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A Study of U.S. Antitrust and EU
Competition Law Policy

—

The assessment of a possible restraint on
competition

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Contents

SUMMARY	1
SAMMANFATTNING	3
PREFACE	5
ABBREVIATIONS	6
1 INTRODUCTION	7
1.1 Theoretical starting points	7
1.2 Aim of the study	7
1.3 Method and materials	8
1.4 Delimitations	9
1.5 Outline	11
2 COMPETITION LAW	13
2.1 A brief introduction	13
2.2 Regulating competition	13
2.2.1 <i>Possible guidance for competition policy</i>	14
2.3 Antitrust law as a model	14
2.4 U.S. antitrust law and EU competition law	15
3 AMERICAN ANTITRUST LAW	17
3.1 A brief introduction	17
3.2 The birth of antitrust law	17
3.3 Institutional arrangements	18
3.4 Goals of U.S. antitrust law	18
3.5 The Sherman Act	19
3.5.1 <i>The application of the Sherman Act</i>	19
3.6 Principles for judgment	20
3.6.1 <i>Ancillary Restraints</i>	21
3.6.2 <i>Rule of Reason</i>	22
3.6.3 <i>Per se-restrictions</i>	24
3.7 Concluding remarks	26
4 EUROPEAN COMPETITION LAW	28
4.1 A brief introduction	28

4.2	The development of European competition law	28
4.3	Institutional arrangements	29
4.3.1	<i>Checks and balances</i>	31
4.4	Goals of EU competition law	32
4.5	Sources of EU competition law	32
4.6	Modernization	33
4.6.1	<i>Influences</i>	34
4.6.2	<i>The shape of the modernization process</i>	35
4.7	TFEU provisions on competition	36
4.8	Concluding remarks	39
5	COMPARISON OF THE PROVISIONS	41
5.1	General comparison	41
5.2	Rule of Reason in CJEU case law	44
5.3	An European Rule of Reason?	48
5.4	Concluding remarks	48
6	ANALYSIS	51
7	LIST OF REFERENCES	58
7.1	Litterature	58
7.2	Articles	59
7.3	Legislation	59
7.3.1	<i>EU primary legislation</i>	59
7.3.2	<i>EU secondary legislation</i>	60
7.3.3	<i>U.S. legislation</i>	60
7.4	Links	60
7.5	Seminars	61
	TABLE OF CASES	62

Summary

As globalization is emerging, competition law has grown from being mainly a national matter to a global concern.

Starting from different traditions, EU competition law has moved towards U.S. competition law in some ways, yet not in others. Some consider the modernization process of EU competition law, initiated in 2004, an acceptance of U.S. antitrust thinking by embracing a more economic approach to competition law. It has been suggested that TFEU Article 101 is to be seen as a structured Rule of Reason, a fundamental principle in U.S. antitrust law. The Rule of Reason is based on evaluation of the pro and anti-competitive aspects of a given agreement between undertakings. By this, the U.S. system has come to be called an “effects-based” system, in contrast to the European system that is called the “form-based” system. The disputed scope of application of TFEU Article 101 renders legal uncertainty.

One of the most complex issues for competition law to handle is the tension between producer welfare and consumer welfare. In Europe, competition law has historically embraced social justice and been part of the political system. The American system, on the other hand, applies more of an economic efficiency perspective, related to consumer welfare.

The structure of TFEU Article 101 does not only cause confusion as to what is to be considered when applying it; possibly, it is the ultimate evidence of the confused view on competition of the EU. Furthermore, the confusion is fueled by the rather contradictory take on the provision by the CJEU. As long as the aims of the provision are not elucidated, the confusion remains.

To consider the overall aims and political agenda of the EU when assessing possible restraints on competition seems difficult to reconcile with the rather economic approach that is stated in TFEU Article 101. Additionally, it is even more of a step away from the guidelines for the interpretation of the provision, provided by the Commission and the purely economic approach to competition that is the foundation of American antitrust law.

It has to be remembered that the systems are fundamentally different, even if it does not always seem like the prohibited conduct on the liberated market differs too much between the two systems. One significant conclusion is that the aims of the provisions are likely not comparable; the assessment of an agreement's restraining effect on competition is done by considering several different factors. TFEU Article 101 is not a codification of the Rule of Reason, but rather a by-product of a different philosophy, and it seems as if the express mention of U.S. terminology in EU competition law, especially by the CJEU, only serve to compound problems and confusion. The similarities between the two systems in the fundamental competition law thinking are rather an effect of the need for adjustment to

changing conditions, globally. Those conditions will continually keep on changing, and competition law will have to follow. Hopefully with clear and predictable provisions on prohibited conduct.

Sammanfattning

EU:s konkurrensrätt och dess amerikanska motsvarighet har ursprung som på många sätt skiljer sig från varandra. Men systemen har många likheter, och dessa verkar öka i takt med att världen blir alltmer globaliserad. Somliga ser till och med den moderniseringsprocess som genomfördes 2004 som ett uttryck för att EU accepterat delar av det amerikanska sättet att se på och tillämpa konkurrensrätten.

En av de mest omdiskuterade frågorna inom EU:s konkurrensrätt är tillämpningen av Lissabonfördragets artikel 101. Det har anförts att artikeln är en kodifierad variant av en av de grundläggande rättsprinciperna inom den amerikanska konkurrensrätten; the Rule of Reason. Denna princip bygger på att ett avtals konkurrensmässiga för- och nackdelar vägs mot varandra vid bedömningen av ett avtals konkurrensbegränsande verkan. Oklarheterna kring vad som ska beaktas vid en bedömning under Lissabonfördragets artikel 101 leder till en rättsosäkerhet som länge har präglat EU:s konkurrensrätt.

Konkurrensrätt är ett mycket komplext rättsområde. En av de svåraste frågorna för lagstiftaren att hantera är den som rör vilka syften konkurrensrätten ska tjäna. EU har sen de första konkurrensrättsliga reglerna antogs fokuserat på, och använt konkurrensrätten som ett verktyg för att uppnå, de uppsatta politiska målen. I USA har fokus istället legat på ekonomiska faktorer och effektiv konkurrens har varit ett mål i sig.

Att beakta EU:s övergripande mål vid tillämpningen av EU:s konkurrensrätt är något som är svårt att sammanfoga med ett ökat ekonomiskt fokus inom rättsområdet. En sådan inställning motsägs också av de riktlinjer som Kommissionen utfärdat rörande tolkningen av Lissabonfördragets artikel 101, och inte minst av påståendet att en tillnärmning av EU:s konkurrensrätt i förhållande till den mer ekonomiskt inriktade amerikanska konkurrensrätten ska ha skett.

Vid närmare undersökning av historiska faktorer och bakomliggande mål med de båda rättssystemen kan slutsatsen dras att de tjänar olika syften, och att the Rule of Reason och Lissabonfördragets artikel 101 därför knappast är jämförbara. Att hävda att Lissabonfördragets artikel 101 är en kodifiering av den amerikanska Rule of Reason är inte korrekt, snarare är denna regel ett uttryck för, och en produkt av, en helt annan filosofi. Det verkar som att användandet av amerikansk terminologi för att namnge ett europeiskt rättsinstitut snarare bidragit till att skapa förvirring angående detta instituts syfte och mål, än att ge det en lämplig benämning.

De likheter som ändå finns mellan systemen, för det kan inte förnekas att sådana existerar, härrör mer än något annat ur den omständigheten att båda

systemen ska tjäna liknande verkligheter, och synen på konkurrensrätt blir mer likartad och mindre nationellt präglad allteftersom världen globaliseras.

Preface

Thanks to mom and dad for your endless love and support.

Thanks et merci to Professor Michael Bogdan for inspiration and wisdom.

“Livet är som bäst när man arbetar hårt!”

Stockholm, January 2012

Amanda Sporre

Abbreviations

Aff'd	Affirmed
Assc.	Association
CFI	Court of First Instance
Cir.	Circuit Court
Ch.	Chapter
CJEU	Court of Justice of the European Union (designate the European Court of Justice and the General Court, along with its specialized tribunals, taken together)
Co.	Company
DG	Directorate-General
E.g.	Exempli gratia (for example)
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Coal and Steel Union
EEA	European Economic Area
EEC	European Economic Community
Et seq.	Et sequentes (and the following)
Etc.	Et cetera
EU	European Union
Fed.	Federal
GC	General Court (formerly known as the Court of First Instance)
GCLC	Global Competition Law Centre (at the College of Europe, Bruges, Belgium)
GmbH	Gesellschaft mit beschränkter Haftung
Ibid.	Ibidem (same place)
I.e.	Id est (that is to say)
Inc.	Incorporation
Ltd.	Limited
OJ	Official Journal
Para.	Paragraph
S.A.	Société Anonyme
Stat.	United States Statutes at Large
TEC	Treaty on European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
U.S.	United States of America
U.S.C.	United States Code
U.S. DOJ	United States Department of Justice

1 Introduction

1.1 Theoretical starting points

Competition law is an engaging matter. From a global perspective, in times of economic uncertainty and crisis affecting companies and states as well as private persons, the debate regarding global markets and international implications for a functioning global economy is, perhaps more than ever, of immediate interest. As globalization is emerging, competition law has grown from being mainly a national matter to a global concern. When used successfully, competition law may serve as a tool to enhance global economy.

