Tézisfüzet

Tóth Tihamér

Állami intézkedések hatása a vállalkozások versenyjogi felelősségére az EU-ban és az USA-ban

Alábbiakban a habilitációs eljárásra készített „The Shadow of the State: Antitrust Liability and State Action in the EU and the U.S." tanulmányom főbb gondolatait összegzem magyarul.

Az államok szabályozási formában megjelenő gazdasági beavatkozásai kihatással lehetnek a vállalkozások versenyjogi felelősségének terjedelmére, miközben magának az állami intézkedésnek a jogszerűsége is megkérdőjeleződhet. Hasonló kérdéseket vet fel az a helyzet, amikor az állam nem maga korlátozza a piaci szereplők magatartását, hanem azok érdekképviseleti szervezetét hatalmazza fel szabályozó szerepkörrel, melynek eredményeként összemosódhat a magánérdekű, kartell-szerű tevékenység a közérdekű szabályozással. A vizsgált két jogrendszer eltérő megoldással, más-más jogi teszttel ad megoldást a problémára. Érdekesség, hogy jóllehet a kérdés az állam feladatkörét érintően kiemelt fontosságú, mégsem jogszabályok, hanem bírói esetjog adja meg a választ.

Az EU Bíróság következetes gyakorlata szerint ugyan az EUMSZ 101. cikke a vállalkozások számára írja elő a versenykorlátozó célzatú vagy hatású megállapodások tilalmát, az uniós hűségklauzula nyomán a tagállamok sem hozhatnak olyan intézkedést, amely e szakaszt megfosztaná hatásosságától. Ezen belül is, a tagállam nem írhat elő, nem buzdíthat, nem hagyhat jóvá versenykorlátozó megállapodást, illetve nem adhat – állami kontroll nélküli - piacszabályozói hatáskört vállalkozások társulásának. „Hibrid" versenykorlátozások esetében, azaz amikor állami és vállalkozói magatartás egyaránt tetten érhető, a tagállami intézkedés jellegétől függ a vállalkozói felelősség. A fenti négy aleset közül a vállalkozói akaratot teljesen kizáró állami előírás, kötelezés az, ami kizárhatja a versenyjogi felelősségre vonást, a többi esetben bírság összegét csökkentő körülmény lehet az állam közrehatása. A jogbiztonság és a EU jog elsőbbsége elveit egyensúlyozó CIF jogeset nyomán az állami kötelezés is csak korlátozott védelmet ad: mihelyst egy jogerős döntés, ítélet kimondja, hogy adott állami intézkedés sérti az uniós jogot, úgy a jövőre nézve eltűnik a vállalkozások fölül az állami védőernyő.

Az USA szövetségi antitröszt jogában kiforrott *state action* doktrína ehhez képest abból indul ki, hogy a tagállamok korlátozhatják a versenyt, a kereskedelmet, amennyiben ez egy világosan megfogalmazott állami intézkedés következménye, ami az intézkedéssel érintett vállalkozások számára is immunitással jár. Amennyiben a szabályozó önkormányzat, szabályozási joggal felruházott testület, akkor a teszt második elemeként annak is igaznak kell lenni, hogy az állam kellő mértékben ellenőrzi a szabályozó tevékenységét. Megjegyzendő, hogy az európai megközelítés nem szab többlet feltételeket a települési és egyéb szintű önkormányzatokkal szemben, azokat ugyanúgy „tagállamnak" tekinti, mint a központi kormányzatot.

A teszt első fele mutat némi hasonlóságot az uniós jogi megoldáshoz, az állami felügyeletet azonban az EU Bíróság főszabályként nem követelte meg döntéseiben (kivétel képez ez alól a vállalkozások társulásainak adott szabályozói tevékenység felügyelete). Ennyiben tehát szigorúbb az amerikai megközelítés (feltéve, hogy az állami felügyelet kritériumát tényleg komolyan számon kérik a bíróságok), másfelől viszont nem foglalkozik azzal a különbséggel, hogy az állami intézkedés milyen mélységben korlátozta a vállalkozások privát autonómiáját, azaz adott esetben egy buzdító, elősegítő intézkedés is immunitást vonhat maga után.

Az USA teszt második fordulatának pontos tartalmát, terjedelmét a Legfelsőbb Bíróság legutóbb a *North Caroline State Board of Dental Examiners* ügyben vette vizsgált tárgyává. A bírók rámutattak arra, hogy a második feltételre azért van szükség, mert a magukat és versenytársaikat szabályozó piaci szereplők (adott esetben a fogorvosok) „strukturális kockázatnak" vannak kitéve annak kapcsán, hogy könnyen összekeverik a saját jogos érdekeiket az állam, a köz érdekeivel. Az állam akkor felügyeli aktívan e „privatizált" szabályozó szervek tevékenységét, ha biztosítani tudják, hogy a szabályozó ne a tagjai egyedi érdekeit, hanem a közjót szolgálják. Így különösen meg kell vizsgálnia az elfogadott szabályozást, s képesnek kell lennie azt módosítani vagy hatályon kívül helyezni. Fontos viszont, s ebben szigorúbb az USA értelmezés az európaitól, hogy nem elegendő a felülvizsgálat jogi-elméleti lehetőségét bemutatni, hanem annak érdemi, tényleges gyakorlása is bizonyítandó a versenyjogi immunitáshoz. Az EU Bíróság esetjog ezzel szemben nem tartja versenykorlátozónak azt az állami intézkedést (így az ezzel takarózó vállalkozók is védettséget élveznek), amely a piaci szereplőkre bízza pl. az árszabályozást, de megmarad egy formális miniszteri vétójog.

Kutatásom eredményeként megállapítható, hogy az USA joga nagyobb mozgásszabadságot enged az állami szintű versenykorlátozásoknak, s következésképpen a vállalkozások, illetve azok társulásai is egy fokkal könnyebben szabályozhatják piaci magatartásukat. Ez EU szigorúbb megközelítése mögött véleményem szerint elsősorban az áll, hogy az európai integráció lelkét a torzulásmentes versenyre épülő európai belső piac projektje adja. A szövetségi államokra jellemző központi hatalom koncentráció a külügy, hadügy terén nem érhető tetten, az európai költségvetés mérete jelképes, így a négy gazdasági szabadság és a verseny védelme az, ami ragasztóanyagként összetartja az eltérő történelmű, kultúrájú tagállamokat. Az USA-ban ellenben működnek a szövetségi állami funkciók, így a föderalizmus elvével összhangban egy fokkal nagyobb szabadságot élvezhetnek a gazdaági szabályozás terén a tagállamok.

Tihamér Tóth

The Shadow of the State: Antitrust Liability and State Action in the EU and the U.S.

I. Introduction

In February 2015, the U.S. Supreme Court affirmed a Fourth Circuit ruling, which upheld a Federal Trade Commission decision finding a state licensing board liable for Sherman Act infringements.[1]A couple of months before that, the EU Court of Justice[2]had ruled that Italy infringed its EU law obligations by delegating the power to fix minimum tariffs of road haulage services for hire and reward by API, a committee composed of a majority of representatives of the economic operators. A couple of years ago, the Hungarian agricultural government actively encouraged the setting of minimum prices for water melon jointly by associations of producers and supermarket chains. Even though the Hungarian Competition Authority opened an investigation, yet it was soon terminated with reference to the lack of public interest. What happened was that in the course of the competition law procedure, the Parliament adopted an act introducing lenient rules for agricultural cartels with a retroactive effect.[3]

These recent cases show that State and private competition restrictions can be closely connected on both sides of the Atlantic. Hybrid cases[4], involving agreements and decisions of undertakings that would be caught by antitrust rules and a corresponding state action give rise to various challenging legal issues. States, as part of their toolkit to shape economic policy, encourage, support or approve market conduct that would normally be condemned as a price or market sharing cartel. The State may also decide to authorize a chamber or other association to regulate market

[1]*North Carolina State Board of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013). See Aaron Edlin & Rebecca Haw: CARTELS BY ANOTHER NAME: SHOULD LICENSED OCCUPATIONS FACE ANTITRUST SCRUTINY?, (explaining that this was the only appellate court case to expose a licensing board to antitrust scrutiny and urging the Supreme Court to take this opportunity to hold boards composed of competitors to the strictest version of its test for state action immunity, regardless of how the board's members are appointed).

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

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

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

entry, quality of services or prices. In this paper I focus on how state involvement may impact on corporate or individual antitrust liability. I will identify those state measures that may immunize companies and those which are considered just as mitigating circumstances, reducing the extent of the responsibility of private actors. The aim is to give an overview of those defenses which companies invoke to defend their cartel-like activities or abusive behavior whenever they acted under state influence, often manifesting in the form of a legislative or regulatory act.

State related anti-competitive actions involve a wealth of legal and policy issues. Therefore, I find it useful to admit which aspects I will ignore in this essay. I do not intend to deal with legal challenges available to attack the State measure itself,[5]nor do deal with the antitrust liability of public companies separately.[6] It is thus not the subject of this paper to look into the liability of states themselves under EU competition[7] or free movement rules[8], under the WTO regime, or, to a

[5] See for example Marek Martyniszyn: Avoidance Techniques: State Related Defences in International Antitrust Cases, p. 4-5. (quoting cases where U.S. courts accepted or refused to acknowledge foreign states as persons falling under Section 1 of the Sherman Act), available at: http://ssrn.com/abstract=1782888. Also, Spencer W. Waller, 'Suing OPEC' (2002) 64 U. Pitt. L. Rev. 105 (arguing that a case against the output restricting OPEC`s members could be successful, as over time the US courts have become more and more focused on the nature of the activities when dealing with the cases implicating foreign states).

