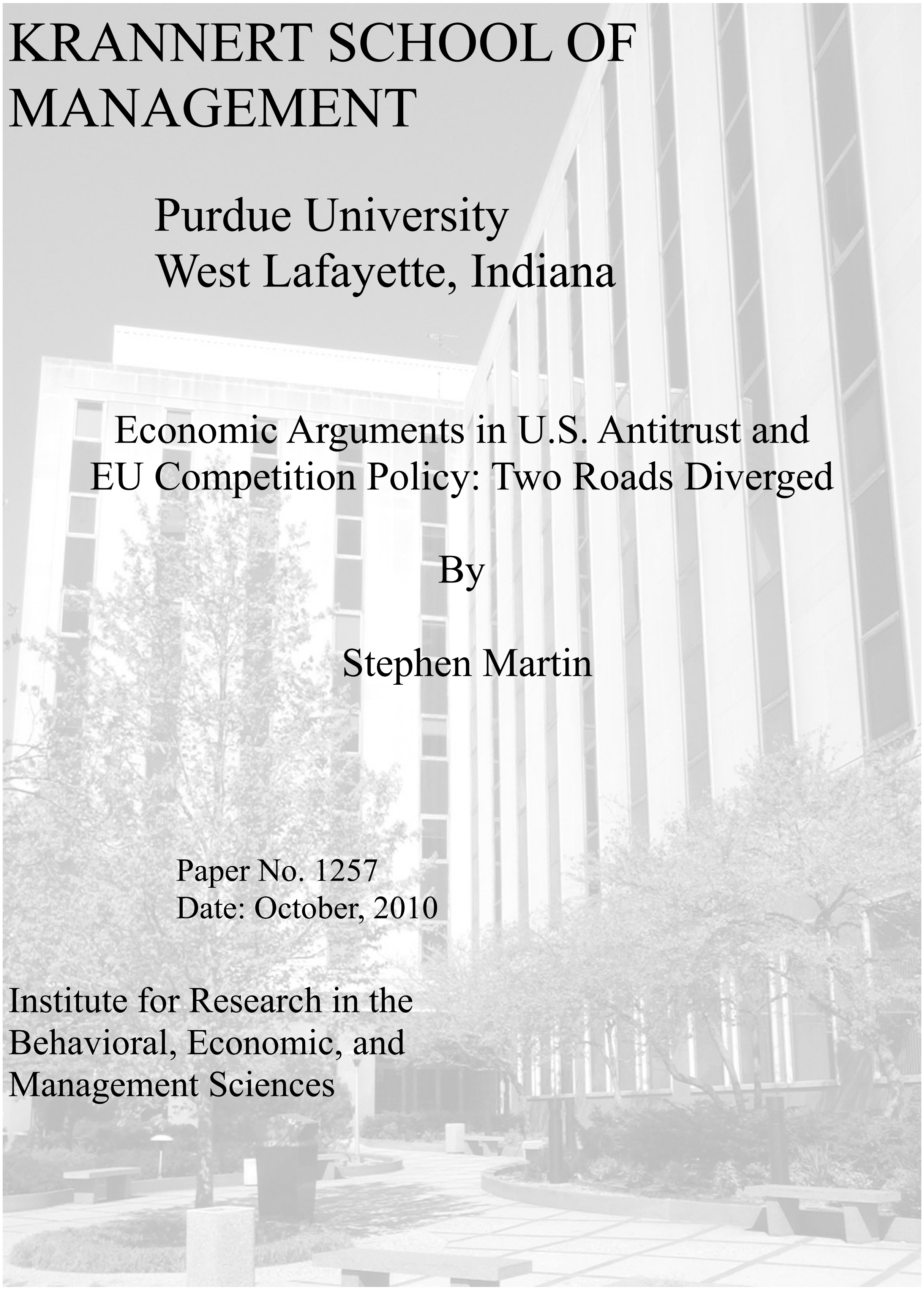

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Economic Arguments in U.S. Antitrust and EU Competition Policy: Two Roads Diverged

By

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Abstract

In this paper, I compare economic arguments in U.S. Supreme Court antitrust and EU Court of Justice competition policy decisions on four topics: refusal to deal, predation, vertical contracts, and horizontal interfirm relations.

*I am grateful for comments on a preliminary version of this paper received at the American Antitrust Institute's June 2009 National Conference and from Pinar Akman at a session organized under the auspices of the Industrial Organization Society at the January 2010 meetings of the Allied Social Sciences Associations. Responsibility for errors is my own.

Contents

1 Introduction

Economics is an essential input — many would say, the essential input — for antitrust and competition policy. Yet antitrust and competition policy are bodies of law. They are not economics. The outcomes of particular antitrust cases can be determined by factors that have nothing to do with economic issues, as when a party's due process rights are infringed or if access to the legal system is denied on the ground that a plaintiff lacks standing.[1]

When it is economic arguments that determine an outcome, the economic rationale may well be shrouded in a veil of precedent, one decision citing another that cites another, and so on. Peeling away the veil reveals the economic arguments that make up the judicial model of market behavior. That model may be implicit; it may not be internally consistent; it may evolve in a common-law way. But it is there.

In this paper I examine the economic arguments underlying U.S. antitrust and EU competition policy decisions in four areas — refusal to deal, predation, vertical contracts, and horizontal interfirm relations. My aim is to outline and compare the economic models of the functioning of imperfectly competitive markets implicit in the two approaches to setting the ground rules for business behavior in a market economy.

2 Refusal to deal

2.1 The rules

For U.S. antitrust, monopoly power is "the power to control prices or exclude competition."[2] For EU competition policy, a dominant firm has "a position of economic strength ... which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[3] U.S. antitrust and EU competition policy have come to very nearly opposite treatments of refusal to deal by the one type of firm and the other.

[1] Rules of standing, although unrelated to the economics of the imperfectly competitive markets with which antitrust and competition policy are concerned, may reflect the economics of the legal system.