The idea of EU competition law was born under circumstances and with aims other than only economic growth, but rather the unification of the single market. In fact, since the beginning of EU competition law, the European approach to competition law has been for competition law to serve primarily as a tool to achieve the aim of unifying the single market.

Recently, however, this old approach has been abandoned for, or at least supplemented with, a more economic approach.¹ There have been voices claiming that American antitrust law has heavily influenced this change.² Many, not least by Americans themselves, see American antitrust law as “the father of competition law”.³

However, as some say this increased economic focus in EU competition law is part of an adoption of American antitrust principles, some claim this to be due to general globalization and a purely European development.

The possible existence of a Rule of Reason-principle for judgment as to what conduct is considered too restraining on competition, as existing in the U.S. system, in the European competition system is possibly one of the most disputed issues in European legal circles.⁴ As long as the criteria for what is considered too restraining on competition remain unclear, this may have negative effects on economics worldwide.

1.2 Aim of the study

This thesis aim is to clarify whether European competition law, in moving toward a more effects-based and economic approach than the former form-

¹ Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011], p. 189.

² Gerber, *Global Competition: Law, Markets and Globalization*, p. 193.

³ *Ibid.*, p. 121.

⁴ Bout, *Lamy Droit Économique*, p. 547.

based approach, is influenced by, and possibly even adopting, an American antitrust law principle.

The search for proof of a possible European adoption of American antitrust principles will be concentrated on an American principle that has been developed in American antitrust case law since the beginning of the competition law evolution: the Rule of Reason. This principle still plays a central role in the U.S. antitrust law system.

In order to address this issue in a proper way, the examination of the matter will focus mainly on two questions:

1. Can a Rule of Reason assessment be lawfully employed under the application of TFEU Article 101?
2. Has globalization rendered the European form-based competition law system of today unfit to serve its purposes effectively?

1.3 Method and materials

This thesis study of the two legal system's competition provisions and principles for assessing agreements will be done by using a comparative method. The comparative method will be complemented with a legal dogmatic method, since it serves well to examine the law and its objectives in order to clarify the substance and application of the legal provisions at issue.

Comparative studies of legal systems make it possible to regard the more familiar legal system from a new perspective. It is my believe that a comparative study of American antitrust law and European competition law, in the light of an economic efficiency perspective, may well serve to better understand the future development of EU competition law. Moreover, the comparison will serve to clarify if the two systems handle the complex of problems related to deciding what constitutes an all too restraining effect on competition in a similar way. It will also serve as the basis for the search of proof of adoption of the Rule of Reason from one system to another. Any other similarities or possible adoptions from one system to another will be left aside in this comparison.

Having set out to use a comparative method to look for similarities in, and possible adoption of legal principles from one legal system to another, constructs a special set of issues for the comparatist to handle. Primarily, the comparison itself causes certain problems that have to be dealt with carefully, and that have to be given special thought.

One of those typical problems is expecting to find a legal problem solved in the same way in a foreign legal system as it is solved in another, more

familiar, legal system. This could possibly render the comparatist great disappointments, since such findings rarely are done.⁵

Regarding the sources for this thesis, there have been no problems finding materials relating to the competition law of the EU. In fact, it seems as if those books are always the ones with the most pages on the shelf of any library. So far so good, competition law is a subject that attracts a wide range of commentators. However, since the adoption of the Lisbon Treaty most books need revising and it seems as a large part of literature on the subject of competition law are about to be edited or has just recently been edited, but have not yet found their way back to the library shelves.

However, the work of the European Union to provide information on the EU online has well served its purpose. For those cases where literature has not been sufficient, the official pages of the EU on the internet have been a great complement to traditional books, especially regarding case law and communications from the Commission of the European Union.

As already mentioned, one of the main challenges for a comparatist is to fully comprehend those legal systems that one is not too familiar with. This may be even more of a challenge if one sets out to learn about this system on the premises that it is constructed as the systems that one is already familiar with.

Since the American antitrust law system is the one out of the two that I have studied that I am less familiar with, I started out learning about this system. As I had the chance to meet with Professor David J. Gerber, where he explained some of the dynamics of globalization in relation to competition law, I also got to know more about his work. His books along with other more traditional sources of law, such as case law, have been my main sources of American antitrust law.⁶

As globalization naturally constitutes a major influence in the development of both legal systems of the comparison, finding materials related to the matter has been of no difficulty.

1.4 Delimitations

When the Treaty of Lisbon came into force on 1 December 2009, a substantial number of changes were brought to the EU. These changes all bring a number of issues to be dealt with for someone who is making a historical review of the development of EU competition law.

⁵ Bogdan, *Komparativ rättskunskap*, p. 52 *Et seq.*

⁶ Seminar on “Global Competition: Law, Markets and Globalization”. Lecturer: Distinguished Professor David J. Gerber, Chicago-Kent College of Law, 29 September 2011. Held at the Stockholm Centre for Commercial Law, hosted by Ulf Bernitz. Invitation available at: http://sccl.se.24-7webhosting.com/uploads/documents/inbjudan_110929.pdf

Regarding the treaties, the Treaty on European Union (TEU) and The Treaty on the Functioning of the European Union (TFEU) were amended and renumbered. The main competition articles were though not amended in substance. In this thesis the provisions on competition in the TFEU will be referred to as the numbers they hold as of today, e.g. former Article 85, once renumbered 81 and finally, as of today holding number 101, will throughout this whole text be referred to as Article 101, if not clearly stated differently.

The modifications have also led to important changes in terminology, including the change in the title of the Court of First Instance (CFI) to the “General Court” (GC). The courts, the European Court of Justice (ECJ) and the General Court, are now together called The Court of Justice of the European Union (CJEU), e.g. the abbreviation CJEU refers to the collective judicial institutions of the European Union, including also the Civil Service Tribunal.⁷ In this text, the name of the CFI is changed historically and will be referred to as the General Court from its inception, following the practice established by the CJEU itself.

Regarding the case law that will be referred in this thesis, the text will refer to the court having delivered the judgment, e.g. ECJ, or GC. However, when referring to the Court of Justice of the European Union in general terms, the text will consistently refer to the CJEU, or simply “the Court”.

Additionally, in this thesis, the term “EC” has been changed historically, and throughout the whole text, it will be referred to as the EU, if not clearly stated differently.

The scope of this thesis is limited. A full examination of European and American competition law in this thesis would be a too burdensome task, not to say impossible. Focusing this examination to one specific issue has been a necessity. The many aspects of competition law, however, is what makes the subject such a fascinating field of law. Yet, this thesis will focus on the comparison of two legal systems regarding a limited field of competition law.

For clarification matters, the aim of this study is not to clarify whether the EU is applying an American principle as it might be applied in American courts as of today. Nor is the purpose to elucidate if the Rule of Reason is developing in American case law as of today, but rather if the concept of an effects-based assessment of an agreements possibly restraining effect on the free market are compatible with the TFEU provisions of today.

The review of case law does not aim to be anything but brief and to explain the key cases to the development of each legal system in the field of competition law. Nor will the reasons for the courts decisions be explained other than to the extent that they are of immediate relevance for the subject matter at hand.

⁷ Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011], p. VIII.

The selection of cases has not been done by examination of the full body of case law existing in the field of study, but rather through second-hand sources, that have all been carefully selected and verified.

This thesis will not focus on any of the issues regarding who TFEU Article 101 applies to, i.e. which entities constitute an ‘undertaking’ and are consequently bound to comply with the competition rules. Nor will it discuss what constitutes a joint conduct caught by Article 101(1) and how this is distinguished from unilateral conduct falling outside the scope and the matter when an agreement appreciably affects trade between Member States and so falls within the jurisdictional scope of Article 101(1). Furthermore, the debate on the applicability of an Ancillary Restraints doctrine on European competition cases will be left aside.

1.5 Outline

As says the old cliché: you cannot know where you are going until you know where you have been. Having taken this into consideration this thesis will commence by explaining the historic development of the rather recent field of law that is competition.

In order to provide the reader a solid ground of knowledge of the two legal separate legal systems I have decided to present the basic features, history and recent development of the two systems that are object to comparison separately. This part of the thesis will be rather descriptive than comparative or analytical. It may seem to the reader as if there is a lack of in depth description of the American system in comparison with the, as far as the amount of words under each section are considered, part where the European system is described. However, this matter has been regarded as necessary by the author due to two specific factors.