[6] Public ownership is not a valid antitrust defense. Publicly owned undertakings come under the scope of competition rules on both sides of the Atlantic. In one notable case the U.S. Supreme Court refused to treat the Postal Service, lacking separate legal personality as a 'person' under Section 2 of the Sherman Act: Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736 (2004). In Europe, the Commission found also Eastern European public undertakings liable in the case on Aluminium imports (85/206/EEC: Commission Decision of 19 December 1984 relating to a proceeding under Article 85 of the EEC Treaty, IV/26.870 - Aluminium imports from eastern Europe, OJ *L 92, 30.3.1985, p. 1–76.*) . *The decision was addresses among others to Hungarian, Polish, East-German and Czechoslovak state owned foreign trade companies. Point 9.2 of the decision explained: "*Entities which engage in the activity of trade are to be regarded as undertakings for the purposes of Article 85 , whatever their precise status may be under the domestic law of their country of origin, and even where they are given no separate status from the State." *No fine was imposed on the companies though, arguably to avoid diplomatic conflicts and lengthy court procedures.*

[7] Prominent Articles of the TFEU are Article 37 (commercial state monopolies) and Article 106 (granting exclusive and special rights). Furthermore, the ECJ relied on the combined reading of various provisions of the Treaties to construe a general obligation for Member States not to make antitrust rules ineffective. Unlike the U.S. Supreme Court, the EU Court of Justice developed its own impressive case law according to which, under strict circumstances, even Member State`s legislative measures making the practical use of antitrust rules can be declared unlawful on competition law grounds. Article 101 TFEU prohibiting anti-competitive agreements is addressed to undertakings. However, if we `mix` it with two other provisions, the result is a cocktail offered to Member States. These other necessary components of the cocktail are, first, the loyalty clause of Art. 4(3) TEU that obliges Member States to facilitate the achievement of the Union's tasks and avoid taking measures that would jeopardize these objectives. Second, the now Protocol No. 27 on the Internal Market and Competition annexed to TEU and TFEU provides that EU `includes a system ensuring that competition is not distorted` (before the Lisbon Treaty, the same 'non-distortion' aim was clear from Article 3(g) EEC, later Article 3(1)(g) EC).

[8]The free movement articles of the TFEU can also be used to challenge anti-competitive state measures (i.e. Article 34 relating to goods, Article 49 on freedom of establishment and Article 56 on the free provision of services).

lesser extent, under U.S. constitutional law,[9] or to consider the exact scope of the state action doctrine.[10] The paper does not cover statutory immunities that exempt a whole industry, an economic sector or some specific conduct from the reach of antitrust laws either.[11] Instead, my aim is to focus on cases which, absent state influence, would fall under the scope of regular competition rules and to inquire to what extent undertakings can defend themselves with state actions. In other words, when and how can they rest peacefully in the comforting shadow of the State, escaping the heat around.

The issues covered in this paper are closely linked to the theory and practice of *corporatism*. Several Western states employed corporatist elements to mediate conflict between businesses and trade unions.[12] Corporatist theory is also invoked when representatives of a profession seek state approval to self-regulate the activities of its members, allegedly serving the public interest, just like guilds it in the medieval centuries. Sauter notes that this system, usually associated with liberal professions, is attractive because the rules are enacted and enforced by experts, allowing for minimal formal state intervention at minimal cost. However, he also warns that the idea of collective representation is essentially antidemocratic, in as much as rules are adopted by private interest groups with semi-public functions instead of the vote of individual citizens represented by political parties[13] Public choice theory suggests that rules adopted and enforced by interest groups tend to benefit the members of that group while allocating the costs of the regulation.

In the first part of the paper I set out the various legal standards applicable under EU and U.S. laws.[14] We shall see that both jurisdictions rely on case law based legal tests instead of well-structured legislation. States do not seem to like to adopt clear-cut rules tying their own hands. The European Court of Justice (hereinafter: the ECJ) acknowledged that States may use undertakings,

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[9] *Interstate* protectionism is illegitimate under the dormant commerce clause. Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. REV. 627, 646 (2006)

[10] The act of state doctrine should not be confused with the state action doctrine. Although both can be used as a defense in cases brought against private parties, the application of the act of state doctrine dos not turn on the identity of the defendants nor on a showing of compulsion. Act of state issues arise when a court must decide upon the effect of official action by a foreign sovereign. See: Spencer Weber Waller, Suing OPEC, 64 U. Pitt. L. Rev. 105 (2002). Furthermore, the act of state defense is invoked in international litigations, the state action doctrine is relied on in domestic litigation.

[11] In the U.S., statutory exemptions relate to labor, insurance, etc. For example, under the McCanan-Ferguson Act, an anti-competitive business activity by insurance companies is exempted from federal antitrust laws to the extent regulated by state law (15. U.S.C. § 1013 (b)).

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

[13] Ibid, at p. 2.

[14] The temptation was almost irresistable to write about how Hungarian law deals with this issue. I decided not to include my own countries rules and practice not to confuse a domestic, national legal system's problems with that of federal, supranational legal orders.

especially public ones, to implement their economic policies, especially under Articles 37 and 106 TFEU. We will discuss how the *Parker* doctrine can be invoked by potential cartelists in the U.S.

In the second part of the paper I will present how these various legal standards are applied in practice, by looking at a number of typical scenarios. *Hybrid cases* are frequent with regard to various boards, chambers and other quasi-public gatherings of professionals regulating entry conditions and fair business conduct. Affected markets involve dentists, lawyers, transporters, just to mention a view. In some markets state intervention is necessary to keep markets working properly. The state regulates conduct that could be otherwise natural candidate of an antitrust investigation. The U.S. *Trinko* dicta makes it easier for dominant companies to escape antitrust liability which is in sharp contrast with the approach of the European Commission and European courts. The relevance of the U.S. `filed rate` doctrine, giving safe heaven to unilaterally charged prices by dominant companies rather than collective actions by competitors, will also be highlighted.

This paper will conclude that just like U.S. states themselves[15], U.S. companies benefit from wider protection than their European competitors when their action is linked to some sort of state action. This reflects a stronger reliance on the theory of federalism in contrast to the basic idea of supremacy of EU law underlying the European integration process, heading towards accomplishing a genuine single market. Apparently, EU Member States enjoy a higher level of sovereignty than U.S. states in the hard core areas of foreign, budgetary and financial policy, not to mention defense. This seems to come at the expense of accepting more serious constraints when it comes to the regulation of their economies. The single market project, based on the four freedoms of goods, services, capital and establishment that ties the members of the family of European countries together, needs strict rules to preclude state related competition restrictions.

II. The shield of state action

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

State action or state compulsion involves an action by the state exercising its sovereign powers of law making or public administration. Whenever the State is acting through a public undertaking, normal competition rules apply. Both jurisdictions acknowledge the unique nature of cases where

[15] Although the EU cannot be characterized as a state, but if it were, it could be regarded a more centralized formation than the federal U.S. in the sense that EU competition rules impose much more restrictions on how constituent states may intervene in markets. To tell but just one example, there are no competition rules in the U.S. on state aid granted to undertakings, whereas the control of state aid is one of the most important pillars of EU competition policy (Articles 107-109 TFEU). Given that the idea of free competition is more deeply embedded in the American culture than in Europe, this can only be explained by a sort of `overcompensation` by EU courts reflecting at the unbalanced share of powers between the European (quasi-federal) and the Member State level. We submit that if more competence and financial resources would be available at European level, European institutions would be less inclined to exert strict control on regulatory actions by Member States.

the sovereign made its point. The involvement of government officials in a cartel-like agreement or decision may serve as an umbrella to protect from the damaging rays of the 'antitrust-sun' rays. A common feature of EU and U.S. antitrust laws is that they both developed doctrines as judge-made law to exempt business conduct connected with state action from the reach of antitrust.[16] Considering the serious nature of this issue involving important constitutional questions, this may come as a surprise.

There are also differences, though. EU law may provide full or partial immunity to undertakings, whereas the civil law consequences under U.S. law are less certain. Looking at the origins of the immunities, European immunity rules are rooted in the concept of economic activity, whereas U.S. law relies on the federalism doctrine to legalize both public and private anti-competitive actions. Furthermore, we will see that the case law of the EU courts is putting more emphasis on the nature, on the intensity of state action, a factor that is largely irrelevant to U.S. courts.

II.1.1. EU law

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

As far as this first category of state measures eliminating business autonomy is concerned, the ECJ clarified its position in *Ladbroke Racing*.[17] The judges noted that the EU antitrust rules of Articles 101 and 102 TFEU apply only to anticompetitive conduct of undertakings carried out on their own initiative. The court explained that if the conduct is required by the legislation, or if the legislation creates a legal framework eliminating competition on the part of the undertakings[18], then the restrictions of competition are not attributable to the undertakings.[19] This requires the EU

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

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

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

[19]Ibid, 33.

Commission or national competition authorities and courts to analyze the wording of national legislation to check whether undertakings are prevented from engaging in autonomous conduct leading to an anti-competitive outcome.