[2] American Tobacco Co. *et al.* *v.* U.S. 328 U.S. 781 (1946) at 811; U.S. *v.* E.I. du Pont de Nemours & Co. 351 U.S. 377 (1956) at 391; U.S. v. Grinnell Corp. et al. 384 U.S. 563 (1966) at 571.

[3] Case 27/76 United Brands and United Brands Continentaal v Commission [1978] ECR 207 at 277; Hoffmann-La Roche & Co. AG *v.* EC Commission [1979] ECR 461 at 520.

LinkLine[4] summarizes the most recent reading of U.S. antitrust on refusal to deal by a firm with monopoly power:

> As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. ... But there are rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct. There are ... limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability.

For EU competition policy, in contrast, one of two recent *GlaxoSmithKline* opinions indicates:[5]

> [T]he refusal by an undertaking occupying a dominant position on the market of a given product to meet the orders of an existing customer constitutes abuse of that dominant position ... where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor....

2.2 The rationales

2.2.1 U.S.

LinkLine was a private antitrust suit by providers of retail internet access against the vertically-integrated firm over the network of which they supplied internet access and against which they competed in the supply of internet access to final consumers. The conduct at issue was a vertical price squeeze (*LinkLine*, pp. 8–9),

> unilateral conduct in which a firm "squeezes" the profit margins of its competitors. This requires the defendant to be operating in two markets, a wholesale ("upstream") market and a retail ("downstream") market. A firm with market power in the upstream market can squeeze its downstream competitors by raising the wholesale price of inputs while cutting its own retail prices. This will raise competitors' costs (because they will have to pay more for their inputs) and lower their revenues (because they will have to match the dominant firm's low retail price).

[4] Pacific Bell Telephone Co. *et al.* *v.* Linkline Communications, Inc., *et al.* 555 U. S. ____ (2009) at 7–9; the material quoted appears in two sequential paragraphs.

[5] Lélos kai Sia v GlaxoSmithKline (Joined Cases C-468/06 to C-478/06) (*GSK/Greece*), ¶ 34.

The *LinkLine* opinion relies on but does not elaborate upon[6] the District Court finding that AT&T had no antitrust duty to deal with its retail competitors. The opinion ties the antitrust treatment of vertical price squeezes to that of refusals to deal, writing[7] "If AT&T had simply stopped providing [digital subscriber line] transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Under these circumstances, AT&T was not required to offer this service at the wholesale prices the plaintiffs would have preferred" and[8] "if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market." But the opinion bases the antitrust treatment of vertical price squeezes on the antitrust treatments of refusal to deal and of predatory pricing rather than on discussion of the impact of vertical price squeezes on market performance.

The 2004 *Trinko* opinion[9] is one of the precedents upon which *LinkLine* relied. *Trinko* revolved around a complaint of constructive refusal to deal,[10] "that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive [local exchange carriers], thus impeding the competitive [local exchange carriers'] ability to enter and compete in the market for local telephone service." The *Trinko* opinion emphasizes[11] that to find a monopolization violation of Section 2 of the Sherman Act requires finding both the possession of monopoly power and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident," and further that

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices–at least for a short period–is what

[6] There is, however, the remark in footnote 2 that "Even aside from the District Court's reasoning ... it seems quite unlikely that AT&T would have an antitrust duty to deal with the plaintiffs. Such a duty requires a showing of monopoly power, but—as the FCC has recognized ...—the market for high-speed Internet service is now quite competitive; [digital subscriber line] providers face stiff competition from cable companies and wireless and satellite providers."

[7] *LinkLine*, p. 11.

[8] *LinkLine*, pp. 16–17.

[9] Verizon Communications, Inc. *v.* Law Offices of Curtis V. Trinko, LLP 540 U.S. 398 (2004).

[10] 540 U.S. 398 at 404.

[11] 540 U.S. 398 at 407, quoting U.S. *v.* Grinnell Corp. 384 U.S. 563 at 570-571.

> attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

Economic profit provides the wherewithal to finance innovation. For which sectors of the economy "monopoly" firms (in the antitrust sense) have an incentive to invest in, or a comparative advantage in, innovation, if any, remains an open question.[12]

The *Trinko* court continues[13]

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

The *Trinko* court later[14] remarks that "Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue." With this admonition in mind, it is worth noting that innovation was not obviously a feature in either *Trinko* or *LinkLine*, and that in both cases the infrastructure of the vertically-integrated firm was not a product of competitive risk-taking, but inherited from a regulatory-regime ancestor.[15]

It is not self-evident that an obligation to supply an essential resource on reasonable terms would of necessity involve day-to-day supervision by courts, any more than does the prohibition of collusion. A firm that colludes exposes itself to antitrust liability; if prosecuted, the legal system must determine whether or not collusion has taken place. Under a rule that treated

[12] See Martin (2010, chapter 14) for a survey of the literature.
[13] 540 U.S. 398 at 407-408.
[14] 540 U.S. 398 at 411.
[15] 540 U.S. 398 at 415–416.

strategically high prices for an essential resource as a monopolization offense, a firm that set such prices would expose itself to antitrust liability; if prosecuted, the legal system would have to determine whether or not prices were set strategically to exclude equally-efficient firms. In this regard, see *Bausch & Lomb*:[16]

> Specifically, we are asked to direct the inclusion of requirements that Soft-Lite file "with the district court a written instrument providing that it will sell its product, without discrimination, to any person offering to pay cash therefor."
>
> The Sherman Act is intended to prevent unreasonable restraints of commerce. The Clayton amendment . . . outlawed agreements with customers which restricted the customer from dealing with the products of a competitor of the seller. Persons injured by unlawful restraints may recover threefold damages. The federal courts have jurisdiction of suits to enjoin violations. Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices. In a business, such as Soft-Lite, which deals in a specialty of a luxury or near-luxury character, the right to select its customers may well be the most essential factor in the maintenance of the highest standards of service. We are, as the District Court apparently was, loath to deny to Soft-Lite this privilege of selection. . . . We have no reason to doubt that Soft-Lite will conform meticulously to the requirements of the decree. When it is shown to the trial court that it has not done so will be an appropriate time for the Government to urge this addition to the decree.