One is the fact that the European competition law system is still highly in a developing process, for example, it recently underwent a major modernization process. A process of such kind has never been seen during the more than a century that antitrust law has existed in the U.S.

The second reason would be that the matter at hand in this thesis is not how the Rule of Reason is applied in U.S. antitrust law, but rather if such a principle has been adopted into EU competition law. The search for such elements leads to the need for a more in depth analysis of the European competition law system.

After the two basic introductions to U.S. antitrust law and EU competition law, the thesis will move on to the actual comparison, where the focus will be set on the matter at hand: the assessment of prohibited conduct regarding restraints on competition. I believe that this method will serve better than

any other will for the reader to fully understand the complexity of the subject.

By comparing the development of American antitrust law with the development, and primarily the more recent development, of European competition law I hope to find implications that support my theory that EU competition law has not only moved toward a more explicitly stated economic approach, an approach that is the cornerstone in American antitrust law, but also adopted American terminology and assessment principles into the EU.

The analysis part, that follows the comparison, naturally serves to conclude my findings. In my analysis, I will search to explain why a possible change of approach to competition in the EU and in EU competition law has occurred, how this relates to American antitrust and globalization and how this may better serve the actors on the market that are operating under EU law, or the Union itself, depending on what reasons for such a change may have been.

I will also try to shed some light on where European competition law is going in the future.

2 Competition law

2.1 A brief introduction

Competition is an abstract idea. The starting point for understanding competition law must be that competition laws exist to protect the process of competition in a free market economy. At first sight, it might seem ironic that competition laws seek to control and interfere with the freedom of conduct of firms in the cause of promoting competition. The regulation is though often necessary to deal with market imperfections.

Competition refers to a process of economic exchange. However, institutions make competition possible and shape its form and intensity. Competition law targets forms of economic conduct that interfere with the effective operation of competitive markets. One can say that competition law is a form of law that interferes with the competitive process in order to maintain its vigor. Competition law must be designed to not only eliminate the harm, but also to avoid damaging the “healthy” components of the system.⁸

These factors make competition law challenging to legislators worldwide. Nevertheless, it is why competition law is such an interesting field of law, in all its complexity.

U.S. antitrust law has long been at the centre of the competition law world. It is often proposed as a model for other countries to follow, as represents extensive experience and a remarkable reservoir of thought and learning. Yet, U.S. antitrust law is unique, as it has developed under economic and legal circumstances that rarely have much in common with those faced by others, either individually or in international contexts.⁹

Regarding Europe and competition law, the experiences from European competition law have not been recognized globally as the American development in the same field. Even though European experience in coordinating national and transnational competition law is the most extensive laboratory for studying the dynamics of transnational competition law development.¹⁰

2.2 Regulating competition

Law enables, promotes and shapes competition. How the law performs these tasks for global markets will be critical to their development. Laws can

⁸ Gerber, *Global Competition: Law, Markets and Globalization*, p. VIII.

⁹ *Ibid.*

¹⁰ Gerber, *Law and Competition in Twentieth Century Europe*, pp. 2-3.

make markets work more effectively and enhance their value, but they can also impair their effectiveness. They can soften and moderate the impacts of markets on societies and groups, but they can also intensify them. The shape and effectiveness of these relationships are key factors in determining the extent to which competition can deliver on its promises, and they hold the potential for both enhancing the benefits of markets and generating support for them.¹¹

2.2.1 Possible guidance for competition policy

On more than one occasion, the OECD has stated that a desirable approach to anti-competitive practices is one that is:

- Accurate – based on widely accepted economic principles and yielding minimal costs from false positives and false negatives.
- Administrable – it should be relatively easy to apply.
- Applicable – the wider the scope of conduct the approach can cover well, the better.
- Consistent – it should yield predictable results.
- Objective – it should leave no room for subjective input from the decision-maker.
- Transparent – the approach and its objectives should be understandable.¹²

2.3 Antitrust law as a model

Reviews of the U.S. antitrust system prior to the Second World War tended to be negative, and they appear to have been based on very little actual knowledge of the system. Comments often focused on the then ‘radical’ practice of prohibiting certain conduct that was deemed anticompetitive. European economic thinking and political realities made such a prohibition seem unwarranted and unrealistic. The U.S. prohibition system was even portrayed as harmful, because it forced firms to merge rather than cooperate.

In the aftermath of the Second World War, European views changed dramatically. The U.S. was now in a dominant position in the market-oriented part of the world, and it promoted antitrust as a tool for fostering democracy and peace and for generating wealth. Many came to identify competition law with its U.S. variant.

The fall of the Soviet Union and the success of U.S. economy in the 1990s opened another chapter in the evolution of this model role. The return of

¹¹ Gerber, *Global Competition: Law, Markets and Globalization*, p. 2.

¹² Jones & Sufrin, *EU Competition Law, Texts, Cases and Materials* [2011], p. 190: OECD Policy Roundtables: Resale Price Maintenance (2008).

global markets and their new prominence brought renewed attention to competition law and much of the attention underscored the model role of U.S. antitrust law. Officials in the many new competition law systems have needed technical assistance, and the U.S. has been willing and able to provide it. All of this reinforces the image of U.S. antitrust as the leader in the field and the “father of competition law”.¹³

2.4 U.S. antitrust law and EU competition law

The Treaty of Rome¹⁴ and the competition rules set within it came into force in 1958. This was seven decades after the birth of the American antitrust system through the enactment of the Sherman Act, which was passed by the Congress in 1890. In fact, the U.S. was the first jurisdiction to adopt a proper “modern” system of competition law, and the Sherman Act is still in force.

It has been common, ever since the establishment of the Treaty of Rome, to discuss EU competition law with reference to U.S. law, looking for comparisons, ideas and lessons to be drawn from the American experience. However, it has to be remembered that the systems are fundamentally different, even it does not always seem like the prohibited conduct by actors on the liberated market differs all too much between the two systems.

One feature that should be noted as differing are the fact that U.S. competition authorities, the Department of Justice (U.S. DOJ) Antitrust Division and the Federal Trade Commission (FTC), enforce the antitrust laws by bringing actions before the ordinary courts. In this manner, the authorities act primarily as prosecutors, leaving to the courts to act as decision makers. In the EU, the competition authorities, the Commission, act both as a prosecutor and as a judge by taking decisions binding on the firms concerned.¹⁵

A second feature that differentiates the two systems is that U.S. antitrust laws are subject to a significant amount of private litigation, which in the EU, although possible, is relatively rare. This has led the U.S. system to develop on a case-by-case basis, while EU law has developed primarily by an administrative authority with the courts to review the legality of the authority’s actions.¹⁶

Regarding the aims for the regulation in two separate systems yet some significant differences are to be found. In Europe, competition law has historically been seen as part of an ‘economic constitution’, which embraces

¹³ Gerber, *Global Competition: Law, Markets and Globalization*, pp. 153-154.

¹⁴ The Treaty establishing the European Economic Community (EEC).

¹⁵ Ezrachi, *EC Competition Law, An analytical guide to the leading cases*, p. 225 *Et seq.*

¹⁶ Jones and Sufrin, *EC Competition Law, Text, Cases and Materials* [2004], p. 19 *Et seq.*

social justice and is part of the political system. The American system, on the other hand, applies more of an economic efficiency perspective, related to consumer welfare.¹⁷

As indicated above, American courts not only articulate the system's objectives, but they also play the central role in creating the norms and principles of substantive law. They give antitrust its content. In contrast to most other competition law systems, the legislature in the U.S. plays a marginal role in influencing the content of the antitrust laws.

The key fact is that the substantive law must be derived from an often inconsistent and unclear body of case law. The relevant statutes are so broad that they seldom have a direct bearing on decisions.

The language of the Sherman Act¹⁸, which is regulating U.S. antitrust law, itself, is little more than a linguistic anchor for case law decisions. As a result, the concepts used are typically 'ad hoc' rather than systematic concepts – that is, they are created in specific situations in order to resolve conflicts between parties. They are not presented in an abstract form, as usual in other competition law systems, as the European law system.

¹⁷ OECD Global Forum on Competition, 2003. The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency, United States, p 2. Available at: <http://www.oecd.org/dataoecd/57/62/2486358.pdf>

¹⁸ The Sherman Antitrust Act July 2, 1890, Ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1-7.

3 American antitrust law

3.1 A brief introduction

American antitrust law is built upon absolute faith in the values of competition. As stated in Northern Pacific Railway Co.:

“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests upon the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic forces, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the act is competition.”¹⁹

3.2 The birth of antitrust law

The development of American antitrust law is closely linked to the development of the American railroad system and business. A need for regulation of the railroad business was discovered soon after the start of the expansion of the railroad system. Until the second half of the 19th century there had been no railroad connection between the eastern and western parts of the country, and as the need for an expansion of the railroad system that already existed in the eastern part of the country, to include the western parts, was now discovered. This was though not a job for one single entrepreneur, but several had to be involved in order to expand the system as demanded. To benefit from this demand for a high pace expansion, the entrepreneurs involved started to cooperate.