Being an exception to the general rule, the standard will be set at a fairly high level. *Strintzis Lines* proves that the hurdle is high for companies to avoid liability[20]. The European Commission imposed fines for collusion among ferry service companies operating between Greece and Italy. The companies argued that the regulatory framework and the official policy substantially restricted their autonomy of conduct. They were obliged to contact each other to negotiate the parameters of their policies, including prices. Yet, the ECJ found that the undertakings still enjoyed some *autonomy* in setting their prices, there was no `irresistible pressure' on them to conclude tariff agreements.

The ECJ did not elaborate on the inherent conflict between the principle of supremacy of EU law and legal certainty, also a central concept of the European legal order. Which law shall one follow? The law, often in the form of a statute of my country, or the vague case law based European norm? Proponents of European federalism argue that even if a Member State measure obliges companies to establish a cartel, undertakings should disobey the national rules. The principle of supremacy of European competition rules enshrined in the founding Treaty shall win the battle. EU-sceptics would defend national rules recalling the principle of legal certainty. The ECJ had to deal with this issue more in depth in the Italian *CIF* case involving the regulatory framework of the Italian match industry.[21]Italian match makers argued that their market quota allocation practice raising entry barriers to other European companies was the result of government regulation. The Court ruled that a national competition authority can indeed investigate the conduct of undertakings in a case even if the cartel is the consequence of unlawful domestic legislation.[22] Such legislation must be disapplied not only by national judges, but also by national regulatory and competition authorities.[23] Yet, balancing general principles of EU law, primacy[24]and legal certainty, the ECJ admitted that this duty to disapply anti-competitive law cannot expose the undertakings concerned to any criminal or administrative penalties in respect of past conduct if the conduct was *required* by the law.[25] The primacy of EU law prevails, however, for the future. This means that once the national competition authority's decision finding of an infringement of Article 101 TFEU and

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

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

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

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

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

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

disapplication of the anti-competitive national law becomes definitive, the companies involved are no longer shielded by national law.[26] Put it differently, their autonomy is re-established, released from the imperative will of the state.[27]

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

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

This category of cases often involves unilateral actions potentially infringing Article 102 TFEU, or cartel-like rules setting by associations. In the eighties of the last century when mostly publicly owned undertakings provided telecommunication services, these entities, often enjoying public law status, often combined rule-making with the provision of services. For example, the ECJ rejected the application of the Italian government against a Commission decision finding the activities of British Telekom (BT) unlawful under the equivalent of today's Article 102 TFEU.[28] BT was at that time a statutory corporation established under the British Telecommunications Act and owned by the state. As holder of the statutory monopoly on the running of telecommunications systems in the United Kingdom, BT had a duty to provide various telecommunication services. BT also had the right to exercise rule-making powers setting charges and conditions by means of schemes published in official gazettes. Some of these schemes were designed to prevent private message forwarding-agencies to enter the monopolized market of BT. The Commission argued that the schemes performed the same function as contractual terms, and were freely adopted by BT without any intervention on the part of the United Kingdom authorities.

There were other cases where the Court did not hesitate to refuse challenges against high fees qualify the activity as public in nature. *Eurocontrol* involved the charging of an allegedly abusive fee for the provision of services involving the supervision of air space. Since the ECJ held that these by their nature connected with the functions of public authority, the competition rules of the treaty designed to address restrictions arising from economic activities could not be applied.[29] Eurocontrol was a public body, regulated by international agreements, which was not the case for

[26]Para 55.

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

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

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

an undertaking registered in Italy as a private corporation, providing environment protection services in the international port of Genoa for a fee. In *Diego Cali* the ECJ held that SEPG was entrusted with duties that belong to the sphere of public authority, therefore, its `clients` could not challenge the fees under antitrust rules.[30]

In addition to pointing out the intensity of state intervention or the public nature of activity, undertakings and their associations may also argue that their rule-making activity was *necessary for the proper functioning* of their business or profession. *Wouters* was the first case where the ECJ acknowledged that there are restrictions adopted by an association of undertakings which can be justified under Article 101 (1), instead of the efficiency based exemption provisions enshrined in Article 101 (3).[31] This judge-made law realizes that there are restrictions that do restrict free, autonomous market conduct without directly related to efficiencies, and yet they are necessary to the proper functioning of a market.[32]Under this *Wouter*-formula undertakings would not dispute the autonomous or economic nature of their activity. Rather, the emphasis is on the unavoidable necessity of the restriction. The state is involved by establishing a chamber like this and authorizing it to adopt rules governing the market activity of its members. In fact, these rules, often intended to maintain the integrity of a profession, could have or should have been adopted by the government itself.

And finally, for the sake of completeness, I shall mention Article 106 (2) TFEU which provides a specific exception for undertakings which perform a *service of general economic interest* from infringing the competition rules. This is not a frequently used defense, it is hard to prove all the elements of this provision. The undertaking should be expressly entrusted with an activity that involves a genuine public service. The second part of the test is that without infringing the competition rules the undertaking would not be able to fulfill its mission laid down by the Member State.[33] And finally, this restriction of competition should not go against the interests of the common market.

I should note that under EU law, the form of the manifestation of the state will does not seem to matter. It is certainly much more straightforward to prove state compulsion if a legislative or regulatory act is present, but it is not a pre-requisite to prove the relative innocence of the undertaking concerned. In *Asia Motors III.* the ECJ held that Article 101 should not be applicable if the conduct was imposed by the authorities through the exercise of `irresistible pressure‘.[34]

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

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

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

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

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

II.1.2. U.S. law

On the other side of the Atlantic, the Supreme Court has long held that anticompetitive action by state governments and private conduct[35] in compliance with that measure are immune from liability under the Sherman Act.[36] The state-action doctrine provides antitrust immunity if the state's intent to displace competition with regulation is "clearly articulated and affirmatively expressed as state policy".[37] For non-public actors the State should also put in place a mechanism to ensure that private interest do not interfere with the public ones. The test looks into whether the private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.[38]

The leading authority is *Parker* which involved a raisin cartel sponsored by the California state government worried about a crisis caused by the oversupply of raisins. To put this case into an integration perspective, some 95% of the California raisins were sold in interstate or foreign commerce, meaning that California essentially shifted the costs of the market protection measure to consumers outside of California. There seems to be not much difference the relations between states in the EU or the U.S. Interestingly, the measure was not challenged by a foreign importer, but by a Californian producer who argued that the scheme was a conspiracy in violation of Section 1 of the Sherman Act. The plaintiff sued the director and members of the state advisory committee. Although the organization of a prorate zone was proposed by producers, and the prorate program was also approved by raisin producers, it was the state, acting through a commission that adopted and enforced the program.

The *Parker* Court ruled that Congress did not intend the Sherman Act to preempt state economic regulation: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[39]The Court could also point out that there was no contract, agreement or conspiracy under Section 1 of the Sherman Act. Actually, it was the state's action that made such conspiracy superfluous. Even though the marketing program for the 1940 raisin crop eliminated competition among producers in respect of the terms of sale, including the price, of the crop and to impose restrictions on the sale and distribution to buyers who subsequently sell and ship in interstate commerce, this regulation of state industry was held to be of local concern not prohibited by the commerce clause in the absence of Congressional legislation.[40]

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

[36]*Parker v. Brown* 317 U. S. 341 (1943). The Supreme Court held at 351that `(t)here is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations.`

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

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

[39] *Parker v. Brown* at *359.*

[40] *Parker v. Brown*, at 368.

State sovereignty and federalism were thus the foundations of the courts' state action jurisprudence. Under the Tenth Amendment to the U. S. Constitution[41] the powers not delegated to the federal level remain in the competence of states. The sovereignty of each state is granted by the United States Constitution. Among the powers which were not delegated, can be found the authority to regulate their economies, as long as it does not unduly impinge over interstate commerce.[42] Judge Kennedy's recent opinion in *North Caroline State Board of Dental Examiners* recalled that federal antitrust law is a central safeguard for the free-market structures. However, there are other values regulated by State at the expense of the Sherman Act. State-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition.[43] The Court quoted *Ticor* warning that the immunity is not unbounded: "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'[44] This comes close to acknowledging the supreme nature of free markets and competition. Exceptions to the competition principle should be clearly expressed.

The proper definition of "state" and thus the scope of the exception has been subject of some controversy. The U.S. state action doctrine applies first of all to state governmental persons and governments themselves who are generally immune from antitrust liability without further inquiry. The Court explained that "[w]hen the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise." The doctrine also covers quasi-governmental entities like cities and other municipalities, regulatory boards and also private actors, but they have to pass a two prong-test. For the purposes of hybrid cases subject to this essay, this two-step test is applied.

Clearly articulated state policy

The seminal *Parker v. Brown* case focused more on the liability of the state and its officials, and the Court did not need go into the details of the question to what extent state mandated private action can be shielded from antitrust laws. It was in *Midcal*[45] where the Court came up with a two prong test.

The first requirement is "clear articulation". This is to ensure that the state has clearly authorized departures from the principles of free-market competition. The second part of the test is called "active supervision," which is intended to ensure that state action immunity covers only the particular anticompetitive acts of private parties that actually serve state regulatory policies. All in all, the state action doctrine makes it clear that a properly adopted and thoroughly supervised regulation preempts federal antitrust policy and creates immunity for companies.