Along with the role of economic profit in creating incentives for resource allocation in a market system, the *Trinko* court emphasizes the disadvantages that an expansive application of antitrust's monopolization prohibition would entail:[17]

> Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 "can be difficult" because "the means of illicit exclusion, like the means of legitimate competition, are myriad." . . . Mistaken inferences and the

[16] U.S. *v.* Bausch & Lomb Optical Co. *et al.* 321 U.S. 707 (1944) at 728–729.
[17] 540 U.S. 398 at 414.

> resulting false condemnations "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." ... The cost of false positives counsels against an undue expansion of § 2 liability.

Trinko's vision of the market mechanism is one in which economic profit — more than a normal, risk-adjusted rate of return on investment — is an incentive for innovation and investment that improves market performance. Section 2 prohibits a firm with market power from investing resources to exclude equally-efficient rivals. But antitrust is imperfect; when in doubt, it is better to err by permitting strategic behavior that is profitable because it excludes than to err by condemning conduct that is profitable because it better serves consumers.[18]

If the supplier of an essential input is vertically integrated, the opportunity for mischievous single-firm conduct lies not in its horizontal relationship with downstream competitors but in its vertical relation with the downstream firms that must be its customers. The position of *Trinko* is that one reason antitrust errs, if it must err, in the direction of accepting the strategic unilateral exercise of market power that worsens market performance by an upstream firm is to avoid facilitating the joint exercise of market power in the downstream market.[19]

Colgate For the most part, the *Colgate*[20] rule, that "*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with

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[18] Two Supreme Court decisions, Lorain Journal Co. *v.* United States 342 U.S. 143 (1951) and Aspen Skiing Co. *v.* Aspen Highlands Skiing Corp. 472 U.S. 582 (1985), are sometimes cited as involving unilateral refusal of access to an essential resource. The *Trinko* Court puts aside the essential facilities doctrine on legal grounds rather than economic analysis of the impact of the practice on market performance argument (540 U.S. 398 at 410–411), noting as well that the Supreme Court "never recognized such a doctrine." What some refer to as essential facilities cases involving joint action are distinguished (footnote 3)) on the grounds that joint action "presents greater anticompetitive concerns" than single-firm action and "is amenable to a remedy ... requiring that the outsider be granted nondiscriminatory admission to the club."

[19] The sense in which an antitrust prohibition of vertical price squeezes would compel negotiation between a vertically-integrated upstream supplier (which must in any case come in contact with its nonintegrated downstream customers) and downstream rivals is not clear. The antitrust prohibition of predatory pricing does not appear to compel negotiation between firms that operate at the same horizontal level.

[20] U.S. v. Colgate & Co. 250 U.S. 300 (1919) at 307. The italicized words are emphasized by the Supreme Court in *Lorain Journal* (342 U.S. 143 (1951) at 155, as they are here.

whom he will deal," is rooted in the common law, not in consideration of the implications of the rule for market performance.[21] The Supreme Court *Trinko* opinion contents itself with referring to "the long recognized right of trader or manufacturer engaged in an entirely private business."

The *Colgate* District Court[22] makes an economic argument to explain a manufacturer's interest in, and the public benefit from, resale price maintenance:[23]

> The successful prosecution of [Colgate]'s business, and the continued use of its soap by the public, depend upon its ability to find and maintain a market for its output. Price cutting would almost inevitably result in reducing the defendant's business in a given community to only those engaged in that practice, and deprive it of the patronage of the great body of wholesalers and retailers engaged in what they believed to be a fair and legitimate conduct of their business. It by no means follows that, in the end, the public would be benefited, as the price cutter could easily raise prices after the demoralization caused by his conduct had been brought about, and profit individually by so doing. What the public is interested in is that only reasonable and fair prices shall be charged for what it buys, and it is not claimed that the defendant's manner of conducting its business has otherwise resulted.

For the District Court, however, the key fact that made Colgate's resale price maintenance program acceptable under the antitrust laws was that it was a unilateral program, not arrived jointly with distributors. Under the Colgate program, distributors were not bound to maintain resale prices; they simply knew that if they did not, they would "incur [Colgate's] displeasure." Because it was a unilateral program, it fell under the common law rule, and did not offend Section 1 of the Sherman Act.

The District Court cites a number of authorities in support of the proposition that a manufacturer "may control and dispose of his own property"

[21] *Colgate* itself involved the nature of contracts between a nonintegrated upstream manufacturer and its distributors, and so lacked the vertical integration aspects central to *LinkLine* and *Trinko*. Whatever the implications of the *Colgate* rule for market performance, it cannot be taken from granted that they are the same in the two different sets of circumstances.

[22] U.S. v. Colgate & Co. 253 F. 522 (1918) at 527.

[23] That "the price cutter could easily raise prices after the demoralization caused by his conduct ... and profit individually by so doing" indicates that for the *Colgate* District Court, a price-cutting retailer would be able to recoup profits lost during a price-cutting phase.

provided he does so "in a lawful and bona fide manner." Most of these authorities in turn reach back to the common law for support.