The cooperation served to keep unwanted competition out of the picture. This conduct kept the prices up, it gave the cooperators unfair terms from their suppliers and it raised the prices to the consumers. These forms of cooperation in the railroad business were called “trusts”.

The influences the conduct of the trusts had on the market grew into a great concern for the government, and in 1890, the Congress passed legislation, the Sherman Act, against these forms of cooperation. The impetus was to constrain the economic power of the trusts and prevent its use to harm both consumers and producers.

¹⁹ Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).

By enacting the Sherman Act, the legislators created something new. At this time, antitrust law did not exist, not even as an idea. This meant that there were no models or other experiences for the legislators to consider or compare. Nor was there scholarly writing on the subject that could guide them in their choices and identify the potential consequences. However, the Sherman Act became the government's most important tool to handle the trusts, and it is from this action against the harmful cooperation in one market that the term "antitrust" has stem.²⁰

3.3 Institutional arrangements

The main authority in the antitrust field is the Antitrust Division of the U.S. Department of Justice (U.S. DOJ). Their primary task is to enforce the antitrust law by acting as a prosecutor by filing suits against prohibited behavior, but also to provide guidance as to what is considered prohibited conduct under American law. The guidance is often provided through collaboration with the Federal Trade Commission (FTC). The U.S. DOJ Antitrust Division also seeks to serve as an advocate for competition by acting in a proactive way, mainly through seeking to promote competition in sectors of the economy that are or may be subject to government regulation. The courts interpret the Sherman Act.²¹

In addition to the enforcement of the Sherman Act, and other antitrust regulations, the U.S. DOJ Antitrust Division has issued several official sets of guidelines. The object of issuing such guidelines are to provide businesses and other actors in the competition field with guidance as to what is deemed as prohibited conduct under the rather vague provision of the Sherman Act.²²

3.4 Goals of U.S. antitrust law

U.S. antitrust law has over time evolved regarding the goals for regulating competition, yet after over a century of experimenting there is today a strong modern consensus that the objective of antitrust policy is to maximize consumer welfare and promote economic efficiency through the optimal allocation of resources in a competitive market context. The goal is having an antitrust regulation that serves to increase efficiency and productivity to the ultimate benefit of the consumer in the form of lower prices, better products, and increased value.

“[f]or more than a century, the U.S. antitrust laws have stood as the ultimate protector of the competitive process that underlies our free market economy.

²⁰ Gerber, *Global Competition: Law, Markets and Globalization*, p. 123.

²¹ <http://www.justice.gov/atr/about/mission.html>

²² Statutory Provisions and Guidelines of the Antitrust Division, Chapter II, p. 30. Available at: <http://www.justice.gov/atr/public/divisionmanual/chapter2.pdf>

Throughout this process, which enhances consumer choice and promotes competitive prices, society as a whole benefits from the best possible allocation of resources.”²³

3.5 The Sherman Act

The Sherman Act embodies the American commitment to a free market economy. It contains a number of articles, “sections”. It is mainly the premier section that regulates contracts that are restraining competition. The first sentence of this section reads as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.²⁴

Even if the Sherman Act claims every conduct that may be restraining competition to be illegal, that is not really what was aimed for by the legislator. Since all agreements do restrain competition in some way, although not always in a harmful way, a prohibition of all possible effects on competition would be all too restraining to the market. The provision has evolved through the application of the provision by the courts.

Over time, a consensus regarding the paramount goal of the Sherman Act has emerged and is as of today consumer welfare along with efficiency.²⁵ The Sherman Act reflects the idea that ultimately competition will produce not only lower prices, but also better goods and services.²⁶

3.5.1 The application of the Sherman Act

Given the small size of the U.S. federal government at the time of the enactment of the Sherman Act, and the limited range of its functions, they were unlikely to rely on a new institution to apply the new law. As a result, the task was given to existing institutions, meaning the courts. U.S. courts have been wrestling ever since with ways to apply the provision.

Soon after the enactment of the statute by the Congress, judges realized that ‘restraint of trade’ was too broad to be applied as written. The Supreme Court soon developed a suitable method to define what conduct was to be regarded as prohibited under the Sherman Act.²⁷ This is still the case in U.S. antitrust law. In contrast to most other competition law systems, the

²³ OECD Global Forum on Competition 2003, “The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency”, p. 2. Available at: <http://www.oecd.org/dataoecd/57/62/2486358.pdf>

²⁴ The Sherman Antitrust Act, 15 U.S.C. § 1.

²⁵ Jones & Sufrin, *EC Competition Law, Text, Cases and Materials* [2004], p. 196.

²⁶ Elhauge & Geradin, *Global Competition Law and Economics*, p. 184.

²⁷ Gerber, *Global Competition: Law, Markets and Globalization*, p. 123.

legislature in the U.S. plays a marginal role in influencing the content of the antitrust laws. It is still the courts that give antitrust its content.

By the 1970s, U.S. courts and lawyers had given a well-established meaning to the simple statute through the development of a set of norms and institutional arrangements. Nevertheless, since the 1970s the antitrust system has undergone yet dramatic changes, mainly due to the debut of exposure to foreign markets and competition. The development of U.S. antitrust law will now be further examined.

3.6 Principles for judgment

The method that the Supreme Court developed to decide what was to be deemed anticompetitive under the Sherman Act is called the “Rule of Reason”. Before this principle was fully accepted, courts had though been employing another method to decide what was to be deemed as an unlawful agreement, the Ancillary Restraints doctrine.

The courts decided that agreements would only be in “restraint of trade” where they “unreasonably” restrained trade, and it would be decided by the application of the Rule of Reason. The assessment of an agreement under the Rule of Reason practically meant that the courts had to weigh the harm to competition from particular conduct against the benefits to competition from that conduct. An agreement would be labeled unreasonable under the Rule of Reason if its anti-competitive consequences outweigh its pro-competitive effects.²⁸

If a part of a contract, which was regarded as restraining of competition in itself, but at the same time of subordinate importance to the contract in whole, it could still pass as lawful under the application of the Ancillary Restraints doctrine.

As the Rule of Reason analysis evolved and over time became more defined, another group of contracts has also been the object of certain discussion and the object of concern to the courts in their efforts to narrow the wide definition of the Sherman Act down into understandable and predictable rules for the society to obey. This group of contracts is those that are to be regarded as prohibited *Per se*.

Since the Rule of Reason is merely a directive to courts that are to decide whether a contract is unlawful under the Sherman Act, and gives little guidance for economic actors, many processes could possibly be taken to courts. Given the high costs and uncertainty of litigation, the courts created the *Per se*-category.

²⁸ Gerber, *Global Competition: Law, Markets and Globalization*, p. 128.

3.6.1 Ancillary Restraints

The evolution of the Rule of Reason was preceded by the use of another doctrine. This doctrine, the “Ancillary Restraints” doctrine, is still being employed and it is today used to govern the validity of restrictions imposed by legitimate business collaboration. Under the doctrine, courts must determine whether the restriction is a ‘naked’²⁹ restraint on trade, and therefore void, or one that is ancillary to the legitimate and competitive purposes of the business association and by this valid.³⁰

Confusingly enough, this Ancillary Restraints doctrine was actually invented even before the development of the Rule of Reason. In the late 1900s, the court in the case *U.S. v. Addyston*³¹ took a step away from the strict approach to restraints on competition, as it was stated in the Sherman Act, by applying a new method. To be more specific, they used this method as to define what constituted an agreement that was restraining on competition. The reasoning of the court was eventually adopted by the Supreme Court as the proper interpretation of the Sherman Act.

The *Addyston* case concerned a division of territory coupled with a collusive bidding scheme and price-fixing agreement. The defendants in the *Addyston* case were pipemakers who were operating in agreement, so that when municipalities offered projects available to the lowest bidder, all companies but the one designated would overbid. This way the pipemakers were guaranteeing the success of the designated low bidder. The defendants asserted that this was a reasonable restraint of trade, and that the Sherman Act could not have meant to prevent such restraints. The U.S. government opposed this point of view.

The court began by noting that it would be impossible for the Sherman Act to prohibit every restraint of trade. Therefore, reasonable restraints were permitted, but this would only apply if the restraint were ancillary to the main purpose of the agreement. No conventional restraint of trade can be enforced unless:

1. it is ancillary to the main purpose of the lawful contract; and
2. it is necessary to protect enjoyment of legit fruits or to protect from dangers.

If the primary purpose is to restrain trade, then the agreement is void.

The Supreme Court decided to judge the contract by weighing the part of the contract that had a negative influence on competition, the part that was restraining on competition, against the main purpose of the contract, to

²⁹ A restraint on trade to which no procompetitive justification is offered, Elhauge & Geradin, *Global Competition Law and Economics*, p. 75.

