranational competition rules of the EU by including—albeit very selectively—state law and non-antitrust rules in the comparison. From a comparative law perspective, the inclusion of both aspects seems necessary to go beyond the “law in the books” and to understand the “law in action.”

My argument can be summarized in the following bullet points.

- Since the late 1970s, US federal antitrust law has made considerable efforts to restrict itself to cases in which a credible theory of harm can be advanced. Where conduct does not and is not likely to harm competition, it should not be prohibited. Prohibiting or chilling such conduct itself restricts competition. Not only the *under-enforcement* of antitrust laws, but also their *over-enforcement* is detrimental to the very competition they are designed to protect.
- This development has, for the greater part, been confined to the federal antitrust laws. Legal comparisons often focus on *antitrust* laws of the jurisdictions to be compared. Whether or not a foreign (non-US) antitrust law has struck the right error-cost balance is usually measured against the perceived gold standard of federal US antitrust law. The refinements in antitrust doctrine using the error-cost framework are very much part of the “rhetoric” of US antitrust advocacy abroad.
- From the perspective of comparative law, however, a superficial comparison implicit in the comparison of individual fields of law (comparing the “antitrust laws” in jurisdictions A and B) does not conform to best practice. A legal comparison has to consider real-life scenarios and take into account all functional equivalents applicable to these scenarios, including rules such as those on contracts, consumer protection, and, in particular, unfair competition—and federal as well as state law. Where, for example, resale price maintenance or unilateral conduct by a non-dominant firm is prohibited, the affected firm will only be mildly

interested in knowing whether it is antitrust law, regulation, unfair competition law, or contract law that prohibits the conduct, or whether the prohibition derives from federal law or state law (although it may, of course, still be interested in the differences with regard to the geographic scope, and in whether these prohibitions are enforced and sanctioned differently).

- Taking functional equivalents into account, the gap between the ostensibly very permissive US antitrust laws and jurisdictions with a more interventionist approach in their antitrust laws is narrowed, especially due to the influence of American *state law*.
- The recognition that these functional equivalents interfere with the sensitive error-cost balance struck by the federal antitrust laws suggests a policy response at or between the two extreme ends of a sliding scale.
 - Either the existence of interventionist functional equivalents that complement the non-interventionist federal antitrust laws even in US law is seen as evidence that there is a pressing need for some restrictive interference beyond the scope of the antitrust laws. In other words, the *descriptive* statement that there is such complementary, more interventionist, law could result in the *normative* recommendation to retain or provide for such legislation. This is a possible, but of course not a logically conclusive inference—as any Is-Ought reasoning, it would be fallacious to determine the normative question by looking only at what is actually happening.
 - At the other end of the scale, the error-cost balance struck by the federal antitrust laws could be considered to be the normatively correct position. If that is the case, it should be applied to the functional equivalents as well. Proponents of this position would, for example, argue for the pre-emption of conflicting state law by the federal antitrust laws because the latter not only passively refrain from condemning conduct that is not considered anticompetitive, but have made an affirmative choice to uphold such conduct as legal and desirable.
- Apart from the two-dimensional comparison between two jurisdictions, the third dimension that is relevant for the comparison between US and EU law has already been touched upon in the previous bullet points: the issue of antitrust federalism. The distinction between “pure” antitrust laws and “meddlesome” functional equivalents of the “antitrust light” variety maps nearly, albeit not exactly, on the federal-state distinction in the US and the EU-Member State distinction in the European Union. As an example recognizable by both US and EU lawyers, one could mention the area of unilateral conduct. In the US, it is in particular state laws such as state franchise relationship laws and sales-below-cost laws that prohibit certain competitive unilateral conduct below the threshold of monopoly power. In the EU, it is mostly Member States’ law that addresses such unilateral conduct, generally under the heading “economic dependency.” This raises, at least partly, the question to what extent federal US or supranational EU law should

“preempt” state laws.¹ The fact that functional equivalents that can interfere with federal/EU antitrust rules can be unfair competition laws, contract law rules, tort law rules, etc. makes any attempt at preserving the balance struck at the federal/EU level a formidable one. Parts VII and VIII of this contribution address this issue.

2. Painting the Bull’s Eye: Bill Kovacic

What remains for the introduction is painting the bull’s eye around the bullet hole: how does all this tie in with Bill Kovacic’s interests?

Bill Kovacic has never contented himself with superficial legal comparisons,² and he has always distanced himself from the “one size fits all” attitude that is sometimes associated with US antitrust advocacy. He has travelled widely—I have yet to attend a conference of any significance anywhere in the world where I do not meet him³—advised foreign jurisdictions on competition law, policy, and advocacy, and he has always made a point of first understanding each jurisdiction’s institutional background before making nuanced policy recommendations.⁴

He has on numerous occasions compared US and EU antitrust policies, pointed out the similarities and differences, and taken into account the institutional differences between the two systems.⁵ More particularly he has highlighted the preference of the US courts to err on the side of non-intervention in monopolization cases, and noted the absence of such a preference in the EU.⁶

1 I have put “preempt” in quotation marks because the European Union concept of supremacy of EU law is not usually called preemption, and the scope and consequences of federal preemption in the United States differ from those of the European concept.

2 For more detail on Bill Kovacic’s contribution to comparative antitrust law, see Andre Fiebig, *The Normative Limits of Comparative Competition Law*, in WILLIAM E. KOVACIC – AN ANTITRUST TRIBUTE, LIBER AMICORUM – VOLUME I 329, 330, 336 (Nicolas Charbit, Elisa Ramundo, Anna Chehtova & Abigail Slater eds., 2012).

3 On the top of my head, I remember meeting him at conferences and workshops in the United Kingdom, the Netherlands, France, Germany, Turkey, Greece, and the United States, and I am sure I would have met him in most other countries of the world if only my travel budget did not put limits to my own radius. A colleague of mine has speculated that Bill Kovacic must have been cloned to achieve omnipresence at simultaneous conferences around the globe. My only doubt that this is true derives from the experience of one conference at Columbia Law School in 2012, where Bill Kovacic was a speaker but made his presentation on speaker phone. It says a lot about Bill Kovacic’s rhetorical skill that even at that conference he clearly dominated the room.

4 See William E. Kovacic, *Lucky Trip? Perspectives from a Foreign Advisor on Competition Policy, Development and Technical Assistance*, 3 EUR. COMPETITION J. 319 (2007); for an example, see William E. Kovacic & Ben Slay, *Perilous beginnings: the establishment of antimonopoly and consumer protection programs in the Republic of Georgia*, 43 ANTITRUST BULL. 15 (1998). See also FIEBIG, *supra* note 2.

5 E.g. William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence?*, Bates White Fifth Annual Antitrust Conference Washington, DC (June 2, 2008).

6 *Ibid.* at 11: “At the margin, US courts have tended to say that courts and enforcement agencies commit greater errors by intervening too much rather than too little. This perspective does not appear in EU jurisprudence or in speeches by EU enforcement officials.”

He is also one of the very few who has emphasized the impact of non-antitrust rules when assessing competition policy.⁷ In this respect, “unfair competition” provisions in particular may interfere with the error-cost framework of antitrust because they prohibit unilateral conduct below the threshold of dominance. Most of the (primarily state) rules I will consider below as irritants to the error-cost framework of antitrust are sold to the public as unfair competition rules or consumer protection rules. The relationship between antitrust and unfair competition law/consumer protection rules is clearly a topic very close to Bill’s heart. On numerous occasions he has extolled the virtues of institutionally joining antitrust and unfair competition/consumer protection lawyers under one roof,⁸ because antitrust and consumer protection rules ideally coexist in a mutually beneficial symbiosis,⁹ and—as Bill’s friend, former colleague at George Mason University, and one of his predecessors as Chairman of the FTC *Tim Muris* pointed out—“robust competition is the best single means for protecting consumer interests.”¹⁰ However, Bill has also emphasized that it is insufficient to put antitrust lawyers and consumer protection lawyers *physically* under one roof—it is the policies that need to be integrated.¹¹ Consumer protection and antitrust should work hand in hand to the benefit of consumers, but, as Bill has pointed out, this is not always

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- 7 William E. Kovacic, *Toward a Domestic Competition Network*, in COMPETITION LAWS IN CONFLICT 316, 320 (Richard A. Epstein & Michael S. Greve eds., 2004) (“Academics, policymakers, and practitioners are becoming increasingly aware that the decisions of bodies such as the Food and Drug Administration, the Patent and Trademark Office, and the Department of Defense deeply influence business rivalry—perhaps as much as the enforcement of traditional antitrust rules.”).
 - 8 E.g., William E. Kovacic, *The Federal Trade Commission and the Assignment of Regulatory Tasks*, in THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION 25 (James C. Cooper ed., 2013); William E. Kovacic, *The digital broadband migration and the Federal Trade Commission: Building the competition and consumer protection agency of the future*, 8 J. ON TELECOMM. & HIGH TECH. L. 1, 12 (2010); William E. Kovacic, *The Consumer Financial Protection Agency and the hazards of regulatory restructuring*, LOMBARD STREET, September 14, 2009, at 19, 21, available at <http://www.ftc.gov/speeches/kovacic/090914hazardsrestructuring.pdf>; also cf. STATEMENT SUBMITTED FOR THE RECORD BY COMMISSIONER WILLIAM E. KOVACIC ON THE PROPOSAL TO CREATE A CONSUMER FINANCIAL PROTECTION AGENCY TO THE COMMITTEE ON ENERGY & COMMERCE AND THE COMMITTEE ON FINANCIAL SERVICES US HOUSE OF REPRESENTATIVES (July 28, 2009), <http://www.ftc.gov/speeches/kovacic/090728stmtrecord.pdf>.
 - 9 Timothy J. Muris, *The Federal Trade Commission and the future development of US Consumer Protection Policy*, Aspen Summit Cyberspace and the American Dream, The Progress and Freedom Foundation, (August 19, 2003) <http://www.ftc.gov/speeches/muris/030819aspen.shtm> [hereinafter Muris, Aspen Remarks]: “Both consumer protection and competition serve the common aim of improving consumer welfare, and they naturally complement each other.”
 - 10 Muris, Aspen Remarks, note 9; Timothy J. Muris, *The Interface of Competition and Consumer Protection*, Prepared remarks at the Fordham Corporate Law Institute’s twenty-ninth annual conference on international antitrust law and policy (31 October 2002), at 7, <http://www.ftc.gov/speeches/muris/021031fordham.pdf>. For an elaboration on how competition protects consumers, see Mark Armstrong, *Interactions between competition and consumer policy*, 4(1) COMPETITION POLICY INTERNATIONAL 97, 100-106 (but see also *ibid.* at 109-112, summarizing various problems that in practice impede intermediaries, such as price comparison sites, from providing the best information).
 - 11 Kovacic, in REGULATORY REVOLUTION, *supra* note 8, at 28; see also *Interview with William E. Kovacic, General Council, Federal Trade Commission*, THE ANTITRUST SOURCE January 2004, 1, 3 [hereinafter, the 2004 Interview]: “A third priority . . . is to promote the realization of the benefits of the Commission’s distinctive combination of functions—to further integrate the application of the agency’s competition and consumer protection authority and pursue projects that exploit synergies between the two missions.”; *Interview with William E. Kovacic, Chairman, Federal Trade Commission*, THE ANTITRUST SOURCE August 2008, 1, 14 [hereinafter, the 2008 Kovacic Interview]: “I am even more convinced than I was four years ago that the FTC can improve its performance significantly by building stronger links between the competition and consumer protection dimensions of its statutory mandates.”, and, *ibid.* at 15: “Recognition of this condition compels the agency to take more steps internally to ensure that connections between our competition and consumer protection capabilities are drawn.”; Stéphanie Yon & William E. Kovacic, *Interview - William Kovacic: A new chairman for the FTC*, CONCURRENCES No 3-2008, 5, 6: “A fourth significant change [scil.: in the FTC compared to 30 years earlier] has taken the form of greater efforts to achieve

the case;¹² there is often “friction”.¹³ The argument in this contribution is essentially that unfair competition policy and consumer protection that is not well coordinated with antitrust policy may upset the fine balance between the legal framework that antitrust law sets for the firms (the “rules of the game”) on the one hand, and the otherwise unrestricted space for independent action by the players within that framework (the “players’ game moves”) on the other. Bill Kovacic has pointed to this detrimental effect of ill-conceived consumer protection rules in the past.¹⁴

Going even more to the core concern of this contribution, the danger of ignoring the law in action on the state level, is Bill Kovacic’s dissent in *N-Data Solutions*, where he pointed out that the majority of Commissioners disregarded the unintended repercussions which the decision might have once the states applied similar standards under their corresponding state antitrust laws:

The Commission overlooks how the proposed settlement could affect the application of state statutes that are modeled on the FTC Act. . . . The federal and state . . . systems do not operate in watertight compartments. As commentators have documented the federal and state regimes are interdependent. . . . [S]tates might incorporate the theories of liability in the settlement and order proposed here into their own . . . jurisprudence. A number of states that employ this incorporation principle have authorized private parties to enforce their . . . statutes in suits that permit the court to impose treble damages for infringements. If the Commission desires to deny the reasoning of its approach to private treble damages litigants, the proposed settlement does not necessarily do so.¹⁵

This tribute to Bill Kovacic attempts to follow in his footsteps and bring a little more nuance to the comparison of “US” and “EU” antitrust law by integrating state laws and non-antitrust laws.

more integration of the agency’s competition policy and consumer protection capabilities. There is a growing realization that in a number of sectors, such as health care and financial services, the FTC can achieve superior outcomes by joining up knowledge that comes from the study of both supply side (the competition policy emphasis) and demand side (the consumer protection policy emphasis) perspectives.”

12 2008 Kovacic Interview, note 11, at 15 (noting that “[t]he cultures of the two fields sometimes conflict”).

13 2008 Kovacic Interview, note 11, at 15.

14 E.g., 2008 Kovacic Interview, note 11, at 15 (noting that “if an agency imposes ever more restrictive standards concerning advertising and various forms of marketing practices, it is possible that the agency will stifle the rivalry and new entry that are important sources of protection for consumers”). Similarly Muris, Aspen Remarks, note 9 (“Consumer protection policy that ignores the impact on competition can result in a cure worse than the disease.”), and Armstrong, note 10, 115 (explaining how the removal of restrictions on—truthful—advertising may increase competition).

15 DISSENTING STATEMENT OF COMMISSIONER WILLIAM E. KOVACIC, IN THE MATTER OF NEGOTIATED DATA SOLUTIONS, LLC, File No. 051-0094.

II. The Problem of Over-Enforcement and Functional Equivalents

Antitrust law has long recognized that over-enforcement can be as much of a problem as under-enforcement. It is important for antitrust law to prohibit those private restrictions that harm competition—but *no more than that*. The costs of type I and type II errors have to be brought into a balance.¹⁶ If we prohibit non-restrictive conduct, this stifles permissible forms of competition and therefore restricts competition itself. This may be just as harmful to competition in the market as a private restraint would be—or even more harmful, because state restraints are less prone to being undermined by the self-correcting forces of competition.¹⁷ As long as conduct does not harm competition, firms should have an unrestricted action space to choose their strategies independently, because competition, like any other evolutionary process, generally thrives when there is variation.

In the following parts of the contribution, I will assess various competitive restraints in turn. For each of these restraints, I will first outline the assessment under federal US antitrust law, which reflects the concern with type I errors and over-enforcement. I will then describe the European position, which is generally more interventionist than the US position, with a greater focus on avoiding type II errors (false negatives). I will keep the description of the US and EU positions as brief as possible, because at this level there is an abundance of legal comparisons. At this level, the big picture is that Europe still is, or at least traditionally has been, interventionist without proper regard to the danger of over-deterrence, while the United States has adopted a framework that provides firms with the necessary free space for action while intervening selectively only in those instances where a well-founded theory of harm can be advanced

16 For a recent detailed overview of the genesis and development of the error-framework analysis in US antitrust law, see Jonathan B. Baker, *Taking the Error Out of “Error Cost” Analysis: What’s wrong with Antitrust’s Right*, SOCIAL SCIENCE RESEARCH NETWORK (September 30, 2013), <http://ssrn.com/abstract=2333736>. While the main thrust of Baker’s argument is against a further re-balancing towards a preference for type II errors, and that occasionally the adjustment may have gone too far in that direction, he does not deny that a balancing is necessary and that the more interventionist antitrust era “had in general likely chilled cost reductions and other efficiency-enhancing conduct.” For early error-cost framework approaches, see Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 222 *et seq.* (1979); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 10, 15 *et seq.* (1984); see also the further references in BAKER (cited at the start of this note) in his note 16. In my contribution, I am not taking a position on whether the US or the EU have gone too far (see BAKER, *op. cit.*; AMERICAN ANTITRUST INSTITUTE (“AAI”), THE NEXT ANTITRUST AGENDA 55-93 (Albert E. Foer ed., 2008)), not far enough (for example, because vertical restraints are still treated under a rule of reason and not as *per se* legal, as ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 297 (1978, and rev. ed. 1993) had recommended), or have hit the mark. I agree with Baker (*ibid.*) that there was a time when the balance was clearly tilted too much towards avoiding type II errors, but, as Bill Kovacic has pointed out, a lot has changed since then, and “[a] proper appreciation for these trends ought to inspire caution before one embraces the proposition that US antitrust doctrine and policy today expose dominant firms to significant, systematic risks attributable to over-inclusive liability rules.” STATEMENT OF FTC CHAIRMAN WILLIAM E. KOVACIC, MODERN US COMPETITION LAW AND THE TREATMENT OF DOMINANT FIRMS: COMMENTS ON THE DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION PROCEEDINGS RELATING TO SECTION 2 OF THE SHERMAN ACT (Sept. 8, 2008). My point is a different one: regardless where one strikes the balance, the considerations supporting this balance should be consistently applied across the boundaries of legal fields.

17 In other words, antitrust enforcement may in itself become a “public restraint on competition.” On the need to tackle such restraints, see James C. Cooper & William E. Kovacic, *US Convergence with International Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U.L. REV. 1555 (2010).

and requires intervention. This widely held view is well encapsulated in the expression “we protect competition, you protect competitors”¹⁸—a sentiment that is rarely openly stated but is the elephant in the room whenever comparative EU and US antitrust law, especially on unilateral conduct, is discussed.¹⁹ Comparisons that go deeper enquire into the different institutional background, such as the market-integration objective in the EU, or the different ideological foundation on which the antitrust laws are built. However, generally they do not question the internalization of the error-cost framework in US law.

A closer look will show both that there was a greater understanding of the over-enforcement problem in Europe than it is generally credited for, and, conversely, that in actual practice US American law is sometimes not as true to the error-cost framework as the US federal antitrust rhetoric wants to make us believe. As mentioned above, the reason for the divergence between rhetoric and reality is that a legal comparison cannot focus exclusively on the limited field of antitrust rules, but has to include functional equivalents.

In comparative law, the traditional functionalist approach is to identify a real-life problem and search for rules in the various legal systems that address this problem (“functional equivalents”).²⁰ Experience shows that quite often—though not invariably—different legal systems reach similar solutions by different routes.²¹ Functional equivalents may come in unlikely guises. What is a procedural rule in one jurisdiction may be a substantive question in another jurisdiction. What may be a contract law question in one jurisdiction may be a tort, unjust enrichment, property, or family law question in another jurisdiction. And what is an antitrust question in one jurisdiction may be an unfair competition, regulatory, business tort, or contract law question in another jurisdiction. These functional equivalents become more readily apparent when one engages in a comparative analysis—or when one has to deal with a conflict of laws case—but they should be of concern to lawyers interested in purely domestic cases as well, especially in the antitrust context. The reason why functional equivalents should be of particular concern in the antitrust context is precisely the danger of over-enforcement. If antitrust law is as much concerned with false positives as it is with false negatives, then it must also be concerned about false positives created by rules that are not part of the “antitrust laws” but are functionally equivalent.

18 This is the title of an article by Eleanor M. Fox, *We Protect Competition, You Protect Competitors*, 26(2) *WORLD COMPETITION* 149-165 (2003).

19 See KOVACIC, *supra* note 5, at 8: “EU officials also have grown accustomed to hearing, by direct quotation or paraphrase, the US Supreme Court’s admonition that the proper aim of antitrust law is ‘the protection of competition, not competitors.’” (citations omitted).

20 Generally, KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 34-40 (3rd rev. ed. 1998); see also Ralf Michaels *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 340-343, 363-381 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

21 This is the famous or—depending on one’s standpoint—notorious *praesumptio similitudinis* (see Zweigert & Kötz, *ibid.*, at 40; for a critical discussion cf. Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 383-419 (Mathias Reimann & Reinhard Zimmermann eds., 2006)). The controversy around this presumption is wholly artificial. It was always conceived as a working hypothesis, and no more.

The following parts of this contribution will look at vertical non-price distribution restraints, vertical price restraints, and various unilateral conduct prohibitions in turn. Each of these parts will be structured in the same way, namely by describing:

- First, the position of US federal antitrust law, which reflect the position of conceptual purity;
- Secondly, the situation in Europe, which can be criticized in many respects for paying too little attention to the problem of over-enforcement and the attendant chilling of pro-competitive conduct; and
- Thirdly, the functional equivalents in the United States that (sometimes considerably) narrow the gap between the conceptually pure error-cost framework position of the federal antitrust laws and the inferior European rules.

I would like to emphasize at the outset what I do *not* want to do:

- I do not want to suggest that the functional equivalents that I mention make US law overall equally restrictive as, or even more restrictive than, European law. In some limited instances, this may be the case, but in general I suspect that European rules are overall more restrictive. In some cases, the American state laws I mention exist only in a small minority of states; in other cases, restrictive state laws cover only a small sub-set of conduct that may be prohibited more broadly in Europe.
- Nor do I want to suggest that we should not be concerned with over-enforcement in Europe, or that because there are functional equivalents in the United States for many of the restrictive rules in European law, these rules necessarily satisfy an imperative need for such restrictions. On the very contrary.

The point I do want to make is that antitrust lawyers that are concerned with over-enforcement need to pay attention to functional equivalents outside the scope of the federal or supranational antitrust laws—on *both* sides of the Atlantic. This requires thinking about the relationship between federal/EU antitrust rules on the one hand, and state antitrust laws or non-antitrust laws on the other hand.

III. Vertical Non-Price Restraints

1. The Position of Conceptual Purity: GTE Sylvania and Germany in 1958

Antitrust law has long emphasized that different distribution strategies may compete with one another, and that prohibiting some of these distribution strategies on the basis that they restrict intrabrand competition may stifle interbrand competition, in particular the competition for the most efficient distribution strategy. While some non-price

vertical restraints were initially treated as *per se* violations;²² *GTE Sylvania* famously acknowledged in 1977 the need for competition between distribution schemes with a switch from a *per se* illegality rule to a rule of reason analysis for such restraints in the United States:

The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. . . . Although intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited both by the ability of consumers to travel to other franchised locations and, perhaps more importantly, to purchase the competing products of other manufacturers. . . . Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. . . . [N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. . . . Because of market imperfections such as the so-called “free rider” effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer’s benefit would be greater if all provided the services than if none did. . . . Economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products.²³

From a comparative perspective, one could add that at least one European jurisdiction was actually some 20 years *ahead* of the United States with regard to vertical non-price distribution restrictions. German antitrust law treated vertical non-price distribution restrictions in principle as *per se* legal as early as 1958.²⁴ The German competition authorities were authorized to declare restrictive vertical distribution agreements unenforceable and prohibit their future use only in circumstances where the extent of their use “substantially impaired competition on the market.”²⁵ This provided the firms with even more legal certainty than the *rule of reason* approach practiced today in the

22 “Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it.” *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967).

23 *Continental T.V. v. GTE Sylvania*, 433 U.S. 36, 51-55 (1977).

24 See § 18 of the German ARC of 1958, which was renumbered as § 16 ARC in the 6th Amendment of 1999; since 2005, Germany has replaced this provision by copy-pasting the EU system of a prohibition-in-principle coupled with a relatively permissive block exemption (or legal exception in the individual case), see §§ 1, 2 ARC 2005/2013. Before 1958, German courts frequently tried to treat vertical restraints under a rule of reason, but felt constrained by the US precedent that was applicable, *mutatis mutandis*, to the Allied decartelization laws then in force in Germany. For a contemporary assessment and overview of the muddled case law, see Ernst-Joachim Mestmäcker, *Dekartellierung und Wettbewerb in der Rechtsprechung der deutschen Gerichte*, 9 ORDO - JAHRBUCH FÜR DIE ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT 99, 122-127 (1957).

25 § 18 of the German ARC of 1958 (= § 16 ARC 1999).

United States, because the prohibition would only apply *ex nunc* once the competition authority had declared the agreement unenforceable and prohibited it for the future.²⁶ It is true, however, that the German freedom to engage in such distribution schemes without fear of intervention became limited as soon as the practice had the capability to affect trade between Member States of the European Union (or more precisely then, European Communities²⁷). If that was the case, the European Treaty rules applied concurrently to the German rules, and, as outlined immediately below, the European rules used to be much more restrictive. All this is history, however, since the European rules eventually underwent a change to a relatively permissive regime in 1999, and Germany subsequently adopted the European scheme in 2005.

2. Europe: Lagging Behind, but Catching Up

The approach to vertical restraints on the EU level was traditionally much more restrictive than in the United States: vertical distribution restraints were treated with hostility, in particular where they interfered with the European market-integration objective,²⁸ even though the German government had submitted the arguments for more lenient treatment of vertical restraints based on the distinction between interbrand and intrabrand competition to the Court.²⁹

The old vertical Block Exemption Regulations tended to address tightly compartmentalized vertical practices, and to dictate rigidly the clauses that firms could use (“white clauses”), or could not use (“black clauses”) in their distribution agreements.³⁰ These regulations turned out to be “straitjackets” for distribution systems; distribution agree-

26 Nor did the competition authorities often make use of the possibility to prohibit vertical non-price distribution strategies. In practice, the greater stumbling block proved to be a statutory form requirement for all—including vertical—restrictive agreements (§ 34 ARC 1958: such agreements had to be in writing). This often caught unsophisticated parties unawares, and was not infrequently used to wiggle out of bad bargains, until the form requirement was eventually repealed.

27 In the following, I will use EU or European Union even when referring to the pre-Lisbon European Communities.

28 Case 56 and 58/64 (*Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*) [1966] ECR (English edition) 299, 339 (refusing to exclude vertical restraints from what is today Article 101 TFEU because the Treaty makes no distinction between horizontal and vertical restraints), 340 (“Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objections of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article [101(1)] is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process.”).

29 *Ibid.* 342: “The applicants and the German Government maintain that since the Commission restricted its examination solely to Grundig products the decision was based upon a false concept of competition and of the rules on prohibition contained in Article 85 (1) [101(1)], since this concept applies particularly to competition between similar products of different makes; the Commission, before declaring Article [101(1)] to be applicable, should, by basing itself upon the ‘rule of reason,’ have considered the economic effects of the disputed contract upon competition between the different makes. There is a presumption that vertical sole distributorship agreements are not harmful to competition and in the present case there is nothing to invalidate that presumption. On the contrary, the contract in question has increased the competition between similar products of different makes.”

30 See, e.g., Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements, [1983] O.J. L173/1; Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements, [1983] O.J. L173/5; Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, [1985] O.J. L15/16; Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to categories of franchise agreements [1988] O.J. L359/46.

ments mostly copied the permissible clauses from the Block Exemption Regulations to ensure their compatibility with competition law; there was little room for creativity.