An 1895 decision,[24] however, one that in contrast to *Colgate*, *Trinko*, and *LinkLine* involved horizontal combination, made the economic argument that the exercise of market power would bring about its own demise:[25]

> Each one of the defendants had an undoubted right to determine for himself the price at which he would sell the goods he made, and he certainly does not lose that right by deciding to sell them at the same price at which a dozen or so of his competitors sell the goods which they make. Collectively the defendants owe no duty to any one of their competitors to regulate the price they fix for their goods so as not to interfere with the price he fixes for his own. And it is difficult to see how the public is injuriously affected by any such agreement between the combining manufacturers. If the price so fixed is the normal and usual one theretofore prevailing, certainly the public cannot complain; still less if the price be reduced. . . . *If, on the contrary, the combining defendants fix the price too high, they restrain their own trade only; the public will buy the goods it wants, not from them, but from their competitors.*

The 1913 State of Washington *Fisher Flouring Mills* decision makes a similar argument in a context that did not involve joint action:[26]

> In the absence of a monopoly . . . a contract fixing retail prices to the consumer cannot have an effect appreciably inimical to the public interest, because it cannot fix prices at an unreasonably high figure without defeating its own purpose by either signally failing to maintain the fixed price, or putting the individual manufacturer out of business. In either case, it fails to restrict competition. Either the consumers will not buy the product at the price fixed, or, if they do, the high price will stimulate competition in production and the price will inevitably fall. The given manufacturer will thus be compelled to accept one or the other alternative. He must either fix the price to cover only a reasonable profit, or he must retire from business, and this, for the

[24] Dueber Watch-Case Co. *v.* Howard Watch Co., 66 Fed. 637.

[25] 66 Fed. 637 at 644; emphasis added.

[26] Fisher Flouring Mills Co. *v.* Swanson 76 Wash. 649 (1913) at 660–661. *Fisher Flouring Mills* is cited in A&P *v.* Cream of Wheat Co. 224 F. 566 (1915), which in turn is cited by the *Colgate* District Court.

> simple reason that, in the absence of a monopoly, either actual or potential, of the entire supply, the natural conditions of trade will defeat any attempted restriction of competition.

These long-ago analyses complement *Trinko*'s view of the role of economic profit in a market system. Economic profit is an incentive for resource reallocation. If a firm has the power to control prices, and exercises that control to earn more than a normal rate of return, by that very action it triggers reactions by consumers and by rivals that erode its power.

Of course, for antitrust, monopoly power is "the power to control prices or *exclude competition*." If a firm that raises price also has the power to exclude equally-efficient competitors, consumers will have no competitors to which to turn; economic profit can persist indefinitely.[27]

2.2.2 EU

The issue in *GSK/Greece* was *GlaxoSmithKline*'s limitation of pharmaceutical supplies to Greek distributors who wished to take advantage of arbitrage opportunities created by regulatory differences among the Member States — taking delivery of pharmaceuticals at relatively low, regulated, Greek prices and exporting them to higher-price parts of the Union.

Among the reasons for the general rule stated by the Court of Justice in *GSK/Greece* and quoted above is that (¶ 37) "parallel imports enjoy a certain amount of protection in Community law because they encourage trade and help reinforce competition."

Additionally, the Court refers to the 1974 *Commercial Solvents* decision,[28] which revolved around the decision of a U.S. multinational to cut off supplies of an essential ingredient to an established customer with which, absent the refusal to deal, its Italian subsidiary would have been in competition. In that decision, and referring to the EC Treaty's requirement that the Community establish "a system ensuring that competition in the common market is not distorted," the Court wrote[29] that "an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition ....

[27] Thus the *Fisher Flouring Mills* Court qualified its sanguine view of the market as a self-correcting mechanism as holding "in the absence of a monopoly."

[28] Joined Cases 6/73 and 7/73 Istituto Chemioterapico Italiano and Commercial Solvents *v* Commission [1974] ECR 223.

[29] Commercial Solvents, ¶ 25.

Since such conduct is contrary to the objectives expressed in Article 3(f) of the Treaty … …an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position …".

The *GSK/Greece* Court also cites the 1978 *Chiquita Banana* decision,[30] one aspect of which was the situation of a Danish distributor of bananas that had been cut off by United Brands after distributing another brand of bananas. The relationship between United Brands and the distributor was strictly vertical — United Brands was not itself a distributor — but the Court once again held that refusal to supply was (¶ 183) "inconsistent with the objectives laid down in Article 3(f) of the Treaty, …since the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market." The Court further wrote (¶¶ 192–193) that the termination of one dealer would have a deterrent effect on other dealers that would interfere with their independence, strengthen United's dominant position, and "have a serious adverse effect on competition on the relevant … market by only allowing firms dependant upon the dominant undertaking to stay in business."

The economic argument of *Commercial Solvents* evinces a commitment to prevent the elimination of equally-efficient competitors — abuse lay in eliminating a consumer by cutting off its supplies of an essential input, not by competition on the merits. One aim of *Chiquita Banana*, to maintain the independence of distributors, "and this independence implies the right to give preference to competitors' goods," serves to lower the cost of entry, which should improve market performance (whether actual entry occurs or not).

While upholding the generally abusive nature of refusal to deal by a dominant firm, the Court of Justice grasped that prohibiting a limitation of supplies might lead a value-maximizing manufacturer to cut off supplies entirely to a low-price market:[31]

> Furthermore, in the light of the Treaty objectives to protect con-

[30] Case 27/76 United Brands and United Brands Continentaal *v* Commission [1978] ECR 207.

[31] *GSK/Greece*, ¶ 68. For another situation involving similar issues, see the Commission's 1977 *Distillers* decision (OJ L 50/16 22 February 1978), which prohibited a dual price structure for UK and continental markets and for a time led The Distillers Company Limited to stop marketing its major distilled beverages in the UK.

> sumers by means of undistorted competition and the integration of national markets, the Community rules on competition are also incapable of being interpreted in such a way that, in order to defend its own commercial interests, the only choice left for a pharmaceuticals company in a dominant position is not to place its medicines on the market at all in a Member State where the prices of those products are set at a relatively low level.

Consumer welfare is foremost in this argument.

The *GSK/Greece* Court concluded that a dominant firm abuses its position if it denies distributors ordinary supplies, and returned the matter to the national court for determination whether the orders in question were or were not ordinary.