³⁰ *Ibid*, p. 108-109.

³¹ *United States v. Addyston Pipe and Steel CO.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

enhance competition, and assessed the complete agreement's compatibility with the Sherman Act. Hence, if the restraining part of the contract was deemed to be of subordinate importance to the main purpose of the contract, it could still be a contract fully valid and in compatibility with the Sherman Act. Overtime, the Ancillary Restraints doctrine evolved and became more nuanced.

The most important conclusion regarding the application of the Ancillary Restraints doctrine in American antitrust law is that the economic analysis plays a crucial part when assessing an agreement. This is due to the intimate connection to the Rule of Reason doctrine and the fact that both theories are closely linked to the main purpose of the Sherman Act; a well-functioning competition.

The decisive criterion for whether an agreement can be passed under the provisions of the Sherman Act is the agreements effects on competition, other positive effects of the agreement are of subordinate importance.

3.6.2 Rule of Reason

The Ancillary Restraints doctrine may have been the doctrine developed first in American antitrust law, but it did not serve as the only doctrine in the field of antitrust law for long. Already in 1911, the dicta of Chief Justice White in *Standard Oil*³² and *American Tobacco*³³ set up the foundations for the development of the modern Rule of Reason.

The opinion of Chief Justice White in *Standard Oil* is the starting point of the modern interpretation of the Sherman Act. Yet, this dicta has also been the source of many misunderstandings, due to the opinions that were drafted in long, complicated and confusing sentences. Fortunately, Justice White later elucidated his own doctrine in the *American Tobacco* case. Justice White's construction of Rule of Reason was successful as to transform the Sherman Act into a workable instrument of economic policy.³⁴

Even if the term Rule of Reason had been used before, it was in the *Standard Oil* case that the court pronounced that in order to decide what agreements were restraining trade a "standard of reason" would be applied. Contracts that were "unreasonable" would be declared void. Yet today this principle on what is reasonable holds a central position in U.S. antitrust law.

Even if the court in the *Standard Oil* case decided that a standard of reasonability would be applied in order to decide what contracts were lawful or void, it took yet many years to give this principle any sort of substance.

³² *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911).

³³ *United States v. American Tobacco Company*, 221 U.S. 106 (1911).

³⁴ Joliet, *The Rule of Reason in Antitrust Law, American, German and Common Market Laws in Comparative Perspective*, p. 29.

The principle was developed and defined by cases judged by the Supreme Court over many years to come. One of those significant cases to the development of the Rule of Reason is Chicago Board of Trade³⁵, in which the Supreme Court stated that:

“But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as *merely regulates and perhaps thereby promotes competition* or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adoption the particular remedy, the purpose and end sought to be attained, are all relevant factors. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.” (Emphasis added)

However, the Supreme Court did not even in this case further specify what were the criteria needed to be fulfilled for a contract, or a part of a contract, that had a restraining effect on competition to yet pass as lawful under the Sherman Act. Apart from the condition that the part of the contract that could possibly have a restraining effect on competition had to be of minor importance when regarded along with the complete contract, or that the restraining effect could enhance competition over time, no guidance in how this test should be conducted was given until 1977.

In 1977, in the GTE Sylvania case³⁶, the Supreme Court finally stated what has had great practical importance ever since:

“The traditional framework of analysis under s 1 of the Sherman Act is familiar and does not require extended discussion. Section 1 prohibits ‘(e)very contract, combination . . ., or conspiracy, in restraint of trade or commerce.’ Since the early years of this century, a judicial gloss on this statutory language has established the ‘rule of reason’ as the prevailing standard of analysis (...). Under this rule, the fact finder *weighs all of the circumstances of a case* in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” (Emphasis added)

For the first time in American case law, the Rule of Reason principle or test was in this decision given some actual substance.

³⁵ Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

³⁶ Continental T.V., Inc. v GTE Sylvania, 433 US 36 (1977).

In the National Society of Professional Engineers³⁷ case, the court denounced the plaintiffs request for the restraint on competition to be deemed as lawful due to positive effects on competition by reference to “public safety”. No such argument could, by the courts opinion, be considered under the Rule of Reason assessment. The court ruled:

“In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest or in the interest of the members of an industry.”

With regards to this court ruling, it is evident that no other aims than economic efficiency combined with maximization of consumer welfare is to be considered under a Rule of Reason assessment.

3.6.3 *Per se*-restrictions

A parallel development of a case law principle of contracts prohibited *Per se*, as mentioned above, occurred alongside of the development of the Rule of Reason.³⁸ For long, this second principle has been one of the cornerstones in U.S. antitrust law. The *Per se*-restrictions prohibit agreements in direct opposition to what is stated in the Sherman Act. These contracts restrain competition without any positive effects on competition, and they are therefore prohibited *Per se*. In these cases, no test is demanded from the courts, and the agreement or conduct is automatically proclaimed as unreasonable by the courts.³⁹

The *Per se* category was invented to designate specific types of conduct as inherently unreasonable and thus obviate the need for further analysis. The main reason for the creation by the Courts of the *Per se* category have been the potentially high costs and uncertainty of litigation. In the Northern Pacific Railway⁴⁰ case from 1958, the court stated that:

“...there are certain agreements or practices which because of their pernicious effect on competition and lack of a redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without an elaborate inquiry as to the precise harm they have caused or the business excuse for their use. The principle of *Per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but *it also avoids the necessity for an incredibly complicated and prolonged economic investigation* into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been

³⁷ National Society of Professional Engineers v. Unites States, 435 U.S. 679 (1978).

³⁸ Craig and de Búrca, *EU Law, Text, Cases and Materials*, p. 971.

³⁹ Gerber, *Global Competition: Law, Markets and Globalization*, p. 128.

⁴⁰ Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958).

unreasonable – an inquiry so often wholly fruitless when undertaken.” (Emphasis added)

Over time, by decisions from the court, the group of contracts always deemed as unlawful *Per se* grew and became a defined and rather easily identified group of conducts. The first case in which the court used the term *Per se* was the *Sonomy Vacuum Case*⁴¹. In its decision from 1940, the court stated that a contract containing a price fixing agreement, which had even before been deemed unlawful under the Sherman Act:

“...has consistently and without deviation adhered to the principle that price-fixing agreements are *unlawful Per se* and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.” (Emphasis added)

The basic idea is that the courts have enough experience with a particular kind of conduct to be confident that it is anticompetitive.

As stated above, the creation of *Per se* categories have had two main objects and effects. One has been to simplify the assessment of the legality of conduct under the antitrust laws, for both decision makers and courts. A second effect has been to increase the effectiveness of enforcement by significantly reducing the costs of litigation for plaintiffs and increasing the likelihood of success.

However, as American antitrust law has over the last decades turned from being merely a domestic issue to a global matter, focus has shifted and the economic analysis that has become more important over time has driven the elimination of form-based rules. Economists have argued that the *Per se* rules should be eliminated, except in those few areas where economic science can have a high degree of confidence in predicting the competitive impact of such conduct, horizontal agreements would be one such example. According to economists, this should be favorable to competition since it is difficult to predict in a precise way the effects of particular conduct without extensive knowledge of the economic context in which it occurs. Courts have responded by accepting this analysis and gradually been eliminating *Per se* categories, thereby subjecting a greater number of restraints to fact-based rule of reason analysis.⁴²

Some of the more important cases where the courts have actually redrawn and cut back the boundaries of *Per se* restriction down are *GTE Sylvania*⁴³, where the Court held that non-price vertical restraints should be analyzed under the Rule of Reason, *State Oil v. Khan*⁴⁴, holding that courts should evaluate maximum resale price maintenance under the Rule of Reason, and

⁴¹ *United States v. Socony Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940).

⁴² Gerber, *Global Competition: Law, Markets and Globalization*, p. 145.

⁴³ *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977).

⁴⁴ *State Oil v. Khan*, 522 U.S. 3 (1997).

Leegin's⁴⁵, where the Court overturned the *Per se* restriction on minimum retail price maintenance agreements.

The *Per se* rule is now broadly confined to naked horizontal cartel arrangements, such as price-fixing, market sharing, restraints on output, bid-rigging and collective exclusive dealing.⁴⁶

3.7 Concluding remarks

The U.S. antitrust system was the first legal system to regulate competition. This has had immense effect to the system, since it has gotten to develop without interference from other legal systems. Yet, the system was developed to suit mainly a domestic market and since globalization started to emerge, the system has faced some challenges. Mainly due to the fact that it has historically served as a model, a model that is now contravened by other systems, adopting other principles than the American ones as an expression of different social, economic and political values. This complicated the application of American principles, since they are adjusted to fit mainly its own legal culture. Furthermore, the high flexibility built into the system may sometimes be at the cost of legal certainty.