It was only over the past 15 years that this approach has been considerably relaxed.³¹ The new vertical block exemption regulations (and accompanying guidelines) provide for a relatively permissive system.³² While even harmless vertical agreements may still be found to contain clauses that restrict competition in the meaning of Article 101(1) TFEU, the newer vertical block exemption regulations largely exempt vertical restraints across the board,³³ provided the market share thresholds are not exceeded³⁴ and the agreement does not contain any of the black-listed hardcore restrictions.³⁵ Even where the block exemption regulation does not apply, it is still possible to establish that the restriction is legally excepted under Article 101(3) TFEU if its requirements are fulfilled in the individual case.³⁶ The effects on interbrand and intrabrand competition are fully acknowledged, and efficiencies achieved by vertical restraints are taken into account.³⁷

Nevertheless, remaining differences between the EU approach and the US approach are often criticized as based on a poor understanding of antitrust principles.³⁸ The market integration objective is still mentioned in a prominent position.³⁹ The rules on online distribution are considered to be too restrictive.⁴⁰ The vertical Block Exemption

31 For an overview of the development of EU law on vertical restraints, see Gianluca Faella, *Vertical Agreements*, in *HANDBOOK ON EUROPEAN COMPETITION LAW – SUBSTANTIVE ASPECTS* 174, 189-194 (Ioannis Lianos & Damien Geradin eds., 2013); for a description of the current law, see *ibid.*, at 194-216.

32 First: Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, [1999] O.J. L336/21, and since June 1, 2010: Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] O.J. L102/1, with the accompanying *GUIDELINES ON VERTICAL RESTRAINTS*, [2010] O.J. C130/1.

33 Article 2 Regulation (EU) 330/2010.

34 Article 3 Regulation (EU) 330/2010 (where neither the supplier nor the buyer exceeds 30 per cent market share on the seller or buyer market, respectively).

35 Article 4 Regulation (EU) 330/2010 (some of these hardcore restrictions will be discussed below, e.g., minimum price fixing and absolute territorial restrictions restricting “passive” sales).

36 *GUIDELINES ON VERTICAL RESTRAINTS*, *supra* note 32, para. 96.

37 See, e.g., *GUIDELINES ON VERTICAL RESTRAINTS*, *supra* note 32, paras. 6, 96-127.

38 E.g., CSONGOR ISTVÁN NAGY, *EU AND US COMPETITION LAW: DIVIDED IN UNITY?: THE RULE ON RESTRICTIVE AGREEMENTS AND VERTICAL INTRA-BRAND RESTRAINTS*, ch. VI (vertical price restraints; on this, see below IV.), ch. VII (territorial restrictions), and *passim* (2013).

39 *GUIDELINES ON VERTICAL RESTRAINTS*, *supra* note 32, para. 7: “Assessing vertical restraints is also important in the context of the wider objective of achieving an integrated internal market. Market integration enhances competition in the European Union. Companies should not be allowed to re-establish private barriers between Member States where State barriers have been successfully abolished.” On the market integration objective, see Ioannis Lianos, *Some Reflections on the Goals of Competition Law*, in *HANDBOOK ON EUROPEAN COMPETITION LAW – SUBSTANTIVE ASPECTS* 1, 17-19 (Ioannis Lianos & Damien Geradin eds., 2013).

40 Regulation (EU) 330/2010 is silent on this particular aspect, but the *GUIDELINES ON VERTICAL RESTRAINTS* (*supra* note 32) contain a few observations (paras. 52-54). For more detail, see, e.g., ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *VERTICAL RESTRAINTS FOR ONLINE SALES*, DAF/COMP(2013)13 (Sept. 12, 2013), <http://www.oecd.org/daf/competition/VerticalRestraintsForOnlineSales2013.pdf> (including a background note by Paolo Buccrossi, concluding, at 39, that “[a]lthough the two jurisdictions are converging over time, the area of what in the EU are referred to as ‘hardcore restraints’ is still wider than in the US and the case law discussed above confirms that this is true also for the assessment of the organization of on-line sales”); Kyriakos Fountoukakos & Camille Puech-Baron, *Latest Developments in the European Union as Regards Online Sales and Selective Distribution: Confirmation of a Hard-Line Approach*, 17(2) *DISTRIBUTION NEWSLETTER—ABA ANTITRUST SECTION* (Feb.

Regulation, although in general quite permissive, does not, for example, allow a distributor to provide for *absolute* territorial protection: so-called “passive sales,” that is, where the customers from outside the allocated territory approach the distributor without the latter’s solicitation, may not be restricted.⁴¹ In the age of the Internet, where customers will find a distributor through search engines even where the distributor does not actively solicit these customers, the lack of the ability to restrict passive sales may severely undermine the allocation of exclusive territories to distributors.⁴² Where selective distribution is practiced, not even active sales to end users may be restricted.⁴³ This also means that a supplier practicing a selective distribution scheme may not ban marketing via the Internet.⁴⁴ More generally, absent special circumstances, no distributor may be banned from marketing via the Internet.⁴⁵ Where a supplier sells components to a buyer for incorporation in a product, the supplier may not restrict the buyer’s ability to sell these parts on as spare parts.⁴⁶ Again, however, it has to be pointed out that in all these cases of hardcore restrictions, it may still be possible to justify the restrictions in the individual case by showing that the elements of the legal exception in Article 101(3) TFEU are present (although the chances are arguably slim).

The upshot is that today the European situation with regard to vertical non-price restraints is not *very* different from that in the United States under *GTE Sylvania*. Some limitations on the supplier’s freedom to negotiate vertical non-price restrictions remain, but these arguably do not constitute a major departure from the general principle.

In the EU Member States, the same standards are applied.⁴⁷ This is largely mandated by EU law.⁴⁸ Whenever there is an agreement, a decision by an association of under-

2013) at 14; David Stein, *Online Distribution in the EU: The New Rules on Vertical Restraints and their Implications for Internet Retailing Across the Atlantic*, 15(1) DISTRIBUTION NEWSLETTER – ABA ANTITRUST SECTION (Jan. 2011) at 16; see also the contributions to the Bundeskartellamt’s 2013 workshop on “vertical restraints in the internet economy” (ARBEITSKREIS KARTELLRECHT, VERTIKALE BESCHRÄNKUNGEN IN DER INTERNETÖKONOMIE), <http://www.bundeskartellamt.de/wDeutsch/Veranstaltungen/AKK.php>.

41 Article 4(b)(i) of Regulation (EU) 330/2010 (making territorial restrictions a hardcore restriction that removes the benefit of the block exemption, but making an exception for the prohibition of *active* sales into exclusive territories).

42 Similarly, Faella, *supra* note 31, at 202.

43 Article 4(c) of Regulation (EU) 330/2010.

44 C-Case 439/09, *Pierre Fabre Dermo-Cosmétique v. Président de l’Autorité de la Concurrence*, [2011] ECR I-9419 (Court of Justice of the European Union).

45 GUIDELINES ON VERTICAL RESTRAINTS (*supra* note 32) para. 52 (“In principle, every distributor must be allowed to use the internet to sell products”).

46 Article 4(e) of Regulation (EU) 330/2010.

47 For the practice regarding vertical non-price restraints in the EU Member States, see, e.g., Andrés Font Galarza, Eryk Lucas Dziadykiewicz & Pablo Figueroa, *Exclusive Distribution: An Overview of EU and National Case Law*, in 2013 COMPETITION CASE LAW DIGEST 31-40 (Nicolas Charbit, Elisa Ramundo & Maly Op-Courtaigne eds., 2012); Stephen Kinsella & Rosanna Connolly, *Selective Distribution: An Overview of EU and National Case Law*, in 2013 COMPETITION CASE LAW DIGEST 41-49 (Nicolas Charbit, Elisa Ramundo & Maly Op-Courtaigne eds., 2012).

48 I am slightly simplifying. First, whenever the agreement is incapable of affecting trade between Member States, Member States are free to introduce stricter or more lenient rules (or none at all). However, the “affectation of trade” criterion is a very sensitive one, so that all but the most regionally limited restraints will trigger the application of EU law. In addition, EU Member States generally do not want to apply a stricter regime to these “regional” restraints. Secondly, EU law does not prevent Member States from having a national regime that is more lenient than EU law. However, where EU law applies, it will govern the result anyway. And implementing a more lenient regime only for those cases in which the affectation-of-trade-between-Member-States criterion is not fulfilled would require a difficult analysis in each case whether EU law applies or does not apply. Therefore, the national compe-

takings, or a concerted practice that may affect trade between Member States, the so-called “convergence rule” in Article 3(2) Regulation 1/2003 applies, and Member States may not prohibit such agreements (etc.) if they are not prohibited under EU law.⁴⁹ The substantive standards employed in *all* Member States with regard to vertical non-price restraints must be identical to the EU law standard.

There is one caveat, however. While Member States may not introduce *competition* law rules that prohibit vertical non-price agreements that are permissible under EU competition law, they may still prohibit such distribution agreements if the provision prohibiting the agreement pursues predominantly other objectives than the protection of competition.⁵⁰

3. US Distribution Restraints in State Law

As explained above, US federal antitrust law will not present a major challenge to the competition between different distribution strategies since the 1977 *GTE Sylvania* decision, and of all the issues discussed in this contribution vertical non-price restraints are the least controversial issue. The principle that stimulated interbrand competition may compensate the restriction in intrabrand competition resulting from vertical non-price restraints had already been recognized in some jurisdictions before the US crossed the aisle, and has now been accepted by the EU as well. As the US and EU models influenced jurisdictions across the world, the concept has been accepted practically everywhere.

And yet, as Dan Crane has pointed out,⁵¹ this is of little consolation to car manufacturers such as Tesla in the United States that want to introduce direct manufacturer-to-consumer sales but find themselves confronted with existing or proposed state laws requiring car manufacturers to sell through independently owned franchisees.⁵²

These restrictions, however, are relatively limited in scope; they are often confined to specific sectors, and leave the supplier in general free to employ vertical non-price restraints.⁵³

tion regimes in practically all Member States have copy-pasted the EU system of Article 101 TFEU without any, or with only minor, modifications. One of the few modifications is § 3 of the German ARC, which exempts some SME cooperation where some, but not necessarily all, of the elements of Article 101(3) TFEU are present. Where the agreement may affect trade between Member States, EU law applies and § 3 ARC is irrelevant for the result.

49 See *infra* Part VII.2.

50 Article 3(3) Regulation 1/2003, and Recital 9 to that Regulation. See *infra* Part VII.2.

51 Daniel Crane, *Tesla and the auto dealers lobby*, TRUTH ON THE MARKET (June 24, 2013), <http://truthonthemarket.com/2013/06/24/tesla-and-the-auto-dealers-lobby>.

52 For in-depth background information on these dealer laws in the car sector see Gerald R. Bodisch, *Economic effects of state bans on direct manufacturer sales to car buyers*, ECONOMIC ANALYSIS GROUP COMPETITION ADVOCACY PAPER EAG 09-1 CA, <http://www.justice.gov/atr/public/eag/246374.pdf>; Francine Lafontaine & Fiona Scott Morton, *State franchise laws, dealer termination, and the auto crisis*, 24(3) J. ECON. PERSP. 233-250 (Summer 2010). Since these papers were published, Tesla's lobbying efforts have eroded some, but by far not all of these state laws.

53 I do not want to be seen as trivializing this: anti-competitive state and local regulations are a source of great antitrust concern. The discussion, however, would lead us too far into the separate issue of the state action doctrine. See, e.g., Peter C. Carstensen, *Controlling Unjustified, Anticompetitive State and Local Regulation: Where is attorney general “Waldo”?*, 56 The Antitrust Bull. 771-821 (2011); D. Daniel Sokol, *Anticompetitive Government Regulation, in The Global Limits of Competition Law* 83 (Ioannis Lianos & Daniel Sokol eds. 2012); D. Daniel Sokol,

A much more general problem had temporarily arisen in Kansas. In a case concerning vertical *price* restraints, *O'Brien v. Leegin*,⁵⁴ the Kansas Supreme Court had done away with rule of reason analysis for *any and all* antitrust restrictions under the Kansas antitrust laws. After explaining that the rule of reason was established in Kansas in two cases, *Heckard*⁵⁵ and *Okerberg*,⁵⁶ the Kansas Supreme Court refused to apply the rule of reason to vertical price restraints for two reasons.

First, *Heckard* and *Okerberg* concerned different types of restraints, “for example, covenants not to compete and a requirements contract,” and could therefore be distinguished. If the Court had stopped here, *O'Brien* would only be of relevance to vertical price restraints.

Secondly, however, the Court went on to emphasize that the relevant provisions in the Kansas state antitrust laws prohibit “[a]ny such combinations” and “[a]ll arrangements, contracts, agreements, trusts or combinations . . .”, and that “this clear statutory language draws a bright line.”⁵⁷ The Court concluded that it was “loathe to read unwritten elements into otherwise clear legislative language . . .”,⁵⁸ and that accordingly “if the *Heckard* and *Okerberg* contracts were to come before us now, it is all but certain we would not append a requirement that an antitrust plaintiff demonstrate the unreasonableness of a defendant’s trade restraint . . . because the clear language of the governing statutes does not require it.”⁵⁹ In the absence of legislative intervention, “we have no confidence in the soundness of the *Heckard* language. . . .”⁶⁰ The Court finally concluded: “The clear statutory language of K.S.A. 50-101 and K.S.A. 50-112 leaves no room for such an approach [*scil.*: *the rule of reason*]. The reasonableness rubric of *Heckard* and *Okerberg* is overruled.”⁶¹

The statutes cited by the Kansas Supreme Court deal with agreed restraints in general, and not exclusively with pricing restraints. *O'Brien* subjected vertical and horizontal

Limiting Anti-Competitive Government Interventions That Benefit Special Interests, 17 GEO. MASON L. REV. 119 (2009); for an interesting new perspective on this issue, see Ioannis Lianos, Towards a bureaucracy theory of the interaction between competition law and state action, CLES Working Paper Series 3/2012, <http://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-3-2012>.

54 *O'Brien v. Leegin Creative Leather Prods.*, 294 Kan. 318, 277 P.3d 1062 (Kan. May 4, 2012); since repealed by New Section 1(c), introduced by enactment of Senate Bill No. 124, An Act concerning the Kansas restraint of trade act; amending K.S.A. 50-101, 50-112, 50-158 and 50-161 and repealing the existing sections; also repealing K.S.A. 50-108 and 50-115, available at http://kslegislature.org/li/b2013_14/measures/sb124/. When I refer to “post-” and “pre-*Leegin*” in this contribution, I mean the US Supreme Court decision (*infra* note 69); when I mean the Kansas decision, I will refer to “*O'Brien*.” For an extensive note on *O'Brien* and its implications, see Michael L. Fessinger, *A Century Behind? The Kansas Supreme Court Opts Out of the Rule of Reason in O'Brien v. Leegin Creative Leather Prods., Inc.* [277 P.3d 1062 (Kan. 2012)] 52 WASHBURN L.J. 323 (2013) (see *ibid.*, at 353-354, for an account of a previous, failed, attempt to repeal *O'Brien* through legislation).

55 *Heckard v. Park*, 164 Kan. 216, 223-24, 188 P.2d 926 (Kan., 1948).

56 *Okerberg v. Crable*, 185 Kan. 211, 217, 341 P.2d 966 (Kan. 1959).

57 *O'Brien*, *supra* note 54, at 342.

58 *Ibid.* at 348.

59 *Ibid.*

60 *Ibid.* at 349

61 *Ibid.*

agreements alike to a *per se* approach. Indeed, its literal approach eliminated the “rule of reason” under the Kansas antitrust laws altogether—it appears that the tinkering with the language of the Sherman Act by inserting a “standard of reason” in *Standard Oil* was too much for the Kansas Supreme Court,⁶² and it seems that the Kansas Supreme Court sided with *Trans-Missouri Freight*⁶³ and Justice Harlan.⁶⁴ To the extent that Kansas law applied, a party that made use of the freedom granted by *GTE Sylvania* to engage in reasonable vertical non-price restraints exposed itself, among other things, to treble damages suits—until the Kansas legislature eventually re-introduced the rule of reason with effect from 18 April 2013.⁶⁵

Had the *O’Brien* decision not been repealed, this would have been a stricter approach to vertical restraints than was ever practiced in Europe. Not only were treble damages never at issue in Europe, but vertical restraints could, even when caught by Article 101(1) TFEU, always be exempted where the requirements of Article 101(3) TFEU were established. The *O’Brien* approach was certainly a more draconian approach than that of the modern vertical Block Exemption Regulations that now govern the result both on the EU level and on the Member States level; the few remaining limits on the supplier’s freedom to agree vertical restraints pale in comparison to the *per se* approach that now governed even vertical non-price restraints in Kansas between 2012 and 2013.

IV. Vertical Price Restraints

1. The Position of Conceptual Purity: *State Oil v. Khan* and *Leegin*

The application of the *GTE Sylvania* reasoning to vertical *price* restraints took a while longer.⁶⁶ Vertical price restraints were considered to be prohibited *per se* under US federal antitrust law until 1997.⁶⁷ Then, of course, *State Oil v. Khan* switched to a rule

62 *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911) (“[I]t inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.”).

63 *United States v. Trans-Missouri Freight Ass’n* 166 U.S. 290, 312 *et seq.* (1897).

64 Concurring Opinion in *Standard Oil*, *supra* note 62, at 85 *et seq.*

65 New Section 1(c), *supra* note 54.

66 Germany had in the ARC 1958 excepted brand manufacturers from the prohibition of resale price maintenance (until 1973, when the exception was repealed). Even under the Allied decartelization laws, the Allied authorities had, on request by the German authorities, agreed not to prosecute resale price maintenance practiced by brand manufacturers in anticipation of the planned rule in the Bill for the ARC (so-called *Willner* letter, dated December 18, 1952, reprinted in *WIRTSCHAFT UND WETTBEWERB* 923 (1952)). For a description of the “rule of reason” analysis practiced by some German courts in the time between 1952 and 1958, see MESTMACHER, *supra* note 24, at 119–122.

67 *Dr. Miles Med. Co. v. John D. Parker & Sons Co.*, 220 U.S. 373 (1911) (vertical minimum price fixing prohibited *per se*); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (vertical maximum price fixing also prohibited *per se*).

of reason approach for vertical *maximum* prices,⁶⁸ and, in 2007, *Leegin* completed the charm by adopting the rule of reason even for vertical *minimum* prices.⁶⁹ The interference with the freedom to use price as a parameter to influence distribution practices was considered objectionable; after all, maximum prices might serve to keep prices low, so as to avoid price gouging by greedy exclusive distributors,⁷⁰ and minimum prices could incentivize distributors to offer better pre-sale services.⁷¹

Since then, *all* vertical restraints are assessed under a rule of reason standard with the possible exception of tying, towards which—at least for the time being—a qualified per se approach is generally adopted, which requires a showing of market power.⁷²

2. Europe: Vertical Price Fixing as a Hardcore Restraint— and an Enforcement Priority?

Where vertical *price* restraints are concerned, the contrast between EU and US law was and is pronounced.⁷³ Traditionally, practically all vertical price fixing used to be treated as an object restriction in Europe. Resale price maintenance was neither exempted under block exemption regulations, nor was it generally possible to receive an individual exemption.

Again, since 1999 the newer generation of vertical block exemption regulations has brought a certain approximation to the US position. These newer block exemption regulations follow the *State Oil v. Khan* example and exempt vertical *maximum* prices (and price recommendations) for undertakings that stay below the relevant market share thresholds.⁷⁴ Vertical *minimum* price fixing, however, is still treated as a hardcore restriction.⁷⁵ The possibility of implementing a legal vertical minimum price fixing

68 *State Oil v. Khan*, 522 U.S. 3 (1997).

69 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). For criticism of this move to a rule of reason, see e.g., Richard M. Brunell, *Overruling Dr. Miles: The Supreme Trade Commission in Action*, 52 THE ANTITRUST BULLETIN 475-529 (2007); Roger D. Blair, *The Demise of Dr. Miles: Some Troubling Consequences*, 53 THE ANTITRUST BULLETIN 133-151 (2008); but see Lino A. Graglia, *Leegin Creative Leather Products, Inc., v. PSKS, Inc.: The strange Career of the Law of Resale Price Maintenance*, 53 THE ANTITRUST BULLETIN 803-847 (2008).

70 *State Oil v. Khan*, 522 U.S. 3, 18 (1997).

71 This is not the place to discuss the pros and cons of resale price maintenance in any depth. Provided interbrand competition works effectively, and it is not impaired due to manufacturer or dealer collusion, there is no reason to fear either vertical non-price or vertical price restraints. And if interbrand competition does not work effectively, the rule of reason should bite—at least in theory. And yet, the very argument of the majority opinion in *State Oil v. Khan* that exclusive distributors may need disciplining through maximum prices set by the manufacturer (*supra* note 70) makes the implicit assumption that these prices are not sufficiently kept in check by interbrand competition or rule of reason enforcement alone.

72 *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-18 (1984); *Illinois Tool Works v. Independent Ink*, 547 U.S. 28 (2006) (rejecting a presumption of market power from the mere fact that the tying product was patented); *Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590, 593-594 (7th Cir. 2008); but see *US v. Microsoft Corp.*, 253 F.3d 34, 89-95 (D.C. Cir., 2001) (discussing the merits of a qualified per se and rule of reason approach to tying in the special context of platform software markets, and applying, exceptionally, the rule of reason).

73 KOVACIC, *supra* note 5, at 12.

74 Article 4(a) Regulation (EU) 330/2010.

75 *Ibid.*

scheme where it fulfills the requirements of Article 101(3) TFEU in the individual case⁷⁶ is arguably a theoretical one.⁷⁷

As already mentioned, and discussed below in more depth,⁷⁸ EU Member States may not employ stricter standards than EU law whenever there is an agreement, a decision by an association of undertakings, or a concerted practice that may affect trade between Member States (the ‘convergence rule’ in Article 3(2) Regulation 1/2003). So, the substantive standards employed in *all* Member States with regard to vertical price restraints must be identical to the EU law standard, at least where the agreement (etc.) may affect trade between Member States.⁷⁹ However, while the Commission does not appear to enforce minimum resale price maintenance vigorously, the Member States appear to treat vertical minimum price fixing cases as an *enforcement priority* in recent years, imposing fines of a magnitude comparable to that of fines for the participation in hardcore horizontal cartels.⁸⁰

3. US State Law on Resale Price Maintenance

After *State Oil v. Khan* and *Leegin* decided that the rule of reason would apply to vertical price restraints, commentators swiftly pointed to this authority to bolster their argument that the *per se* rule against vertical price fixing in Europe should be abandoned.⁸¹ As indicated above, the argument based on the 1997 *State Oil v. Khan* case

76 GUIDELINES ON VERTICAL RESTRAINTS (*supra* note 32) paras. 223-229.

77 FAELLA, *supra* note 31, at 199, 200.

78 Part VII.2.

79 For a synthesis of the application of the competition rules to resale price maintenance, see Derek Ridyard, *Resale Price Maintenance: An overview of EU and national case law*, in 2013 COMPETITION CASE LAW DIGEST 51-60 (Nicolas Charbit, Elisa Ramundo & Maly Op-Courtaigne eds., 2012).

80 For the United Kingdom, see, e.g., Press Release, Office of Fair Trading, OFT issues Statement of Objections to sports bra supplier and three UK department stores (September 20, 2013) (statement of objections sent to the sports bra supplier DB Apparel UK Ltd., Debenhams, John Lewis, and House of Fraser, alleging resale price maintenance agreements); see also Greg Shaffer, *Anti-Competitive Effects of RPM (Resale Price Maintenance) Agreements in Fragmented Markets*, prepared for the Office of Fair Trading (February 7, 2013), http://www.offt.gov.uk/shared_offt/research/RPM.pdf. For Germany, see, e.g., Press Release, Bundeskartellamt, Bußgeld gegen die WALA Heilmittel GmbH wegen vertikaler Preisbindung bei Dr. Hauschka-Kosmetik (July 31, 2013) (fines of €6.5m against WALA Heilmittel and responsible individuals for resale price maintenance—compare the amount of the fine with a nearly contemporaneous €10m fine for participation in a hardcore price-fixing cartel against Moravia Steel, Press Release, Bundeskartellamt (July 11, 2013)); Press Release, Bundeskartellamt, Bundeskartellamt verhängt Bußgeld gegen TTS Tooltechnic wegen vertikaler Preisbindung (August 20, 2012) (fine of €8.2m against TTS Tooltechnic for resale price maintenance; for more information, see also the summary of the decision in Fallbericht, October 8, 2012, Case B5-20/10); Press Release, Bundeskartellamt, Bundeskartellamt verhängt Bußgeld gegen Hörgerätehersteller Phonak GmbH (October 15, 2009) (fine of €4.2m against manufacturer of hearing aids for resale price maintenance); Press Release, Bundeskartellamt, Bundeskartellamt verhängt Bußgeld gegen CIBA Vision (September 25, 2009) (fine of €11.5m against producer of contact lenses that practiced resale price maintenance by contacting distributors that deviated from recommended prices); for scathing criticism of the German fixation on resale price maintenance, see Albrecht Bach, *Form-based Approach at its Best—German FCO Re-discovers Old Rules on Recommended Resale Prices*, 1 J. EUR. COMPETITION L. & PRACTICE 241-244 (2010); Wernhard Möschel, *Markenartikel und vertikale Kooperation*, WIRTSCHAFT UND WETTBEWERB 1229-1237 (2010). Austria has recently published a consultation, cf. Austria: The Federal Competition Authority (FCA) launches Public Consultation on Draft Guidelines regarding Vertical Price Fixing, ECN BRIEF 03/2013 (July 2013), http://ec.europa.eu/competition/ecn/brief/03_2013/au_vertgl.pdf. For the enforcement practice in other EU Member States, see Ridyard, *supra* note 79.

81 Alison Jones, *Completion of the Revolution in Antitrust Doctrine on Restricted Distribution: Leegin and Its Implications for EC Competition Law*, 53(4) THE ANTITRUST BULLETIN 903 (Winter 2008); eadem, *Resale Price Maintenance: A Debate About Competition Policy in Europe?*, 5(2) EUROPEAN COMPETITION JOURNAL 479 (2009); Peter Gey & Hans-Georg Kamann, *The assessment of minimum resale price maintenance in Europe in the aftermath*

regarding vertical *maximum* price fixing was accepted in the 1999 vertical Block Exemption Regulation, but the argument based on the 2007 *Leegin* decision regarding vertical *minimum* price fixing failed in the 2010 revision of the Regulation.

And yet, these commentators rarely raised the question whether firms could, post *Leegin*, actually put their price maintenance schemes in action in the United States.⁸² The answer to this question depends on the state law of all the states in which the firm in question wants to practice the scheme—or more accurately, all the states whose commerce is affected to a sufficient degree for those states’ laws to apply.⁸³

So what is the state law on this issue in the several states? The situation varies from state to state, and is currently not settled in most states. The clarification of the legal position requires the state legislatures or the state courts to decide the issue by statute or decision handed down *after Leegin*.⁸⁴ Unless this has happened, various scenarios can be distinguished.

a. General State Rule with or without Pre-Khan/Leegin Precedent

The most common scenario is that the state antitrust statute includes as the relevant rule for vertical price constraints only a basic prohibition against anticompetitive contracts, combinations, or conspiracies, more or less⁸⁵ closely modeled on § 1 Sherman Act. In these cases, one has to distinguish two sub-scenarios.

- In some states, there is no state precedent on vertical price restraints under these state quasi-“§ 1 equivalents.” Because practically all state antitrust laws choose to follow the interpretation of the federal antitrust laws to the extent that state law does not clearly require a divergent interpretation, it is very likely—though

of *Leegin*, ZEITSCHRIFT FÜR WETTBEWERBSRECHT (ZWeR) 208 (2008); Möschel, *supra* note 80; BORIS KASTEN, HOCHSTPREISBINDUNGEN (2005) (on maximum price fixing); Boris Kasten, *Vertikale (Mindest-) Preisbindung im Licht des “more economic approach”*, WIRTSCHAFT UND WETTBEWERB 994-1007 (2007) (on minimum price fixing post *Leegin*). See recently Nagy, *supra* note 38, ch. VI.