A general grant of authority to set prices or acquire other entities does not seem to meet the clear articulation prong of the test. In *City of Boulder* the Supreme Court emphasized that a general grant

[41]The Tenth Amendement, as part of the Bill of Rights, was ratified on December 15, 1791. The Court reasoned in Parker v. Brown, that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351.
[42]New York v. U.S. 505 U.S. 114 (1992).
[43] Ibid, p.6-7.
[44] p. 636.
[45]445 U.S. 97, 105 (1980).

of authority is not equal with an authorization to engage in specific anticompetitive conduct.[46] Yet, in *Town of Hallie* the Court believed that giving cities the authority to decide where to provide sewage services foreseeably included potentially anticompetitive conduct in the form of refusing to serve.[47] This low standard for foreseeability led to many cases exempting companies from the reach of antitrust law. In *Martin* the Fifth Circuit held the fact that the legislature authorized the hospital to contract with any individual for the provision of kidney dialysis services, a subsequent exclusive contract cannot be subject to antitrust laws, since the alleged anticompetitive conduct in the form of an exclusive agreement was foreseeable.[48]

The Supreme Court explained that clear articulation does not require that the state *compels* the anticompetitive conduct at issue. In *Southern Motor Carriers* the Supreme Court reasoned that a state legislature's decision to set rates through a public service commission, rather than through free market forces, clearly demonstrated its intention to displace competition in motor carrier ratemaking and thus the first requirement was satisfied.[49] The absence of compulsion does not mean that there is a lack of state policy. U.S. law is more permissive in this regard. Under EU law, a permission to restrict competition does not result in immunity. Since the autonomy of undertakings was only limited and not eliminated, they are liable under Article 101 TFEU.

One problem with the state action doctrine is that some lower level courts applied the state action doctrine extensively, exempting government officials and undertakings from the reach of federal antitrust laws.[50] The American Bar Association, Section of Antitrust Law (ABA Antitrust Section) warned that "[s]tate action immunity drives a large hole in the framework of the nation's competition laws."[51] The Federal Trade Commission also urged courts to clarify and re-affirm the original purposes of the state action doctrine to help ensure that robust competition continues to

[46] *City of Boulder*, 455 U.S. at 56.
[47] *Town of Hallie v. City of Eau Claire*, 471 U.S. at 41–43.
[48] Martin v. Memorial Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996).
[49] *Southern Motor CarriersRate Conference, Inc. v. United States* 471 U.S. at 60 (1985).
[50] A. M. Dively notes that „the elusive contours of the doctrine have caused circuit splits and overbroad application that threatens to subvert the goals of both federalism and competition". She analyses the United States Court of Appeals for the Eleventh Circuit decision in *Federal Trade Commission v. Phoebe Putney Health System,Inc. as an* example of misapplication of state action immunity. The case was about a merger between private hospitals under an allegedly "sham" authorization by the state hospital authority. The district court held the combination of the authority's power to acquire and lease hospitals, to operate on a nonprofit basis, and to operate hospital networks demonstrated that Georgia's legislature "intended to guarantee that hospital authorities could accomplish their mission of promoting public health regardless the potential anticompetitive effects. In *FTC v. Phoebe Putney Health Sys., Inc*., 663 F.3d 1369, 1378 (11th Cir. 2011) the appellate court affirmed the district court's ruling that because the Georgia Legislature clearly articulated the intent to empower county hospitals to engage in anti-competitive activity, the Hospital Authority of Albany–Dougherty County's proposed acquisition of its only competitor was protected under the state action doctrine. *Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369. In: Angela M. Dively: Clarifying State Action Immunity Under The Sherman Antitrust Laws: FTC v. Phoebe Putney Health System, Inc.; St. Thomas Law Review [Vol. 25 2012], p. 74. Since then, the Supreme Court agreed with the Federal Trade Commission's petition and defined the contours of the doctrine more clearly.
[51] American Bar Association, Section of Antitrust Law, *The State of Antitrust Enforcement—2001*, at 42 (2001), *available at* http://www.abanet.org/antitrust/pdf_docs/antitrustenforcement.pdf.

protect consumers.[52]Also Hovenkamp warned that inferring immunity from the mere grant of other ordinary corporate powers would disserve principles of federalism as well as competition policy.[53]

Active supervision by the state

State action immunity covers not only public actors, but also private actors may benefit of the antitrust shield. *Parker* immunity may also cover non-sovereign actor controlled by market participants, but they must show that the challenged restraint is clearly articulated as state policy, *and* it is actively supervised by the State. These two conditions strive to ensure that a non-state entity may invoke immunity only if it exercises the State's sovereign power. Accordingly, *Parker* immunity requires that the anticompetitive conduct of non-sovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own.

Political subdivisions of the state such as municipalities, cities or townships are not entitled to the same protection from antitrust law as the state itself.[54] When faced with actions of an entity that has a combination of public and private attributes courts usually inquire whether the connection between the State and the entity in question is sufficiently strong that there is danger that it is involved in a private arrangement.[55] The city must thus show that there is a state policy to displace competition and that the legislature contemplated the kind of municipal actions alleged to be anticompetitive.[56] The federal government reacted to this narrow interpretation by passing the Local Government Antitrust Act (LGAA) of 1984, barring antitrust damage actions against local governments or private parties whose conduct was based on official action by a local government.[57]

In *City of Black Hawk*[58], the businesses and property owners plaintiffs in the Colorado city of Central City, sued the neighboring city of Black Hawk and several casinos for a conspiracy to restrain and monopolize trade in the limited gaming industry. The 10th Circuit Court of Appeal held that plaintiffs' allegations that even if defendants met with city officials and urged them to take anticompetitive action, this falls under the *Noerr-Pennington* doctrine, which makes no distinction

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[52] The FTC State Action Report concluded that "[s]ome lower courts have implemented the clear articulation standard in a manner not consistent with its underlying goal." OFFICE OF POLICY PLANNING, FTC, REPORT OF THE STATE ACTION TASK FORCE 5 (2003), , at 25. a*vailable at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

[53] Herbert J. Hovenkamp, Antitrust's State Action Doctrine and the Ordinary Powers of Corporations 6–7 (July 12, 2012),*available at* http://ssrn.com/abstract=2012717. (criticizing some judgments that have carried the idea of "authorization" much further, concluding that authorizing a firm to engage in its ordinary corporate activities, such as contracting or acquiring assets, also operates to authorize conduct that would otherwise be unlawful under the antitrust laws).

[54]Assuming that cities act in their public capacity and not as an economic actor. That contrasts with the interpretation of the ECJ that makes no distinction whether the state measure originates from the Parliament, a government entity, or a local municipality.

[55]*Crosby v. Hospital Auth. of Valdosta & Lowndes County*, 93 F.3d 1515, 1524 (11th Cir. 1996) and *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*,753 F.2d 790, 792 (9th Cir.1985).

[56]*Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*,at 792. See also: *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (holding that Colorado may have authorized the city of Boulder to regulate cable television services, but the statute did not sufficiently articulate state policy to confer protection from antitrust laws).

[57]15 U.S.C. § 34-36. Note that the act does not impose a bar on injunction actions.

[58]*GF Gaming Corporation v. City of Black Hawk*, 405 F. 3d 876, 886-87 (10th Cir., 2005).

between petitioning government officials and conspiring with them.[59] The court made it clear that plaintiffs' allegations that the private defendants were engaged in a conspiracy to further private interests is irrelevant to the question whether they are entitled to immunity under the LGAA.[60]

Boards, bars, and various other agencies with mixed private-public features are also subject to the second prong of the test. The Supreme Court held in *Goldfarb* that even if the State Bar is a state agency for some limited purposes, it is not allowed to foster anticompetitive practices for the benefit of its members.[61]

The second part of the *Midcal* test, active supervision requires the actual involvement of the state, the existence of a state's authority to exercise supervisory power is not sufficient. The leading case is *Midcal* involving again a Californian statute requiring liquor manufacturers to impose resale prices on distributors. The unanimous *Midcal* Court established that the RPMs are not immunized under Parker due to the lack of active supervision of the price schedules approved by the state.[62] This test is more demanding than the EU Court's case law. For the statute measure and subsequently, for the private competition restriction to become lawful the state not only needs to articulate its policy clearly, but must also review the reasonableness of the resale prices.

Another interesting case is *Ticor*.[63] The Federal Trade Commission (FTC) filed an administrative complaint charging insurance companies with horizontal price fixing in setting fees for title searches and examinations. In each of the four States concerned - Connecticut, Wisconsin, Arizona, and Montana - uniform rates were established by a rating bureau licensed by the State and authorized to establish joint rates for its members. Rate filings were made to the state insurance office and became effective unless the State rejected them within a specified period. This set of fact was evaluated quite differently by various institutions in the course of the procedure. The Administrative Law Judge of the FTC held that the anticompetitive activities were covered by state-action immunity in Wisconsin and Montana. The Commission held on review that none of the States had conducted sufficient supervision to warrant immunity.[64] When the matter came to the courts, the Court of Appeals reversed, holding that state action immunity applied in each of the four States. The court explained that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the active supervision requirement.[65]

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[59]Ibid, at point 16.
[60]Ibid, at point 27.
[61] *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791 (1975).
[62]Midcal, a wine wholesaler, sold a number of cases of wine at a price below the effective price schedule. In a similar case, in the EU, the Court did not hold the state measure imposing a vertical RPM unlawful. A 1981 French statute obliged all publishers and importers to fix the retail price for their books. As a rule, retailers were not able to sell books cheaper than 5% of the fixed price. It is also true, that the Court inserted the qualification, that this measure does not contravene EU competition rules "as Community law now stands" and also warned that other rules of the Treaty, notably the free movement provisions, may prohibit a law like this. 229/83, *Association des Centres distributeurs Edouard Leclerc and others/SARL « Au blé vert » and others* [1985] ECR 1. The Court did not have to deal with the liability of the undertakings themselves, but based upon the doctrine of autonomous business conduct, publishers and importers setting the RPM would have been exempt from antitrust rules, since their action was prescribed by the state.
[63]*Federal Trade Commission v. Ticor Title Insurance Company et al.*, 504 U.S. 621.