The Rule of Reason in U.S. antitrust law gives the courts discretion to draw the line regarding the application of the Sherman Act. This is a burdensome task, since theoretically all market factors bearing on competition are to be considered. Far from being in conflict with the Rule of Reason, the *Per se* concept was designed to facilitate the accomplishment of this judicial duty. It is applied by the courts in order to decide whether the court has to examine the effects of the restraint.

Even if the courts statements on what restraints on competition should be regarded as ancillary to the main contract varies, since no agreement is comparable to another, the main principle of the Rule of Reason remains the same; a functioning competition is the main purpose of the application of the Sherman Act. Regarding the courts assessment of agreements by application of the principles elaborately worked out by the courts, the general idea is that the assessment is done by weighing the restraint on competition against the purpose of the Sherman Act. This is done by the application of the Rule of Reason.

The importance of the *Per se* restrictions, once invented to simplify the assessment of competition conduct for the courts, have lately been somewhat diminished. Since the *Per se* categories, one by one, have been abandoned by case law and the Rule of Reason assessment applied to an extended number of cases, some of them former comprised in *Per se* categories.

⁴⁵ Leegin Creative Leather Products, Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

⁴⁶ Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011], p. 196.

This development has given the courts yet greater decisive rights regarding what can be deemed as lawful. Also, the task that the *Per se* restrictions have served, to grant the actors on the market some certainty regarding what is considered the absolute limits for what can be accepted under the Sherman Act, is no longer as highly valued as the possibility for the court to consider every case. This may be due to the increased complexity of competition, with growing global markets and increased economic interest in every greater agreement affecting competition.

4 European competition law

4.1 A brief introduction

The development of competition law in Europe is very complex. It involves many states, actors and institutions, and the relationships among national institutions and between those institutions and the institutions of the European Union have frequently changed. It has sometimes been suggested that competition law systems in Europe either are poor copies of U.S. antitrust law or simply forms of administrative regulation of the economy.

One factor that has highly influenced the European development of competition law is the decision by the EU in 2004 to require Member States to apply EU law rather than national law in most significant competition law cases. This was a great change to European competition law, and it has greatly reduced the practical importance of national competition law systems in the global arena.⁴⁷

EU competition law is traditionally seen as a form-based system. The main competition provisions are found in Article 101 and 102 of the Lisbon Treaty (TFEU), and they are drafted in broad terms. Article 101 broadly aims to prevent restrictive agreements. Article 102 broadly aims to prevent abuses of market power.

The EU competition authorities have been criticized for taking an all too formalistic approach to competition law, failing to take an economic approach by operating on the assumption that certain things should be prohibited as a matter of course because they are bound to have an anticompetitive effect.⁴⁸

As a response to this critique, along with a number of other factors, a large work of modernization of EU competition law was made in 2003 and 2004.

4.2 The development of European competition law

Competition law in Europe has been a story of progress. In the first decades after the Second World War, competition law was virtually unknown in most European countries. It was seldom talked about, even in law faculties. Development from the 50s has been slow, but in many ways remarkable.

⁴⁷ Gerber, *Global Competition: Law, Markets and Globalization*, p. 159.

⁴⁸ Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011], p. 191.

Europe provides the only significant experience in which national competition law has been interwoven with economic and political integration. Since the founding of the European common market in 1957, there have been two levels of competition law in Europe, one national, the other European. National competition law developments were formally independent of EU law until 2004.

The sources of European competition law can historically be traced back to the 1951 European Coal and Steel (ECSC) Treaty⁴⁹. By guidance from several antitrust experts, the treaty came to include some fundamental competition provisions. These provisions included a prohibition of cartels, a ban on the “misuse” of economic power and a system of merger control.⁵⁰

Competition provisions were included in the Rome Treaty that established the European Economic Community (EEC) in 1957. In the Rome Treaty, France, Germany, Italy and the Benelux countries included competition provisions in order to deter private conduct that they feared might undermine the central task of the common market. The provisions were however very brief and there was great uncertainty about the functions they would serve.

Within a few years, however, competition law had become a central component of the legal system, a ‘pillar’ of the emerging EU legal system. It was often used to break down barriers to trade and thereby help to establish the conditions for positive economic development.⁵¹

Yet, prior to the 1990s, there was little effort to relate the systems in Europe to each other. Each operated independently, and typically, there was little interaction among them. Despite the progress in European integration, Member State competition authorities showed little interest in coordinating among themselves or even communicating among themselves.

However, as the Commission identified a clearer path of coordination, Member States sought to learn from, and about, each other as they gradually began to recognize the value of sharing experience, expertise and resources. They communicated more frequently, both on their own and in the context of EU institutions.⁵²

4.3 Institutional arrangements

A number of authorities are in charge of applying EU competition rules, National, as well as EU authorities. On EU level, the Commission is in charge, empowered by the Treaty, of ensuring the application of the

⁴⁹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007, OJ C306/50.

⁵⁰ Elhauge & Geradin, *Global Competition Law and Economics*, p. 49.

⁵¹ Gerber, *Law and Competition in Twentieth Century Europe*, pp. 335-390.

⁵² *Ibid*, pp. 392-416.

competition rules set out in the TFEU. In order to do this the Commission enjoys a number of investigative powers. Examples of those powers are inspection in business and non-business premises and written requests for information.⁵³ The Commission may also impose fines on undertakings that violate EU competition rules. The main rules on procedures are set out in Council Regulation (EC) 1/2003^{54, 55}.

The Commission has the primary responsibility for developing and applying EU competition law. The energy, judgment and effectiveness of competition officials have given force and content to competition law and made it a central force in European unification.⁵⁶

Since 1 May 2004, all national competition authorities are, alongside the European Commission, in charge of public enforcement of Articles 101 and 102 TFEU, the Treaty provisions on anticompetitive agreements and abuse of dominant positions. They are to fully apply the provisions of the Treaty in order to ensure that competition is not distorted or restricted. National courts may also apply these prohibitions to protect the individual rights conferred to citizens by the Treaty. This was part of the intended decentralization under the modernization process.⁵⁷

The Commission also serves as a law enforcement agency. Its role is to develop and apply legal principles. The Commissions' decisions are subject to comprehensive legal review by the courts of the European Union, namely the General Court (formerly the Court of First Instance) and the European Court of Justice (ECJ), collectively called the Court of Justice of the European Union (CJEU) after the enactment of the Lisbon Treaty.⁵⁸

Within the European Commission, the Directorate General for Competition (DG Comp) is primarily responsible for enforcing the competition law of the EU. The institutional competence of DG Comp allows it to operate with limited need of approval from the overtly political decision making procedures of the Council of Ministers. Nevertheless, major competition decisions must be approved by the full Commission and, in some cases, by the Council of Ministers.⁵⁹

⁵³ Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU (text with EEA relevance), OJ C 308/6, 20.10.2011, pp. 6-32.

⁵⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, pp. 1-25.

⁵⁵ http://ec.europa.eu/competition/antitrust/overview_en.html

⁵⁶ *European Union Encyclopedia and Directory*, "Essay on the legal framework of the European Union" by Rose M D'Sa, p. 206.

⁵⁷ Bernitz, *Svensk och Europeisk marknadsrätt 1, konkurrensrätten och marknadsekonomins rättsliga grundvalar*, pp. 68-74.

⁵⁸ http://ec.europa.eu/competition/antitrust/key_actors_en.pdf

⁵⁹ Gerber, *Global Competition: Law, Markets and Globalization*, p. 185.

4.3.1 Checks and balances

In order to ensure that all relevant views and evidence are taken properly into account before a final decision is adopted by the Commission, a number of checks and balances have been established. Those checks and balances form the Commissions' internal deliberation process and are all of different nature and operate at different stages of the decision making process.

As a part of the external checks and balances, one finds the possibility of judicial review by the courts of the European Union. In accordance with TFEU Article 263, the decisions adopted by the Commission are subject to legal review by the Courts of Justice of the European Union (CJEU).

It follows established case law that the court undertakes comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met. As the General Court has stated, when it reviews the legality of a decision finding an infringement of Article 101(1) or 102 TFEU, the applicants may call upon it

"[...] to undertake an exhaustive review of both the Commission's substantive findings of facts and its legal appraisal of these facts."⁶⁰

With regard to the review of complex economic and technical appraisals made by the Commission, the Courts of the European Union will assess

"[...] whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. However, while the Courts recognize that the Commission has a margin of appreciation in economic or technical matters; it does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Courts [of the European Union] must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it."⁶¹

Moreover, the CJEU has, by virtue of Article 31 of Regulation 1/2003, unlimited jurisdiction to review fines or periodic penalty payments imposed by the Commission. The CJEU may cancel, reduce or increase the fine or periodic penalty payment imposed.⁶²

⁶⁰ *Cimenteries CBR and Others v. Commission*, Cases T-25/95 [2000] ECR II 508, para. 719.