82 But see JONES, *Completion*, *supra* note 81, at 964-965 (warning, with great premonition, that (1) one would have to await how the rule of reason would be applied, and (2) that “U.S. firms will also have to be mindful of state antitrust or unfair competition laws, which may be interpreted differently from the federal antitrust laws and which may still condemn RPM *per se*.” (internal citation omitted)); identically eadem, *Resale Price Maintenance*, *supra* note 81, at 514.

83 I will return to the question whether federal law preempts these state laws later (*infra* VII.). The quick answer for now is that state laws are given wide leeway even in prohibiting conduct that is considered beneficial by the federal antitrust laws.

84 Helpfully, one author has compiled a table of state antitrust statutes and cases dealing with such RPM issues, starting with Michael A. Lindsay, *Overview of State RPM (Complete)*, ANTITRUST, Fall 2007, 1; see also the accompanying articles, e.g., Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, ANTITRUST SOURCE (Oct. 2009), 1; idem, *Repatching the Quilt: An Update on State RPM Laws*, ANTITRUST SOURCE (Feb. 2014), 1 (further references *ibid.*, in note 3). The table is regularly updated, see https://www.americanbar.org/publications/the_antitrust_source.html (under supplementary materials).

85 Some state statutes differ in that they prohibit contracts that, for example, “control” or “maintain” prices (or use similar language). See, e.g., Conn. Gen. Stat. Ann. § 35-28(A); Haw. Rev. Stat. § 480-4(b)(1); Ill. Comp. Stat. Ann. 10/3(1)(A); Kan. Stat. Ann. § 50-112; Minn. Stat. Ann. § 325D.53, Subdiv. 1(1)(a); Mont. Code Ann. § 30-14-205; Nev. Rev. Stat. Ann. § 598A.060; N.H. Rev. Stat. Ann. § 356:2. This language could indicate a slightly greater willingness to catch vertical restraints as well; after all, “price maintenance” is usually shorthand for vertical price fixing schemes. However, one can still argue that (i) the statutes do not explicitly say that such agreements are prohibited *per se*, and that therefore (ii) “controlling” or “maintaining” prices should only be prohibited *per se* when agreed between competitors. The wording of Ohio Rev. Code Ann. § 1331.01(B)(4) arguably sufficiently diverges from the wording of the Sherman Act to opt for an interpretation prohibiting vertical price restraints *per se*, if the courts so choose.

not certain—that in these states vertical price restraints will now be treated under the rule of reason, just as they are under federal law.⁸⁶

- In other states, courts have pronounced vertical price restraints to be *per se* illegal under the state “§ 1 equivalent” during the time when vertical price restraints were still prohibited *per se* on the federal level. Where these states’ laws apply, it seems slightly riskier for firms to implement their price maintenance schemes in reliance on the change in the law in *Leegin*.⁸⁷

I would suspect that the courts even in the latter category of states would generally follow the federal antitrust laws’ U-turn in *Leegin*. Nevertheless, it is at least possible that the pre-*Khan/Leegin* decisions under state law are considered to reflect the state law’s position for the future.

And indeed, not only had one state, Kansas, decided post *Leegin* that vertical price fixing is *per se* illegal under state antitrust law, although this was later reversed by legislation, but also is there some evidence in several other states—including populous and commercially important states such as New York, Michigan, and Illinois—suggesting that state law may continue to consider vertical price fixing to be a *per se* violation.⁸⁸

In Kansas, the Supreme Court had held in the *O’Brien* judgment, discussed above in the context of vertical non-price restraints, that Kansas law prohibits vertical price maintenance agreements *per se*.⁸⁹ It is a telling facet that the case was one against *Leegin Creative Leather Products* itself—which shows that winning on the federal level is not enough.

86 In particular, there are very few post-*Leegin* decisions under state law that extrapolate from the US Supreme Court’s interpretation of the Sherman Act in *Leegin* to state law. But see *Spahr v. Leegin Creative Leather Prods.*, 2008 WL 3914461, 2009-1 Trade Cases § 76,566 (E.D. Tennessee 2008), where a federal district court took an (educated) guess that Tennessee courts would follow the US Supreme Court’s *Leegin* decision:

At issue in this case are minimum resale price maintenance agreements and, so far as this Court can tell, no Tennessee court has ever analyzed the application of the TTPA to such agreements. Therefore, the Court is without guidance from any reported Tennessee decision on the question of whether the Tennessee courts will analyze resale price maintenance agreements as horizontal restraints which are *per se* illegal or under the rule of reason. The plaintiffs suggest, without any citation of authority or analysis, that the Tennessee courts will not follow the Supreme Court’s holding in *Leegin*. Defendant, on the other hand, suggests that the Tennessee courts are likely to do just that in view of the fact that every Tennessee case decided under the TTPA has relied heavily on federal precedent. . . . This Court finds defendant’s argument to be persuasive.

Ibid. at *13-14. Similarly, for Illinois law, *House of Brides, Inc. v. Alfred Angelo, Inc.*, 2014 WL 64657 (N.D.Ill., January 8, 2014). *Contra, O’Brien*, *supra* note 54, and discussion in the accompanying text (considering resale price maintenance *per se* illegal under Kansas state law, despite a lack of pre-*Leegin* case law to that effect; repealed by legislation in April 2013).

87 See, e.g., *infra* nn. 90-92 and accompanying text for the possibility of post-*Leegin per se* illegality in *California*.

88 *House of Brides* has since held that Illinois Antitrust Law follows *Leegin*’s interpretation (*supra* note 86 and *infra* note 96). In addition to the cases brought under state law in the states mentioned (see text following this footnote), the state attorneys general of the following states emphatically supported legislative reversal of the *Leegin* decision, which may make an aggressive enforcement of state laws more likely: Arkansas, Hawaii, Oregon, Arizona, California, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Utah, Vermont, West Virginia, and Wyoming. See the Communication of the Chief Legal Officers of these states (May 14, 2008), http://www.naag.org/assets/files/pdf/signons/antitrust.AG_Letter_Supporting_S2261.pdf.

89 See the citation *supra* in note 54, and the discussion in the text following that footnote.

In California, there was pre-*Leegin* case law under the Cartwright Act holding vertical price fixing to be *per se* illegal.⁹⁰ Commentators have argued that this line of precedent is obsolete in the face of *Leegin*.⁹¹ However, when a federal District Court was confronted with the question whether vertical price fixing remains *per se* illegal in 2013, the Court declined to assume that state courts would automatically follow the *Leegin* decision in their interpretation of the Cartwright Act:

[*Leegin* involved an interpretation of a federal statute, not the Cartwright Act. Under current California Supreme Court precedent, vertical price restraints are *per se* unlawful under the Cartwright Act [citing *Mailand*]. There is no indication that precedent is changing [citing *Chavez*]. While the California Supreme Court's decision in *Mailand* did rely on Supreme Court authority, there is some indication that the opinion was derived from California authority as well [citing *Mailand*'s reference to *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 172 P.2d 867, 873 (Cal.1946)]. In any event, simply because the Supreme Court has changed course regarding the Sherman Act does not mean the California Supreme Court will regarding the Cartwright Act. Until the California Supreme Court has given a persuasive indication that it will, the Court cannot simply disregard its decision. See *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236, 61 S.Ct. 179, 85 L.Ed. 139 (1940) (“[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted.”).⁹²

In addition, the State of California pursued vertical price fixing claims in 2010 and 2011, evidently as *per se* violations; these cases were settled.⁹³

90 *Mailand v. Burckle*, 20 Cal.3d 367, 143 Cal. Rptr. 1, 572 P.2d 1142, 1147 (Cal. 1978); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 113 Cal. Rptr.2d 175, 180 (Cal. App.2d Dist. 2001).

91 James M. Mulcahy, *California Courts are Beginning to Reexamine their Outdated Decisions Addressing Vertical Price and other Distribution Restraints under the Cartwright Act*, 17(2) DISTRIBUTION NEWSLETTER – ABA ANTITRUST SECTION (Sept. 2013) at 8, 13, 14, 16-25 (concluding that *Mailand* “is no longer binding law”, but that it remains to be seen whether California courts follow *Leegin*, and listing lower courts’ decisions that indicate a departure from *Mailand*).

92 *Alan Darush MD APC v. Revision LP*, 2013 WL 1749539 (C.D. Cal. April 10, 2013); this decision dismissed the complaint with leave to amend, and the amended complaint reportedly survived the motion to dismiss, see *Lindsay, Repatching the Quilt* (*supra* note 84), 1-3, citing *Darush MD APC v. Revision LP* (Darush II), No.12-cv-10296 (C.D. Cal. July 16, 2013). Similarly, *Alsheikh v. Superior Court*, 2013 WL 5530508 (Cal.App. 2 Dist., October 7, 2013) (“if there were vertical price fixing, that would, under *Mailand v. Burckle*, *supra*, 20 Cal.3d 367, be a *per se* violation under the Cartwright Act, notwithstanding a change of law under the Sherman Antitrust Act [citing to *Leegin*]”).

93 *The People of the State of California v. DermaQuest*, Final Judgment, Case No. RG 10497526 (Cal. Super. Ct. Alameda County Feb. 23, 2010), available at <http://apps.alameda.courts.ca.gov/domainweb/service?ServiceName=DomainWebService&TemplateName=jsp/imgviewer.html&rofaid=03/02/10&Action=24150019> (consent judgment in which DermaQuest was enjoined from engaging in resale price maintenance and undertook to disavow its resale price maintenance agreements (para. 4 of the judgment) and to pay to the State of California \$70,000 as a civil penalty and \$50,000 for investigation costs and attorney fees (paras. 5, 6 of the judgment)); *The People of the State of California v. Bioelements*, Final Judgment, Case No. 10011659 (Cal. Super. Ct., Riverside County, filed Jan. 11, 2011), available at http://ag.ca.gov/cms_attachments/press/pdfs/n2028_bioelements_final_judgment.pdf (consent judgment on substantially the same terms, the civil penalties being in this case \$15,000 and the investigation costs and attorneys fees \$36,000).

The States of New York, Illinois, and Michigan similarly filed a complaint, post *Leegin*, against the resale price maintenance practiced by Herman Miller under their state antitrust laws.⁹⁴ The case was settled by consent decree without an admission of wrongdoing or liability; Herman Miller was enjoined from practicing resale price maintenance schemes and agreed to pay \$750,000 to the states.⁹⁵ There is no allegation that Herman Miller had substantial market power; the theory of the complaint seems to have been that resale price maintenance is prohibited *per se* under the state antitrust laws of New York, Illinois, and Michigan.⁹⁶ While the position under New York's antitrust statute, the Donnelly Act, is not yet clear,⁹⁷ resale price maintenance agreements are definitely *unenforceable* in New York.

Similarly, though not quite as unambiguously, a Louisiana Court of Appeal stated in a 2011 *obiter dictum* that “[w]here the alleged restrictions are vertical, and not directed at fixing prices, their legality is governed by the rule of reason . . .”,⁹⁸ referring to a

94 Specifically, the complaint alleged violations of N.Y. Gen. Bus. Law §§ 340, 342, and 342-a; 740 Illinois Compiled Statutes 10/3; and Mich. Comp. Laws Ann. §§ 445-771 *et seq.* See Complaint, available at http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/antitrust/08_cv_02977_Complaint.pdf, paras. 47-49.

95 State of New York, State of Illinois, State of Michigan v. Herman Miller, No. 08 Civ. 2977 (S.D.N.Y. filed Mar. 25, 2008), available at http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/antitrust/Signed_FJ.pdf (final judgment and consent decree in which Herman Miller was enjoined from entering into resale price maintenance agreements and, without admitting wrongdoing or liability, undertook to pay \$750,000).

96 It has recently been held that the Illinois Antitrust Act is to be interpreted in line with *Leegin*. House of Brides, Inc. v. Alfred Angelo, Inc. 2014 WL 64657 (N.D. Ill., January 8, 2014). Even before *House of Brides*, *Lindsay* had already doubted that the Herman Miller consent decree properly reflects the state of the law in Illinois. *Lindsay*, State Resale Price Maintenance Laws, *supra* note 84, at 4. According to *Lindsay*, the *Gilbert's Ethan Allen Gallery* case established that under Illinois state law vertical price restraints are not illegal *per se*. *Ibid.* citing *Gilbert's Ethan Allen Gallery v. Ethan Allen*, 620 N.E.2d 1349, 1350, 1354 (Ill. App. Ct. 1993), *aff'd* 642 N.E.2d 470 (Ill. 1994). However, that case concerned the unilateral termination of a distributor, allegedly because that distributor was unwilling to adhere to the suggested resale prices. While the judgment contains a few *obiter dicta* that may indirectly cast doubt on the wisdom of treating vertical price restraints practiced in a competitive market as a *per se* violation (620 N.E.2d 1349, at 1354, stating that *per se* agreements are “normally” agreements between competitors), the case was decided exclusively on the basis of the state statute that corresponds to Sherman Act § 2. This was, unsurprisingly, held to require a rule of reason analysis. *Gilbert's* does not establish that a vertical agreement fixing prices would require a rule of reason analysis.

97 In New York, there is pre-*Leegin* case law that resale price maintenance is *per se* prohibited. *Worldhomecenter.com, Inc. v. Franke Consumer Prods.*, 2011 WL 2565284 (S.D.N.Y. 2011) cites *George C. Miller Brick v. Stark Ceramics*, 770 N.Y.S.2d 235, 2004-1 Trade Cases § 74,249 (App. Div. 4th Dep 2003) for this proposition; from the mere text of that decision, however, it is impossible to see whether the conduct complained of concerned vertical price fixing, and the contested N.Y. Supreme Court decision is unavailable. In *Worldhomecenter.com*, a federal district court considered it likely that New York courts would follow *Leegin* under the Donnelly Act, but held that the issue needs not be decided given that the restriction complained of concerned *advertised*, rather than *actual* resale prices. *Worldhomecenter.com* claims (at *3) that “[w]hile the Court is not aware of any New York State case dealing with vertical price maintenance claims under the Donnelly Act post-*Leegin*, at least a few federal courts assessing Sherman Act and Donnelly Act claims have applied *Leegin* to require a rule of reason analysis under both statutes. See *Arista Records, LLC v. Lime Group LLC*, 532 F.Supp.2d 556, 570, 581 (S.D.N.Y. 2007); *Gatt Communications, Inc. v. PMS Associates, LLC*, 2011 WL 1044898 at *4 (S.D.N.Y. March 10, 2011).” As the introductory clause in this quote indicates, none of these citations is on point. *Arista* did not apply *Leegin* to the Donnelly Act. While *Leegin* is cited in *Arista*, the court did not comment on whether or not it could be applied to the Donnelly Act. The claim based on resale price maintenance was rejected because a competitor cannot show *antitrust injury* based on an allegation of its competitors’ *minimum* pricing. In *Gatt*, the plaintiff alleged that the supplier had terminated Gatt’s distributorship after Gatt refused to continue participation in a bid-rigging scheme. The District Court in *Gatt* (since affirmed by *Gatt Communications, Inc. v. PMC Associates*, 711 F.3d 68 (2d Cir. Feb. 14, 2013), while citing *Leegin* and applying a rule of reason analysis to the Donnelly Act claim, did not discuss the position of New York law on resale price maintenance in detail.

98 *Van Hoose v. Gravois*, 70 So.3d 1017, 1022, 2011-0976 (La. App. 1 Cir. 2011) (emphasis added).

1981 decision by the 5th Circuit applying Louisiana law.⁹⁹ Given that the case before the Court concerned *non-price* restrictions, the proviso regarding vertical price fixing in a dictum may have been an inadvertent slip of the pen, an attempt to stay faithful to the cited opinion, and not a conscious decision to except vertical price fixing from the rule of reason treatment.¹⁰⁰ However, given the scarcity of decisions clarifying the state antitrust laws in general and Louisiana antitrust law in particular,¹⁰¹ the indication that the *per se* rule may apply to vertical price fixing may become significant in future cases.

b. States That Prohibit Vertical Minimum Price Fixing with Explicit Language (No, Not That Sort of Explicit)

In addition to the states in which there is post-Leegin evidence that vertical price fixing continues to be viewed as a *per se* violation, some states use language in their statutes that seems unambiguous in its condemnation of vertical price restraints.

Maryland is the clearest case. It is, at least so far, the only state that has made a conscious decision post-Khan/Leegin to outlaw vertical minimum price restraints by statute. The Maryland antitrust laws provide that any contract, combination or conspiracy “that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service” is considered to be an unreasonable restraint of trade or commerce.¹⁰² There are attempts in other states and even on the federal level to introduce such “Leegin Repealers.”¹⁰³

Other states also have provisions that deal explicitly with vertical price restraints, though not under their antitrust laws but under contract law. For example, vertical price fixing agreements are unenforceable under New York and New Jersey law.¹⁰⁴ It

99 Red Diamond Supply v. Liquid Carbonic Corp., 637 F.2d 1001, 1005, text accompanying and in note 6 (5th Cir. 1981), where the 5th Circuit stated in an *obiter dictum* that vertical price fixing was prohibited *per se* under federal law, which was held to be a proxy for Louisiana law (*ibid.* at 1003).

100 The following statement, preceding the statement which seems to except vertical price fixing from the rule of reason, could indicate that the Louisiana court considered all vertical restraints to be governed by the rule of reason: “When a vertical conspiracy is alleged, plaintiffs must show that the restraint of trade violates the ‘rule of reason’” (*Van Hoose*, *supra* note 98, at 1022, citing, however, to *Plaquemine Marine, Inc. v. Mercury Marine*, 859 So.2d 110, 118 (La. App. 1st Cir. 2003), a case that concerned a vertical *non-price* restraint, and which in turn cited to the *State Oil v. Khan* case; federal law would not, in 2003, have justified a statement that *all* vertical restraints are governed by the rule of reason).

101 For Louisiana, see *Red Diamond Supply*, *supra* note 99, at 1003 (“There is very little case law construing or applying Louisiana antitrust statutes and none that is particularly helpful to us in this case.”); for Kansas, see *O’Brien*, *supra* note 54, at 322 (“Kansas’ antitrust law under the KRTA, originally enacted in 1897, remains largely undeveloped; very few cases have reached this court. We have observed generally that the KRTA is broad in scope but that the bulk of its provisions have not been meaningfully interpreted by Kansas courts.” (internal citations omitted)). The same is arguably true for most state antitrust laws, with the possible exceptions of New York’s Donnelly Act and California’s Cartwright Act.

102 Md. Code Ann. Com. Law § 11-204(b).

103 See Alan J. Meese, *Assorted Anti-Leegin Canards: Why Resistance Is Misguided And Futile*, 40 FLA. ST. U. REV. 907, 931-933 (2013).

104 N.Y. Gen. Bus. Law § 369-a (“§ 369-a. Price-fixing prohibited. Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.”); N.J. Stat. Ann. § 56:4-1.1 (“§56:4-1.1. *Contracts to restrain resale of commodity at lower than stipulated price; unenforceability.* Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.”). For an application of the New York statute, see *People ex rel. State*

should be noted that these contract law statutes merely deny the vertical minimum price fixing agreements enforceability and actionability; they do not make the agreement illegal, entail criminal sanctions, or support treble damages claims.¹⁰⁵ While the comparative analysis must take into account both antitrust laws and contract law rules, the different remedial consequences have to be acknowledged.

c. Summary

Even post *Leegin*, a supplier that wants to establish a nationwide, or at least interstate, price maintenance scheme in the United States faces hurdles in a substantial number of states. The scheme would definitely be found to infringe the antitrust laws, with all its harsh remedial consequences, in Maryland¹⁰⁶ and Kansas.¹⁰⁷ In New York¹⁰⁸ and New Jersey,¹⁰⁹ the scheme is definitely unenforceable under contract law; at least in New York it is also quite possibly illegal under the Donnelly Act.¹¹⁰ The scheme would also likely be considered illegal in Michigan,¹¹¹ and California,¹¹² though no longer in Illinois.¹¹³ Together, these states in which the scheme is certainly or likely unenforceable

v. Tempur-Pedic Intern., Inc., 30 Misc.3d 986, 916 N.Y.S.2d 900, 2011-1 Trade Cases § 77,311 (N.Y. Sup. 2011), *aff'd*, 95 A.D.3d 539, 944 N.Y.S.2d 518 (N.Y. App. Div. May 8, 2012) (holding that N.Y. Gen. Bus. Law § 369-a makes any vertically price-fixing contract unenforceable but not illegal); *see also* *Worldhomecenter v. Franke Consumer Prods.*, *supra* note 97 (§ 369-a makes agreement unenforceable but not illegal). The consent decree in *Herman Miller*, *supra* note 95, suggests that vertical price fixing may additionally be *illegal* under the Donnelly Act, but in *Tempur-Pedic*, the Attorney General chose to rely exclusively on N.Y. Gen. Bus. Law § 369-a (leading to speculation that this was done “perhaps out of concern that the court would interpret the Donnelly Act in light of the Supreme Court’s *Leegin* ruling”, DOUGLAS F. BRODER, *US ANTITRUST LAW AND ENFORCEMENT* 59 in note 111 (2nd edn. 2012)). The *New Jersey* statute was only briefly mentioned in an *obiter dictum* in *Exit A Plus Realty v. Zuniga*, 930 A.2d 491, 497 (N.J. Super. Ct. App. Div., September 5, 2007) (mentioning N.J. Stat. Ann. § 56:4-1.1 as an example of a statutory provision that clearly makes the agreement automatically unenforceable, rather than making it only voidable). It has been remarked that the decision does not mention *Leegin* (Michael A. Lindsay, *Overview of State RPM*, *THE ANTITRUST SOURCE* (April 2013) at x), but it is unclear why it should have—quite apart from the limited purpose for which the provision was cited, the *Leegin* decision is completely irrelevant for the interpretation of a statute that makes such an agreement explicitly unenforceable under *contract law*. This, of course, is precisely the point to which I am trying to draw attention in this contribution—that non-antitrust laws are treated as a separate category but may, of course, have an effect on the balance supposedly achieved by the antitrust laws.

105 *People of the State of New York v. Tempur-Pedic Int’l*, 95 A.D.3d 539, 540, 944 N.Y.S.2d 518, 519 (N.Y. App. Div. May 8, 2012) (“[The] statutory language makes clear that an action may not be maintained in a court of law to enforce such a provision. However, there is nothing in the text to declare those contract provisions to be illegal or unlawful; rather the statute provides that such provisions are simply unenforceable in the courts of this state.”).

106 U.S. Census Bureau estimate of the 2012 population: slightly below 6m. For the post-*Leegin* statute explicitly outlawing resale price maintenance in Maryland, *see supra* note 102.

107 2012 population estimate: slightly below 3m. For the *O’Brien* decision, *see supra* note 54.

108 2012 population estimate: about 19.5m. For the New York statute making resale price maintenance unenforceable, *see supra* note 92.

109 2012 population estimate: slightly below 9m. For the New Jersey statute making resale price maintenance unenforceable, *see supra* note 104.

110 As indicated in the Herman Miller consent decree, *supra* note 95; but *see Worldhomecenter.com v. Franke Consumer Prods.*, *supra* note 97, indicating, in an *obiter dictum*, a preference for a rule of reason approach under the Donnelly Act.

111 2012 population estimate: slightly below 10m. For Michigan’s position on resale price maintenance, *see the Herman Miller consent decree supra* note 95.

112 2012 population estimate: about 38m. For California’s position on resale price maintenance, *see supra* notes 90-93 and accompanying text.

113 For Illinois’ new position on resale price maintenance, *see, first*, the Herman Miller consent decree *supra* note 95, but then the decision in *House of Brides*, *supra* notes 88, 96.

account for a population of more than 75 million inhabitants. These 75 million inhabitants cannot be reached by the resale price maintenance schemes. However, that is not all that limits the significance of the federal Leegin decision for the law in action.

First, in the majority of states it is currently simply unclear what the situation is. Even if the best bet is that they would follow the example of federal antitrust law interpretation, Kansas has shown that courts could decide the other way. Establishing resale price maintenance schemes on the mere reliance on the slogan that “there is no place like Kansas” may be a risky strategy.

Secondly, contracts in a substantial number of jurisdictions choose, for example, New York law as the applicable law. Of course, parties could avoid New York law where the resale price maintenance scheme is a major part of a distribution agreement, but it is far from certain that all contract parties would think of this aspect before they (or their New York law firms) insert the choice of applicable law clause.

Thirdly, and most importantly, consumers in jurisdictions in which a vertical minimum price maintenance scheme is operating legally (or at least unchallenged) may well decide to buy the product more cheaply from sellers located in jurisdictions in which the scheme is unenforceable. It is not unheard of for consumers coming from out of state to go shopping in New York or California, say, by using such exotic means as the Internet. It is difficult to see how minimum resale price maintenance schemes can be successfully operated under these conditions¹¹⁴—except perhaps for large bulky items in remote jurisdictions such as refrigerators in Alaska or ovens in Hawaii.¹¹⁵ And, indeed, practitioners in the United States have been reported to advise their clients even post Leegin to refrain from using outright resale price maintenance schemes and instead rely on the old, pre-Leegin ways to implement similar schemes unilaterally (Colgate) or by way of consignment.¹¹⁶ These, of course, are exactly the practices that are employed in the EU as well, where minimum resale price maintenance is still prohibited.¹¹⁷

114 See, e.g., Barbara O. Bruckmann, *The Case for a Commerce Clause Challenge to State Antitrust Laws Banning Minimum Resale Price Maintenance*, 39 HASTINGS COST. L.Q. 391, 411 (Winter 2012) (“Per Se State laws can prevent a manufacturer from adopting competitive RPM strategies in neighboring Leegin States because, as a practical matter, it cannot set resale prices for some but not all resellers in the same economic market.”).

115 All right, it admittedly works the other way round as well.

116 Thom Lambert, *Some Thoughts on the Spring Meeting: Bummed About RPM, Happy About the FTC’s Future*, TRUTH ON THE MARKET (April 12, 2013), <http://truthonthemarket.com/2013/04/12/some-thoughts-on-the-spring-meeting-bummed-about-rpm-happy-about-the-ftcs-future/>.

117 Case C-217/05, Confederación Española de Empresarios de Estaciones de Servicio v. v Compañía Española de Petróleos SA, 2006 ECR I-11987 paras. 38 *et seq.*; Case T-325/01, DaimlerChrysler AG v. Commission, 2005 ECR II-3319, paras. 86-87 GUIDELINES ON VERTICAL RESTRAINTS, *supra* note 32 paras. 12-21 (describing when agents are treated as genuine agents, that is, not undertakings).

V. Unilateral Conduct

1. The Position of Conceptual Purity in the United States: Requirement of Clear Monopoly Power and Avoiding Type I Errors

The US American main concern in the area of unilateral conduct is clearly the avoidance of type I errors, that is, false positives because of over-enforcement.¹¹⁸ Bill Kovacic has pithily summarized the development in his reaction to the notorious 2008 DOJ Report:

Several aspects of modern Section 2 jurisprudence stand out. The first is the judiciary's almost exclusive focus on whether challenged behavior yields harmful economic effects or is likely to do so. . . . The second trait of this jurisprudence is wariness of rules that might discourage dominant firms from pursuing price-cutting, product development, or other strategies that generally serve to improve consumer welfare. This wariness reflects respect for the economic contributions of large firms and concern that overly restrictive rules will induce passivity. Implicit in this view is confidence in the resilience of the US economic system and the capacity of the dominant firm's rivals, suppliers, and customers to adopt effective counterstrategies to blunt exclusionary strategies.¹¹⁹

Prohibiting unilateral action directly limits the variation of approaches in the market place, and over-enforcement in this area means prohibiting or chilling the use of legitimate approaches in the competitive process.

a. Unrestricted Freedom to Act Unilaterally Below the Monopoly Power Threshold

US federal antitrust law is adamant that prohibitions of unilateral action should be restricted to cases of firms with monopoly power, or at most cases where there is a dangerous probability that they acquire monopoly power.¹²⁰ The reason is that practices that may be harmful in the hands of a true monopolist may be “harmless or even beneficial when practiced by nonmonopolists.”¹²¹ Below this threshold, firms are prohibited from conspiring with each other, but as long as they avoid this temptation,

118 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 US 398, 414 (2004) (“The cost of false positives counsels against an undue expansion of §2 liability.”).