For EU competition policy, refusal to deal is abuse of a dominant position if it blocks innovation. This appears from the 1995 *Magill* decision,[32] which concerned the refusal of the three leading television broadcasters to Ireland to allow publication of television listings by an independent firm that sought to market a combined listing (¶ 54): "The [broadcasters'] refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand." Despite the fact that the broadcasters held intellectual property rights over their own schedules, "Such refusal constitutes an abuse under ... the Treaty."[33]

The economic model apparent in these applications of EU competition policy to dominant firm behavior recognizes that dominant firms in imperfectly competitive markets can behave strategically to raise the cost of entry and frustrate innovation. For EU competition policy, the exercise of market power need not sow the seeds of its own destruction. The aim of the anti-abuse provisions of EU competition policy is to channel the competitive

[32] Joined Cases C-241/91 P and C-242/91 P RTE and ITP *v* Commission [1995] ECR I-743.

[33] It appears from the later *Bronner* decision (Case C-7/97 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG. [1998] ECR I-7791) that refusal is not abuse if there are economically reasonable terms on which the refused competitor could reach the market. Further, from *IMS Health* (IMS Health GmbH & Co. OHG and NDC Health GmbH & Co. KG Case C-418/01 Judgment of 29 April 2004, ¶ 49), refusal "may be regarded as abusive only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services ... and for which there is a potential consumer demand." Here too the focus is on innovation.

abilities of dominant firms into competition on the merits, and away from impeding the ability of actual or potential competitors to compete on the merits.

3 Predation

3.1 The rules

In *Weyerhaeuser*,[34] and citing *Brooke Group*,[35] Justice Thomas outlines the rules for U.S. antitrust treatment of predatory pricing:

> "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." . . . Second, a plaintiff must demonstrate that "the competitor had . . . a dangerous probabilit[y] of recouping its investment in below-cost prices."

As stated by the Court of Justice in its 2009 *Wanadoo* decision, the EU requirements for finding predatory abuse of a dominant position are[36]

> [F]irst, . . . prices below average variable costs must be considered *prima facie* abusive inasmuch as, in applying such prices, an undertaking in a dominant position is presumed to pursue no other economic objective save that of eliminating its competitors. Secondly, prices below average total costs but above average variable costs are to be considered abusive only where they are fixed in the context of a plan having the purpose of eliminating a competitor . . . .

3.2 The rationales

3.2.1 U.S.

Justice Thomas explains the economic logic behind the antitrust treatment of predation[37]

[34] Weyerhaeuser Co. *v.* Ross-Simmons Hardwood Lumber Co., Inc. 549 U. S. 312 (2007) at 318–319.
[35] 509 U.S. 209 (1993) at 222, 224.
[36] Case C-202/07 P France Télécom SA v Commission (2009), ¶ 109.
[37] 549 U. S. 312 (2007) at 319–320, internal citations omitted.

> The first prong of the test—requiring that prices be below cost—is necessary because "[a]s a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control." ... We were particularly wary of allowing recovery for above-cost price cutting because allowing such claims could, perversely, "chil[l] legitimate price cutting," which directly benefits consumers. ... Thus, we specifically declined to allow plaintiffs to recover for above-cost price cutting, concluding that "discouraging a price cut and . . . depriving consumers of the benefits of lower prices . . . does not constitute sound antitrust policy." ...

The resource allocation strengths of a market system depend on firms making decisions that equate marginal revenue and marginal cost. For the leading empirical case, constant returns to scale,[38] marginal cost equals average cost. From an economic point of view, pricing above average cost does not exclude equally-efficient rivals, hence is not predatory exclusion. The unwillingness to condemn above-unit-cost price cutting leaves unspecified the antitrust treatment of prices that are between average cost and average variable cost.

Continuing, Justice Thomas writes:

> The second prong of the *Brooke Group* test—requiring that there be a dangerous probability of recoupment of losses—is necessary because, without a dangerous probability of recoupment, it is highly unlikely that a firm would engage in predatory pricing. As the Court explained in *Matsushita*, a firm engaged in a predatory-pricing scheme makes an investment—the losses suffered plus the profits that would have been realized absent the scheme—at the initial, below-cost-selling phase. . . . For that investment to be rational, a firm must reasonably expect to recoup in the long run at least its original investment with supracompetitive profits. . . . Without such a reasonable expectation, a rational firm would not willingly suffer definite, short-run losses.

The economic basis of the recoupment test is that in a market system, firms act to maximize profit, or, in a dynamic perspective, value. If a value-

[38] Martin (2004).

maximizing firm could not reasonably expect to recoup profits lost during a predatory phase, it would not pursue a predatory strategy.[39]

3.2.2 EU

The rationale for the first element of the EU rule is as stated in *Wanadoo*, that pricing below average variable cost by a dominant firm justifies the presumption that the objective is to eliminate competitors. This rule can be traced to *AKZO Chemie*,[40] where one also finds an economic argument to support the second element of the EU rule (¶ 72):[41]

> Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.

In proceedings before the Court of First Instance, Wanadoo pleaded that the Commission needed to demonstrate a possibility of recoupment in order to support a finding of abuse of a dominant position:[42]

> [Wanadoo] submits that the recoupment of losses is entirely separate from the test of predation and the Commission must provide evidence of it. It takes the view that, if an undertaking in a dominant position cannot reasonably expect to reduce long-term competition with a view to recouping its losses, in particular because it is easy to enter the market in question, it is not rational for that undertaking to engage in a policy of predatory pricing. In that situation, the policy of low prices applied by the undertaking must be explained otherwise than by a strategy of predation.

[39] See *Matsushita* (475 U.S. 574 at 588–589, also cited by Justice Thomas): "A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered."

[40] AKZO Chemie BV *v.* Commission 1991 ECR I-3359, ¶ 71.

[41] For case studies of predation against rivals with limited financial resources, see Gabel (1969), Genesove and Mullin (1997). For a formal treatment, see Poitevin (1989).

[42] T 340/03 France Télécom v Commission [2007] ECR II 107, ¶ 219.

The Court of First Instance, and later the European Court, rejected this approach, referring to the *Tetra Pak II* statement that[43] "It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated."