[64]Ticor Title Ins. Co., 112 F.T.C. 344 (1989).
[65]922 F.2d 1122 (1991).

The *Town of Hallie* Court explained that where the action of a government entity is at stake, it is presumed that it is engaged in state policy, with little chance of being unduly influenced by private interests.[66]

The Court was more demanding in its most recent *North Caroline State Board of Dental Examiners* case. The judges pointed out that there is a structural risk of market participants' confusing their own interests with the State's policy goals.[67] The second part of the test is there to ensure that these entities should not diverge from the State's considered definition of the public good and engage in private self-dealing.[68] The Court emphasized that the supervision requirement turns not on the formal designation to regulators the structural risk of market participants' confusing their own interests with the State's policy goals.

What do public officials have to do to meet the second part of the test? The content of this obligation is still not sufficiently clear. The Antitrust Modernization Commission recommended that courts could consider using a flexible, "tiered" approach that requires a different level of active supervision depending on factors like the type of conduct at issue, the industry, the regulatory scheme. If the conduct at issue were price-fixing, the affirmatively articulated state policy ought to be more detailed and specific than if the conduct involved less clearly anticompetitive activities.[69]

The Court explained in *North Caroline State Board of Dental Examiners* that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a non-sovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." The Court has also identified a number of requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy the state supervisor may not itself bean active market participant, and the mere potential for state supervision is not sufficient.[70]

An interesting question is to what extent an authorization decision by the state can meet the second prong of the test as far as the *past effects* of an anti-competitive conduct are concerned. In *Columbia Steel v. Portland General Electric*[71] the 9th Circuit held that retroactive amendment of an order does not immunize the anti-competitive conduct of the past 20 years. The opinion emphasized that "state-action immunity is a question of federal antitrust law that turns on the clarity of a state's

[66] *Ibid*, at. 45-47.
[67] p. 13.
[68] p. 10.
[69] Report, at 373.
[70] P. 13-14., quoting Patrick and Ticor
[71] *Columbia Steel Co. v. Portland General Electric Co*., 111 F.3d 1427, 1442 (9th Cir. 1996). Columbia Steel was a large consumer of electric power in Portland, Oregon. The company brought action against two electric utilities charging them with dividing the city of Portland into exclusive service territories in violation of the Sherman Act. The companies raised a state-action immunity defense on the basis of a 1972 order of the Oregon Public Utility Commission which approved a division of the Portland market into exclusive service territories. The Court decided that the state did not clearly exercise its statutory authority to approve the allocation of exclusive service territories in Portland back in 1972. The decision of 1992 by the regulatory commission "could not satisfy the Midcal test retroactively by amending the 1972 order years after the company entered into the monopolistic agreement it now seeks to cloak with federal antitrust immunity. In other words, the state of Oregon cannot satisfy the objective Midcal clear articulation test by declaring that it had intended to displace competition with regulation 20 years earlier."

expression of its policy, not the subjective intent of its policymakers".[72] However, in a case decided ten years earlier, the same court agreed that the state's authorization shields conduct that occurred before the measure, provided that this was the intent of the legislator.[73] The plaintiff argued that the provisions of the legislation were enacted in 1982, and those statutes cannot confer retroactive immunity upon a lease agreement that was signed in 1966. The court disagreed by recalling the legislative intent, that was to articulate and affirm a pre-existing state policy of allowing municipalities to enter into anticompetitive agreements at public airports.[74] Compared that with EU jurisprudence, the state measure reinforcing, approving past conduct infringing antitrust rules would not shield undertakings from liability.[75]

If we take competition seriously, courts should require genuine evidence that the state did intend to replace market functions with other means to reach its goals. Silence on this issue, just like silence as regards the second prong of the test, review of private business conduct, is not sufficient to apply the state action doctrine to exempt otherwise unlawful, anti-competitive private action. Courts should not simply infer from circumstances, or second-guess crucial public policy objectives.

The cases presented so far involved a clash between federal antitrust law and private action supported by a state or municipality. In addition to that, state courts also held that *state antitrust rules* cannot be applied either in case of state action. For example, there was no way the plaintiff could successfully challenge the fee of a taxi company that was regulated by the city of Chicago.[76]

II. 2. Foreign state compulsion

A specific form of the state action doctrine is when the sovereign is a foreign state, in many instances closely linked to a public undertaking. Actions of a third country may also lead to immunity, yet the bar seems to be fairly high in practice.[77] Unlike the EU`s approach on autonomous economic activity or the US`s federalism based state action doctrine, this exception

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[72]*Ibid*, at 7-9.

[73]*California Aviation v. City of Santa Monica*, 806 F.2d 905 (1986). California Aviation, Inc. sued the City of Santa Monica, alleging that the City engaged in unlawful price fixing and unfair competition in the execution of a lease with California Aviation at Santa Monica Municipal Airport. In 1966, California Aviation and the City entered into a thirty-year lease at Santa Monica Municipal Airport. The lease provided that California Aviation could charge no less for petroleum products than the City charged. California Aviation contended that this lease provision violated the Sherman Act.

[74] Section 21690.5 of the Californian code stipulates: "Therefore, since the proper operation of the state's publicly owned or operated airports is essential to the welfare of the state and its people, the Legislature recognizes and affirms such operation as a governmental function to be discharged in furtherance of the policy of securing the benefits of commerce and tourism for the state and its people."

[75]Moreover, the Member State itself would also be lilable under the „reinforce" limb of the effet utile rule. See, for example: C-35/96, *CNSD* [1995] ECR I-2883, paras. 53-54.

[76]Chirikos v. Yellow Cab, 410 N.E. 2nd at 69.

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

recalls international law principles like non-intervention and comity.[78] The foreign state compulsion defense may provide safe harbor for a corporation or individuals who participated in otherwise unlawful anti-competitive conduct ordered by a foreign sovereign.

Both U.S. and EU case law require compulsion, the defendant will not prevail if only the advice, support, or encouragement by the foreign government can be established.[79] The Antitrust Enforcement Guidelines of the DOJ and FTC from 1995 consider the threat of penal or other severe sanctions indispensable for the recognition of the compulsion.[80] It is pointed out that in cases, where the conduct occurs in the U.S., the defense is not available.

In the U.S., the district court in *Animal Science* elaborated a three-part test whereby the defendant invoking compulsion should show:[81] (i) the existence of an entity in the defendant's state qualifying as an arm of the state by enjoying governmental or quasi-governmental powers that are 'either uniquely peculiar to sovereigns or of essentially sovereign nature', (ii) a direct link between the entity's powers and the defendant, allowing the entity to compel the defendant, subject to a significant negative repercussions for non-compliance, and (iii) the compulsion is the fundamental force causing the defendant's act, challenged as a violation of US law. The court noted that participation in the framing of the governmental prescript does not exempt it from compulsion.

In *Swiss Watchmakers*[82] the court acknowledged that the compulsion would lift the liability from the compelled companies. This case dealt with state-approved and state-facilitated regulation of the watch-making industry, which aimed at keeping all the know-how, machinery and watch parts in Switzerland, so as to protect the Swiss watch industry from potential competition. Although the regulation was recognized and approved by the government, it was still considered a private agreement, subject to the antitrust rules and the claim of foreign sovereign compulsion was not successful. Despite the state's engagement, the direct foreign government action compelling the defendant's activities was missing.

A recent state compulsion related case in the U.S. is the Chinese *Vitamin C case*.[83] Chinese manufacturers of vitamin C and their trade association were accused of price-fixing and limiting

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

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

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

[81] *Animal Science Products v. China Nat. Metals & Minerals Import & Export Corp. (Animal Science)*, p. 69

[82] *United States v. Watchmakers of Switzerland Information Center, Inc. (Swiss Watchmakers)* 1963 Trade Cases (CCH) 70,600 (S.D.N.Y. 1962), *modified*, 1965 Trade Cases (CCH) 71,352 (S.D.N.Y. 1965).

[83] *In re Vitamin C Antitrust Litigation (Vitamin C)* 584 F. Supp. 2d 546 (E.D.N.Y. 2008). While more companies were sued, only North China and Hebei Welcome remained in the case by the time of the verdict. Other companies settled out of court.The case is now under appeal: Re Vitamin C. Antitrust Litigation, 13-4791, U.S. Court of Appeals for the Second Circuit (Manhattan).

exports in 2005.[84]According to plaintiffs, prices rose as high as $15 a kilogram from about $2.50 a kilogram during the scheme, which lasted from about 2001 to 2006.The Brooklyn jury found in favor of the U.S. buyers of Vitamin C in March 2013. They were awarded $54.1 million in damages, tripled to $162.3 million under U.S. law. The district court found the evidence available too ambiguous and denied the defendants` motion on foreign sovereign compulsion. It was not enough that the Chinese government also submitted an *amicus brief* to the U.S. court admitting that companies were required by law to coordinate export prices and volumes. The court concluded that the influence of the government was not to be regarded as conclusive evidence on compulsion, especially since other pieces of the documentary evidence submitted by the plaintiffs contradicted the brief`s position.[85]

As far as the EU is concerned, the ECJ was also confronted with arguments relying on irresistible pressure by foreign governments. Yet, this pressure has never been so intense to eliminate corporate liability. In *Aluminium imports*,[86] concerning anticompetitive agreements with very broad membership between mostly primary manufacturers of aluminum, a decision adopted shortly before the fall of the Berlin Wall, the EU Commission noted that even if a government *supported* a contract in violation of the competition law, this does not alter the position of the companies involved. EU competition law does not make a distinction between private and public undertakings, both are subjects of competition rules, even if the latter can be used as a tool to pursue public policy.[87] In *Wood Pulp,* an U.S. export cartel attempted to rely on this defense.[88] The ECJ noted that the US legislation, in this case the Webb Pomerene Act, exempts only export cartels from the scope of application of US antitrust, but does not require their creation.