119 STATEMENT OF FTC CHAIRMAN WILLIAM E. KOVACIC, *supra* note 16, at 4. The DOJ report itself (DEPARTMENT OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 SHERMAN ACT (2008)) was withdrawn soon thereafter, *see* Press Release, Department of Justice, Justice Department withdraws Report on Antitrust Monopoly Law (May 11, 2009), http://www.justice.gov/atr/public/press_releases/2009/245710.htm.

120 *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 *et seq.* (1993).

121 PHILIP AREEDA & HERBERT HOVENKAMP, 3 ANTITRUST LAW § 651j 3rd edn. (2008) (also pointing out that the corollary of being too lax in finding monopoly power may be that courts become “unwilling to condemn exclusionary practices that are anticompetitive when practiced by a true monopolist, but ambiguous or harmless when the defendant is not a monopolist.”, *ibid.*).

they are free to choose their actions—unilaterally—without having to fear interference from the antitrust laws.¹²²

b. Prohibited Conduct: The Examples of Predatory Pricing, Refusal to Deal, and Margin Squeeze

Even where a firm has exceeded the threshold of monopoly power, US law is very concerned about the danger of false positives with regard to the conduct to be prohibited. Extreme care has to be taken lest pro-competitive conduct be prohibited or chilled.

The standard example is, of course, predatory pricing.¹²³ *Matsushita* and *Brooke Groupe* stand for the proposition that predatory pricing is “rarely tried and even more rarely successful”;¹²⁴ and, given the low probability of occurrence and success, we generally want to take advantage of low prices for the benefit of consumers, even where they are intended to wipe out a competitor.¹²⁵ Only where prices are below the relevant measure of cost *and* there is a dangerous probability of recoupment may antitrust interfere. As long as post-predation exploitation is not sufficiently likely, we want to ensure that firms are free to price as low as they wish. This means that firms without monopoly power (or the dangerous probability of achieving such power) are free to set their prices. It also means that above-cost pricing will be in a safe harbor. And it means that pricing below cost is innocuous where the “recoupment” is not intended to come from post-predation exploitation of its increased market power, but, for example, cross subsidization of a “loss leader” from other products.

Similar reasoning applies to refusals to deal. A firm, even a monopolist, is generally free to choose with whom it wants to contract.¹²⁶ If it were otherwise, and the firm with monopoly power would be compelled to share its resources, the incentives to invest for a firm with monopoly power—or a firm that might, post investment, acquire monopoly power—would be reduced; and the incentives for competitors of the firm with monopoly power to invest in circumventing any bottlenecks would be reduced

122 *American Needle v. National Football League*, 560 U.S. 183, 130 S. Ct. 2201, 2209 (2010) (“Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions. Thus, in § 1 Congress ‘treated concerted behavior more strictly than unilateral behavior.’ . . . This is so because unlike independent action, ‘[c]oncerted activity inherently is fraught with anticompetitive risk’ insofar as it ‘deprives the marketplace of independent centers of decisionmaking that competition assumes and demands.’ . . . And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm’s necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition.”).

123 See Joskow & Klevorick, *supra* note 16.

124 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*, 475 U.S. 574, 589 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993).

125 *Brooke Group* at 226-227 (“[T]he costs of an erroneous finding of liability are high. . . . [M]istaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect. . . . It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high” (internal citations omitted)).

126 *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (“In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell”); see also *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

if they can expect to get a free—or at least risk-free—ride on the dominant firm’s investment.¹²⁷ Only very exceptionally can a duty to deal follow from § 2 Sherman Act.¹²⁸

The policy to let even dominant firms compete freely unless a credible theory of harm can be advanced does not change when the two categories of predatory pricing and refusal to deal are combined to form the theory of margin squeeze.¹²⁹ After *Linkline*, three scenarios are distinguished. First, the downstream prices offered to the dominant firm’s customers are so low as to be predatory. In that case, the theory of harm is one of predatory pricing and the standards of that theory of harm are to be employed. In the second scenario, the upstream prices demanded by the dominant firm from the firms that compete on the downstream market are so high as to amount to a constructive refusal to deal. In that case, the theory of harm is one of refusal to deal and the standards of that theory of harm are to be employed. In the third scenario, the prices on the downstream market are not so low as to be predatory and the prices on the upstream market are not so high as to amount to a constructive refusal to deal. In that case, there does not appear to be a credible theory of harm. In other words, there is no need for a stand-alone abuse of margin squeeze.

c. Limited Potential Irritants on the Level of Federal Antitrust: Attempted or Joint Monopolization and § 5 FTC Act

While the prohibition of monopolization in § 2 Sherman Act has been largely reduced by these error-cost framework considerations to catch only cases in which antitrust injury is sufficiently likely, the federal antitrust laws have the potential to reach more conduct. § 2 Sherman Act also provides for “attempted monopolization.” The possibility of “joint monopolization” has been discussed for a long time, and employed from time to time by the courts.¹³⁰ To the extent the FTC applies § 5 FTC Act as an “incipiency” statute to catch cases that fall outside the core of § 2 Sherman Act, there is a question whether firms in the United States can conduct their affairs really with less need to worry about antitrust law than in Europe.

Nevertheless, even the prohibition of attempted monopolization, the potential use of joint monopolization, and § 5 FTC Act are today very much assessed against the dangers of over-enforcement. Accordingly, these statutory provisions, which theoretically could make antitrust enforcement at least as aggressive as the Commission’s use of Article 102 TFEU, are interpreted restrictively by the antitrust authorities and

127 *Trinko*, at 407-408 (“Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion”).

128 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 *et seq.* (1985) (emphasizing sacrifice by terminating an existing, and therefore presumably profitable, relationship). *See also Trinko*, at 408-409 (discussing *Aspen Skiing*). For more detail from an error-cost perspective *see* Keith N. Hylton, *Unilateral Refusals To Deal and the Antitrust Modernization Commission Report* 53 THE ANTITRUST BULLETIN 623-641 (2008).

129 *Pacific Bell Telephone Co. v. Linkline*, 555 U.S. 438 (2009).

130 *See, e.g., United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984).

courts. Attempted monopolization is made subject to the demanding “dangerous probability of success” threshold. Joint monopolization is not widely accepted as a basis for liability, and certainly not widely employed in litigated cases. While the theoretical reach of § 5 FTC Act—and the desirability of harnessing its potentially wide reach by issuing guidelines—is hotly debated,¹³¹ instances in which § 5 FTC Act is employed by the FTC to reach cases that could not be reached by § 2 Sherman Act are far and few between; and where the Commission has made the attempt, it has often been stopped by the courts. While § 5 FT. Act is employed to catch unilateral conduct that is meant to lead up to a conspiracy, such as invitations to collude, the use in cases that fall short of § 2 Sherman Act liability is rare.

Overall, then, federal antitrust enforcement against unilateral conduct in the United States is largely governed by the concern for avoiding false positives.

2. Europe: Dominance Threshold on the EU Level, Economic Dependency on the MS Level, and Avoiding Type II Errors

Unilateral conduct has long been identified as one of the major issues on which US and European law have substantial and persisting differences of opinion.¹³² Both the EU and, in particular, the Member States require less in terms of market power than the US before an undertaking has to fear antitrust scrutiny of its unilateral conduct (below a.). And in terms of impermissible conduct, the main concern of European antitrust law again appears to be avoiding type II errors, that is, false negatives due to under-enforcement (below b.).

a. The Threshold Below Which Unilateral Conduct Is Free from Scrutiny

On the EU level, Article 102 TFEU requires an abuse by “one or more undertakings of a dominant position.” Below this threshold of dominance, EU law does not scrutinize unilateral conduct, and to this extent EU law appears to mirror the safe-harbor approach of the US. What is more, given that the US courts have occasionally framed “monopoly power” in terms of a “dominant position,”¹³³ one could believe that the same cut-off threshold is used on both sides of the Atlantic.

131 See the early in-depth treatment in William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 944 *et seq.* (2010) (arguing for the development of guidelines); more recently STATEMENT OF COMMISSIONER JOSHUA D. WRIGHT, PROPOSED POLICY STATEMENT REGARDING UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT (June 19, 2013) and the ensuing debate, *e.g.* in the contributions to 9(1) CPI Antitrust Chronicle (September 16, 2013): Maurice E. Stucke, *A Response To Commissioner Wright’s Proposed Policy Statement Regarding Unfair Methods Of Competition*, *ibid.*; Daniel Crane, *Section 5 of the FTC Act and The Need For Guidelines*, *ibid.*; Harry First, *What About Green Stamps? A Comment on the FTC’s Section 5 Authority*, *ibid.*; A. Douglas Melamed, *A Solution In Search of a Problem*, *ibid.*; Sharis Pozen, *Section 5 Guidelines: Fixing a Problem That Does Not Exist?*, *ibid.*; Steven Salop, *Guiding Section 5: Comments on the Commissioners*, *ibid.*; Joe Sims, *Section 5 Guidelines: Josh Wright as the New King of Corinth?*, *ibid.*

132 See, *e.g.* KOVACIC, *supra* n. 5, at 11-12; Giorgio Monti, *Unilateral Conduct: The Search for Global Standards*, in RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 345, 355-360 (Ariel Ezrachi ed., 2012); John Vickers, *Competition Law and Economics: A Mid-Atlantic Viewpoint*, 3 EUR. COMPETITION J. 1, 5-7 (2007).

133 See, *e.g.*, United States v. Continental Can Corp., 378 U.S. 441, 458, 459, 461, 464 (1964).

This, of course, is not the case. On the EU level, dominance is indeed required, but the standards applied in the EU for determining dominance are less demanding than the US standards. While firms in the US start to worry about monopoly power once they exceed fifty and approach sixty per cent market share, in Europe they will have to start paying attention once they get into the vicinity of forty per cent market share,¹³⁴ and “very large market shares” starting from fifty per cent may trigger a presumption of dominance.¹³⁵ Of course, market share thresholds are completely vacuous unless the standards of market definition are considered.¹³⁶ So, if it were the case that EU law simply defined markets more broadly than the US did, then it would be possible that the US-sixty percent and the EU-forty percent market share thresholds actually reflected the same level of market power. However, this is unlikely to be the explanation. Markets tend to be defined *at least* as narrowly in the EU as they are in the US¹³⁷

Of course, market share is, on both sides of the Atlantic, only a first indication for dominance, and in addition some of the cases in the forty-sixty percent market share bracket that may be caught in the EU but not under the monopolization prong in the US may be cases that could be pursued as “attempted monopolization” under § 2 Sherman Act (or perhaps at least under § 5 FTC Act).¹³⁸ Even with these qualifications, however, EU law is arguably quicker to find dominance than US federal antitrust law.

Apart from the lower threshold for finding single dominance, EU law clearly allows for collective dominance of several undertakings,¹³⁹ whereas the joint monopoly theory in the United States has had only patchy support from the courts.

134 See, e.g., KOVACIC, *supra* note 5 at 12.

135 Case C-62/86, AKZO Chemie BV v. Commission, 1991 ECR I-3359 para. 60 (“With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position (judgment in Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461 [41]). That is the situation where there is a market share of 50% such as that found to exist in this case”). However, the significance of this “presumption” should not be overstated; as Andrea Coscelli and Geoff Edwards have recently put it: “The decision suggests only that in the absence of contrary evidence rebutting the presumption, can dominance be found on the basis of market shares alone.” (*Dominance and Market Power in EU Competition Law Enforcement*, in HANDBOOK ON EUROPEAN COMPETITION LAW – SUBSTANTIVE ASPECTS 350, 361 (Ioannis Lianos & Damien Geradin eds., 2013) (emphasis in the original)).

136 Consider, for example, the franchising cases in which the brand of the products which the “locked-in” franchisee had to order from the franchisor was defined as the relevant market. See *infra* n. 185 and accompanying text. More generally, Louis Kaplow has made a sustained argument that the whole market definition/market share approach to market power is a tautological exercise anyway (see, e.g., Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010); idem, *Market Definition Alchemy*, SOCIAL SCIENCE RESEARCH NETWORK (May 15, 2013), <http://ssrn.com/abstract=2265306>). *Contra* Gregory J. Werden, *Why (Ever) Define Markets? An Answer to Professor Kaplow*, 78 ANTITRUST L.J. 729 (2013); Malcolm B. Coate, *Market Definition Is Not Alchemy*, SOCIAL SCIENCE RESEARCH NETWORK (September 30, 2013), <http://ssrn.com/abstract=2333819>.

137 See, e.g., the market definition in aftermarket cases, *infra* note 213.

138 As to the (not crystal clear) market share thresholds necessary to establish the “dangerous probability of success” required for attempted monopolization, see e.g., ERNEST GELLHORN, WILLIAM E. KOVACIC & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS 5th edn. 189-190 (2004).

139 In the Article 102 TFEU context, see, e.g., Joined Cases C-395/96 P and C-396/96 P, *Compagnie maritime belge transports and Others v. Commission*, 2000 ECR I-1365 [35] *et seq.*; in the merger context see originally Joined Cases C-68/94 and C-30/95, *France and Others v Commission* (“Kali & Salz”), 1998 ECR I-1375 [152] *et seq.*, and more recently C-413/06 P, *Bertelsmann and Sony v. Impala*, 2008 ECR I-4951 [119] *et seq.* (Grand Chamber); Case T-342/99, *Airtours v. Commission*, 2002 ECR II-2585 [56] *et seq.*; Case T-102/96, *Gencor v. Commission*, 1999 ECR II-753 [123] *et seq.*; Nicolas Petit, *The Oligopoly Problem in EU Competition Law*, in HANDBOOK ON EUROPEAN COMPETITION LAW – SUBSTANTIVE ASPECTS 259, 296-307 (Ioannis Lianos & Damien Geradin eds., 2013); BIRGIT LINDER, KOLLEKTIVE MARKTBEGRIFFSCHUNG IN DER FUSIONSKONTROLLE (2005). For an analysis of collective dominance cases on the Member States level, see Nicolas Petit, *Collective Dominance: An Overview of National*

b. The Prohibited Conduct: Predatory Pricing, Refusals to Deal, and Margin Squeeze in the EU

Again, the differences between EU law and US law with regard to conduct deemed to be abusive are well known. In the EU, dominant undertakings are said to have “a special responsibility not to allow its behaviour to impair genuine undistorted competition on the common market.”¹⁴⁰ I will only mention three examples, although much more could be said on the EU jurisprudence regarding exclusionary abuses such as loyalty rebates.¹⁴¹

With regard to predatory pricing, the Court of Justice of the EU merely requires a showing either that prices were below average variable cost, in which case it is presumed that to pursue the objective of eliminating rivals, or that prices were above average variable cost but below average total cost, in which case it is necessary to also prove a plan to eliminate competitors or to show anticompetitive effects.¹⁴² In either case, the likelihood of recoupment is not considered a necessary requirement in the EU (although it may be “a relevant factor” in the overall assessment whether the conduct was abusive).¹⁴³ On the other hand, where a dominant undertaking charges prices that are not predatory under these standards but are lower for the customers of a competitor than for its other customers, the mere fact that there the prices discriminate will not qualify these prices as abusive.¹⁴⁴

With regard to refusals to deal, European law acknowledges the general principle that even a dominant undertaking should “have the right to choose its trading partners and

Case Law, in 2013 COMPETITION CASE LAW DIGEST 31-40 (Nicolas Charbit, Elisa Ramundo & Maly Op-Courtaigne eds., 2012). For an overview of the German law and practice, see Florian Wagner-von Papp, *Germany*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: COMPETITION LAW (Francesco Denozza & Alberto Toffoletto eds., 2013) at paras. 151, 157, 163-164, 500, 502, 505, 514; see also Eckart Wagner, *Die Analyse kollektiver Marktbeherrschung in der dEutschen Fusionskontrolle im Vergleich zur Europäischen Fusionskontrolle*, WIRTSCHAFT UND WETTBEWERB (WuW) 619 (2009) (comparing German and EU law).

140 Case 322/81, *Nederlandsche Banden-Industrie-Michelin v. Commission*, 1983 ECR 3461 at [57]; since then, the special responsibility language is consistently used, see, e.g., Case 202/07 P, *France Télécom v. Commission*, 2009 ECR I-2369 at [105]; Case C-209/10, *Post Danmark v. Konkurrencerådet*, 2012 ECR (nyr) at [23] (Grand Chamber). Monti, *supra* note 133 at 351, notes that the “special responsibility” phrase may not be “terribly helpful in providing guidance”, but that it “serves as a reminder of the stricter scrutiny that dominant firms find themselves under in the EU, as compared to the US.”

141 For a critical overview on the EU law on rebates see Alison Jones & Liza Lovdahl Gormsen, *Abuse of Dominance: Exclusionary Pricing Abuses*, in HANDBOOK ON EUROPEAN COMPETITION LAW – SUBSTANTIVE ASPECTS 423, 457-467 (Ioannis Lianos & Damien Geradin eds., 2013).

142 *France Télécom*, *supra* note 140 at [109], reiterating the principles established in *AKZO*, *supra* note 135 [70]-[71] j; Jones & Lovdahl Gormsen, *supra* note 141, 427-442.

143 *France Télécom*, *supra* note 140 at [110]-[113]. But see *ibid.* at [107]: “In particular, it must be found that an undertaking abuses its dominant position where, in a market the competition structure of which is already weakened by reason precisely of the presence of that undertaking, it operates a pricing policy the sole economic objective of which is to eliminate its competitors with a view, subsequently, to profiting from the reduction of the degree of competition still existing in the market.” This indicates that, while recoupment is not a formal requirement in the EU, the theory of harm is essentially the same as in the United States.

144 *Post Danmark*, *supra* note 140, at [23] (“[T]he fact that the practice of a dominant undertaking may . . . be described as ‘price discrimination’, that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse.”).

to dispose freely of its property,”¹⁴⁵ and that the impact on investment incentives and the need to avoid free riding have to be taken into account.¹⁴⁶ For the same reasons, access to resources protected by intellectual property rights is only granted in “exceptional circumstances.” Nevertheless, the authorities and courts in the EU are generally quicker than American courts to allow access, provided the product or service is indispensable for carrying out that person’s business, that is, it cannot economically viably be duplicated by an as-efficient competitor, there is no actual or potential substitute for the facility to which access is requested, the refusal would eliminate all (or only effective?) competition, there is consumer harm, and there is no objective justification.¹⁴⁷

Then there is the decision by EU courts to acknowledge a separate theory of harm for margin squeezes¹⁴⁸—without any need to demonstrate that the wholesale prices on the upstream market are so high as to amount to a constructive refusal to supply (or that the downstream prices are so low as to be predatory).¹⁴⁹ The diametrically opposed positions that the US Supreme Court and the Court of Justice of the European Union have taken on margin squeezes—in nearly contemporaneous decisions—have been explored in a host of comparative articles.¹⁵⁰

An even broader point is that Article 102 TFEU cannot only catch exclusionary conduct but also exploitative abuses,¹⁵¹ even though in the case law pure exploitation (as opposed to exclusionary conduct coupled with exploitation) is sparse.¹⁵²

145 COMMUNICATION FROM THE COMMISSION – GUIDANCE ON THE COMMISSION’S ENFORCEMENT PRIORITIES IN APPLYING ARTICLE 82 OF THE EC TREATY [NOW 102 TFEU] TO ABUSIVE EXCLUSIONARY CONDUCT BY DOMINANT UNDERTAKINGS, [2009] O.J. C45/7 para. 75 [hereinafter COMMISSION, PRIORITIES PAPER].

146 Case C-7/97, Oscar Bronner GmbH & Co KG v. Mediaprint, 1998 ECR I-7791; *see also* the Opinion by AG Jacobs in that case; COMMISSION, PRIORITIES PAPER, *supra* note 145 paras. 75-90.

147 The above formulation is an amalgam of the not entirely consistent requirements established in *Bronner*, para. 41, Case T-201/04, *Microsoft v. Commission*, 2007 ECR II-3601, and COMMISSION, PRIORITIES PAPER, *supra* n. 145, paras. 81 *et seq.* *See also* 6/73, *Commercial Solvents v. Commission* [1974] ECR 223. While the Court decisions to date have adopted slightly different criteria to refusals to deal where IP rights were concerned and those where physical resources were concerned, the Commission, *ibid.*, seems to want to move to a unitary standard (*see* Renato Nazzini, *Abuses of Dominance: Exclusionary Non-Pricing Abuses*, in HANDBOOK ON EUROPEAN COMPETITION LAW – SUBSTANTIVE ASPECTS 473, 490 (Ioannis Lianos & Damien Geradin eds., 2013); for an analysis of the requirements for a refusal to deal, *ibid.*, at 488-502).

148 Case C-280/08 P, *Deutsche Telekom v. Commission*, 2010 ECR I-9555; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige*, 2011 ECR I-527.

149 *TeliaSonera*, at paras. 54-58. *But see* the COMMISSION’S PRIORITIES PAPER, *supra* note 145, para. 80 (treating margin squeezes as constructive refusals to supply).

150 *See, e.g.*, George A. Hay & Kathryn McMahon, *The Diverging Approach to Price Squeezes in the United States and Europe*, 8 J. COMPETITION L. & ECON. 259 (2012); John B. Meisel, *The Law and Economics of Margin Squeezes in the US and the EU*, 8 EUR. COMPETITION J. 383 (2012); Johannes Zöttl, *Kein Verbot der Kosten-Preis-Schere im US-amerikanischen Kartellrecht*, RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 445 (2009). *See also* Jones & Lovdahl Gormsen, *supra* note 142, 442-457.

151 KOVACIC, *supra* note 13, at 11.

152 On exploitative abuses in the EU, *see e.g.* Michal S. Gal, *Abuse of Dominance - Exploitative Abuses*, in HANDBOOK ON EUROPEAN COMPETITION LAW – SUBSTANTIVE ASPECTS 385-422 (Ioannis Lianos & Damien Geradin eds., 2013); *see* Renato Nazzini, *Abuse Beyond Exclusion: Exploitation and Discrimination Under Article 102 TFEU*, in 2012 FORDHAM COMP. L. INST. 459-492 (Barry Hawk ed., 2013). The absence of exploitative abuses in the US is arguably again to be explained by a reliance on the self-correcting forces of competition. *But see* Ariel Ezrachi & David Gilo, *Are Excessive Prices Really Self-Correcting?* 5(2) J. COMPETITION L. & ECON. 249-268 (2008).

c. Economic Dependency Rules in the Member States

On the European Union level, the standard for dominance may be lower than in the US, but at least the standard employed is that of dominance: unilateral conduct below this threshold is in a safe-harbor as far as EU competition law is concerned.¹⁵³ The differences in the required market shares should be acknowledged but not be overstated, given that they are not the only criterion but only a first (though in practice extremely important) indication of dominance. With regard to the prohibited conduct, there are also significant differences; for example, compared to the United States, less is required in the EU to show an abuse of predatory pricing, a refusal to deal, or a margin squeeze. And yet, important as they are, these differences seem more questions of degree than qualitative. This changes once we move to the Member States level.

On the Member States level, the approach to unilateral conduct is even more restrictive than on the EU level. This is possible because Member States are not required by EU law to adopt the standards of EU law with regard to unilateral conduct. While the “convergence rule” in Article 3(2) Regulation 1/2003 more or less requires Member States to mirror the EU standards with regard to agreements and concerted practices, the second sentence of that provision provides for an exception from the convergence rule in so far as “unilateral conduct” is concerned.¹⁵⁴ This exception was introduced as a result of lobbying from the Member States, especially Germany and France, which have provisions on “economic dependency” in their national competition laws.¹⁵⁵ I will outline the consequences of this concept of “economic dependency” using the German example.¹⁵⁶

Under constant lobbying pressure from the small and medium-sized enterprise (“SME”) lobby, German competition law has added more and more rules on “economic dependency” over the past decades. Under the current regime—reaffirmed by the legislature as recently as June 2013¹⁵⁷—German law distinguishes between two sets of economic-dependency type rules in the relevant provision, § 20 ARC—dependence on undertakings with “relative market power” and on those with “superior market power.”

153 For a discussion of this safe-harbor effect see Giorgio Monti, *The Concept of Dominance in Article 82*, 2 EUR. COMPETITION J. 31, 46-48.

154 See *infra* Part VII.2. Actually, the exception is already contained in the phrasing of the first sentence, i.e. the convergence rule, itself, which only applies where there is an agreement, a decision of an association, or a concerted practice.

155 For a comparative overview of economic dependency provisions and other stricter law for unilateral conduct in various Member States, see IOANNIS KOKKORIS, A GAP IN THE ENFORCEMENT OF ARTICLE 82, 21-43 (2009); COMMISSION STAFF WORKING PAPER ACCOMPANYING THE REPORT ON THE FUNCTIONING OF REGULATION 1/2003, SEC(2009) 574 final (April 29, 2009) at paras. 160-179. For a worldwide comparison, see ICN Task Force for Abuse of Superior Bargaining Position [sic], Report on Abuse of Superior Bargaining Position, 7th Annual Conference, Kyoto (April 14-16, 2008).

156 I focus on German law instead of French law, first, because I am much more confident as to the content, enforcement practice, and potential functional equivalents to be taken into account in German law, and secondly, because I feel much more comfortable and unconstrained when criticizing my home jurisdiction.

157 *Bundesgesetzblatt* (Federal Gazette) 2013 I 1738 (June 29, 2013).

(i) *Relative Market Power*

The first set of rules applies to undertakings with “relative market power.” An undertaking is deemed to have “relative market power” if SME’s depend on it “in such a way that sufficient and reasonable options to switch to other undertakings do not exist.”¹⁵⁸ It is something of a mystery how such options could be absent when there is effective competition in the market. The very term “relative market power”—the direct translation from the German “*relative Marktmacht*”—reveals the oxymoronic nature of this concept (although I find it much easier to identify the “moronic” aspect than the “oxy” one). Either there is *market* power, in which case it cannot be “relative” to the parties; or there is relative power, in which case it is not “market” but “bargaining” power. The solution to this mystery seems to be that there may be effective competition for *newcomers* into the market, but that path dependencies following from earlier decisions of the dependent undertaking deprive the dependent distributor’s freedom to switch to other suppliers (or vice versa), perhaps because of transaction-specific investments.

Economic dependence (and the corresponding relative market power) can arise from three case scenarios: an SME undertaking may depend on making available a product to its customers if the product in question is the “top brand” in a particular product category, or one of a “group of top brands.” The question in these cases is whether a customer would confidently expect a seller to stock this particular brand (or at least one of the top group of brands). The standard example for this category is the so-called *Rossignol* case: *Rossignol* terminated a long-standing business relationship with a sports shop. The sports shop claimed that it needed to stock *Rossignol* skis to be taken seriously by its customers. *Rossignol* was said to have a market share of only about 8%.¹⁵⁹ Nevertheless, the court decided that economic dependence could be established even in the presence of “considerable competition” between suppliers, and that *Rossignol* had a duty to deal with the sports shop.¹⁶⁰

A second case category is “scarcity-induced dependence.” The paradigm example for this category, mentioned already in the legislative materials, are cases from the oil crisis, in which a supplier of oil, faced with scarce supply during the oil crises, was supposed to apportion its supplies non-discriminatorily among its distributors.