The economic basis of the U.S. rule on recoupment is that firms are rational value-maximizers, predation is unlikely[44] and unlikely to succeed. If the likelihood of recoupment cannot be shown, one may infer that prices have not been set below an appropriate measure of unit cost; evidence to the contrary either has been misinterpreted or, if not, indicates that the firm setting the prices has made a mistake.

The economic basis of the EU rule on recoupment is that firms are rational value-maximizers; if it has been shown that prices have been set below average variable cost, the firm setting the prices must have done so as part of a value-maximizing strategy; hence no separate proof of recoupment is in order. Further, prices set below average cost are an abuse if part of an exclusionary scheme.[45]

A rational value-maximizing firm may set a price below current average variable cost if learning-by-doing is present, or if a product is introduced to a market. Properly interpreted, the EU rule would not condemn such pricing as an abuse, since such prices would not be set as part of a scheme to eliminate competitors.

4 Vertical Contracts

Vertical contracts, at least those that generate legal briefs, typically involve a larger manufacturer and smaller, perhaps more numerous, distributors. As such, they inhabit an economic and legal half-way house between monopolization/dominance and collusion/cooperation, between Section 2 and Section 1,

[43] Case C-333/94 P Tetra Pak International SA *v.* Commission 1996 ECR I-5951 ¶ 44 (*Tetra Pak II*).

[44] But see Cargill, Inc. *v.* Monfort of Colorado, Inc., 479 U.S. 104 (1986) at 121, footnote omitted: "As the foregoing discussion makes plain . . . predatory pricing is an anticompetitive practice forbidden by the antitrust laws. While firms may engage in the practice only infrequently, there is ample evidence suggesting that the practice does occur."

[45] Legal responsibilities, of course, often depend upon an evaluation of intent. See Justice Holmes in dissent in Abrams *v.* U.S., 250 U.S. 616 (1919), at 626–627: "[T]he word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not."

between Article 102 and Article 101.

4.1 U.S.

For U.S. antitrust, the passage from the 1967 *Schwinn* decision[46] to the 1977 *Continental TV* decision[47] was central to the transition from wholesale application of the principle of competition to explicit, rule of reason, evaluation of the impact of business practices on market performance. In *Schwinn*, the Supreme Court permitted territorial and other contractual restrictions on distributors if Schwinn retained title to bicycles until they reached the final consumer and condemned them *per se* if distributors purchased bicycles for resale. Despite the statement of principle that[48] "we must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable'," the basis of the decision was the common law condemnation of restrictions on alienation:[49] "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded *after the manufacturer has parted with dominion over it*. . . . Such restraints are so obviously destructive of competition that their mere existence is enough. *If the manufacturer parts with dominion over his product or transfers risk of loss to another*, he may not reserve control over its destiny or the conditions of its resale."

Ten years later, the *Continental TV* Court reversed Schwinn's *per se* rule, noting "the Court in Schwinn did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. . . . The pivotal factor was the passage of title: All restrictions were held to be *per se* illegal where title had passed, and all were evaluated and sustained under the rule of reason where it had not."[50] The *Continental TV* majority held that[51] "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing" and returned vertical restraints to the rule of reason category.

In footnote 19 of *Continental TV*, the Supreme Court gives priority to

[46] U.S. *v.* Arnold, Schwinn & Co. *et al.* 388 U.S. 365.

[47] Continental T.V., Inc., *et al. v.* GTE Sylvania, Inc. 433 U.S. 36.

[48] 388 U.S. 365 at 374.

[49] 388 U.S. 365 at 379, internal citations and footnote omitted, emphasis added.

[50] The *Continental TV* majority interprets *Schwinn*'s sale/no sale distinction as an "effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions;" see pages 52–54. This reading of *Schwinn* is not convincing.

[51] 433 U.S. 36 at 58–59.

interbrand competition over intrabrand competition (emphasis added):

> *Interbrand competition* is the competition among the manufacturers of the same generic product — television sets in this case — and *is the primary concern of antitrust law.*

This view no prior basis in antitrust (Grimes, 2002),[52,53] but has echoed through later decisions.[54]

The economic vision implicit in the U.S. antitrust treatment of manufacturer-distributor contracts is that vertical restrictions simultaneously reduce intrabrand competition and increase interbrand competition,[55] and so fall under the rule of reason. In principle, the rule of reason might permit or condemn any particular set of restraints, depending on their net impact on market performance. But interbrand competition is the primary concern of U.S. antitrust.

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[52] But see the 1913 State of Washington *Fisher Flouring Mills* decision (76 Wash. 649 at 668–669): "Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at, or above their reasonable price."

[53] Footnote 19 continues with a brief economic argument about the relation between intrabrand and interbrand competition. It may be correct that "The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer," but the reverse is not the case: the premise of the tradeoff that the majority identifies in the decision is that by restricting intrabrand competition, a manufacturer can make his brand more competitive *vis-à-vis* the brands of other manufacturers. If so — and the economic literature does not justify such a general conclusion — this explains why restrictions on intrabrand competition are privately profitable for the manufacturer that imposes them. It does not demonstrate that restrictions on intrabrand competition benefit consumers or improve market performance. It may also be correct that "But when interbrand competition exists ... it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." To the extent that restrictions on intrabrand competition aim to promote product differentiation, however, interbrand substitutability will be reduced. There is also the Hart and Tirole (1990) argument that in the presence of holdup problems, vertical restraints may be a prerequisite for a manufacturer to fully exploit its potential market power.

[54] Among which Business Electronics *v.* Sharp, 485 U.S. 717 (1988), *Khan*, 522 U.S. 3 (1997), and *Leegin*, 127 S. Ct. 2705 (2007).

[55] 433 U.S. 36 at 51.