II.3. Summary of the tests: different philosophies with similar results

To wrap up the first part of this paper, the common denominator of various European scenarios is the distinction made between economic activity and public actions. Whenever the entity involved in the anti-competitive action can be characterized as an *undertaking* for the purposes of EU

[84] This suit came after EU and U.S. federal agencies imposed huge fines on mostly European manufacturers of various vitamins, including Vitamin C. Interestingly, this lawsuit was initiated by lawyers of private plaintiffs. The EU Commission did not investigate the alleged infringement.

[85] Ibid, p. 557.A retired ministry employee who was formerly in charge of vitamin C exports admitted at trial that 'on the whole,' the government did not involve itself in price fixing.

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

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

[88]*A. Ahlström Osakeyhtiö and others v Commission of the European Communities (Wood Pulp)*, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85 [1988] ECR 5193, para 20.

competition rules, it will be subject to antitrust rules. Or, it would be more proper to say that whenever the activity is an *economic activity*, antitrust rules will apply, regardless of the public or private law status of the actors.

Due to the different personal scope of the cartel prohibition, U.S. case law also covers individual actions of public officials and representatives of undertakings. Therefore, rules need to be put in place to carve out officials implementing state policy and thereby interfering with free competition. States thus may provide for the defense and indemnification of agency members in the event of litigation. They can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision.

The European approach does not interpret this antitrust shield in the light of proper allocation of sovereign powers between EU (federal) and Member States (states) levels of government.[89] Neither undertakings, nor national governments could argue successfully that EU competition rules should not be applied just because a clearly articulated national policy restricted competition. The emphasis in Europe is to draw the line properly between public and genuine business action.

It seems that competition policy protecting the functioning of the single European market is *superior* to industrial and other national policies, however clearly they are articulated and reviewed by Member States. The U.S. approach, reflecting a stronger trust in the judgment of states themselves, is in sharp contrast with European law and policy, where Member States' regulations are generally regarded with some suspect of protectionism undermining the grand enterprise of the European single market.

III. Specific scenarios contrasting the application of U.S. and EU law

In this part of the paper I will compare cases with similar fact patterns to inquire whether the somewhat different European and U.S. state action tests will lead to different results. First, I consider seemingly business conduct with an aim to persuade government to adopt rules in line with the interests of these lobbyists. Second, I will deal with regulatory, or tariff setting committees which are undoubtedly part of the public administration, yet a decisive influence of corporate representatives may transform them into a cartel meeting. Next, I present the issues related to regulatory bodies composed of market participants, i.e. chambers in Europe and boards in the U.S., which often have a public law foundation. Government influence may manifest itself either before the action by the chamber takes place, i.e. by giving market actors an uncontrolled power to set market parameters themselves, or may occur afterwards, in the form of approving a previous decision by this association of undertakings. Then, we turn our attention to regulated industries, like energy, telecommunication and other public utilities, where public service is sometimes provided subject to price regulation.

[89]On the other side of the Atlantic, federal law respects the residual sovereignty of states by acknowledging their right to regulate their domestic economies the best they can, even by eliminating or restricting competition.

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

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

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

> "… when it (*the Member State*) grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort. In that case the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings." [90]

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

This rule of reason option was also considered and elaborated upon by the ECJ in *API* relating to the Italian regulation of road haul tariffs. The Court explained that in order to properly assess the objectives and effects of a decision the overall regulatory and economic context should be taken into account.[91] The Court applies a proportionality test[92] here, verifying whether the restrictions imposed by the rules at issue in the main proceedings are limited to what is necessary to ensure the implementation of legitimate objectives.[93] Yet, the Court was confident that the minimum fees set

[90] *Wouters and Others*, C-309/99, EU:C:2002:98, paragraph 97. (on rules imposed by the Dutch Bar restricting the establishment of joint offices with accountants).

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

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

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

by the commission, and also the legislation approving those fees, were not justified by a legitimate objective. The Court acknowledged that preserving road safety can be a legitimate public interest objective, but refused to accept the argument that road safety would call for setting minimum prices.[94] The Court pointed out that a mere reference in a general manner to the protection of road safety, without establishing any link whatsoever between the minimum operating costs and the improvement of road safety is not sufficient. Furthermore, the measures in question go beyond what is necessary. The rules would not enable carriers to prove that, although they offer prices lower than the minimum tariffs fixed, they nevertheless comply fully with the safety provisions in force. In addition, there are a number of EU and national regulations protecting road safety, which constitute more effective and less restrictive measures.[95]

What is striking with this reasoning is that the ECJ did not even mention the option of Article 101 (3) to justify the anti-competitive rules. Rather, it relied on its case law developed under the free movement provisions relating to goods, services and establishment which relate to Member State measures hindering trade between EU countries. In other cases the Court was more restrictive, quickly dismissing argument of companies that their restrictions imposed would pursue public interests.[96] The protection of public interest is not the task of entrepreneurs but belongs to the hard core competence of the state.

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

In the U.S., *North Carolina State Board of Dental Examiners* opinion is the leading authority.[97] This board is the agency of the State for the regulation of the practice of dentistry. Six of its eight members are licensed, practicing dentists. The Board administers a licensing system for dentists. Following complaints that non-dentists were charging lower prices for teeth-whitening, the Board issued at least 47 official cease-and-desist letters to non-dentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This led several non-dentists to stop offering teeth whitening services in the state.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the

[94]Ibid, para 50-57.

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

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

[97] *North Carolina State Bd. of Dental Examiners v. FTC*, No. 13–534., decided February 25, 2015.

Federal Trade Commission Act. The FTC, sustaining the administrative law judge's ruling, reasoned that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which was not the case. The FTC determined that the Board had unreasonably restrained trade in violation of antitrust law. The Fourth Circuit affirmed the FTC. The Supreme Court also held that the Board cannot invoke state-action antitrust immunity because it was not subject to active supervision by the State. The fact that a controlling number of the Board's decision makers are active market participants was a decisive factor.

Parker immunity may also cover non-sovereign actor controlled by market participants, but they must show that the challenged restraint is clearly articulated as state policy, and is actively supervised by the State. These two conditions strive to ensure that a non-state entity may invoke immunity only it exercises the State's sovereign power. Accordingly, *Parker* immunity requires that the anticompetitive conduct of non-sovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. The second part of the test is to ensure that these entities should not diverge from the State's considered definition of the public good and engage in private self-dealing.[98] There is a structural risk of market participants' confusing their own interests with the State's policy goals.[99]

III.2. Regulatory committees

Whenever market parameters like prices are not set by the free play of supply and demand, but by some combination of market players and state officials, there is always a danger of a disguised cartel behind the regulatory process. Usually, there is a top down and a bottom up approach. By the first I mean when the government creates a committee to be in charge of the regulation and invites representatives of market players to contribute. In my view, situations like this, when the State sets up the consultation mechanisms and takes the initiative, there is less likelihood of a disguised cartel. The second category refers to associations, chambers created by the market players themselves, which, in co-operation with state authorities, take up self-regulatory duties.[100] These institutions are at the borderline of public and private law. Their actions are at the borderline of anti-competitive decisions, or agreements.

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

In *Centro Servizi Spediporto*[101] the ECJ held that, where legislation of a Member State provides for road-haulage tariffs to be approved and brought into force by the State on the basis of *proposals*

[98] p. 10.
[99] p. 13.
[100] I find these two groups useful for the purposes of this paper, even though there is a grey area, i.e. a chamber for a profession established by law with complusory membership.
[101] EU:C:1995:308. In this and similar cases quoted here the ECJ was asked to rule on the liability oh Member States To establish state liability under the combined readings of Articles 101 TFEU and 4(3) TEU a private anti-competitive

submitted by a committee, where that committee is composed of a majority of representatives of the public authorities and a *minority* of representatives of the economic operators concerned and in its proposals must observe certain public interest criteria, the fixing of those tariffs cannot be regarded as an agreement. Three years later, the ECJ specified in *Librandi*[102] that there is no cartel agreement even if the representatives of economic operators are in majority on the committee, provided that the tariffs are fixed with due regard for the public-interest criteria defined by law and the public authorities take the final decision considering the observations of other public and private bodies.

Criticizing the ECJ, Damien Gerard observed that the Court's jurisprudence lacks consistency, there is no clearly articulated and consistently applied test.[103] The reason for that might be that most of the cases decided by the Court focused on the liability of Members States in connection with an allegedly anti-competitive private conduct. The Court was obviously cautious not to put an unbearable and unjustified burden on Member States, so tried to navigate wisely to emphasize those factors that helped to legitimize the state measure.[104]

The most recent *API* judgment gives an example for anti-competitive state regulation involving a cartel-like conduct in the Italian road transport sector. The Osservatorio adopted a series of tables fixing the minimum operating costs of road transport undertakings for hire and reward. The Osservatorio was composed principally of representatives of professional associations of carriers and customers.[105] Furhermore, decisions of the Osservatorio were approved by a majority of its members, without a State representative having a right of veto.[106]Those tables were set out in a ministerial a couple of days later. [107]

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action should also be identified. Therefore, these cases can help explore the conditions under which an anti-competitive agreement is absent.