The final category is dependence due to the “unique relationship” between the supplier and distributor. These are cases where the SME has made transaction-specific investments into the relationship with a particular supplier or distributor, which make the SME vulnerable to opportunistic conduct by the party with relative market power.

158 See the legal definition of ‘relative market power’ in § 20(1) ARC, as amended in 2013.

159 BGH, Nov. 20, 1975, KZR 1/75, NEUE JURISTISCHE WOCHENSCHRIFT 801, 802 (1976). An English translation of an extract of the decision is available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1488.

160 One explanation for the harsh line by the Court may have been that the termination of the sports shop apparently was a reprisal for undercutting recommended prices.

Many of these “relative market power” cases concern refusals to deal; in particular, § 20(1) ARC is often invoked where distribution agreements are terminated. Much like courts in the US,¹⁶¹ German courts stress that in principle the “powerful,” and even the dominant, supplier must remain free to choose its contractual partners and to structure its distribution system as it sees fit.¹⁶² However, it is clear that the whole point of § 20 ARC is that this freedom is only a conditional one. The question then becomes how quick the courts are to find an undertaking to be “dependent” on another undertaking, despite the fact that the latter is not in a dominant position. German courts follow—or at least pay lip service to—the principle that in determining dependency they will not take into account the allegedly dependent firm’s prior “miscalculations” and any “uncalled-for self-inflicted dependency.”¹⁶³ But the demarcation between an “uncalled-for” self-inflicted dependency and the kind of prior decision that results in a cognizable dependency is left to the vagaries of a balancing of interests. Under German law, duties that would only apply to firms with monopoly power under US federal antitrust law apply below the threshold of dominance as soon as the lower hurdle of “relative market power” is reached.

Undertakings with relative market power are prohibited from “unduly impeding” or “discriminating without objective justification” dependent SME undertakings (§ 20(1) ARC 2013). Undertakings with relative market power are also prohibited from demanding or inducing dependent (SME or large) undertakings to afford them preferential treatment (§ 20(2) ARC 2013)—a provision that was inserted to deal with *demand-side* market power, especially as exercised by the big food retail chains vis-à-vis their suppliers, such as charging slotting fees or demanding retroactive rebates.

(ii) *Superior Market Power: Sales Below Cost and Margin Squeezes*

The second big category of economic dependence are cases of “superior market power” (§ 20(3) ARC 2013). This concept denotes a disparity of power not in the vertical relationship between supplier and distributor, but on the horizontal level between a powerful competitor and its SME competitors. Two paradigm examples for superior market power are the big food retail chains vis-à-vis their mom-and-pop-store competitors, and the petrol stations run by the big brand petroleum conglomerates vis-à-vis independent gasoline stations.

Where an undertaking has superior market power vis-à-vis its SME competitors, it is prohibited from exercising its superior market power to impede its SME competitors.

¹⁶¹ *Colgate*, *supra* note 126.

¹⁶² BGH, 31 Jan. 2012, KZR 65/10, WuW/E DE-R 3549, 3554 para. 29—*Werbeanzeigen*; BGH, 28 Jun. 2005, KZR 26/04, WuW/E DE-R 1621, 1624—*Qualitative Selektion*; BGH, 8 Mar. 1983, KZR 1/82, WuW/E BGH 1995, 1996—*Modellbauartikel III* (qualitative selective distribution system allowed the exclusion of mail order distributors); BGH, 24 Mar. 1981, KZR 2/80, WuW/E BGH 1793, 1797—*SB-Verbrauchermarkt* (qualitative selective distribution for toy car racetracks was legitimate, and the refusal to supply supermarkets was not abusive); also cf. BGH, 15 Apr. 1986, KVR 3/85, WuW/E 2238, 2246—*EH-Partner-Vertrag*.

¹⁶³ Cf. Jörg Nothdurft, in, *KOMMENTAR ZUM DEUTSCHEN UND EUROPÄISCHEN KARTELLRECHT* 11th edn (Eugen Langen & Hermann-Josef Bunte eds., 2011) at § 20 paras 58, 73.

In particular, it is prohibited from selling below cost and from engaging in margin squeezes.

The prohibition against “sales below cost” is at the core of the provision that is today § 20(3) ARC.¹⁶⁴ The rules on superior market power were first introduced in 1980, but back then the provision was merely an authorization for the competition authority to initiate administrative proceedings. In 1990, it was “upgraded” to a prohibition that could be enforced by private plaintiffs. While sales below cost were not, at that time, explicitly mentioned in the statutory text, the explanatory memorandum accompanying the government bill mentioned that sales below cost should be considered abusive conduct in the meaning of the prohibition for undertakings with superior market power to unduly impede their SME competitors. The German antitrust courts, however, argued in the *Hitlisten-Platten* decision that, in order to amount to an *antitrust* infringement, sales below cost would have to result, with a sufficient likelihood, in lasting harm to the structural conditions for effective competition.¹⁶⁵ Given that such lasting harm to structural conditions is difficult to prove even in cases of *predatory pricing* practiced by a *dominant* firm, this reduced the category of “sales below cost by non-dominant firms with superior market power” to little more than a complicated definition of an empty set. Furthermore, the courts explicitly stated that it is perfectly permissible for multi-product sellers to employ a loss-leader strategy, in which the losses of advertised loss leaders are compensated by profits from other products bought by one-stop shoppers attracted by the loss leaders.¹⁶⁶

It did not take long for the lobbyists and the legislator to react. With effect from 1999, the legislature amended the prohibition of an abuse by firms with superior market power by adding that sales below cost were to be deemed an abuse unless it was only practiced on an occasional basis or objectively justified. This amendment was a direct reaction to, and intended to repeal, the *Hitlisten-Platten* decision; the legislator explicitly sought to eliminate the requirement of a likely lasting effect on competition established in that decision.¹⁶⁷ This time, the antitrust courts bowed grudgingly to the legislature’s express wishes. While the Court of Appeal in Düsseldorf accepted that the stricter requirement of a likely lasting effect on competition had been rejected by the legislator, it still sought to reintroduce a requirement of at least an “appreciable effect on the competitive conditions” in the *Wal-Mart* case.¹⁶⁸ However, the Federal Court of Justice decided on appeal that, considering the legislative amendment, sales

164 More precisely, the German case law and statutory *antitrust* law speaks of *proffering* below *purchase price*, which on the one hand prohibits not only the sale but even advertising sales below costs but on the other hand leaves *producers* free to sell below their production cost. As the term “sales below cost” is more frequently used in the international context, I shall use this term instead. In the German *unfair competition* context, it is indeed the cost—not the purchase price—which is the relevant threshold (see, e.g., Helmut Köhler, in, *GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB* 31st edn. (Helmut Köhler & Joachim Bornkamm eds, 2013) at § 4 para. 10.190).

165 BGH, April 4, 1995, KZR 34/93, ZEITSCHRIFT FÜR GEWERBLICHEN RECHTSSCHUTZ UND URHEBERRECHT (GRUR) 690, 692 (1995)—*Hitlisten-Platten*.

166 *Ibid.*; BGH, March 30, 2006, Case I ZR 144/03, GRUR 596, 597 [19] (2006)—*10% billiger*.

167 See *Bundestags-Drucksache* (Parliamentary Documents) no. 13/10633 at 72 (report and recommendation of the committee for economy).

168 OLG Düsseldorf, December 19, 2001, Kart 21/00 (V), WuW/E DE-R 781 — *Wal-Mart* (II.B.3.d.aa. of the opinion).

below cost by an undertaking with superior market power constituted a *per se* abuse, provided only the below-cost price was offered on more than an occasional basis and not objectively justified, even where there was no danger of any harm to the structural conditions for effective competition.¹⁶⁹

In the meantime, the Court of Appeal in Düsseldorf seems to have managed to pull the teeth of the sales-below-cost provision for many of the practically relevant scenarios; where a manufacturer has granted certain *generalized* promotional rebates for its entire product range to a distributor, the distributor may allocate the entire rebate *in full* to the “cost” measure of those products from the range that were actually marketed as loss leaders.¹⁷⁰ In cases in which the manufacturer has agreed to such general rebates, it will be nearly impossible to find that any sale was “below cost.”¹⁷¹ Nevertheless, where such an allocation of general rebates is not possible, for example, in the case of a single-product manufacturer, it is still the case that German law considers it an antitrust violation for undertakings with superior market power to sell below cost on a more than an occasional basis, even in the absence of any likelihood that the low prices could affect competition. Accordingly, advertising loss leaders, designed to attract customers into a store in order to make a profit on other products bought by one-stop shoppers—once (rightly) considered to be entirely unproblematic under both antitrust and unfair competition law¹⁷²—may infringe antitrust law, despite the absence of any injury to competition or the market structure.

To make matters even worse, the legislator in 2007 caved in to renewed lobbying efforts and made the rule even *more* restrictive for *food products*. With respect to food products, even *occasional* offers to sell below cost are now deemed to be an infringement unless objectively justified—and available objective justifications are reduced to selling perishable stocks or “similarly serious cases.” While this special provision for food products lapsed according to a sunset clause on January 1, 2013, the legislature chose to revive and extend it until 2018 in the most recent revision of the ARC (see now § 20(3)2 no. 1 ARC).¹⁷³

Margin squeezes are prohibited for the undertaking with superior market power where the spread between the wholesale price charged to the SME competitor and the retail price of the powerful undertaking is negative (§ 20(3)2 no. 3 ARC). The paradigm case here are cases of the big brand petroleum conglomerates operating their own petrol stations while also supplying independent petrol stations. The *Bundeskartellamt*

169 BGH, Nov. 12, 2002, KVR 5/02, WuW/E DE-R 1042, 1045, 1049–1050—*Wal-Mart*. For an English summary of that case see Wagner-von Papp, *supra* note 139, para. 465.

170 OLG Düsseldorf, Nov. 12, 2009, VI-2 Kart 9/08 OWi, BeckRS 2010, 07922—*Rossmann*, affirmed by the BGH (reported in BUNDESKARTELLAMT, TÄTIGKEITSBERICHT 2009/2010, *Bundestags-Drucksache* (Parliamentary Documents) no. 17/6640, at 30, 80–81).

171 See BUNDESKARTELLAMT, ABSCHLUSSBERICHT SEKTORUNTERSUCHUNG MILCH (Final Report Sector Enquiry Milk), Docket B2-19/08 (Jan. 2012) at [330]–[331], available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Stellungnahmen/2012_01_Sektoruntersuchung_Milch_Endbericht_final.pdf (in German).

172 *Supra* note 153.

173 *Supra* note 144.

seems to handle margin squeeze allegations in its enforcement practice with the necessary skepticism.¹⁷⁴

(iii) *Summary and Critique*

To summarize, for undertakings that are not dominant, but which have “relative market power” because SME undertakings are dependent on them, § 20(1) ARC establishes a prohibition to “unduly impede” dependent SME undertakings. In particular, this may result in a duty to deal with SME distributors or suppliers. § 20(1) ARC also prohibits undertakings with relative market power from discriminating between dependent SME undertakings without objective justification. § 20(2) ARC seeks to protect dependent suppliers against demands by buyers with demand-side market power that seek “special favours.” § 20(3) ARC establishes prohibitions for undertakings that are not dominant but have “superior” market power vis-à-vis their SME competitors. The main categories of prohibited conduct for undertakings with superior market power are sales below cost and margin squeezes with a negative spread.

The problem with these rules should be evident. After all the careful balancing that has gone into avoiding false positives in the context of abuses of dominant positions (even in the more interventionist EU regime) by making sure that only dominant undertakings are subjected to an abuse control of their unilateral conduct, some Member States simply overthrow this balance and subject a wide range of other undertakings to control of their unilateral conduct. And on what basis? In the “top brand”/“group of top brand” category, in particular, the undertaking is being penalized for having invested and succeeded in creating a valuable brand. One may debate whether having such success can in some cases result in an increased exposure to a duty to deal where the brand product is so distinct from any substitutes that it becomes a market in itself, so that the supplier of this brand is *dominant* in the market. But these cases can be taken care of under the rules on abuses of a dominant position; in that context, due account can be taken of the balancing between underutilization due to the dominant undertaking’s incentive to limit output artificially, and the underinvestment that could result if the investment incentives for the dominant undertaking to invest in the brand product were reduced due to the anticipation of having to accommodate free riders, and also the underinvestment into competing brands or technologies on part of the dominant undertaking’s competitors. Extending these balancing decisions to undertakings that are not dominant—such as *Rosignol* with its 8 per cent market share—is certain to upset the carefully crafted balance, in particular because the standard for determining relative market power is a vague one, and the *ex ante* determination whether a given undertaking is subject to the restrictions on its unilateral conduct is accordingly difficult. This may lead to both the prohibition and the chilling of pro-competitive conduct by non-dominant undertakings.

It is perhaps slightly less easy to deconstruct the merits of the “unique relationship” category based on transaction-specific investments. Where the parties choose markets

174 Cf. Bundeskartellamt, B7-11/09, [49] *et seq.*—*MABEZ* (Aug. 6, 2009).

over hierarchies, and one of the parties has to make transaction-specific investments, there is a potential for post-contractual opportunism by the other party.¹⁷⁵ To the extent that the investments would be lost for the first party if it moved its assets to another use, the second party has the first party over the barrel. Even where the contract specifies the rights of the parties, the law always permits later renegotiations, which the second party can use opportunistically to extract the value of the transaction-specific investments. It is understandable that a legal regime should want to protect against such post-contractual opportunism, because otherwise non-myopic parties would underinvest in transaction-specific investments. And yet, it is unclear that this amounts to a *competition* law problem. First, one could expect that at least in some cases reputational effects would prevent parties from exploiting opportunities to act opportunistically. Where a powerful supplier, for example a franchisor, exploits its franchisees, word will get around; short-term profitable opportunism may well be a poor business strategy in the longer term. Secondly, while reliance on reputational effects may not always be a sufficient safeguard, the remaining cases of post-contractual opportunism could be taken into account in assessing the validity of the modification or novation of the contract concluded following renegotiations under contract law principles. It does not require the extension of the control of unilateral conduct to conduct by non-dominant undertakings, which could stifle pro-competitive initiatives.

With regard to prohibited conduct, the rules on economic dependence likewise upset the careful balancing that has gone into deciding whether conduct by dominant undertakings is abusive.

The harmfulness of the economic dependency rules is particularly evident in the prohibition of undertakings with superior market power to offer to sell below cost.¹⁷⁶ With regard to predatory pricing by dominant undertakings, even EU law, which takes a more interventionist stance than US law in not requiring proof of likely recoupment, requires that the prices are shown to be below the relevant measure of cost; there needs to be a short-term sacrifice, at least in the form of deliberately foregone profits as opportunity costs.¹⁷⁷ It seems clear that even in the EU, it is not predatory pricing if an undertaking makes losses on a loss leader which it hopes to recapture concurrently with the sale of another product—where, in other words, the undertaking does not make a short-term sacrifice. In the latter case, prohibiting the below-cost pricing would harm consumers without addressing any competitive problem. If any further demonstration of the harmfulness of sale-below-cost prohibitions should be necessary, the following thought experiment may be instructive. If two competitors agree not to sell below cost, this horizontal price-fixing cartel agreement would not only be unenforceable for reasons of public policy (see also article 101(2) TFEU), but also would it attract a large fine on the undertakings, and in some jurisdictions, may result in fines

175 See generally, Oliver E. Williamson, *The Economic Institutions of Capitalism* 52-67, 95-96, and passim (1985).

176 For more detail, see ORGANISATION ON ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *RESALE BELOW COST LAWS AND REGULATIONS*, DAF/COMP(2005)43 at 9-12 (executive summary) and 19-58 (background note) (Feb. 23, 2006), <http://www.oecd.org/regreform/sectors/36162664.pdf>.

177 COMMISSION, *PRIORITIES PAPER*, *supra* note 145, paras. 63-65.

for or imprisonment of the responsible individuals—and rightfully so. Where the two competitors, however, are supermarket chains (or other undertakings with superior market power), the statutory sale-below-cost prohibition is a perfect substitute to the cartel agreement, which is even enforced by the law, so that the usual incentive to cheat in a non-cooperative prisoners' dilemma cannot undermine the compact.

The prohibition of sales below cost in § 20(3) ARC undermines all this careful balancing. It prohibits low prices from which consumers could have benefitted without any clear theory of harm. Various theories are advanced, explicitly or implicitly, to support the prohibition of sales below cost, but none of them is even remotely persuasive.

Traditionally, the justification for the prohibition of below-cost sales relied on a predation narrative; competitors, such as mom-and-pop stores, might be priced out of the market by powerful large undertakings, such as the evil supermarket chains. There are several problems with supporting the current law on selling below cost on this basis. First, the practice of offering loss leaders below cost in order to recoup the losses with sales of other products to the same customers during their one-stop shopping is not likely to result in any anti-competitive exclusion. Exclusion of competitors is only possible where the overall bundle of products bought by one-stop shopping consumers is cheaper than it would be elsewhere—and such overall cheaper prices are a victory achieved by efficient competition, not by anti-competitive exclusion.¹⁷⁸ Also, in the market for retail stores, barriers to entry are low—there would be no possibility for post-predation raising of prices.¹⁷⁹ The theory relies on a predation narrative without any of the necessary preconditions of predatory pricing. Secondly, the genesis of the prohibitions in today's § 20(3)2 nos. 1 and 2 ARC demonstrates that the predation narrative cannot be the justification of these prohibitions. The Federal Court of Justice's *Hitlisten-Platten* decision had explicitly been based on this rationale, and had accordingly added the necessity to show a sufficient likelihood of lasting harm to the structural conditions for effective competition; but the legislature amended the law precisely to overturn this decision. A predation theory without any need to show that the structural conditions for effective competition will be, or at least realistically could be, impaired is implausible. Thirdly, the predation theory becomes even more absurd if it is advanced to support the prohibition of even *occasional* sales below cost, introduced for food products in 2007, and extended in 2013. Fourthly, especially in the paradigm case of supermarkets against mom-and-pop stores, the prohibition of below-cost sales is completely *ineffective* in preventing supermarkets from displacing mom-and-pop stores. The reason why supermarket chains can offer products at much lower prices than mom-and-pop stores are twofold: first, their distribution costs are usually lower because of economies of scale and scope; and secondly, they will be able to negotiate with their suppliers for larger discounts, either because of economies of scale or because of demand-side market power vis-à-vis these suppliers. Because their *costs*

178 For the (self-evident) statement that exclusion on the basis of more efficient conduct is not abusive, see *Post Danmark*, *supra* note 140, and the quotation from that judgment *infra* note 241.

179 MONOPOLKOMMISSION, PREISKONTROLLEN IN ENERGIEWIRTSCHAFT UND HANDEL? ZUR NOVELLIERUNG DES GWB, SPECIAL REPORT 47 (2007) [58].

are lower, supermarket chains can price mom-and-pop stores out of the market even with sales *at* (or slightly above) cost. Below-cost sales will often be aimed at competition between the large supermarket chains, rather than at competition with mom-and-pop stores.

Realizing that the predation narrative does not work, the justification is occasionally (implicitly) shifted to a demand-side market power narrative: where supermarket chains offer, for example, milk products at below-cost prices to lure customers into their stores, they may exercise their demand-side market power to milk the dairy farms and creameries dry. There is indeed some evidence that demand-side market power depresses prices below the competitive level in the milk sector.¹⁸⁰ The problem, however, is that the justification of the prohibition of below-cost selling based on demand-side market power is not only a *non sequitur*; the remedy would be positively *counterproductive*. Where supermarkets may not offer below cost but nevertheless want to lure customers into their stores with low prices for milk products—or want to match their competitors’ low prices—they have to *reduce their costs for milk products*. In other words, they have to exert *even more* pressure on creameries and dairy farms to lower their supply prices. Also, if it were the demand-side market power that was to be addressed, it would not make sense to condition the prohibition on the relative horizontal size of the undertaking in comparison to the undertaking’s competitors, as is the case for cases of superior market power. If demand-side market power were the underlying rationale, sales below costs would have to be a category of relative market power in the vertical relationship—the question would have to be whether the suppliers—the dairy farms or creameries—are dependent on the distributor, the supermarket chain.

In short, none of these justifications for the sale-below-cost prohibition is remotely persuasive. The continued existence and extension of the sale-below cost statute is only explicable by public choice considerations. The price-increasing effects help producers that are well organized and ready to lobby the legislator. For the general population, the harmful effects of sale-below-cost statutes are not sufficiently transparent to put any pressure on legislators; instead, the statute can be sold as a mom-and-pop store protection scheme—and who would not want to save the high street against the evil chains (unless it requires paying transparently higher prices)?

It is particularly unfortunate that the *Bundeskartellamt*, usually a stalwart for good competition advocacy, sent mixed signals to the legislator in the run-up to the 2013 amendment to the ARC. On the one hand, it did point out the harmfulness of the prohibition.¹⁸¹ On the other hand, it complained at the same time that the *Rossmann* decision by the Higher Regional Court Düsseldorf made enforcement of the prohibition exceedingly difficult, and that this could only be remedied by a legislative clarification.

180 See, e.g., BUNDESKARTELLAMT, *supra* note 158.

181 BUNDESKARTELLAMT, STELLUNGNAHME ZUM REGIERUNGSENTWURF ZUR 8. GWB-NOVELLE (June 22, 2012) at 25-26, available at <http://www.bundeskartellamt.de/wDeutsch/publikationen/Diskussionsbeitraege/StellungnahmenW3D-nauidW26146.php>.

tion.¹⁸² Furthermore, the €100,000 fine the *Bundeskartellamt* had imposed on an individual in the *Rossmann* case—despite unfettered discretion not to prioritize the enforcement of the prohibition, or at least not to impose fines, or at least not fines on individuals, and despite the borderline conduct, which was later even found to be lawful by the courts¹⁸³—likewise did not send the signal that the sale-below-cost prohibition is actually an undesired anti-competitive contaminant in the ARC. The legislator followed the much less mixed signals given by the lobbyists for the retention of the prohibition.

3. SME-Protection in the United States

Surely such a travesty could never happen in the United States. After all, restricting unilateral conduct below the monopoly power threshold is the clearest example of interference with free competition that is likely to prohibit or chill pro-competitive conduct, especially where low prices are concerned.

And yet, once we move beyond Sherman Act enforcement, we encounter quite a number of prohibitions that are eerily reminiscent of the economic dependency rules just outlined. Rules limiting the competitive pressures that chain stores may exert vis-à-vis mom-and-pop stores without regard to efficiencies (below a.), rules protecting SME distributors against termination or non-renewal (below b.), and rules against selling below cost (or even below cost plus mark-up) even where there is no question of recoupment (below c.) are not wholly unknown in the United States.

a. Robinson-Patman Act

First, similar to the German rules in § 20(1) and (2) ARC—the prohibitions for undertakings with relative market power to discriminate dependent undertakings and to request preferential treatment from suppliers—the Robinson-Patman Act prohibitions¹⁸⁴ were introduced with exactly the same aim of protecting mom-and-pop grocery stores against chain stores.¹⁸⁵ Like the prohibition of unjustified discrimination in § 20(1) ARC, selling at discriminatory prices or providing special favors to selected purchasers requires a justification under the Robinson-Patman Act, and unlike the open-ended

182 *Ibid.* at 25.

183 See *supra* note 170.

184 Technically, the Robinson-Patman Act (15 U.S.C. § 13) amended the Clayton Act.

185 See *Volvo Trucks North America v. Reeder-Simco GMC*, 546 U.S. 164, 175 (2006) (“Augmenting that provision [§ 2 of the Clayton Act] in 1936 with the Robinson-Patman Act, Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain-stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand.”); see also Justice Stevens’s dissent (joined by Justice Thomas), *ibid.*, at 187 (“the Robinson-Patman Act was primarily intended to protect small retailers from the vigorous competition afforded by chain stores and other large volume purchasers.”); *Dayton Superior Corp. v. Majram Supply Co.*, 2011 WL 710450 (E.D.N.Y., Feb. 22, 2011) (“The Robinson-Patman Act was specifically enacted to protect small businesses from discriminatory pricing by manufacturers in favor of large chain stores” (internal citations omitted)); *American Federation of State, County and Mun. Employees Dist. Council 37 Health & Sec. Plan v. Bristol-Myers Squibb Co.*, —F. Supp.2d—, 2013-1 Trade Cases § 27,402, 2013 WL 2391999 at *13 (S.D.N.Y., June 3, 2013). See also ANTITRUST MODERNIZATION COMMISSION (“AMC”), REPORT AND RECOMMENDATIONS 311, 313 (April 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

interest-balancing under § 20(1) ARC, the Robinson-Patman Act even limits the available defenses.¹⁸⁶

Like § 20(2) ARC, the Robinson-Patman Act prohibits “passive discrimination” by making it unlawful “knowingly to induce or receive a discrimination in price which is prohibited by this section.”¹⁸⁷

The Robinson-Patman Act distinguishes between primary-line, secondary-line, and tertiary-line price discrimination.¹⁸⁸ In primary-line price discrimination cases, competing manufacturers complain that price-discriminating rebates to distributors lead to customer foreclosure, for example because particularly high rebates are targeted at the competitors’ customers. In secondary-line price discrimination claims, purchasers complain about the seller’s preferential treatment of other purchasers who compete with them for customers. In tertiary-line cases, the discrimination affects competition between competing customers of the purchasers where the purchasers themselves are not direct competitors.

Primary-line price discrimination claims are all but obsolete; *Brooke Group* has held that such primary-line discrimination claims have to satisfy basically the same predatory pricing requirements as are required to show a § 2 Sherman Act infringement.¹⁸⁹ Primary-line discrimination under the Robinson-Patman Act is arguably not an irritant to the error-cost framework any more.

By contrast, the secondary-line (and tertiary-line) price discrimination prohibited by the Robinson-Patman Act aims at protecting individual competitors against injuries, regardless of any harm to competition in general. All that is required is a showing of a “diversion of sales or profits from a disfavored purchaser to a favored purchaser,” and a “permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.”¹⁹⁰ It is one of the few instances in which most US American antitrust lawyers

186 15 U.S.C. § 13(a), (b), (c), (d), and (e).

187 15 U.S.C. § 13(f). As to the requirement of “knowingly” inducing a discrimination “prohibited by this section”, see *Gorlick Distribution Centers v. Car Sound Exhaust System*, 723 F.3d 1019, 1021-1024 (9th Cir. July 19, 2013) (affirming summary judgment for defendant, because, while the competitor-defendant had known that its discounts were higher than those granted to its competitors, plaintiff had not shown that defendant had known that the discounts did not qualify for a defense under the Robinson-Patman Act).

188 See, e.g., *Volvo Trucks*, supra note 185, at 176; *Marjam Supply Co., v. Firestone Building Prods. Co.*, 2012-2 Trade Cases § 78,157, 2012 WL 6005709 at 3 note 6 (D.N.J., Nov. 30, 2012).

189 Supra note 125. In addition to the requirements of predatory pricing, a primary-line price discrimination claim has to show *discriminatory* rebates. See *Felder’s Collision Parts v. General Motors*—F. Supp.2d—2013 WL 1681175 (M.D. La., April 17, 2013). For a similar rejection of primary-line price discrimination allegation under EU law where prices were not predatory, see *Post Danmark*, supra note 144.