4.2 EU

In the 1966 *Consten and Grundig* decision, ECJ found abuse in a manufacturer's reliance on a contract granting an exclusive territory to a distributor to block "parallel imports" from one member state to another:[56]

> The principle of freedom of competition concerns the various stages and manifestations of competition. Although competition between producers is generally more noticeable than that between distributors of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article [101](1) merely because it might increase the former.

In *Metro I*,[57] the Court was willing to rely on competition between different systems of distribution to get good market performance in the consumer electronics sector: "[T]he structure of the market does not preclude the existence of a variety of channels of distribution adapted to the peculiar characteristics of the various producers and the requirements of the various consumers."

From early days, EU competition policy has condemned restrictions on parallel trade as restrictive of competition:[58] "by its very nature, a clause prohibiting exports constitutes a restriction on competition, . . . since the agreed purpose of the contracting parties is the endeavour to isolate a part of the market." But the 1998 *Javico* decision,[59] which arose out of a contractual breakdown between a French perfume manufacturer and a distributor authorized to distribute in three Eastern European countries,[60] makes clear that whether or not a restrictive contract is abusive depends on its impact on market performance (¶ 17):[61] "even an agreement imposing absolute territorial protection may escape the prohibition laid down in Article [101] if it

[56] [1966] ECR 299 at 342. The same unwillingness to accept restrictions on one type of competition to promote another appears in the 1972 U.S. *Topco* decision, mentioned below.

[57] Metro SB Großmärkte GmbH & Co KG *v.* Commission Case 27/76 judgment of 25 October 1977 (1977) ECR 1875, ¶ 20.

[58] Case 19/77 Miller International Schallplatten GmbH *v* Commission [1978] E.C.R. 131, ¶ 7. See also Case 26/75 General Motors Continental *v* Commission [1975] ECR 1367, Case 226/84 British Leyland *v* Commission [1986] ECR 3263, Joined cases 96-102, 104, 105, 108 and 110/82 IAZ International Belgium and others *v* Commission [1983] ECR 3369, and the auto distribution cases.

[59] Case C 306/96 Javico *v.* Yves Saint Laurent Parfums SA [1998] ECR I 1983.

[60] For the purpose of EU competition policy, the distribution scheme restricted competition, but it received an exemption from the Commission.

[61] The same point is made in Case 5/69 Völk *v.* Vervaecke [1969] ECR 295, p. 302.

affects the market only insignificantly, regard being had to the weak position of the persons concerned on the market in the products in question" and (¶ 19)

> In the case of agreements of this kind, stipulations of the type mentioned in the question must be construed not as being intended to exclude parallel imports and marketing of the contractual product within the Community but as being designed to enable the producer to penetrate a market outside the Community by supplying a sufficient quantity of contractual products to that market. ...

In principle, therefore, antitrust and competition policy both view vertical restraints through the lens of impact on market performance. In application, antitrust gives a priority to promotion of interbrand competition that competition policy does not, and competition policy gives weight to market integration considerations that antitrust does not.

5 Horizontal relations: collusion, tacit collusion, cooperation

5.1 U.S.

The ancient rule that treats collusion as the supreme evil of antitrust can be traced to Judge Taft's 1898 aversion to setting sail on a sea of doubt[62]

> It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have *set sail on a sea of doubt*, and have assumed the power to say, in respect to contracts which have no other purpose ... than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.
>
> The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it.

In 1904, the U.S. Supreme Court made competition the bedrock of U.S. antitrust:[63]

[62] 85 F. 271 at 283–284, emphasis added.
[63] 193 U.S. 197 at 337; emphasis added.

> Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period in our history. Be all this as it may, *Congress has*, in effect, *recognized the rule of free competition* by declaring illegal every combination or conspiracy in restraint of interstate and international commerce.

From this bedrock rose a sweeping edifice of decisions that condemned all departures from independent price-setting, such as *Trenton Potteries*' 1927[64]

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices,

and *Socony-Vacuum*'s 1940[65,66]

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.

As late as 1972, on the way to condemning exclusive territories that were part of a grocery store joint purchasing agency, the Supreme Court was unwilling to trade off less competition in one part of the economy to get more competition in another:[67]

[64] U.S. *v.* Trenton Potteries 273 U.S. 392 at 397.

[65] U.S. v. Socony-Vacuum Oil Co., Inc. et al. 310 U.S. 150 at 221.

[66] Between the two decisions, of course, came Appalachian Coals, Inc., *et al. v.* U.S. 288 U.S. 344 (1933). It remains to be seen whether *Appalachian Coals* is the exception it is usually made out to be, or a bellwether.

[67] 405 U.S. 596 at 610 (*Topco*), emphasis added.

> [T]he freedom guaranteed each and every business, no matter how small, is the *freedom to compete* — to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it *cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.*

Judge Bork's 1986 *Rothery Storage* decision takes a much less expansive view of the scope of the *per se* rule. Against the background of exclusive dealing arrangements between a national moving line and its local agents, he wrote:[68]

> At one time ... the Supreme Court stated in *Topco* and *Sealy* that the rule for all horizontal restraints was one of *per se* illegality. The difficulty was that such a rule could not be enforced consistently because it would have meant the outlawing of very normal agreements ... that obviously contributed to economic efficiency. The alternative formulation was that of Judge Taft in *Addyston Pipe & Steel*: a naked horizontal restraint, one that does not accompany a contract integration, can have no purpose other than restricting output and raising prices, and so is illegal *per se*; an ancillary horizontal restraint, one that is part of an integration of the economic activities of the parties and appears capable of enhancing the group's efficiency, is to be judged according to its purpose and effect.

It was vertical relations that were at issue in *Rothery Storage*. The 2006 *Dagher* decision,[69] in contrast, involved horizontal cooperation effected by means of a joint venture. Two major oil companies, competitors on all vertical levels of the world petroleum industry, formed a joint venture[70] "to consolidate their operations in the western United States, thereby ending competition between the two companies in the domestic refining and marketing of gasoline." The Supreme Court affirmed a District Court refusal to find the arrangement in violation of the Sherman Act:[71]

[68] 792 F.2d 210 at 229. *Sealy* (388 U.S. 350 (1967)), involved retail price maintenance and exclusive territories. In *Rothery*, the Appeals Court viewed the restrictions as ancillary to legitimate contracts and therefore permissible under Section 1.