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

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

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

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

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

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

What is interesting and also worrying at the same time, is a subsequent note by the ECJ. The Court emphasized that the activity of the Osservatorio would also fall outside the cartel prohibition if its members were to act as 'experts' who are independent of the economic operators concerned, being required to set tariffs taking into account their own business interests, but also the public interest and the interests of undertakings in other sectors or users of the services in question.[108] Can you imagine that a gathering of persons affiliated with various competing undertakings, empowered to adopt regulatory decisions, without or even with some public officials being present, would be able to forget about where they come from and where they are going back after the meeting? Can they genuinely represent the diverging interest of other market players?

Retaining the right to actively supervise the decision of the undertakings is crucial in the U.S. too. The FTC enumerated a number of factors in *Kentucky Household Goods Carrier Association* that are relevant in determining whether the supervision was indeed actively exercised. These include: (i) how did the authority proceed, was there a hearing with a proper notice, (ii) did the agency issue written reasoned decision, (iii) was there a qualitative and quantitative agency assessment of how private action served the public interest enshrined in state legislation, (iv) what business data was collected to establish the background of the decision, (v) were economic studies conducted, (vi) were operating costs and profit levels checked, (vi) the history of disapproving previous rate proposals, simple 'rubber stamping' not being sufficient.[109]

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

Second, not only the composition of these groups, but also the factors they are supposed to consider are relevant. If this is not regulated, it is likely that participants will follow their own private economic interests. There is a fair chance to act independently, i.e. not in a capacity of an economic actor, but a wise professional, if the factors to be taken into account for regulating a tariff are well defined by the law.

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costs were in fact fixed by the Osservatorio. From 12 September 2012, the tasks of the Osservatorio were assigned by law to a department of the Ministry for Infrastructure and Transport.

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

[109]139. F.T.C. 404 (2005), aff'd, 2006 U.S. App. LEXIS 21864 (6th Cir. 2006).

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

III.1. Lobbying for regulation

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

European law makes a fine distinction between cases where companies genuinely recommend government officials a certain way of conduct and scenarios where undertakings conclude an anti-competitive agreement beforehand, and then seek state approval or support, i.e. by making their agreement compulsory for every market participant. An agreement among competitors setting the same price would be a naked competition restriction, whereas agreeing on a common plan to lobby the government to set the same price by way of regulation is exempt from the reach of EU competition law.

As far as the U.S. is concerned, *Noerr-Pennington* established a specific exemption for individuals and corporations.[110] The court made it clear that

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

> "we think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[111]

The U.S. approach is based on the respect of the institutions of representation and *the right of petition*. Antitrust rules are meant to govern economic activity. Actions by companies targeting government officials are characterized as political activity, even if they eventually will have economic effects.

However, *Noerr-Pennington* does not provide an unlimited coverage for business. Context does matter. For instance, firms cannot bring an anticompetitive agreement outside the reach of the Sherman Act merely by requesting a subsequent legislative approval to their pre-existing arrangement. In *California Motor Transport*[112], the Supreme Court held that the immunity does not apply where defendants tried to defeat the plaintiff's application to obtain licenses to operate a common carrier by sham complaints before regulators and courts. The Court also refuses to acknowledge immunity if a boycott was aimed at petitioning economic ends.[113]

To sum up, bi- or multilateral lobbying is beyond the reach of antitrust on both sides of the Atlantic. However, this may not serve as a disguise of a genuine cartel conduct, existing before and without relevance to the subsequent lobbying activity. Representatives of undertakings have a narrow path to walk.[114]

III. 4. The filed rates doctrine

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

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[111]Ibid, at 136.This conclusion was reached even though the track companies lobbied against the truck industry in a deceptive and unfair way.

[112]*California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972).

[113]For example, in *SCTLA*, an association of lawyers did not accept new cases until the District of Columbia did not reaise the hourly fees of court-appointed criminal defense laywers. *FTC v. Superior Court Trial Lawyers Ass'n (SCTLA)* 493 U.S. 411 (1990).

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

U.S. law is driven by the *Keogh* judgment prohibiting a private plaintiff from pursuing an antitrust action seeking treble damages where the plaintiff claimed that a rate submitted to, and approved by, a regulator resulted from an antitrust violation. The Supreme Court explained that only the competent regulator could change these rates, even if the rate was higher due to a price-fixing conspiracy. The Antitrust Reform Commission was quite critical with this exemption. Relying on the two prong structure of the state action doctrine, it suggested that Congress should overrule it legislatively where the regulatory agency no longer specifically reviews, just rubber stamps proposed rates.[115]

Similar issues were raised in the seminal *Ticor* opinion. The FTC filed an administrative complaint against six of the nation's largest title insurance companies, alleging horizontal price fixing in their fees for title searches and title examinations. The Commission charged the title companies with violating § 5(a)(1) of the Federal Trade Commission Act which prohibits "unfair methods of competition in or affecting commerce."[116] The Court ruled that where prices or rates are initially set by private parties, subject to veto only if the State chooses, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate setting scheme. The mere potential for state supervision is not an adequate substitute for the State's decision. While most rate filings were checked for mathematical accuracy, some were unchecked altogether. Absent active supervision, there can be no state-action immunity for what were otherwise private price-fixing arrangements.

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

III. 5. Regulated industries

When free competition is replaced with regulation, then competition laws may become superfluous, since there will be no competition in the form of independent business decisions to be protected. One issue is however, how intense this regulation should be to eliminate corporate responsibility. An interesting subsection of cases relate to challenging the fees of companies active in the regulated

[115]Report, recommendation No. 68.

[116]38 Stat. 719, 15 U.S.C. 45(a)(1). Title insurance involves insuring the record title of real property for persons with some interest in the estate, i.e. owners. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers.

sectors. Another issue is to ask how clearly do these sectors specific rules state whether and to what extent antitrust rules ought to be set aside?[117]

Regulation interfering with competition rules is not only an issue in telecommunication and energy. Agriculture is also heavily regulated. The ECJ dealt with this issue in *Suiker Unie*[118]. The common organization of the sugar market provided that each Member State shall fix, on the basis of the quantity allocated to it for each factory or undertaking producing sugar in its territory, a basic quota and a maximum quota. The Court acknowledged that this restriction together with the relatively high transport costs is likely to have a not inconsiderable effect on one of the essential elements in competition, namely the supply, and consequently on the volume and pattern of trade between Member States.[119] However, the common market regulation did not fix consumer prices and, consequently, producers were allowed some freedom to determine themselves the price at which they intend to sell their products.[120] Neither did EU rules preclude competition on quality. The Court thus ruled that regulation left in practice a residual field of competition, and that this field comes within the provisions of the rules of competition.[121] It follows that whenever market regulation leaves some room for autonomous business conduct a collusion among market player will be caught by EU competition rules.

In the U.S., where regulatory statutes are silent in respect to antitrust, courts must determine whether these rules implicitly preclude the antitrust laws' application. The *Gordon* Court took into account the following factors: (i) the existence of regulatory and supervisory authority under the securities law; (ii) evidence that the regulatory authority did in fact exercise its authority; and (iii) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting results.[122]

The Antitrust Modernization Commission concluded in 2007 that U.S. courts are usually reluctant to recognize implied immunities to the antitrust laws in the absence of a clear exception clause.[123] In contrast, in *Billing v. Credit Suisse First Boston Ltd.*[124]the Supreme Court, applying the previous three prong test, made it fairly hard for plaintiffs to rely on the applicability of antitrust in the regulated markets of financial services. Under the heading of the third prong, the Court reasoned its decision to reverse the contrary decision of the Second Circuit that there is a serious risk that

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

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

[119] *Id*., para 17.

[120] *Id*., para 21.

[121] *Id*. para 24.

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

[123]Report, p. 341.

[124]CREDIT SUISSE SECURITIES (USA) LLC v. BILLING (No. 05-1157) 426 F. 3d 130

antitrust courts, with non-expert judges and non-expert juries, will produce results conflicting with the position of the Securities and Exchange Commission. Thus, allowing an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market.[125]

Another case in point is *Trinko*.[126] This case is fairly often cited in Europe by incumbents trying to escape additional antitrust control by national authorities or by the EU Commission. Interestingly, the Antitrust Modernization Commission warned that *Trinko* is best
understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act; and that it should not be construed as displacing the role of the antitrust laws in regulated industries.[127]

The European approach is quite different, giving more room for EU antitrust rules in sectors where there is a national regulator. One of the reasons lies in the supremacy of EU law, the other that there is no fear of generalist, non-expert judges or juries reaching flawed conclusion. According to EU case law, t is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that EU competition rules do not apply. In a situation like this the restriction of competition is not attributable to the autonomous conduct of the undertakings, but rather to the action of the government. This exception excluding the applicability of EU competition law provisions has been accepted only under exceptional circumstances.[128]

For example, the European Commission did not hesitate to impose fines on Deutsche Telekom for a margin squeeze even when the wholesale fees of the German incumbent were approved by the sector regulator.[129] It was argued that the regulation did not prohibit lowering retail prices, so the undertaking could have avoided squeezing its competitors out of the market. Cases like this demonstrate what the well-established EU case law on special responsibility of dominant undertakings implies.[130] They are obliged to preserve the residual competition that is still present on markets dominated by them. The ECJ also held[131] that the liability of the undertaking is not

[125]Ibid, p. 17. The Court also noted that in this sectors antitrust has little if any added value to the sector specific regulations. The conduct challenged in this case was also prohibited by SEC and there was also a right for bringing damage actions.