190 *Volvo Trucks*, supra note 185, at 177 (citing, *inter alia*, *FTC v. Sun Oil*, 371 U.S. 505, 518-519 (1963), and *FTC v. Morton Salt*, 334 US 37, 49-51 (1943), respectively); *J.D. Fields & Co. v. Nucor-Yamato Steel*—F. Supp.2d—2013 WL 5467104 (E.D. Ark. Sept. 30, 2013).

openly, though grudgingly, acknowledge that the law protects competitors instead of competition.¹⁹¹

The Robinson-Patman Act is certainly not loved by US American antitrust lawyers, and usually its existence is swept under the carpet.¹⁹² Judge Bork characterized the Act as based on “wholly mistaken economic theory,”¹⁹³ a characterization with which Justice Stevens “happen[s] to agree.”¹⁹⁴

Calls for the repeal of the Robinson-Patman Act are nearly constantly on the table. For example, the Antitrust Modernization Commission recommended in 2007:

The Commission recommends that Congress finally repeal the Robinson-Patman Act (RPA). This law, enacted in 1936, appears antithetical to core antitrust principles. Its repeal or substantial overhaul has been recommended in three prior reports, in 1955, 1969, and 1977. That is because the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage. At the same time, it is not clear that the RPA actually effectively protects the small business constituents that it was meant to benefit. Continued existence of the RPA also makes it difficult for the United States to advocate against the adoption and use of similar laws against US companies operating in other jurisdictions. Small business is adequately protected from truly anticompetitive behavior by application of the Sherman Act.¹⁹⁵

And yet, the Robinson-Patman Act remains in force.¹⁹⁶ Nor is it a mere “law in the books.” Even though the DOJ has completely ceased its enforcement, and the FTC

191 AMC, *supra* note 185, at 317 (“[t]he Robinson-Patman Act does not promote competition, however. Instead, the Act protects competitors, often at the expense of competition that otherwise would benefit consumers . . .”); *see also* the quote accompanying note 176. *But see Volvo Trucks*, *supra* note 185, at 180-181 (majority stating that interbrand competition is the primary concern of antitrust law, that “[t]he Robinson-Patman Act signals no large departure from that main concern,” and that “we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition”) (emphasis in the original)).

192 *See, e.g.*, Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 *FORDHAM L. REV.* 1113, 1118 (1983) (“No one, it appears, dwells longer than necessary in the land of Robinson-Patman”). The leading treatise on Antitrust Law had originally declined to deal with the Robinson-Patman Act, PHILIPP E. AREEDA & DONALD F. TURNER, 1 *ANTITRUST LAW* 1st edn. (1978) at § 100. The current edition deals with the Robinson-Patman Act, but with the apologetic proviso that “dislike for a particular statute or doctrine is not a good reason for excluding it from what purports to be a ‘full coverage’ treatise on federal antitrust law.” HERBERT HOVENKAMP, 14 *ANTITRUST LAW* 3rd edn. (2012) at § 2300 in footnote 1. At least at Columbia Law School, exams in antitrust law regularly include the instruction: “Assume that the Robinson-Patman Act has been repealed.”

193 BORK, *supra* note 16 at 382 (“The attempt to counter the supposed threat to competition posed by price discrimination constitutes what is surely antitrust’s least glorious hour. The instrument fashioned for the task was the Robinson-Patman Act, the mishapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory. . . . Although it does not prevent much price discrimination, at least it has stifled a great deal of competition.”).

194 Dissent by Justice Stevens, joined by Justice Thomas, in *Volvo Trucks*, *supra* note 185, at 188.

195 AMC, *supra* note 185, iii. On the AMC’s recommendation, *see* Daniel J. Gifford, *Farewell to the Robinson-Patman Act? The Antitrust Modernization Commission’s Report and Recommendation*, 53 *THE ANTITRUST BULLETIN* 481-516 (2009).

196 In *Volvo Trucks*, *supra* note 185, this was essentially the dissent’s argument: while the policy of the Robinson-Patman Act may be “wholly mistaken,” the letter of the law is still binding.

has also all but stopped enforcing it, private enforcement—in the form of injunctive relief or treble-damages actions—is alive and kicking.¹⁹⁷

In addition to the private enforcement of the federal Robinson-Patman Act, there is additional enforcement of similar provisions in state laws; numerous states have provisions that more or less mirror the Robinson-Patman Act.¹⁹⁸

By contrast, the Grand Chamber of the Court of Justice of the European Union, usually so much more interventionist than US courts, held that primary-line *and* secondary-line price discrimination as such does not constitute an abuse, even where the discriminating undertaking is *dominant*.¹⁹⁹

b. Protection of Distributors and Franchisees against Termination

As mentioned above, one of the most common case categories under the German § 20 ARC is the termination or non-renewal of, or other abusive conduct in the context of franchise and similar distribution agreements. Especially car dealerships and petrol station owners frequently seek protection under § 20 ARC.

Are franchisees protected against opportunistic conduct by the franchisor in the United States? Once the question is reframed in these functional terms, it is much less clear that US law can be reduced to the simple rule that the non-dominant firm is free to structure its distribution system as it sees fit. There are several state laws protecting franchisees against the franchisor's opportunism.²⁰⁰ As is the case in Germany, car dealership franchises and petrol stations are important sub-categories of franchises in the United States, and in these sectors franchisees are even protected by federal law.²⁰¹

197 While AMC, *supra* note 185, 316, describes a downward trend in successful enforcement, there is no dearth of recent, at least partially successful, Robinson-Patman litigation. *See, e.g., J.D. Fields & Co. v. Nucor-Yamato Steel*—F. Supp.2d— 2013 WL 5467104 (E.D. Ark. September 30, 2013) (defendant's motion for judgment on the pleadings denied in relation to the Robinson-Patman price discrimination claims).

198 For an in-depth, albeit now slightly dated, treatment of the state price discrimination statutes, *see* ABA ANTITRUST LAW SECTION, FEDERAL AND STATE PRICE DISCRIMINATION LAW Ch. 4-56 (1991).

199 *Supra* note 144.

200 *See, e.g.,* Robert W. Emerson & Uri Benoliel, *Can franchisee associations serve as a substitute for franchisee protection laws?*, 118 PENN. ST. L. REV. 99, 106 (2013) (citations to the relevant state laws in note 31 and summary of the content at 105-107); *Lafontaine & Scott Morton*, *supra* note 52; Boyd Allen Byers, *Making a case for federal regulation of franchise regulation—A return-of-equity approach*, 19 J. CORP. L. 607, 622, 624-627 (1994) (citing various sector-specific and general franchise relationship laws). *See also* David Hess, *The Iowa Franchise Act: Towards protecting reasonable expectations of franchisees and franchisors*, 80 IOWA L. REV. 333 (1995).

201 With regard to petrol stations (and other franchises in the petroleum industry), the Petrol Market Practices Act, 15 U.S.C. §§ 2801-2806, provides for a notice period for terminations (15 U.S.C. § 2804), and for protection against termination and non-renewal for other reasons than those enumerated in 15 U.S.C. § 2802(b). In this sector, the federal protection preempts state law, 15 U.S.C. 2806(a). With regard to car dealers, 15 U.S.C. § 1222 provides:

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: Provided, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

It has, however, been noted that courts tend to interpret 'good faith' in 15 U.S.C. § 1222 narrowly as the absence of intimidating or coercive conduct. *Byers*, *supra* note 200, at 626 (text accompanying fn. 121 with references); *Byers* points out, however, that the federal statute does not preempt state law, unless it is in direct conflict: 15 U.S.C. § 1225, so that the states may protect for more protection of the franchisee under (sector-specific or general) state law.

Contract law rules may also be used to protect franchisees.²⁰² To the extent they apply, these provisions usually have the consequence that the franchisor is limited in the reasons for terminating, and sometimes even not renewing, the franchise, and/or that sufficient notice has to be given to the franchisee—which is very similar to the consequences once § 20 of the German ARC applies.²⁰³

In the case of car dealerships, US federal law does not preempt state law that does not directly conflict with the provisions of federal law.²⁰⁴ Consequently, some state franchise laws exceed the federal protection. As an illustration, we can use a case mentioned in the previous section on the Robinson-Patman Act. In *Volvo Trucks*, the US Supreme Court held that the Robinson-Patman Act prohibition of secondary-line price discrimination has to be interpreted restrictively to exclude competitive bidding cases where the product is produced to the customer's specifications and there is no head-to-head competition between the favored and the disfavored purchaser in the individual case.²⁰⁵ While the plaintiff therefore did not succeed under the Robinson-Patman Act, and therefore did not receive *treble* damages under the Clayton Act, the Court noted that the plaintiff had successfully claimed for single damages under the Arkansas Franchise Practices Act before the state courts.²⁰⁶ The plaintiff in *Volvo Trucks* had claimed to have been singled out for elimination in the 1997 “Volvo Vision” programme, which sought to reduce the number of dealers from 146 to 75; the plaintiff filed the suit in February 2000, arguing that Volvo's strategy had been to make the conditions for its dealership so unpleasant as to amount to a constructive termination. Apparently, this argument was enough to claim damages under the Arkansas Franchise Practices Act. Even under the restrictive German economic dependency rules, Volvo could have terminated the dealership outright without fear of reprisal with a notice period of only 12 months (or possibly less).²⁰⁷

Leaving antitrust-unrelated rules aside, some US American courts have also argued that § 2 Sherman Act (or its state law equivalents) may apply to franchisors even if

202 See Byers, *supra* note 200, at 628 (discussing cases under Article 2 of the UCC) and 631-635 (discussing common law doctrines).

203 For the question in which cases sufficient notice has to be given before a distribution system can be restructured see BGH, Jan. 31, 2012, Case KZR 65/10, WuW/E DE-R 3549, 3553–3554 paras. 22–27 — *Werbeanzeigen*. Where a car dealership is terminated, a contractually agreed notice period of 12 months was considered sufficient even where transaction-specific investments have not been amortized by the time the termination becomes effective, BGH, Feb. 21, 1995, Case KZR 33/93, NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNGS REPORT (NJW-RR) 1260, 1261 (1995) (at the time, the European Block Exemption Regulation no. 123/85 required a notice period of 1 year, which the court took into account in the assessment). See also Wernhard Möschel, in, *GWB*, 4th edn (Ulrich Immenga & Ernst-Joachim Mestmäcker eds., 2007) at § 20 para. 153 with further references. More generally, commercial agency agreements are subject to certain notice periods in the EU. Article 15-19 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, [1986] O.J. L382/17 (providing, in principle, for staggered statutory minimum notice periods of up to three months (reached after the third year of the contract has commenced), or, if the Member State so chooses, up to six months (reached after the sixth year of the contract has commenced)).

204 See *supra*, note 202.

205 *Volvo Trucks*, *supra* note 185. The Court left undecided whether or not two purchasers could ever compete in such a situation, given that the sale of the custom-made product would eventually only be made to the one successful purchaser.

206 *Volvo Trucks*, *supra* note 185, at 173 in n. 2.

207 *Supra* note 190.

the primary market for franchises on which the franchisor operates is competitive.²⁰⁸ The reasoning of these courts comes down to the argument—and I apologize for the crude oversimplification—that under certain conditions a contract lock-in may confer monopoly power even where the primary market is competitive.²⁰⁹ True, where the franchisee conferred this power on the franchisor knowingly by contract, it is common ground that § 2 Sherman Act will not apply;²¹⁰ but there are cases where this post-contractual power was not evident to the franchisee, and under *Newcal* § 2 Sherman Act may apply to these cases.²¹¹ This, albeit limited and not widely accepted, contract lock-in theory of monopoly power is essentially the same reasoning as that applied by German courts to justify “relative market power” while acknowledging that there is no dominance.²¹²

To be clear, the point I want to make here is *not* that we need, or do not need, franchisee protection in the absence of monopoly power by the franchisor—perhaps we do, perhaps we do not. Nor is my point that we should infer from *Newcal* that § 2 Sherman Act will be applicable in a wide range of franchise cases—arguably it will not. Nor is my point that because US law restricts the supplier’s freedom to structure its distribution agreement even in some instances in which the supplier has no monopoly power, we should not be critical towards antitrust statutes that provide for rules on economic dependency—we should. Nor is my point that US federal or state law is in many or most cases as restrictive (or, depending on one’s point of view, “protective”) as jurisdictions with rules on economic dependency—my overall impression is that US law is much less restrictive (or “protective”).

My point is this: while we are aware of the danger of over-enforcement in the antitrust laws, we tend to compartmentalize the law and view its various subdivisions “antitrust law,” “contract law,” “franchise law,” “unfair competition law,” etc. in isolation. As a consequence, we are very concerned that antitrust law retain its conceptual and doctrinal purity—such as the non-dominant firm’s unrestricted freedom to act unilaterally. Accordingly, antitrust lawyers find harsh words for antitrust decisions like

208 *Newcal Ind., Inc. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008), *cert. den.*, 129 S.Ct. 2788 (2009) (although the 9th Circuit was at pains to emphasize that this was only a Rule 12(b)(6) decision, *ibid.* at 1046 and 1051); followed by *In re Apple & AT&TM Antitr. Lit.*, 596 F.Supp.2d 1288, 1302-1306 (N.D. Cal. 2008). *Newcal* and *In re Apple* were distinguished in *In re ATM Fee Antitr. Lit.*, 768 F. Supp.2d 984, 997 (N.D. Cal. 2009) (no monopoly power conferred by alleged lock-in where switching costs were low). For a critical discussion of *Newcal* see PHILIP AREEDA & HERBERT HOVENKAMP, 2B ANTITRUST LAW § 519 3rd edn. (2007) with *idem*, 2013 SUPPLEMENT TO ANTITRUST LAW 205-210 (2013).

209 *Newcal*, *supra* note 189, at 1046-1051. The antitrust franchise cases usually concern allegedly abusive conduct *within* the existing franchise relationship, especially in relation to tying. Arguably, US American courts would not go so far as to use the same argument for the *termination* of the franchise, which by definition releases the franchisee back onto the competitive market. This is concededly a not insubstantial difference to the German case law under § 20 ARC, where terminations are one of the main categories of allegedly abusive conduct; but these latter cases may be covered by the American state franchise relationship laws as functional equivalents (above nn. 181-183).

210 *Newcal*, *supra* note 209, at 1048-1049; *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 438 (3d Cir.1997); *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1476 (9th Cir.1997); *In re Apple*, *supra* note 189, 1302-1303, 1305-1306.

211 *Newcal*, *supra* note 208, at 1046-1051; *see also In re Apple*, *supra* note 208, at 1301-1306 (alleged technological restrictions on switching communications services on the iPhone after the contractual two-year period were not transparent to consumers).

212 *Supra* V.2.c.(i).

Newcal or the European aftermarket cases such as *Hugin* or *Hilti*,²¹³ or antitrust laws that include rules on economic dependency.²¹⁴ However, we lose sight of all the restrictions of conduct imposed in other areas of law. If we are genuinely concerned about over-enforcement and the chilling effect it may have on legitimate forms of competition, we need to take into account *all* legal (and ideally even extra-legal) restrictions of conduct, not just restrictions by “antitrust laws.”²¹⁵ The comparative, functional perspective highlights that what one jurisdiction treats as an antitrust problem (for example franchisee protection under the German rules on economic dependency), may be treated by another jurisdiction as a contract or *sui generis* problem (such as the franchise relationship state laws); and that what one jurisdiction treats as a problem of economic dependency below the threshold of dominance may be treated by another jurisdiction without special rules on economic dependency as a case of monopoly power. We need to look beyond the artificial confines of legal classifications to see the whole picture.

c. Sales Below Cost

Surely, however, the non-sensical sales-below-cost prohibition for undertakings with superior market power vis-à-vis their SME competitors in the German ARC described above²¹⁶ is so antithetical to the well-balanced error-cost approach in *Matsushita* and *Brooke Group*,²¹⁷ which carefully avoids prohibiting or chilling conduct that would benefit consumer welfare by requiring a showing of a dangerous probability of recoupment, that nothing like it could possibly exist in the United States.

Yet, again, state law complicates matters. The sale-below-cost state statutes adopted by “a majority of states”²¹⁸ do upset the careful balance of the predatory pricing error-

213 Cf. Case 22/78, *Hugin Kassaregister AB and Hugin Cash Registers Ltd v. Commission*, [1979] ECR 1869 [8] (market for Hugin cash register spare parts required by independent undertakings); Case C-53/92 P, *Hilti AG v. Commission*, [1994] ECR I-667 (separate market for cartridge strips/nails that are compatible with Hilti nail gun).

214 For the German rules on economic dependency, see *supra* V.2.c.

215 This is not quite the same as saying that it is irrelevant whether a particular jurisdiction treats, for example, the wrongful termination of a franchise as a pure contract (or *sui generis* etc.) issue or as an antitrust issue. To the extent, for example, that the law of that jurisdiction provides for different remedies in antitrust cases, it may clearly be of tremendous importance how the case is qualified. This is most notably the case in the US, where the qualification of the case as an antitrust case (or not) is of tremendous importance because of the mandatory trebling of damages in antitrust cases, whereas under contract and franchise law only single damages are owed (in *Volvo Trucks*, the nudged-out dealer received \$513,750 under the Arkansas state franchise law, but missed out on the more than “\$1.3 million” under the Robinson-Patman Act; *Volvo Trucks*, *supra* note 185, at 173 text in and accompanying n. 2). But in jurisdictions where the remedy in both contract and antitrust cases is single damages to begin with, the distinction may well be of less practical importance.

216 *Supra* V.2.c.(ii).

217 *Supra* note 114.

218 Francis M. Dougherty, *Validity, Construction, And Application of State Statutory Provision Prohibiting Sales of Commodities Below Cost – Modern Cases*, 41 A.L.R. 4th 612 § 2[a] (originally published in 1985). The US contribution to the 2005 OECD Roundtable lists 25 states with general resale-below-cost laws, and 31 states with resale-below-cost laws for specific products (mostly gasoline, cigarettes, liquor, and milk/dairy products), OECD, *supra* note 176, at 171, 178-179.

cost framework, and these statutes are frequently litigated.²¹⁹ Unless these statutes are invalidated on constitutional grounds, which is not generally the case,²²⁰ or are interpreted restrictively along the lines of the federal predatory pricing standard, they, too, can undermine the fine balancing of the case law under the federal antitrust laws with regard to predatory pricing.²²¹ Some courts have started to interpret these state laws restrictively along the lines of federal antitrust laws. However, the extent to which these statutes are to be interpreted restrictively is often unclear; and the statutes frequently let sales below costs suffice as *prima facie* evidence of an intent to injure competition, which helps these cases, at a minimum, clear the summary judgment hurdle²²²—which in itself may act as a disincentive to sell below cost because of the threat of discovery costs. Some courts have affirmatively stated that the differences between the Sherman Act and the respective state sales-below-cost prohibitions prevent the courts from aligning the interpretation of the state statutes with the federal standards on predatory pricing.²²³

219 For an overview of general state law prohibitions of sales below cost and their application, see e.g., DOUGHERTY, *ibid.*; see also Edward K. Esping, John R. Kennel & Thomas Mukus, 58 C.J.S. MONOPOLIES § 97 at I.I.E.3.a. Low or Predatory Pricing; for additional statutes against selling gasoline below cost, see Erin Masson Wirth, *Validity, Construction, and Application of State Statutory Provisions Prohibiting Sale of Gasoline Below Cost*, 26 A.L.R. 6th 249 (originally published in 2006).

220 A few state courts have considered sales below cost statutes to be unconstitutional under their state constitutions, especially where the statutes did not at least require an intent to injure competition (e.g., Ports Petroleum Co., Inc. of Ohio v. Tucker, 916 S.W.2d 749, 1996-1 Trade Cases § 71,338 (Ark., 1996), striking down art. 4 of Act 380 of 1993 as violating the due process clause of the Arkansas Constitution; Kentucky Milk Marketing and Antimonopoly Commission v. Kroger Co., 691 S.W.2d 893 (Ky., 1985), finding a minimum-markup scheme (for milk products) in violation of art. 2 of the Kentucky constitution; Remote Services, Inc. v. FDR Corp., 764 S.W.2d 80 (Ky., 1989), finding a similar minimum-markup scheme for gasoline likewise in violation of art. 2 of the Kentucky constitution), while other state courts have rejected claims of unconstitutionality (e.g., Bhandari v. Nilsestuen, 342 Wis.2d 248, 816 N.W.2d 350 (Table), 2012 WL 1623501 (Wis.App.), 2012 WI App 73 (Wis. App. 2012) (rejecting claim that a statute prohibiting sales below cost plus a statutory markup for petrol [and, as the court notes in fn. 4, tobacco products and alcohol], as opposed to pure sales below cost for other products, infringed the equal protection clause; the statute in question was Wisconsin Stat. § 100.30); Utah v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah, 1990); Baseline Liquors v. Circle K Corp., 129 Ariz. 215, 630 P.2d 38 (Ariz. App., 1981) (upholding a statute requiring a markup of 12% in the absence of proof of a lesser cost). For a collection of successful and unsuccessful constitutional challenges see DOUGHERTY, *supra* note 218, at §§ 3-7; for the sector-specific statutes referring to gasoline, see MASSON WIRTH, *supra* note 219, at §§ 4 and 5.

221 William H. Jordan, *Predatory pricing after Brooke Group: The problem of state “sales below cost” statutes*, 44 EMORY L.J. 267, 268, 270-272, 300-304, 307-316 and *passim* (1995), with further references.

222 See, e.g., J.M. Smith Corp. v. Ciolino Pharmacy Wholesale Distributors, 2012 WL 5349376 (E.D. La. 2012) (leaving undecided whether the Louisiana sales below cost statute, La. R.S. § 51:422, is to be interpreted as an antitrust statute and requires a likelihood of recoupment, and emphasizing that the mere sales below cost constitute a *prima facie* violation). In *Felder’s Collision Parts*, *supra* note 189, the plaintiff alleged predatory pricing, Robinson-Patman Act discrimination, and an infringement of La. R.S. 51:1405(A) (which tracks roughly § 5 FTC Act language), but apparently and astonishingly not an infringement of the sales-below-cost statute La. R.S. § 51:422 (the only provision that seems to me to have held a modicum of promise on the basis of the pleadings).

223 Bay Guardian v. New Times Media, 187 Cal. App.4th 438, 445, 452-459, 114 Cal. Rptr.3d 392, 395, 402-407 (Cal. App. 1 Dis. 2010) (stating that “Section 17043 recites distinctive language, and has dissimilar elements and a different focus than [scil.: § 2 Sherman Act and the Robinson-Patman Act]”, 187 Cal. App.4th at 455, 114 Cal. Rptr.3d at 404, holding that “recoupment of losses . . . is not a requirement to prove a violation of section 17043”, 187 Cal. App.4th at 445, 114 Cal. Rptr.3d at 395, rejecting any requirement of an anticompetitive impact, 187 Cal. App.4th at 456-457, 114 Cal. Rptr.3d at 405, and upholding jury verdict awarding some \$16m in damages); applied in Rheumatology Diagnostics Laboratory, Inc. v. Aetna, Inc., 2013 WL 5694452 (N.D. Cal., Oct. 18, 2013); see also Star Fuel Marts, LLC v. Sam’s East, Inc., 362 F.3d 639, 648 (10th Cir. 2004) (“This distinction between the two Oklahoma statutes is important because an attempted monopolization claim requires not only anticompetitive conduct, but that the defendant have sufficient market power such that there is a “ ‘dangerous probability’ that an attempt to achieve monopoly power will succeed.” [citing *Brooke Group*]). When the anticompetitive conduct at issue is below-cost selling, the plaintiff must show that there is a dangerous probability that the defendant will recoup any losses it sustained in selling below cost [citing, *inter alia*, *Matsushita*]. *The purpose of the OUSA*,

These sales-below-cost statutes can be even more pernicious than the German prohibitions in § 20(3)2 nos. 1 and 2 ARC. First, some of these statutes prohibit not only sales below cost, but sales below “cost *plus x% markup*” (with x being often around 5-10). If one went along with the underlying narrative that mom-and-pop stores and other SME’s are to be protected against competition from more efficient chain stores, these “cost plus markup” statutes could even make some sense. Where the German provision is internally inconsistent, because the plain sales-below-cost prohibition cannot achieve the stated purpose of protecting mom-and-pop stores against the chain stores where the latter have lower costs, the “below-(cost+markup)” prohibition really does protect SME’s against competition from more efficient chain stores.²²⁴ However, to the extent there is agreement that the sales-below-cost prohibitions reduce consumer welfare by protecting less efficient competitors, it is clear that the even more restrictive “cost plus markup” statutes reduce consumer welfare even more by protecting even less efficient competitors against the pressures of competition. It should also be noted that the sales-below-cost statutes will often apply to dual distribution cases so as to prohibit margin squeezes—and in the case of sales-below-(cost+markup) statutes, even margin squeeze cases where the margin between wholesale and retail prices is positive (but lower than the mandatory markup).

There is a second consideration why (at least some) of the state legislation on sales below cost can be more restrictive than the German provisions. The German provisions prohibit sales below cost only for undertakings with “superior market power” vis-à-vis SME’s, the mom-and-pop stores. In contrast, many state statutes prohibit sales below cost *across the board*. As the Arkansas Supreme Court noted:

Indeed, in some instances the Act appears to have exactly the opposite effect from its stated purpose. . . . The flip side of prohibiting below-cost pricing is that smaller enterprises and single retail outlets (the mom and pop stores) are not able to use this strategy as a means of attracting customers and, thereby, competing with larger firms. Though completely free and innocent of predatory intent, these smaller outlets are foreclosed by the Act from engaging in a pricing mechanism that is one of the few competitive tools they have at their disposal.²²⁵

Under the German antitrust rule, at least *this* particular danger does not exist, because only undertakings with superior market power, not the “mom and pop stores,” are

however, is simply to prevent loss leader selling and to protect small businesses. Whether a defendant, in the future, may recoup its losses is irrelevant. Thus, under the OUSA, a defendant's market power is not at issue; rather, the inquiry is limited to the defendant's intent, and whether competitors (or customers) have been injured.” (emphasis supplied)).

224 Provided the mom-and-pop store is not also subject to the cost+markup requirement, *see infra* text following note 207.

225 *Ports Petroleum Co., Inc. of Ohio v. Tucker*, 916 S.W.2d 749, 755, 1996-1 TRADE CASES § 71,338 (Ark.,1996).

prohibited from selling below cost.²²⁶ In addition, where the sales-below-(cost+markup) prohibitions apply equally to chain stores and mom-and-pop stores, the internal inconsistency that characterizes the German provisions is replicated: the lower costs of chain stores enables them to underprice mom-and-pop stores without even selling below cost+markup because mom-and-pop stores will have to add the same markup to their own, higher, costs. In other words, there is a Catch 22: either, the cost+markup statute applies only to chain stores, in which case less efficient competitors are kept alive artificially to the detriment of consumer welfare, or the cost+markup schemes applies across the board, in which case it will also be detrimental to consumer welfare, but not to the same extent, but will at the same time be ineffective in protecting mom-and-pop stores.

Indications in the EU that above-cost predatory pricing might, in exceptional cases, merit attention under Article 102 TFEU²²⁷ are usually met with an almost visceral reaction on the other side of the Atlantic. Yet these considerations at least apply only to *dominant* undertakings, and where markets are highly concentrated, it may make some (limited) sense to protect even slightly less efficient competitors; they may still provide some competitive pressure on the dominant firm and so keep prices below the price (and the output above the output) that would result in their absence. By contrast, the sales-below-cost statutes generally apply to *all* firms, regardless of any market power, and the German statute applies to cases of merely “superior” market power. In these cases, the artificial protection of less efficient competitors will most likely not contribute *anything* positive to the degree of competition on the market. Even if there may be exceptional constellations where the protection of the inefficient competitor could put some downward pressure on prices even in these markets, this positive effect is surely outweighed by the costs of shielding the many inefficient competitors from competition by more efficient undertakings. The balance between type I and type II errors is difficult to strike in many situations; I would submit that this is *not* one of them.