⁶¹ *Microsoft v. Commission*, Case T-201/04 [2007] ECR II-3601, point 87-89. See also *P Commission v. Tetra Laval*, Case C-12/03 [2005] ECR I-987, point 39.

⁶² Article 229 EC and Article 31 of Regulation 1/2003.

In accordance with TFEU Article 264, if an action for annulment is well founded, the CJEU will declare the decision of the Commission to be void. The CJEU may partially annul the decision to the extent that the void part can be separated from the whole, e.g. it may reduce the level of fine imposed in the original decision or find that an infringement was only proved to exist for a shorter time than found by the decision of the Commission. If the CJEU opts for annulment, the Commission may restart the investigation at the point where the error occurred.⁶³

4.4 Goals of EU competition law

The objectives and priorities of EU policy have not remained static over time.⁶⁴ Throughout the period until the modernization in 2004, EU competition law had two stated goals: to protect the competitive process from restraint and to promote European integration. This duality has been a key factor in shaping the EU competition law provisions.⁶⁵

However, voices representing the conception that EU competition law should become more efficiency oriented and more like the economics-based conceptions of U.S. antitrust law were heard as early as in the 1960s. They claimed that the mixture of goals that guided decision making in the EU was too vague to provide effective and predictable guidance and the goal of economic efficiency corresponded most closely to the economic objectives of European integration.⁶⁶

4.5 Sources of EU competition law

Beside the primary sources, the TFEU competition law provisions, secondary sources of EU competition law can be found in regulations adopted by the Council of Ministers or by the Commission. Some of these regulations contain the general rules for the implementation of the Treaty provisions laying down, among others, the investigative powers of the Commission. Other regulations deal either with particular types of conduct or with specific sectors.⁶⁷ Case law from the CJEU also serve as guidance as to what are deemed as prohibited conduct under EU competition law.⁶⁸ All institutions applying EU competition law are bound to follow the interpretations of the CJEU.⁶⁹

⁶³ http://ec.europa.eu/competition/antitrust/key_actors_en.pdf

⁶⁴ Craig and de Búrca, *EU Law, Text, Cases and Materials*, p. 960.

⁶⁵ Bout, *Lamy Droit Économique*, p. 315.

⁶⁶ Gerber, *Global Competition: Law, Markets and Globalization*, p. 184.

⁶⁷ <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>

⁶⁸ Bout, *Lamy Droit Économique*, p. 317.

⁶⁹ Elhauge & Geradin, *Global Competition Law and Economics*, p. 52.

Due to the increased complexity of competition law, with an enhanced focus on the economic effects of competition law, the Commission has introduced numerous non-regulatory documents. These have been introduced mainly to clarify the Commission's approaches to a number of issues. Those instruments, often labeled "Guidelines" or "Notices", do not bind courts but only the Commission. The soft law instruments are, however, often very helpful for firms seeking to determine whether their conduct is likely to be challenged by the Commission.⁷⁰

Regarding national competition laws, these do still exist, but they are closely patterned on EU competition law and contain provisions that are nearly identical to the articles of the TFEU. Member States may, however, apply stricter competition rules to unilateral conduct.⁷¹

4.6 Modernization

Plans to modernize EU competition law began to take shape in the late 1990s. The initial impetus can be traced to the fall of the Soviet Union, since the EU expected dramatic changes to global markets and an expansion of the EU into Eastern Europe to follow the fall of the Soviet Union.⁷² The primary focus was, however, on changes in institutional and procedural components of the system.

Over time, there had been complaints about the lack of predictability in the methods that the Commission and the CJEU used in determining and applying the substantive competition law norms regarding competition.⁷³

As a response to this, during the same period as the modernization of the institutional and procedural components of the system was proceeding, another form of modernization also began to take shape. This modernization represents a fundamental re-orientation of much of the substantive law thinking in EU competition law. The two processes are closely interrelated, each conditioning the other.

A White Paper on modernization was worked out, where changes to the competition law system of Europe were suggested.⁷⁴ In the summary of this paper, the Commission stated the objectives for the suggested changes:

"It is thus essential to adapt the system to the economic and social changes which have occurred since 1962 so as to relieve companies of unnecessary bureaucracy, to allow the Commission to become more active in the pursuit of serious competition infringements and to increase enforcement of the

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, p. 52.

⁷² Gerber, *Global Competition: Law, Markets and Globalization*, p. 187.

⁷³ *Ibid.*, p. 192.

⁷⁴ White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999], OJ C132/1.

competition rules by the national authorities and courts. In this respect, the White Paper proposes the setting-up of an exception system accompanied by a modernisation of the competition rules.⁷⁵

Eventually the Commission reviewed and overhauled the working of EU competition law from 1996-2004. As part of this modernization, the Commission set about reformulating its approach to agreements, accepting that there should be a shift from an approach based on form to one focused on effects.⁷⁶

4.6.1 Influences

Calls for a more U.S.-style approach to competition law in Europe began to penetrate European academic literature in the 1980s. The existing European system came to be characterized as the ‘form-based’ system, because it contained rules that determined outcomes by reference rather than by reference to its effects. Instead of a ‘form-based’ system, some called for an ‘effects-based’ approach in which there were no, or few, legal conclusions to be drawn from the form of an agreement. Legal conclusions should only be drawn when the factual circumstances had been analyzed from an economic perspective.⁷⁷

The reasons for the starting change of opinion on the European approach to competition law are several. To mention one, not to be understated, are the economic performance records of the U.S. and Europe in the 1990s. During this decade, the U.S. saw a dramatic economic growth whereas European economic performance lagged behind. For many in European business, this led to a call for reduced interference from the Commission in business activities, specifically in the area of competition law enforcement.⁷⁸

Another contributing factor to increased willingness by the Commission to respond positively to arguments that it had previously not taken very seriously, was the formation and development of the TCL Group. The emergence and consolidation of this group facilitated the development and consolidation of relationships within this group, in which both EU as well as U.S. officials took part.⁷⁹

These pressures combined with a growing conviction among leading Commission officials that the criticisms were often well-founded led the Commission to seek more defensible basis for its decision practice. A more economic approach seemed to promise a more specific reference point for

⁷⁵ http://europa.eu/legislation_summaries/other/l26059_en.htm

⁷⁶ White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, paras. 56-57.

⁷⁷ Gerber, *Global Competition: Law, Markets and Globalization*, pp. 193-194.

⁷⁸ *Ibid.* p. 195.

⁷⁹ *Ibid.*, p. 194.

decisions, one that would be both more intellectually sound and more predictable.⁸⁰

U.S. institutions, both private and public, pushed hard for adoption of the adoption of economics-based characteristics in EU competition law. They did it with the conviction that the U.S. model was well functioning enough to serve as a model in antitrust legislation worldwide, they were driven by the desire to avoid legal clashes between U.S. antitrust law and EU competition law as transatlantic trade increased as globalization emerged.⁸¹

4.6.2 The shape of the modernization process

The modernization process developed its own dynamics. The process was both a decentralization of authority and an effort by the Commission to control the future development of competition law. The Commission controlled the process as it drove the proposals forward, managed the meetings and controlled the agenda. Member State governments generally played a relatively passive role in the development of the modernization package.

After much debate and extensive consultation exercise the Council adopted Regulation 1/2003 on 16 December 2002, and it has applied since 1 May 2004.⁸² By this, the Commission's proposal to abolish notification, render article 81(3) a directly applicable exception and decentralize the application and enforcement of the competition rules was accepted.

The new regulation also gave the Commission the power to investigate infringements of the competition rules on its own initiatives, or acting on a complaint. In competition cases, the Commission plays the part of lawmaker, policeman, investigator, prosecutor, judge and jury. Inevitably, this arrangement has long been subject to criticism, and it is notable that this position was not changed by modernization.

In summary the modernization process may be regarded as divided into three separate, yet interrelated, dimensions:

1. Substantive Modernization: "effects-based approach"
2. Procedural Modernization: exception system and negotiated procedures
3. Institutional Modernization: decentralization and network enforcement

There are yet several new challenges to the effects-based system. In the seventh annual conference held by the Global Competition Law Centre (GCLC) of the College of Europe in Bruges, Belgium, in October 2011, devoted to the subject "Ten Years of the Effects-Based Approach in EU

⁸⁰ *Ibid.*, p. 195.

⁸¹ Gerber, *Global Competition: Law, Markets and Globalization*, p. 201.

⁸² Jones & Sufrin, *EC Competition Law, Text, Cases and Materials* [2004], p. 1050.

Competition Law: State of play and Perspectives”, the Chief Economist of DG Comp, Kai-Uwe Kühn, addressed some of these issues.