[69] Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

[70] 547 U.S. 1 at 4.

[71] 547 U.S. 1 at 5–6.

> Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful. ... These cases do not present such an agreement, however, because Texaco and Shell Oil did not compete with one another in the relevant market—namely, the sale of gasoline to service stations in the western United States—but instead participated in that market jointly through their investments in [the joint venture].

With *Dagher*, what had been a prohibition of "Any combination which tampers with price structures is engaged in an unlawful activity" has become[72] "the narrow category of activity that is per se unlawful under § 1 of the Sherman Act". The Supreme Court's 2010 *American Needle*[73] emphasized that for U.S. antitrust, the applicability, or lack of it, of the § 1 hinged on[74] "a functional consideration of how the parties ... actually operate." If the arrangement joins independent centers of decisionmaking, a rule of reason inquiry is called for, otherwise not.[75] It remains possible to challenge the formation of anticompetitive joint ventures.[76] Whether that way will be followed remains to be seen, but the way remains open for a return to the old common law rule that would permit combinations falling short of monopoly.[77]

5.2 EU

Against a background like that of *GSK/Greece*, the ECJ's 2009 *GSK/Spain* decision[78] involved the treatment under what is now Article 101[79] of agreements between GSK and its Spanish distributors, agreements that provided

[72] 547 U.S, 1 at 8.

[73] American Needle, Inc. *v.* National Football League et al. 24 May 2010 560 U. S. ____ (2010).

[74] Slip. op., p. 6.

[75] In footnote 9, the Court wrote that there was "no need to pass upon" the argument that Section 1 did not apply to fully-integrated joint ventures, since, functionally, NFLP was not such a venture. The *Dagher* rule survives to another day.

[76] 547 U.S, 1 at 7.

[77] See, in this regard, Justice Holmes' distinction (Northern Securities Company *v.* U.S. 193 U.S. 197 (1904) at 404) between contracts in restraint of trade and combinations or conspiracies in restraint of trade). For a reminder where this approach can lead, see the Friedmann (1942) and Lewis (1943) discussions of Crofter Hand Woven Harris Tweed Co., Ltd *v.* Veitch and Another (1942). I All E.R. 142.

[78] GlaxoSmithKline Services Unlimited *v.* EC Commission (Joined Cases C 501/06 P, C-513/06 P, C-515/06 P and C 519/06 P) 6 October 2009 (Glaxo Wellcome). See similarly Case C-209/07 Beef Industry Development Society and Barry Brothers [2008] ECR I-0000.

[79] Of the Treaty on the Functioning of the European Union.

for a lower wholesale price of pharmaceuticals to be distributed in Spain and a higher wholesale price of pharmaceuticals destined for export. The economic standard applied in GSK/Spain hinged on the word "or" in the Article 101 prohibition of "agreements ... which may affect trade between Member States and which have as their object *or* effect the prevention, restriction or distortion of competition within the internal market...." The Court reiterated (¶ 55) "the anti-competitive object and effect of an agreement are not cumulative but alternative conditions" and that "it is not necessary to examine the effects of an agreement once its anti-competitive object has been established." The rationale appears in an earlier decision,[80] that "certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition." Thus (¶ 63) "it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article [101] EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such."

Much hinges, of course, on what is meant by preservation of a competitive market structure. If preservation of a competitive market structure means (as it seems to in *Chiquita Banana*) condemning behavior that artificially raises entry cost, then much economic thought suggests that preserving a competitive market structure will also serve consumer welfare. If preservation of a competitive market structure means keeping less-efficient firms on the market, the opposite is true.

It should be kept in mind that the issue here is circumstances under which agreements are incompatible with the internal market under Article 101(1). Article 101(3) allows the Commission to set aside the Article 101(1) prohibition for agreements which, in specified ways, improve market performance. The Commission has availed itself of this prerogative, in individual cases and via a series of Guidelines, Notices, and Block Exemptions. In this way, EU competition policy has at one and the same time been more open than U.S. antitrust to possible efficiency gains from cooperation but also alert to the possibility that cooperation might blend seamlessly into effective collusion.

6 Parting Thoughts

What models of the workings of imperfectly competitive markets emerge from U.S. antitrust and EU competition policy decisions? U.S. antitrust recognizes that single firms may invest resources to obtain or maintain positions of market power. It is skeptical to the possibility that such investments

[80] Case C 8/08 T Mobile Netherlands and Others [2009] ECR I 0000, ¶ 29.

may be profitable for their exclusionary effect. As long as actual competitors and potential entrants do not confront strategic costs of expansion or entry, economic profit plays a benign role, sending signals that guide socially beneficial resource reallocations. Hard-core collusion to set prices remains beyond the pale. Cooperation in other dimensions is increasingly viewed through rose-colored glasses.

EU competition policy is distinguished by the special responsibility of dominant firms not to distort competition on the common market. This does not reach the level of a general condemnation of economic profit;[81] rather, it translates into an insistence that dominant firms may maintain their positions by competition on the merits, not otherwise.[82] With regard to dominant firm behavior and interfirm cooperation, the EU's commitment to market integration leads it to apply competition policy in ways that promote good market behavior.

One thing is certain. Screaming Lord Sutch once asked "Why is there only one Monopolies Commission?" For long after 1890, there was only one supreme tribunal interpreting competition law. That is no longer the case.

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[81] Article 102(b) of the Treaty defines unfair prices as an abuse of a dominant position; this provision has been little applied.

[82] In *Wanadoo* (Case C-202/07 P ¶ 106), the ECJ writes (emphasis added) "Article [102] prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods *other than those which come within the scope of competition on the basis of quality.*" For discussion of this point, see Giocoli (2009).

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