Given the various US American rules that explicitly or implicitly protect SMEs against competition from more efficient larger competitors—such as the Robinson-Patman Act, the federal and state laws on franchisees’ protection, and prohibitions of sales below cost on the level of state law—it is perhaps slightly surprising that the United States denied

226 Concededly, the German unfair competition rules could apply to sales below cost even where the seller does not have superior market power (even though “some degree of market power” is said to be required even here, *supra* note 145, *at* para. 10.191). However, sales below cost *without more* are not considered to be unfair competition. On the contrary: the seller is generally free to sell below its costs. See BGH, January 31, 1979, Case I ZR 21/77, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2611 (1979) = ZEITSCHRIFT FÜR GEWERBLICHEN RECHTSSCHUTZ UND URHEBERRECHT (GRUR) 321 (1979)—*Verkauf unter Einstandspreis I*; BGH, October 27, 1988, Case I ZR 29/87, NEUE JURISTISCHE WOCHENSCHRIFT-RECHTSPRECHUNGSREPORT (NJW-RR) 356 (1989) = GRUR 371 (1990)—*Preisvergleich*; BGH, March 30, 2006, Case I ZR 144/03, GRUR 596, 597 (2006)—10% billiger. The qualification as “unfair” competition is reserved for those sales below cost which are (i) *intended* to eliminate competition and (ii) “objectively capable of eliminating competitors”. BGH, March 30, 2006, Case I ZR 144/03, GRUR 596, 597 (2006)—10% billiger; Köhler, *supra* note 164, paras. 10.189-192. Moreover, the intention to eliminate competition may not be deduced from the mere fact that the sales were below cost, or that they result in the elimination of a (less efficient) competitor, see Köhler, *supra* note 164, para. 10.192.

227 COMMISSION, PRIORITIES PAPER, *supra* note 145, [24], [65].

not merely having explicit rules on “abuses of superior bargaining power,” but also that there were any other applicable competition or non-competition provisions.²²⁸

VI. A Preliminary Summary and a Few Comparative Observations

1. A Few Comparative Observations on the Differences between the EU and US

The examples have shown that the error-cost framework, so carefully balanced for vertical non-price restraints (part III), vertical price restraints (part IV), and unilateral conduct (part V) on the US federal antitrust level, is not applied as strictly in the European Union, even though there has been some convergence over the past 15 years.

Remaining differences between the US and the EU are sometimes due to the institutional background. In the EU, where antitrust enforcement is still largely administrative enforcement (despite efforts to strengthen private enforcement that have changed the landscape in recent years²²⁹), type I errors do not have to be eliminated to the same extent on the level of the interpretation of the substantive laws; the reduction of type I error can be left to the discretion of the administrative authority tasked with enforcing the laws.²³⁰ This environment is very different from the one in the United States, where the restrictive interpretation of the substantive antitrust laws is often a result of the—justified or unjustified—fear of a chilling effect resulting from unmeritorious private litigation.²³¹ We have it on excellent—indeed the very best—authority that in the United States

228 See ICN, *supra* note 155, at 10 (“Of the 32 jurisdictions responding to the survey, 24 jurisdictions indicated that their laws and regulations do not contain any specific prohibition against ASBP. Most agencies in those jurisdictions noted that ASBP is not an antitrust term or concept under the legal systems of those jurisdictions. In this category, 12 jurisdictions (Barbados, Belgium, Cyprus, Czech Republic, Egypt, Jersey, Pakistan, Singapore, Switzerland, Turkey, United Kingdom, and United States) reported no applicable provisions and did not respond to the remainder of questionnaire section B. The remaining jurisdictions responded to the questionnaire on the basis of their general competition provisions, non-competition provisions, or both types of provisions, to the extent that these may apply to ASBP-type conduct.”).

229 There is now considerable private enforcement in some Member States, for example, Germany and the United Kingdom, although it is not remotely comparable to the practice in the US. The EU Commission has recently proposed legislation to overcome some of the remaining procedural hurdles, *see* Commission Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 (June 11, 2013).

230 Cf. VICKERS, *supra* note 132 at 6; for a formalization in an economic model of the different incentives under an administrative and a private enforcement regime *see* Andreea Cosnita-Langlais & Jean-Philippe Tropeano, *Institutional Design and Antitrust Evidentiary Standards* (13 March 2014) (preliminary version of the working paper presented at the MaCCI Annual Conference 2014). This is a consideration that is accepted in the US as well, where the laxer standards of § 5 FTC Act are justified by pointing to the enforcement discretion and expertise of the FTC. I refuse to take a position in the recent heated discussion about the merits or demerits of § 5 FTC Guidelines that would limit the FTC’s discretion (*supra* note 131) for much the same reasons why I avoid travelling into war zones during my holidays.

231 Cf. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-559 (2007), and the statements by Bill Kovacic in the text following this footnote. *But see* AAI *supra* note 16 at 219-246 (arguing that the allegations of wide-spread unmeritorious, frivolous and prohibitively expensive private enforcement are unfounded, and that the EU should introduce effective private rights of action).

[j]udicial concerns about over-deterrence also appear to stem from perceptions that the existing system of private rights of action is unduly expansive. Fears about unduly expansive private enforcement are driving doctrine in an increasingly non-intervention minded direction that encumbers public agencies as well. In their efforts to correct what they believe to be overreaching by private litigants, courts are embracing liability standards that inevitably curb public enforcement bodies.²³²

Bill Kovacic concludes:

If, as I believe, judicial perceptions of overreaching by private suits are narrowing the zone of substantive liability, public agencies eventually may be unable to do their job. This consideration points to the need for a deeper empirical examination of how the operation of private rights actually affects business decision making and how public agencies can prosecute cases without carrying burdens that courts have imposed on private litigants to cure perceived deficiencies in the system of private rights.²³³

Other differences between the EU and US systems may be explicable by a different weighting of type I and type II errors due to the different historical development of the market players in the European Union, where many sectors, especially utilities, are still dominated by incumbent state-owned undertakings, undertakings protected by legal monopolies, or their successors.²³⁴ Where investments in infrastructure were initially financed by taxpayer money, granting competitors access to this infrastructure may be less problematic from an error-cost perspective than in an environment where the investment in the infrastructure was a result of private initiative. Whatever its merits in the US, “[y]ou did not build that!”²³⁵ gets a whole new meaning in the European context.

Then there is, of course, the old recognition that the US is, for all practical purposes, a single market, whereas Europe started with protected national markets. The idea that it is not sufficient to tear down state interference with interstate trade if private actors then re-establish the division into national markets by way of private restraints is one that underlies not only the creation of the Single Market in Europe,²³⁶ but also many of the initiatives to introduce a competition law framework into the WTO regime, or more generally the accusations of market barriers against international entry erected by private restraints. While Europe has come a long way since 1958, surprisingly

232 STATEMENT OF FTC CHAIRMAN WILLIAM E. KOVACIC, *supra* note 8, at 4 (see also *ibid.* at 6-7); also cf. KOVACIC, *supra* note 8, at 22-23; MONTI, *supra* note 132, at 357-359.

233 STATEMENT, *ibid.* at 8.

234 *Post Danmark*, *supra* note 140, at [23] (“When the existence of a dominant position has its origins in a former legal monopoly, that fact has to be taken into account.”). See also VICKERS, *supra* note 132, at 6; Jones & Lovdahl Gormsen, *supra* note 141, at 456; ZOTT, *supra* note 150 (seeing this aspect as part of the explanation for the greater willingness of the Court of Justice of the EU to accept margin squeeze allegations against incumbent telecoms firms).

235 A phrase that even has its own Wikipedia entry: http://en.wikipedia.org/wiki/You_didn't_build_that.

236 *Supra* notes 28, 39.

many product markets are still to be defined on a national level, for example due to national regulations, consumer preferences, or language barriers.

Yet other differences may be due to the different ideological background of the antitrust laws. Ordoliberalism has been a strong influence on European Union law, and the starting point of an individual's freedom to compete which should be restrained neither by state nor by powerful private actors, and the focus on the competitive process rather than the outcome may lead to slightly different results than the prevailing focus on efficiency dominating the US American discourse.²³⁷ However, these ideological differences should not be overstated.²³⁸ Contrary to the insinuations by many depictions of ordoliberalism in English,²³⁹ the individual's freedom to compete²⁴⁰ is not to be confused with a guarantee for this individual to stay on the market. Where an individual competitor cannot compete with more efficient competitors solely because of its lower efficiency, its elimination from the market is a result of competition.²⁴¹ Just like the freedom of speech does not guarantee that anybody listens to you, the freedom to compete does not guarantee your survival on the market. Even though ideological differences are arguably most often invoked in explaining differences, the real reasons usually lie elsewhere. In reality, the two approaches of ordoliberalism and efficiency-

237 See in particular Pierre Larouche & Maarten Pieter Schinkel, *Continental Drift in the Treatment of Dominant Firms: Article 102 TFEU in Contrast to § 2 Sherman Act*, SOCIAL SCIENCE RESEARCH NETWORK (May 2013), TILEC Discussion Paper No. 2013-020, <http://ssrn.com/abstract=2293141>; see also DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION 159-204, esp. 167-175, 181-198 (2010) with further references; IDEM, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (1998).

238 For a concise yet very well-balanced account of different strands of ordoliberalism and the freedom to compete in English, see Lianos, *supra* note 39, at 30-36; see also *ibid.*, 36-41 on the competitive process as an intrinsic value.

239 See, e.g., ALISON JONES, EU COMPETITION LAW 4th edn. 35 (2011) ("An ordoliberal approach leads to the kind of competition policy . . . where competitors and small and medium sized enterprises are protected for their own sake regardless of the effects on efficiency . . ."); RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 7th edn. 22 (2012) ("It is not surprising that the beneficiaries of such thinking would be small and medium-sized firms . . ."); even Anca Daniela Chiriță, *The Analysis of Market Dominance and Restrictive Practices Under German Antitrust Law in Light of EC Antitrust Law*, 4 EUR. COMPETITION J. 415, 439-440 (2008) appears to fall into this trap, despite her otherwise extensive knowledge of the subject matter (see at 439: "German ordoliberal thinking considers SMEs to be crucial to achieving the goal of enhancing consumer welfare . . .", and at 440: "This 'special' protection from the excess of market power applies only to SMEs and newcomers . . ., and reveals a modern facet of German ordoliberalism."). The confusion is understandable—German competition law is heavily influenced by ordoliberalism, and it contains provisions that clearly protect SMEs for their own sake. However, these latter rules are the result of SME lobbying and political opportunism, not of ordoliberal ideas. The SME provisions have been consistently denounced by ordoliberals, see e.g., ERNST-JOACHIM MESTMÄCKER, DER VERWALTETE WETTBEWERB (1984); and the many critical observations and recommendations by the Monopoly Commission, e.g., MONOPOLKOMMISSION, *supra* note 179 at [54]-[72] (sales below cost), [73]-[99] (passive discrimination); MONOPOLKOMMISSION, DIE 8. GWB-NOVELLE AUS WETTBEWERBSPOLITISCHER SICHT, SPECIAL REPORT 63, (2012) at [79]-[82] (passive discrimination), [83]-[85] (sales below cost); MONOPOLKOMMISSION, STÄRKUNG DES WETTBEWERBS IN HANDEL UND DIENSTLEISTUNGEN, XIX. MAIN REPORT 2010/2011 (2012), *Bundestags-Drucksache (Parliamentary Document)* no. 17/10365, at [169], [1184]-[1188] (sales below cost), [1178]-[1183] (passive discrimination); see also MONOPOLKOMMISSION, MARKTÖFFNUNG UMFASSEND VERWIRKLICHEN, XII. MAIN REPORT 1996/1997 (1998), *Bundestags-Drucksache (Parliamentary Document)* no. 13/11291, at [99]. For an excellent account of ordoliberalism see Larouche & Schinkel, *supra* note 237.

240 Wernhard Möschel, *The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy*, 157 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS (JITE) 3, 5 (2001) ("Ordoliberal policy . . . protects the individual's economic freedom of action as an end in itself").

241 See the judgment of the Grand Chamber in *Post Danmark*, *supra* note 140, at [21]-[22] ("Nor does that provision [article 102 TFEU] seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market. Thus, not every exclusionary effect is necessarily detrimental to competition (see, by analogy, TeliaSonera Sverige, paragraph 43). Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.").

based competition law are rarely far apart in their recommendations. From a US perspective, the following quote from Richard Posner encapsulates the relationship of efficiency and the process of competition well: “Efficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further.”²⁴² The ordoliberal perspective is often said to be that efficiency is not an end in itself but is “an indirect and derived goal” of the competitive process;²⁴³ but there is also the even more process-oriented view that we will only ever know what outcome is efficient if there is competition, because we can establish what is efficient only once the individual preferences have been revealed in the process of competition (*Erich Hoppmann*).²⁴⁴ Even this view, however, has to be modified in cases where market failures make the outcome of unfettered competition unreliable indicators for efficiency and welfare.²⁴⁵ The difference between the efficiency-oriented Chicago approach and the process-oriented ordoliberal approach, then, is that the former sees competition as a “mediate goal that will often be close enough to the ultimate goal [of efficiency],” while the latter sees the process of competition, usually, as a necessary condition for achieving efficiency, but exceptionally allows departures where there are intrinsic reasons why merely guaranteeing an unfettered process of competition would be inefficient. The positions are not very far apart, even though the efficiency-oriented view may be, as a matter of degree, more willing than the process-oriented view to short-circuit the competitive process as soon as the most efficient outcome appears evident. *Mutatis mutandis*, the result-oriented view may also, as a matter of degree, put more weight on certain and quantifiable allocative efficiencies that are achievable in the short run, for example resulting from cooperation, and discount to a greater degree uncertain dynamic efficiencies that could potentially result from independent action, while the process-oriented view might prefer to force the firms to engage in duplicative (and therefore in the short term inefficient) independent action, in the hope that the uncertain, but potentially great dynamic efficiencies eventually offset the short-term inefficiencies of duplication. This difference goes less to the “freedom versus efficiency” debate that is so often emphasized when ordoliberalism is mentioned, and more to the potential conflict between certain short-term quantifiable allocative efficiencies on the one hand, and uncertain long-term, difficult to quantify, though potentially large dynamic efficiencies on the other hand. This is a conflict that even a system that focuses *purely* on efficiency-reasons has to address.

Ordoliberalism has also resulted in a preference for *ex ante* legal certainty, justiciability, and hence “form-based” rules.²⁴⁶ Especially in the context of Article 102 TFEU, this form-based approach has led to severe criticism for leading to too many Type I errors. Yet again, however, it is necessary to distinguish the application of the “form-

242 POSNER, ANTITRUST LAW, 2nd edn. 28-29 (2001).

243 MÖSCHEL, *supra* note 240, at 4.

244 See also LIANOS, *supra* n. 39, at 36-39.

245 On the controversy on this point see WERNHARD MÖSCHEL, WIRTSCHAFTSRECHT IM WANDEL 210-228 (2011).

246 LIANOS, *supra* n. 39, at 35-36; WERNHARD MÖSCHEL, RECHT DER WETTBEWERBSBESCHRÄNKUNGEN 53-54 (1983).

based” approach as practiced by the Court of Justice—which is, in my view, indeed often too interventionist—from the principle of relying on predictable *ex ante* rules that do not depend on the *ad hoc* proof of anti-competitive effects in each individual case. The approach of accepting the Type I and Type II errors in individual cases that are inevitably associated with a rule-based (as opposed to a case-by-case) decision-making in competition law can be justified when the costs of administering the application of competition law are taken into account.²⁴⁷ This concern is also reflected in the US American staggered approach of applying *per se* prohibitions, a quick-look rule of reason illegality, the full rule of reason, a quick-look rule of reason legality, or *per se* legality, depending on the *ex ante* probability that a particular form (!) of conduct is pro- or anti-competitive. However, even from the perspective of a form-based approach, the rules can and should be fine-tuned to reflect new insights into the relative costs of Type I and Type II errors; and, in this regard, the Court of Justice’s practice, which often refers to 40 year old cases without any discussion whether their analysis may need updating, can be criticized with good reason.

2. Differences between the Theoretically Pure and Practically Messy Legal Position in the (United?) States

However, the examples above have also shown, however, that the remaining points that are in dispute between the US and the EU framework occasionally pale against the differences between the rhetoric underlying the application of the US federal antitrust laws (more precisely, the Sherman Act and Clayton Act, excluding the Robinson-Patman Act) and the reality of the law in action in the individual states. Due to a number of “irritants,” the error-cost framework may be of less impact on the law in action in the United States than could be assumed on the basis of the federal law in the books as it is presented to foreigners.

Some of the irritants derive from the application of federal statutes, such as the Robinson-Patman Act, § 2 Sherman Act where market power is found to derive only from a contractual lock in, or the federal franchise protection statutes in the petroleum and car sectors.

Most of the irritants to the error-cost framework, however, originate on the state level, either because of more restrictive state antitrust laws—for example, states prohibiting minimum resale price maintenance *per se* even post *Leegin*²⁴⁸—or because of unfair competition laws in the broader sense that protect competitors to the detriment of

247 Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of ‘Per se Rules vs. Rule of Reason’* SOCIAL SCIENCE RESEARCH NETWORK (November 21, 2005), available at <http://ssrn.com/abstract=872694>.

248 Ben Depoorter & Francesco Parisi, *The Modernization of European Antitrust Enforcement: The Economics of Regulatory Competition*, 13 GEO. MASON L. REV. 309, 321-322 (2005), warning that Regulation 1/2003 risks “[r]eplicating the flaws of the US system”, “in which there are dozens of institutions that can say ‘no’ but not one that can say ‘yes.’” (internal citation marks omitted, citing Frank H. Easterbrook, *Monopolization: Past, Present, Future*, 61 ANTITRUST L.J. 99, 109 (1992)), FIRAT CENGİZ, ANTITRUST FEDERALISM IN THE EU AND THE US (2012) 94 (writing, after discussing the validity of Illinois Brick Repealers: “[A]s the downside of this flexible approach [scil.: to preemption of state antitrust law], when designed strategically, diverse state standards may impose significant burdens on the system and force a policy change at the federal level, even though that policy change is not considered entirely plausible from a substantive perspective.”).

consumers, such as franchisee protection statutes or sales-below-cost statutes. Bill Kovacic is among those who have called attention to the problem:

To an important degree, both jurisdictions [*scil.*: US and EU] resemble a policymaking archipelago in which various government bodies other than the competition agency deeply influence the state of competition. Too often each policy island in the archipelago acts in relative isolation, with a terribly incomplete awareness of how its behavior affects the entire archipelago. It is ever more apparent that competition agencies must use non-litigation policy instruments to build the intellectual and policy infrastructure that connects the islands and engenders a government-wide ethic that promotes competition.²⁴⁹

Given that the error-cost framework is firmly based on the recognition that over-enforcement can be not only unhelpful for, but positively detrimental to the goals of antitrust law, the question of federal pre-emption of the state laws by the federal antitrust laws arises naturally.

VII. A Case for Federal Preemption and EU Convergence?

After all that was said above, it is not surprising that there have been calls for federal pre-emption,²⁵⁰ especially where state statutes interfere with interstate vertical price maintenance schemes²⁵¹ or the predatory pricing standards.²⁵² Others, including the majority of the Commissioners in the Antitrust Modernization Commission, consider the resulting divergences as an acceptable price to be paid for having antitrust federalism.²⁵³

249 KOVACIC, *supra* note 5, at 24.

250 Commissioner John Warden's separate statement in the AMC Report and Recommendations, *supra* note 185, 444 ("I believe that state law—whether called antitrust law, consumer protection law or unfair competition law—that regulates the same business activity with the same purported objectives as the federal antitrust laws should be preempted except in its application to strictly local activities affecting a particular State. . .").

251 See, e.g., BRUCKMANN, *supra* note 114 (arguing for a narrow pre-emption where the conduct takes place wholly out of the *per se* State and where the prohibition's application to this conduct would amount to controlling extraterritorial conduct); Katherine M. Brockmeyer, Note, *State Regulation of Resale Price Maintenance on the Internet: The Constitutional Problems with the 2009 Amendment to the Maryland Antitrust Act*, 67 WASH. & LEE L. REV. 1111 (2010) (finding in Maryland's *per se* approach a violation of the dormant commerce clause); Leiv Blad & Bryan Killian, *A Civil Conflict: Can the States Overturn Leegin?* 1(1) CPI ANTITRUST CHRONICLE (Jan. 7, 2011).

252 JORDAN, *supra* note 221, 306-309 (discussing whether the interference of sale-below-cost statutes with the federal predatory pricing standards could lead to a constitutional challenge, but, after reviewing several unsuccessful challenges under the Commerce Clause, the Equal Protection Clause, the Supremacy Clause and the Due Process Clause, concluding that "the Supreme Court's decision in *ARC America* and the opinions of appellate courts . . . make the success of a preemption challenge to state sales below cost statutes extremely unlikely." (*ibid.* at 309)). For an overview of various unsuccessful and (much less often) successful constitutional challenges of the sales-below-cost statutes, see also Dougherty, *supra* note 218, at §§ 3-7.

253 *Supra* note 185, at 185-197 (though suggesting that state antitrust enforcement focus on local markets); but see the separate Statement of Commissioner Carlton, *ibid.* 400, and especially the one by Commissioner Warden (*supra* note 250). It should be noted that the trigger for the scrutiny by the AMC seems to have been the Microsoft case, and therefore the focus was more on state enforcement of the federal laws. Harry First, *Modernizing State Antitrust Enforcement: Making the Best of a Good Situation*, 54 THE ANTITRUST BULLETIN 281-304 (2009). While divergences

1. Preemption in the United States

This is not the place to discuss in depth constitutional issues, such as that of the dormant Commerce Clause—and, at any rate, I certainly would be the wrong person for doing this.²⁵⁴ I will therefore confine myself to a few superficial observations that, I hope, are permitted to an outsider.

At least at first glance, the Supreme Court's decision in *California v. ARC America*²⁵⁵ would seem to prevent successful pre-emption challenges based on the reasoning that the state laws on resale price maintenance, sales below costs, or franchise protection interfere with the general policies under the federal antitrust laws. *ARC America* concerned a pre-emption challenge to *Illinois Brick Repealer* statutes. The Ninth Circuit Court of Appeals had argued that the state statutes allowing indirect purchasers to claim damages contrary to the interpretation in *Illinois Brick* of the federal antitrust laws (§ 4 of the Clayton Act) interfered with the policies espoused in *Illinois Brick*, namely preventing complex litigation regarding the amount of the pass on, preventing multiple liability of the defendant, and providing sufficient incentives for the direct purchasers to bring a claim.²⁵⁶ The Supreme Court reversed, reasoning that, first, the federal antitrust laws did not explicitly or implicitly preempt the field of antitrust law.²⁵⁷ Secondly, any pre-emption challenge against the application of state antitrust laws would face an uphill battle, because of the presumption that “areas traditionally regulated by the States” are not preempted by federal law²⁵⁸ and antitrust laws were traditionally regulated by the states.²⁵⁹ Thirdly, the relevant test for answering whether the application of state laws was preempted was the following:

The path to be followed in pre-emption cases is laid out by our cases. It is accepted that Congress has the authority, in exercising its Article I powers, to pre-empt state law. In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding pre-emption. First, when Congress intends that federal law occupy a given field, state law

between *enforcers* may lead to practical problems as well, this state enforcement of *federal* laws seems more unproblematic to me than the application of divergent state laws, especially as the federal courts have jurisdiction over state enforcement of federal antitrust law, so that there is a harmonizing influence here. See also Thomas C. Arthur, *The Unsatisfactory Application of the Antitrust Statutes of the United States by the Federal Courts*, in *MODERNISATION OF EUROPEAN COMPETITION LAW* 61, 64-65 (Jules Stuyck & Hans Gilliams eds., 2002). Arthur states that “[w]hile state antitrust laws could be more restrictive of business practices than is federal antitrust law, that has remained a theoretical rather than a practical problem.” (*ibid.*, 64). The different assessment here (in contrast to the AMC and Arthur) is arguably owed to two circumstances: first, *Leegin* has made federal law more permissive, so that in this respect states are now “lagging behind.” Secondly, Arthur's remark and the considerations of the AMC refer to the state *antitrust* laws, while I consider (albeit superficially) non-antitrust state rules as well as state antitrust rules.

254 The most important constitutional considerations with respect to antitrust federalism are discussed from a comparative US-EU perspective in CENGİZ, *supra* note 248.

255 490 U.S. 93 (1989).

256 *In re Cement and Concrete Antitrust Lit.*, 817 F.2d 1435, 1444-1447 (9th Cir. 1987).

257 *California v. ARC America*, 490 U.S. 93, 101-102 (1989).

258 *Ibid.* at 101; see also *ibid.*: “[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).”

259 *Ibid.* at 101 with footnote 4.

in that field is pre-empted. . . . Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, . . . , or when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,”²⁶⁰

In *ARC America*, as in the scenarios of interest here, the only question was whether the state laws in question “pose an obstacle to the accomplishment of the purposes and objectives of Congress.” With regard to the *Illinois Brick Repealer* statutes granting standing to indirect purchasers, the court argued that “State laws to this effect are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct.”²⁶¹ The Court then went on to explain that *Illinois Brick* merely concerned the statutory interpretation of federal law, and that the policy reasons that led the Court in *Illinois Brick* to restrict standing for damages claims to direct purchasers under federal law were not undermined by state laws granting indirect purchasers standing as well.²⁶² The complexities of litigation reintroduced by the necessity to unravel the pass-on issue could be confined to state courts.²⁶³ The Court also dismissed the argument that the *Illinois Brick Repealer* interfered with the policy that direct purchasers should have a sufficient incentive to bring a suit.²⁶⁴ With regard to the policy of avoiding multiple liability, the Court stated that multiple liability was only to be avoided *under § 4 Clayton Act*, and that “in none of those cases [scil., *inter alia*, *Illinois Brick*] did the Court identify a federal policy against States imposing liability in addition to that imposed by federal law.”²⁶⁵

The problem in extrapolating from *ARC America* to the pre-emption questions at issue here (resale price maintenance, franchise protection, sales below cost) is that *ARC America* is based on both a broad and a narrow ground. The narrow ground consists

260 *Ibid.* at 100-101 (internal citations omitted).

261 *Ibid.* at 102.

262 *Ibid.* at 103 (“[N]othing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws. The Court of Appeals also erred in concluding that state indirect purchaser statutes interfere with accomplishing the purposes of the federal law that were identified in *Illinois Brick*”).

263 *Ibid.* at 103-104, pointing to the fact that claims under the *Illinois Brick Repealer* statutes could be brought in the state courts to begin with, and that where the plaintiff sued before the federal courts, the federal courts could exercise their discretion to decline jurisdiction over the state law claims.

264 The Court’s argument here seems not entirely unambiguous to me. The Court argues that the settlement should have separated the funds for distribution under federal antitrust law for direct purchasers and those for distribution under the state laws, which could be distributed among direct and indirect purchasers (*see ibid.* at 104-105). Yet it is clear that unless there is multiple liability for the defendant, it is impossible to divide the damages in such a way that both indirect and direct purchasers receive damages without necessarily diminishing the amount of damages that would have been available to the direct purchasers. The argument seems to be that *Illinois Brick* was merely concerned with providing sufficient incentives that *somebody* bring an action: “*Illinois Brick* was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute—§ 4 of the Clayton Act—would result in no one plaintiff having a sufficient incentive to sue under that statute. State indirect purchaser statutes pose no similar risk to the enforcement of the federal law.” *Ibid.* at 104. This, however, seems to be based either on multiple liability for the defendant or on an implicit discounting of the force of the incentive argument in *Illinois Brick*. It appears that the Court assumed that the indirect purchasers would be reimbursed from separate funds, after direct purchasers were fully compensated under federal law—in other words, the Court seems to accept multiple liability for the defendant. See the text following this footnote.