[126]*Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004). In a previous case of *Town of Concord v. Boston Edison Co*., 915 F.2d 17 (1st Cir. 1990), the First Circuit rejected monopolization claims brought by a municipally owned electric utility against an integrated electric utility. The same Judge Breyer argued that there was no obvious basis for concluding that federal judges sitting in antitrust cases could do a better job than the sectorial regulators in addressing the competitive problem.

[127]Report, recommendation No. 67.

[128] See Case 41/83 *Italy* v *Commission* [1985] ECR 873, paragraph 19; Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraphs 27 to 29; and Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 67).

[129] Commission Decision of 21 May 2003 (Case COMP/C-1/37.451, 37.578, 37.579 – Deutsche Telekom AG), OJ L 263, 14.10.2003.

[130] Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 57.

[131] Case C-280/08 P., *Deutsche Telekom AG v European Commission,* judgment of the Court of 14 October 2010., [2010] ECR I-09555., paragraph 91.

constrained just because the national regulatory authority may itself have infringed Article 102 TFEU in conjunction with the *effet utile* principle, and therefore that the Commission could have brought an action for failure to fulfill obligations against Germany.[132] EU law, being supreme in its nature to national law expressing the intentions of domestic law makers does not really care how clear the Member State measure is on this point. The rule is that Member States should not adopt measures that could restrict the full application of EU competition rules. The reason for that is not that competition policy is regarded as superior to other public policies, but rather that EU law is supreme to national laws, even legislation adopted by parliaments.

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

One issue that comes up is whether there is a relationship between the existence of state liability and the scope of individual or corporate responsibility? One could assume that the if the state itself could be held liable for an anti-competitive regulatory measure that leads undertakings to anti-competitive behavior, than there is not much need for antitrust to strike down on companies. On the other hand, if the state cannot be held liable for the anti-competitive outcome, than antitrust law should have a wider potential scope to deal with the issue through making the corporations responsible.

EU law seems to be stricter against Member State measures than U.S. law, respecting States' sovereignty as regards regulating their own economies. EU law has an Article 16 TFEU, addressing the issue of state measures relating to public undertakings, and those with exclusive or special privileges. There is also the more general case-law based *effet utile* doctrine which makes states responsible for their measures approving, encouraging, prescribing a cartel like conduct, including the unsupervised delegation of regulatory powers to industry actors. U.S. states cannot be held responsible for legislative or regulatory measures like these. So, does it mean that EU law does not need antitrust rules covering a State-driven anti-competitive actions? Does U.S. antitrust law cover a wider range of issues to counterbalance the lack of state-related competition law provisions?

The practice of the EU Commission as regards hybrid cases seems to support this distinction. It has happened only once that the EU competition watchdog went both after the undertakings and the state itself. That famous case involved the tariff setting by Italian customs agents. A law authorized the country-wide association CNSD to adopt minimum and maximum tariffs that were subsequently approved by a ministerial decree. Here, the Commission addressed a decision to CNSD, the association of customs agents, and also sued Italy before the ECJ for infringing its obligation under the Treaty.[133] The ECJ had no doubts that even an association created by an act of Parliament can be seen as an association of undertakings for the purposes of Article 101 TFEU.

[132] *Id*, at para 91.
[133] C-35/96, *CNSD* [1995] ECR I-2883, paras 53-54.

It noted that neither were the members of CNSD appointed by government, nor were they obliged to take into account public interest.

The Commission prefers nowadays to challenge anti-competitive state regulation on the basis of the four freedoms, especially the free movement of goods and the free provision of services, or, under Article 37 TFEU regulating commercial state monopolies. Most of the European case law on anti-competitive state practices arose on the basis of competitors' challenges before national courts. The Commission did adopt a number of decisions addressing monopolies in the telecoms and postal sectors in the eighties, but it has not established a consistent enforcement policy since then. We can claim that the European *effet utile* rule is stricter than the U.S. state action doctrine in as much as it does not allow Member States to create cartel-like arrangements and justify them invoking important public interests going beyond competition policy. The consequence would be a wider liability for companies engaging in anti-competitive activities under public umbrella. However, we should add that other provisions of the TFEU, those relating to the free movement rules, can also be invoked against anti-competitive state actions, even more easily, without the need to prove the link with an Article 101 TFEU like cartel. These provisions do allow for a public interest defense taking into account other interests than undistorted free competition.[134] With that, more state interventions could be justified, so the room for legitimate anti-competitive behavior by undertakings may not be that narrow as if we considered only the competition rules of the Treaty.

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

V. Conclusion

The *Midcal* test is a "rigorous" one that "ensure[s] that private parties [can] claim state-action immunity from Sherman Act liability only when their anticompetitive acts [are] truly the product

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

of state regulation.[135] The *Parker* test is different in the sense that they it looks at the existence of a clearly established and supervised state policy, and does not inquire whether entities subject to the regulation had any realistic chance to deviate from the state policy. In the EU, when the government only supports an agreement interfering with the free play of competition, EU antitrust rules continue to apply.

Another important difference between the European and U.S. perspectives is, also noted by the Antitrust Modernization Commission[136], that the state action doctrines applies regardless of the effects the state measure may have in other states. For example, in the seminal *Parker v. Brown* case the vast majority of consumers who paid higher prices for raisins because of California's regulatory scheme were outside the state, given that most of the raisins were sold outside the state. This is a typical result of protectionist state regulation, internalizing the positive effects and exporting the negatives one. Avoiding this spillover effect is central to how EU law perceives this issue.

Due to the different conceptual settings of the two approaches, unlike EU case law, U.S. state action doctrine does not automatically apply if a municipality is the actor. It must be proven that their actions reflect state policy.[137] This is not the case in the EU, where measures adopted by local governments are treated the same way as measures of the State.

Under the second prong of the U.S. test, the state must actively supervise the action of private entities. A passive supervision does not suffice. In contrast, EU Courts do not inquire how intensively public officials controlled the activity of undertakings when it comes to an approval of a previous anti-competitive agreement. U.S. law is more demanding here, whereas it allows for much more room at the first prong of the state action test, by not requesting an autonomy erasing compulsion by the state. In sum, it is hard to judge which approach is stricter. U.S. law gives immunity for firms that were not compelled by the state to act in an anti-competitive manner as long as the state actively supervises their activity. The same would constitute an infringement of EU law.

In the EU, the internal market principle and the commandment of free, undistorted competition play a central role in uniting 28 different countries. In the U.S., the 50 states share a common history, born in wars, united by strong common interests, expressed in strong federal foreign, defense, monetary and fiscal policies, all these missing in Europe. Perhaps that is one of the reasons why European integration is much more sensitive on state imposed competition restrictions, imposing stricter conditions on Member States with an indirect impact on businesses.[138]

One thing that European could learn from the U.S. jurisprudence is to give more importance to the ex-post control of the government on anti-competitive, state authorized competition restrictions. The test applied by the ECJ is more formalistic than that of the U.S. Supreme Court. That would

[135]Patrick v. Burget, 486 U.S. 94, 100 (1988).
[136]Ibid, at 374.
[137]*City of Lafeyette v. La. Power & Light Co.*, 435 U.S. at 412-413. (1978)
[138]Another reason is that in Europe, state owned undertakings, even monopolies have played and still play a more decisive influence in the economy than in the U.S.

lead to the illegality of some state measures, thus to the vanishing of the shield protecting business from antitrust rules. U.S. case law, unlike its European counterpart does not draws a bright line between state measures mandating or just encouraging anti-competitive conduct. The autonomous decision making doctrine of the ECJ is clearly well established from a conceptual perspective. Practically, however, given the enormous pressure government entities can exert on individuals or corporations, it does not really matter whether the state's action is to be classified as mandatory or suggestive. Loyal entities may even be expected to guess and act according to the will of the state.

A crucial question is to what extent the state measure relating to an otherwise cartel-like private arrangement can genuinely protect public interest. Under certain circumstances, other public policy interest, like safety, consumer or environment protection may legitimize the restriction of economic freedom. In other cases, the reference to 'other public policies' covers nothing more than the particular interests of a group of market players.

Judge Kennedy's *North Caroline Dental Exeminers* opinion recalled that although federal antitrust law is a central safeguard for the free-market structures, there are other values regulated by State at the expense of the Sherman Act. State-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition.[139] The Court quoted *Ticor* warning that the immunity is not unbounded: "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'[140] This comes close to acknowledging the supreme nature of free markets and competition. Exceptions to the competition principle should be clearly expressed.

I believe that free and undistorted competition is a key to our human flourishing and the performance of our economies. Yet, competition is not all-mighty. There can be various reasons why it does not function properly, or why the side-effects of rivalry call for state intervention. The ultimate question comes up easily, but is hard to answer: to what extent do we trust the state when it regulates markets? The problem is much more complex than the existence of corruption. Lack of information about real and future market circumstances, the lobbying efforts of strong players can easily distort public decisions. I believe that a narrowly construed antitrust immunity for state action can help to answer these questions properly.

[139] Ibid, p.6-7.
[140] p. 636.

Tóth Tihamér tudományos közleményei
(2017. január 31.)

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