265 *Ibid.* at 105.

in the analysis that the three policy grounds for denying standing for indirect purchasers are unaffected by the state statutes. Some commentators have indicated doubts whether this narrow argument can be extrapolated to the conflict between *Leegin* and the per se treatment in the states, or the conflict between the safe-harbor afforded to unilateral conduct of firms without monopoly power on the federal level and the franchise protection laws on the state level, or the conflict between the federal predatory-pricing standards and the sales-below-cost statutes.²⁶⁶ However, it seems to me that the broad reason given by the Court, that in principle state statutes based on the state's police powers will not be preempted except where there is a clear indication from Congress, would lead the courts in all the above-mentioned scenarios to adopt a position equally accommodating to the state statutes as the analysis in *ARC America*. In all these scenarios one can argue that the State laws in question "are consistent with the broad purposes of the federal antitrust laws,"²⁶⁷ despite their divergence from federal law.

With regard to resale price maintenance, one can argue that, first, federal antitrust law considered this practice as *per se* prohibited for nearly a century and, secondly, that even today federal law does not consider the practice per se legal but subjects it to a rule of reason analysis; it does not seem particularly outrageous, then, that individuals states take a slightly stricter stance. Thirdly, during the time when there was a federal per se rule but the Miller-Tydings and McGuire Acts permitted the states to enact "fair trade laws" (from 1937 to 1975), the constellation that a seller from a "non-fair trade law State" (today: a *per se* State, such as California²⁶⁸ or Maryland²⁶⁹) sold goods below the minimum price into a "fair trade law State" (today: a *Leegin* State, such as Tennessee²⁷⁰) already existed in the United States. In one such case, the Second Circuit accepted that the undercutting of the fair-trade prices was a natural consequence of leaving the decision whether to adopt fair trade laws to the individual states.²⁷¹ While it is true that the Miller-Tydings and McGuire Acts made it clear that the choice whether to outlaw resale price maintenance was one for the states to make, while today this freedom of choice for the states merely follows from the general assumption that the states are free to regulate unless they are preempted, it seems unlikely that the courts would today see exactly the same constellation as so unbearable that they would find the state laws as implicitly preempted.²⁷²

266 See, e.g., Bruckmann, *supra* note 114 (arguing for a narrow pre-emption where the conduct takes place wholly out of the per se State and where the per se prohibition's application to this conduct would amount to controlling extraterritorial conduct); Blad & Killian, *supra* note 251 (arguing that *ARC America* does not preclude a preemption challenge against *Leegin Repealers*).

267 *Ibid.* at 102.

268 *Supra* note 90-92.

269 *Supra* note 102.

270 *Supra* note 86.

271 *General Electric Co. v. Masters Mail Order Co.*, 244 F.2d 681 (2d Cir. 1957), cert. den., 355 U.S. 824 (1957).

272 But see Bruckmann, *supra* note 114, at 401-403, who discusses the *Masters Mail Order* case, but finds its reasoning unavailing in today's environment, because today, in contrast to then, there is no federal statute that makes clear that leaving the decision to the states is an affirmative choice.

The franchise protection laws, which, like other unfair competition laws on the state level, can conflict with the safe-harbor for firms without monopoly power, also share the “broad purpose” with federal laws—namely, the federal laws protecting franchisees in the car sector and the petroleum sector.²⁷³ What is more, the federal statute in the car sector explicitly allows the states to adopt their own car dealership protection laws provided they do not conflict with the federal statute.²⁷⁴ In this context, it seems difficult to argue that the State franchise protection laws must be preempted. More generally, if one wanted to preempt all laws that would interfere with the safe-harbor for firms without monopoly power, it would be difficult to know where to stop—unless one wants to harmonize practically all laws regulating businesses across the States. We will get back to this argument in the European context.²⁷⁵ It seems to me that in the United States the idea of preempting vast fields of police powers would meet with even greater resistance than in the European Union.²⁷⁶

This last argument also applies to the sales-below-cost laws. While the attempt to justify these laws in terms of an antitrust theory of harm seems to defend the indefensible,²⁷⁷ the states could argue that the sales-below-cost laws are meant to protect SME competitors with strong roots in the local community, or that they serve a consumer protection purpose, because consumers could be misled into thinking that in a store where milk is cheap everything else is cheap as well. Before anyone objects that it is unrealistic that anyone would employ these justifications, I would like to point to the Wisconsin sales-below-cost prohibition, which states that

[t]he practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce. Such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy. Bankruptcies among merchants who fail because of the competition of those who use such methods result in unemployment, disruption of leases, and nonpayment of taxes and loans, and contribute to an inevitable train of undesirable consequences, including economic depression.²⁷⁸

273 *Supra* note 202.

274 *Supra* note 202. In the petroleum sector, the federal preemption is made explicit (from which one may arguably deduce, *a contrario*, that franchise protection laws in other sectors are not generally preempted).

275 *Infra* 2.

276 *Similarly*, First, *supra* note 253, at 292-293.

277 *See supra* V.2.c.(ii) in the German context.

278 Policy Statement in the Unfair Sales Act, Wisconsin Stat. § 100.30(1). *See also* the wording of the Louisiana statute (La. R.S. § 51.422(A)):

Any advertising, offer to sell, or sale of any merchandise . . . at less than cost as defined . . . with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or impairing fair competition and thus injuring public welfare, is *unfair competition* and contrary to and violative of public policy as expressed in this Sub-part, *where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create monopoly in any line of commerce.* (Emphasis added)

Surely, the federal antitrust laws should not preempt a statute that prevents all these evils from arising. . . .

2. European Union: Convergence *Vel Non*

In the EU, the “pre-emption” issue is addressed in a slightly different way. For a long time, Member States were in principle free to adopt and apply national antitrust laws that could be stricter or more lenient than the European standards; only where European law had made an affirmative choice by “positive action” that certain conduct was permissible were the Member States prevented from undermining that choice by applying their stricter rules.²⁷⁹ In all other cases, parties had to clear both “barriers,” the European competition rules and the national antitrust rules.²⁸⁰ The situation was not unlike the situation today in the United States today, although it was arguably always easier for the “federal” level to “preempt” stricter national law.²⁸¹

This changed with effect from May 1, 2004, the date from which Regulation 1/2003 became applicable. Article 3(2) of Regulation 1/2003 provides in its first sentence that where agreements, decisions by associations of undertakings or concerted practices may affect trade between Member States, and EU competition law does not prohibit the conduct, Member States may not apply their stricter national laws to prohibit the conduct (the so-called convergence rule). In other words, with regard to vertical and horizontal agreements, Member States may apply stricter national law only where the conduct also infringes EU law, or where the conduct lacks the capability of affecting trade between Member States. The upshot is that Member States are more or less

Similarly, the definition of “loss leader” in California (Cal. Bus. & Prof. Code §17030). Generally, *see* Dougherty, *supra* note 218, at § 2[a] (“Such statutes . . . are aimed at ending ‘loss leader’ selling, which has been defined as below-cost sales . . . advertised and made with the intent of luring customers to the store, where they may be entrapped into purchasing other goods at marked-up prices that will more than make up for the loss on the ‘leaders.’”). *See also* Parish Oil v. Dillon Companies, 523 F.3d 1244, 1254-1255 (10th Cir. 2008) (collecting sources stating that loss leaders may mislead consumers in this way, quoting, *inter alia*, Safeway Stores v. Okla. Retail Grocers Ass’n, 360 U.S. 334, 340 (1959), but noting that “[w]e cite economic literature from the first half of the last century because that is when the Colorado legislature enacted the UPA. We do not mean to suggest that these theories would necessarily pass muster under more modern economics.” *Ibid.* in footnote 6; the 10th Cir. rejected the classification of the gasoline discount that was conditioned on a grocery purchase as a loss leader, *ibid.* at 1255). The same reasoning has been used in Germany by the lobbyist for the brand manufacturer association before the parliamentary subcommittee on the question whether to revive the strict sales below cost provision for food products in the 2013 amendment to the ARC that had lapsed under a sunset clause. Andreas Gayk’s submission to the subcommittee economic affairs, Protocol 17/74 (June 27, 2012).

279 Case 14/68 (*Walt Wilhelm v. Bundeskartellamt*) [1969] ECR I, establishing the “modified double barriers” approach. The Court held that “one and the same agreement may, in principle, be the object of two sets of parallel proceedings, one before the Community authorities under Article 85 of the EEC Treaty [now Article 101 TFEU], the other before the national authorities under national law” (*ibid.*, at para. 3; this is the “double barriers” part of the so-called “modified double barriers” approach—if undertakings wanted to go ahead, they generally needed to clear both the EU law hurdle and the national law hurdle). However, “this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the Common Market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules” (*ibid.*, at para. 4; this is the “modification” compared to a “pure” double barriers approach).

280 *Ibid.*

281 The exact contours of the “positive action” affirmative-choice exception never became clear, but it was widely assumed that, for example, the decision to exempt certain conduct in a Block Exemption Regulation would be taken to prohibit the application of stricter national antitrust laws to that conduct.

confined to copying the EU law with regard to vertical and horizontal agreements.²⁸² The positive consequence is that problems such as the difference between Leegin and per se states could not arise in the EU.²⁸³ The negative aspect, of course, is that with regard to the substantive rules in this area antitrust federalism has ceased to exist.²⁸⁴

The convergence rule does not, however, apply to unilateral conduct.²⁸⁵ In this area, Member States are free to legislate for and apply stricter rules to conduct, even where this conduct may affect trade between Member States. As mentioned above,²⁸⁶ this is why rules such as the German rules on economic dependency still exist. These stricter national rules on unilateral conduct may be an irritant to undertakings that want to draft their business plans on a pan-European scale. To ensure “a level playing field,” the Commission had argued for a convergence rule including unilateral conduct from the start,²⁸⁷ and the exclusion of unilateral conduct from the convergence rule was merely a compromise with the Member States that insisted on retaining their stricter rules. In a Report on the functioning of Regulation 1/2003, the Commission reiterated their view that the unilateral-conduct exception and the resulting divergent standards in the Member States “fragment business strategies that are typically formulated on a pan-European or global basis,” and that the problems caused by this exception “should be further examined”.²⁸⁸

However, the discussion above has hopefully made clear that the troubles with an uneven playing field would not end even if the political feat²⁸⁹ of eliminating the

282 Article 3(2) Regulation 1/2003 is much more complex than that, but the details are not of concern here. For details see Ulf Böge & Andreas Bardong, in *Competition Law: European Community Practice and Procedure* (Günther Hirsch, Frank Montag & Franz Jürgen Säcker eds., 2008) at 4-3-074 *et seq.*; Eddy De Smijter & Lars Kjøbye, *The Enforcement System Under Regulation 1/2003*, in *THE EC LAW OF COMPETITION* 2nd edn. (Jonathan Faull & Ali Nikpay eds., 2007) at para. 2.43-2-54.

283 Always keeping in mind that EU law treats minimum vertical price fixing as a hardcore restriction, which is not quite the same as saying that it is per se prohibited (it may be justifiable in the individual case under Article 101(3) TFEU). A better example would be maximum vertical price fixing: Member States could not start to prohibit maximum vertical price fixing where the vertical Block Exemption Regulation 330/2010 applies.

284 For a recent plea for more antitrust federalism in the EU, see Christopher Townley, *Co-ordinated Diversity: Revolutionary Suggestions for EU Competition Law (and for EU Law too)* SOCIAL SCIENCE RESEARCH NETWORK (July 26, 2013), <http://ssrn.com/abstract=2298588>.

285 This is generally taken to be the result of the second sentence of Article 3(2) Regulation 1/2003, although it is already implicit in the wording of the first sentence, the convergence rule itself. For details on the unilateral-conduct exception see Böge & Bardong, *supra* note 282, at 4-3-097 *et seq.*

286 *Supra*, text accompanying note 154.

287 Even though Article 3 of the Commission Proposal would not have achieved this result. Article 3 of the Commission Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No. 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (‘Regulation implementing Articles 81 and 82 of the Treaty’), COM(2000) 582 final, [2000] O.J. C 365 E/284. But that is another story.

288 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, REPORT ON THE FUNCTIONING OF REGULATION 1/2003, COM(2009) 206 final (April 29, 2009) at paras. 22, 43. For more detail, see COMMISSION STAFF WORKING PAPER ACCOMPANYING THE COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND COUNCIL - REPORT ON THE FUNCTIONING OF REGULATION 1/2003 {COM(2009)206 final}, SEC(2009) 574 final (29 April 2009) at paras. 160 *et seq.*, esp. paras. 177-179.

289 It is doubtful that the resistance put up by the Member States in 2002, when Regulation 1/2003 was adopted, can be overcome in a revision of Regulation 1/2003. Cf. Luis Ortiz Blanco & Alfonso Lamadrid de Pablo, *EU Competition Law Enforcement: Elements for A Discussion on Effectiveness and Uniformity*, in 2011 FORDHAM COMP. L. INST. 45, 96-97 (noting that the unilateral conduct exception is seen as a problem by stakeholders, but “whereas the EC appears to share this opinion, the extension of the convergence rule to unilateral conduct appears

unilateral conduct exception could be achieved. The reason is that Article 3(2) Regulation 1/2003 only addresses national competition rules. Article 3(3) Regulation 1/2003 provides that the convergence rule does not “preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles [101 and 102 TFEU],” and Recital 9 elaborates that the convergence rule

does not preclude Member States from implementing on their territory national legislation, which protects other legitimate interests provided that such legislation is compatible with general principles and other provisions of Community law. In so far as such national legislation pursues predominantly an objective different from that of protecting competition on the market, the competition authorities and courts of the Member States may apply such legislation on their territory. Accordingly, Member States may under this Regulation implement on their territory national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration.²⁹⁰

The problem, which by now should be obvious, is that functional equivalents from areas of law such as “acts on unfair trading practice” may very well interfere with EU antitrust law *just as much as national antitrust laws*.²⁹¹

The clearest example to demonstrate this is, once again, prohibitions of sales below cost.²⁹² As discussed above, these prohibitions—contained, for example, in § 20(3)2 nos. 1 and 2 of the German ARC²⁹³—have the potential to upset the fine balance, struck by the law on predatory pricing abuses by dominant undertakings, between permitting aggressive competition with low prices as long as they are not capable of eliminating competition, and prohibiting prices that are genuinely predatory. If the Commission succeeded in extending the convergence rule to unilateral conduct, Germany would arguably have to let go of these provisions in its antitrust laws.²⁹⁴

not to have enough political support” (citation omitted)).

290 For commentary on Article 3(3) Regulation 1/2003, *see, e.g.*, Smijter & Kjølbye, *supra* 282, paras. 2.55-2.73. ¶

291 Cf. COMMISSION STAFF WORKING PAPER, *supra* note 155, para. 181 (“Drawing the borderline appears particularly difficult in relation to laws concerning stricter competition rules for unilateral conduct, on the one hand, and laws covering unfair trading practices, on the other hand, both of which currently fall outside the scope of the convergence rule.”). For more detail *see* Hanns Ullrich, *Anti-Unfair Competition Law and Anti-Trust Law: A Continental Conundrum?*, EUI Working Paper LAW No. 2005/01, SOCIAL SCIENCE RESEARCH NETWORK (Feb. 2005), <http://ssrn.com/abstract=837086>.

292 ULLRICH, *ibid.*

293 For similar rules in other EU Member States, *see* COMMISSION STAFF WORKING PAPER, *supra* note 155, paras. 170-172.

294 Böge & Bardong, *supra* note 282, at 4-3-023 and 4-3-026 (also pointing to the opposite view which considers the sales-below-cost provisions in (now) § 20(3) ARC as provisions which predominantly pursue a different objective).

However, even if § 20(3) ARC were emasculated by an extended convergence rule, nothing much would change: Germany has practically interchangeable rules on sales below cost in its rules on unfair trade practices.²⁹⁵ That sales-below-cost prohibitions straddle the line between antitrust law and unfair competition laws will also be familiar to the American reader.²⁹⁶ Indeed, the unfair competition rules on sales below cost interfere *even more* with the balance struck by the antitrust—here predatory pricing—rules: where the German antitrust prohibition at least requires a certain market power, the unfair competition rules have an even lower standard.²⁹⁷ Nevertheless, these rules would arguably qualify as “provisions of national law that predominantly pursue an objective different from that pursued by Articles [101 and 102 TFEU],” precisely because they are concerned with effects on *individual market participants* and do not require an effect on *competition*.

The problem, in other words, is that *bad antitrust rules and non-antitrust rules share the characteristic that they are not conditioned on actual or likely effects on competition*. To use this characteristic in order to distinguish antitrust rules and non-antitrust rules, and to allow Member States to apply stricter non-antitrust rules at will, undermines the attempt to achieve a level playing field.

The difficulty is that there is no easy solution to avoid this problem. In order to achieve a level playing field and to avoid interference of functional equivalents with well-balanced antitrust rules, one would have to harmonize ever more fields of law. One could start with a harmonization of unfair competition rules. However, the question then becomes how to distinguish unfair competition rules from contract law rules—many practices prohibited in one jurisdiction under unfair competition rules are treated in another jurisdiction under contract law rules, for example under public policy. Again, we have encountered this in the US context when looking at the unenforceability of resale price maintenance in New York and New Jersey.²⁹⁸ Restrictive covenants are also often subjected to a double control under antitrust laws and contract law rules, for example, both in the United States and in Germany.²⁹⁹ Where a party with monopoly power, such as a utility, has reserved itself the right to determine the price unilaterally, German contract law provides for judicial review of the exercise of the

295 The general prohibition in § 4 of the Act against Unfair Trade Practices (UWG) has traditionally been applied to sales below costs under certain conditions; see *supra* note 207. Given Recital 9, it would be difficult to argue that that rule does not predominantly pursue a different objective in the meaning of Article 3(3) Regulation 1/2003. See Böge & Bardong, *supra* note 282, at 4-3-023.

296 See, e.g., the California, Wisconsin and Louisiana statutes, *supra* note 279.

297 *Supra* note 226.

298 *Supra* note 104.

299 See, e.g., Harvey J. Goldschmid, *Antitrust's Neglected Stepchild: A Proposal For Dealing with Restrictive Covenants Under Federal Law* 73 COLUM. L. REV. 1193 (1973); Milton Handler & Daniel E. Lazaroff, *Restraint of Trade And the Restatement (Second) of Contracts*, 57 N.Y.U.L. REV. 669 (1982); Restatement (Second) of Contracts §§ 187, 188; in Germany, see e.g., BGH, March 13, 1979, Case KZR 23/77, NEUE JURISTISCHE WOCHENSCHRIFT 1605-1606 (1979); BGH, November 3, 1981, Case KZR 33/80, NEUE JURISTISCHE WOCHENSCHRIFT 2000 (1982).

discretion in determining the price,³⁰⁰ leading to a *de facto* control of exploitative prices that may or may not coincide with standards under Article 102 TFEU.³⁰¹

Indeed, in the area of unfair trade practices in the *business-to-consumer* context, the EU *has* attempted to achieve full harmonization, and has again encountered the problem discussed here. The Unfair Commercial Practices (“UCP”) Directive,³⁰² which provides for full harmonization can, of course, not fully harmonize all functional equivalents. Just as Article 3(3) Regulation 1/2003 cops out by permitting the application of rules with a predominantly non-competition objective, the UCP Directive leaves Member States free, for example, with regard to their contract law (Article 3(2) UCP Directive), health and safety rules (Article 3(3) U.C.P. Directive), and “conditions of establishment or of authorisation regimes, or to the deontological codes of conduct or other specific rules governing regulated professions in order to uphold high standards of integrity” (Article 3(8) UCP Directive). Recital 7 adds that the Directive “does not address legal requirements related to taste and decency which vary widely among the Member States,” and mentions that “[c]ommercial practices such as, for example, commercial solicitation in the streets, may be undesirable in Member States for cultural reasons. Member States should accordingly be able to continue to ban commercial practices . . . for reasons of taste and decency even where such practices do not limit consumers’ freedom of choice.” I leave it to the reader to assess how “full” this full harmonization really is.

In order to achieve a level playing field, we would not only have to harmonize the national antitrust rules, unfair competition rules, and contract law rules, but also tort law, commercial law, business regulations, etc. A harmonization of all these areas would not only be infeasible politically but would also be impossible legally, because the European Union operates under the principle of conferred competences. While the European Union has legislated in a wide range of areas, its competences are not unlimited.

VIII. A Few Tentative Conclusions

Divergent rules in federal systems can lead to severe frictions. The policy of the federal antitrust laws can be completely undermined by state antitrust laws, if there is no coordination mechanism. This is largely the case in the US, even though it should be stressed that most states go along with the decisions made by the federal antitrust laws. Short of harmonizing the entire legal system on the federal/EU level, there appears no

300 § 315 of the German Civil Code.

301 BGH, July 5, 2005, Case X ZR 60/04, NEUE JURISTISCHE WOCHENSCHRIFT 2919, 2920 (2005); BGH, March 28, 2007, Case VIII ZR 144/06, NEUE JURISTISCHE WOCHENSCHRIFT 1672, 1674 [17] (stating the principle, but rejecting its application where there was no monopoly power because customer had the choice of another provider). *See also* BGH, July 31, 2013, Case VIII ZR 162/09, BeckRS 2013, 15532 (considering the provider’s wording of a the reservation of the unilateral power to determine the price in a boilerplate contract vague and void).

302 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market . . . , [2005] O.J. L149/22 (the Unfair Commercial Practices Directive or UCP Directive).

entirely principled solution to the problem of divergent rules in federal systems. Full harmonization of the entire legal system is not only legally impossible under the US Constitution and the EU Treaties, but would also be undesirable—competition between competition systems, testing different rules empirically, is a desirable feature as long as we do not know the “objectively best,” or at least “objectively better” rules.³⁰³

This leaves muddling through as an option. Article 3 Regulation 1/2003 is an attempt at such muddling through. Considering there was no experience with or model for such a convergence rule, it is not a bad first attempt. Nevertheless, Article 3 Regulation 1/2003 falls into the two extremes with their respective disadvantages. With regard to unilateral conduct, Member States are completely free to apply stricter law; this replicates the problems of the US system. With regard to horizontal or vertical agreements, however, it leads nearly to full harmonization, leaving virtually no room to experiment at all.

There are intermediate solutions.³⁰⁴ One would be to allow the states to act freely as long as there are no, or no substantial, externalities on other states. In the US, the Antitrust Modernization Commission recommended that “[s]tate non-merger enforcement should focus primarily on matters involving localized conduct or competitive effects.”³⁰⁵ In the EU, Member States are unconstrained by EU competition law to the extent that the conduct in question lacks the capability of affecting trade between Member States. An advantage of these approaches to allocate “localized” matters to the states, is that the states in these cases have better knowledge of the competitive environment, and also that externalities, if any, will be negligible. However, reducing state jurisdiction to *only* these cases would mean emasculating state antitrust enforcement and the scope for experimentation with better rules.

With regard to other than localized cases, it seems to me that the approach developed by the Court of Justice in the *Walt Wilhelm* decision has a lot to commend itself: in principle, states are free to experiment with their competition laws, but the “parallel application of the [state] system can only be allowed in so far as it does not prejudice the uniform application” of the federal/EU rules.³⁰⁶ To me, this combines very nicely the advantages of a competition of competition laws with the advantages of uniformity. The question then becomes, of course, under what circumstances the state enforcement does prejudice the uniform application of federal/EU law, and who should decide that this is the case.

This contribution has shown that, first, the importance of the law in action, including state antitrust enforcement, should be acknowledged, and, secondly, that the federal/EU legislator (or, failing that, the courts) should be much more precise in specifying the extent to which they want to achieve convergence, and to what extent they want

303 See, e.g., Townley, *supra* note 284.

304 FIRST, *supra* note 253, at 286-291.

305 AMC, *supra* n. 185, at 187; see also *ibid.* at 192, 196-197.

306 *Supra* note 279.

antitrust federalism to play a role. If the federal decision to treat resale price maintenance under a rule of reason is to be given effect, somebody with the requisite competence would have to clarify that conflicting state law is preempted. If the convergence rule in Article 3(2) Regulation 1/2003 were to be extended to unilateral conduct, one would have to bear in mind that this would not only eliminate rules on economic dependency (arguably a desirable effect), but also would affect rules that could catch conduct aimed at collusion, such as prohibitions of invitations to collude. The EU competition rules have no § 5 FTC Act to address the gap between concerted practices and unilateral conduct, and one should arguably not eliminate national rules addressing this gap without considering the implications.

Even with regard to rules on economic dependency, whose elimination I would generally welcome very much, one has to bear in mind that these rules may have some residual desirable functions. One such function may be as a facilitator of private enforcement. In civil law jurisdictions, access to evidence rules are often underdeveloped. For a private plaintiff it is well-nigh impossible to prove dominance without discovery or disclosure, and civil law jurisdictions do not usually provide for extensive access to evidence in their civil procedure laws. To the extent that economic dependency rules catch truly *abusive* conduct by *dominant* undertakings, they may serve the useful function of allowing private enforcement against conduct that in reality is, but could not procedurally be proven to be, an abuse of a dominant position. Of course, it would be better if the national systems addressed the evil at its root, and instead provided for a procedural solution to a procedural problem, in order to avoid the many type I errors that go with the extension of unilateral conduct rules to non-dominant undertakings.³⁰⁷ As long as this switch to a procedural solution is not made, however, the economic-dependency rules may have a modicum of value as a functional equivalent for effective access to evidence rules. With regard to the protection of transaction-specific investments, as well, the economic-dependency rules may serve some useful purpose. Again, it would be preferable to treat it as the contract-law problem that it is; but before a convergence rule eliminates the provisions seeking to protect such investments, one would have to decide whether one wants to eliminate the protection of those investments or whether they should be protected by other means.

One last observation. The bulk of this contribution has portrayed antitrust laws on the state level as an undesirable irritant to the “gold standard” of the antitrust rules on the federal/EU level. While I have pointed to several instances where this is arguably true, I do not want to suggest (or be seen as suggesting) that this is generally the case. I do believe there is value in competition between competition systems, and between different competition enforcement systems. In particular in the EU, where the competition rules on the Union level are fragmentary and do not have any emergency gap-fillers such as § 5 FTC Act, there is value in retaining a system of antitrust federalism. As always, discovering the best—or at least better—rules by relying on competition may be more wasteful than the immediate adoption of the system that is known to be

307 See now the COMMISSION PROPOSAL, *supra* note 229.

the most efficient system. Relying on regulatory competition and soft convergence, aided by networks of enforcers,³⁰⁸ may mean that we have to put up for a certain time with inefficient rules such as economic dependency rules on the Member State level. The worst thing that could happen, however, would be to entrench an undesirable rule on the federal/EU level. Imagine the effects the entrenchment of economic dependency rules would have on the EU level—and then read the Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe.³⁰⁹

I would, however, like to end on a positive note: the Green Paper gives Bill Kovacic ample opportunity to apply to the European Union his considerable skills in antitrust advocacy. I look forward to watching and learning.

308 For a proposal of a “Domestic Competition Network” between the various antitrust enforcers in the United States in analogy to the International Competition Network, see KOVACIC, *supra* note 7. From a comparative EU/United States perspective, see Firat Cengiz, *Management of Networks Between the Competition Authorities in the EC and the U.S.: Different Politics, Different Designs*, 3 Eur. Competition J. 413–436 (2007).

309 EUROPEAN COMMISSION, GREEN PAPER ON UNFAIR TRADING PRACTICES IN THE BUSINESS-TO BUSINESS FOOD AND NON-FOOD SUPPLY CHAIN IN EUROPE, COM(2013) 37 final (January 31, 2013).

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An Antitrust Tribute *Liber Amicorum* - Volume II

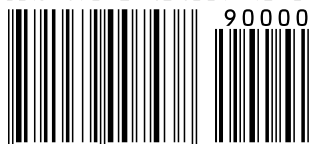
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ISBN 978-1-939007-43-8



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