One main concern regarding the effects-based approach is, according to Chief Economist Kühn, the enormous amount of data to be considered while assessing an agreement as too if it is possibly restraining on competition. Chief Economist Kühn also identifies a possible problem with legal certainty under the application of the more effects-based system.⁸³

The Chief Economist’s fellow speakers at the conference held by the GCLC also addressed this issue of possible loss in legal certainty after the adoption of a more economic approach to competition law. One of the fellow speakers, Damien MB Gerard, UC Leuven, even addresses the effects based approach under TFEU Article 101 and its paradoxes as being “Modernization at war with itself?”.⁸⁴

4.7 TFEU provisions on competition

TFEU Article 101(1) prohibits agreements or other collusions between two or more independent undertakings that has as its object or effect the prevention, restriction, or distortion of competition and which affects Member States. It applies only to agreements that appreciably affect competition and trade. TFEU Article 101(3) provides that the prohibition may be declared inapplicable to agreements, which fulfill its four criteria broadly where beneficial aspects of the agreement outweigh its restrictive effect.

TFEU Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices 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, and in particular those which:

- (a) Directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) Limit or control production, markets, technical development, or investment;
- (c) Share markets or sources of supply;
- (d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

⁸³ <http://www.coleurop.be/template.asp?pagename=gclcseventhannual>

⁸⁴ *Ibid.*

(e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices,
- which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

There are also the Block Exemption Regulations. Under these regulations, certain categories of agreements automatically benefit from the article 101(3) exception.⁸⁵

A central issue in EU competition law is to decide what constitutes an appreciable restraint on competition. When do the pro-competitive aspects of the agreement satisfy the conditions of Article 101(3) and ‘trump’ the anti-competitive effects identified under Article 101(1)?⁸⁶

In the Article 81(3) Guidelines (April 2004) it is stated that methodology is based on an economic approach and that the assessment under Article 81 consists of two parts: (i) object/effect to restrict competition; (ii) balancing anti- and pro-competitive effects.⁸⁷

⁸⁵ Elhauge & Geradin, *Global Competition Law and Economics*, p. 51.

⁸⁶ Craig and de Búrca, *EU Law, Text, Cases and Materials*, p. 972.

⁸⁷ Commission Notice: Guidelines on the Application of Article 81(3) of the Treaty, OJ C 101/97, 27.4.2004.

An assessment of the agreement is done by asking: does the agreement restrict actual or potential competition that would have existed without the agreement/restraint?

It is also stated that in the Guidelines that the prohibition of Article 81(1) only applies where based on proper market analysis it can be concluded that the agreement has likely anti-competitive effects on the market. Negative effects on competition within the relevant market are likely to occur when the parties individually or jointly have or obtain some degree of market power. Yet, it has to be considered if the restrictive agreements may generate objective economic benefits to outweigh the negative effects of the restriction of competition.

The aim of the assessment is to determine whether the net effect of such agreements is to promote the competitive process. Ultimately, the protection of rivalry and the competitive process is said to be given priority over potentially pro-competitive efficiency gains.

The competition law provisions of the EU were not modified under the adoption of the TFEU, why case law as well as Guidelines adopted before the modernization process was initiated are still valid.⁸⁸ The CJEU has generally interpreted the article broadly.⁸⁹

In addition to the requirement of showing possible effect on trade between Member States, TFEU Article 101(1) has two elements. First, the challenged activity must be an “agreement” or “concerted practice” by firms or a decision by an association of firms. Second, the agreement must have “the object or effect” or restricting competition. Even though Article 101(1) lists various agreements that can satisfy this test, this list is not to be seen as exhaustive. In the debate regarding the interpretation of Article 101, the distinction between “object” and “effect” is of great importance.⁹⁰

Regarding what the “object” of the agreement may be, it is not referring to the subjective intention of the parties, but rather the objective meaning and purpose of the agreement. If the contract is deemed to have the “object” of restricting competition, it infringes Article 101(1) without having to establish its effects.⁹¹

If an agreement does not have an anticompetitive object, it can still infringe Article 101(1) by having anticompetitive effects. This is decided through a test that requires an examination of the economic conditions prevailing on the market, or markets, concerned and of the effects of the agreement on competition.⁹²

⁸⁸ Bout, *Lamy Droit Économique*, p. 316.

⁸⁹ Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011], p. 189.

⁹⁰ Elhauge and Geradin, *Global Competition Law and Economics*, pp. 79-80.

⁹¹ *Ibid.*

⁹² *Ibid.*

The restraining effect on the market(s) must be appreciable and this is decided by a principle called the “de Minimis” rule. This requirement is not stated in the text of the article, but stands as one basic feature to the application of the article. The Commission has in its so-called “de Minimis” Notice⁹³ stated that agreements do not appreciably restrict competition if the quantitative thresholds decided by the Commission are not met.

Yet, the quantitative test does still not apply to agreements that have the objective purpose of fixing price, or the output to divide markets. This parallels U.S. law, which makes such agreements *Per se* illegal regardless of how small the firms are that engage in it.⁹⁴

Agreements that infringe TFEU Article 101(1) can still be justified under Article 101(3). A justification requires four conditions to be met. Whether an agreement satisfies the conditions of Article 101(3) essentially turns whether its pro-competitive features outweigh its anti-competitive features.

The four conditions that have to be met under TFEU Article 101(3) are:

1. The agreement must contribute to improving the production or distribution of goods to promoting technical or economic progress
2. The agreement must allow consumers a fair share of the resulting benefit.

At the same time, the agreement may not:

3. Impose restrictions that are broader than necessary to attain the positive objectives.
4. And/or eliminate competition in respect of a substantial part of the products in question.

The commission states that TFEU Article 101(1) is about identifying the anti-competitive effects of an agreement whilst Article 101(3) allows the balancing of offsetting efficiencies against these restrictive effects. It seems though as if the CJEU suggests that broader objectives may be relevant under both Article 101(1) and 101(3) and that Article 101(1) may play a fuller role than the Commission concedes under their now clearly stated economic approach based on a consumer welfare objective to Article 101.⁹⁵

4.8 Concluding remarks

European competition law has evolved from roots and in contexts far from those in the U.S. During this process, many states have moved from weak economies, low incomes and political instability to market-based economic

⁹³ Commission Notice on Agreements of Minor Importance which do not appreciably Restrict Competition under Article 81(1) of the Treaty establishing the European Community, OJ C 368, 22.12.2001, pp.13-15.

⁹⁴ Elhauge & Geradin, *Global Competition Law and Economics*, p. 80 *Et seq.*

⁹⁵ Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011], p. 189.

systems that provide prosperity and stability. Competition law has been part of that process.

The European modernization in competition law can be divided into two different processes, linked together through having been influenced by the same external factors to a wide extent, one of those factors are the U.S. antitrust law.

The EU competition law has undoubtedly been heavily influenced by U.S. antitrust law and reasoning on several levels. The movement toward a more U.S.-style competition law in the EU has sometimes been explicitly intended, while at other times it has been only indirectly indicated.

On one level, it represents a response to U.S. experience. For example, elimination of the notification system was frequently justified by reference to the fact that U.S. antitrust law operates quite effectively without the need for a notification system. More generally, the move has taken place in a context in which U.S. economic ‘successes’ since the early 1990s have been seen as a challenge to EU policy makers, who have sought to ‘catch up’ to U.S. competitiveness. On another level, however, it has been driven by growing confidence in the intellectual foundations of U.S.-style substantive law analysis within the DG Comp.

In summary, the European competition law evolution has not been controlled by U.S. developments, but at times it has been influenced by them. European decision makers have often looked to elements of U.S. experience but the basic conceptions, goals and institutional structures of European competition law have been fashioned by European institutions responding to European conditions. Key decision makers in the Commission increasingly have found the logic and policy claims used in the U.S. system to be persuasive.⁹⁶

Regarding TFEU Article 101 and its objectives, the matter is rather disputed. Is it designed to simply prevent agreements that harm consumer welfare, or is it also designed to prevent agreements that restrain economic freedom or harm EU or public policy concerns, such as the single market objective? Can an agreement that harm consumer welfare still be accepted if it serves to help achieve some other EU objective? It seems as if there is no crystal clear answer regarding what agreements are prohibited by Article 101 and what analysis is required under TFEU Article 101(1) and Article 101(3), even if the Commission now takes an economic approach based on a consumer welfare objective.

⁹⁶ Comments by Mario Monti, then European Commissioner for Competition, to the speech given by Hew Pate, Assistant Attorney General, US Department of Justice, at the Conference “Antitrust in a Transatlantic context”, available at: http://ec.europa.eu/competition/speeches/text/sp2004_005_en.pdf

5 Comparison of the provisions

5.1 General comparison

It has been suggested that TFEU Article 101 is to be seen as a structured Rule of Reason, injected into EU competition law by the broad and developed U.S. jurisprudence on a Rule of Reason.⁹⁷

The American Rule of Reason bases itself on the evaluation of the pro and anti-competitive aspects of a given agreement between undertakings. Judge Taft in the *Addyston* case pronounced that the Rule of Reason only admits restraints to trade which are ancillary to lawful contracts and to conceive it in any other way would mean to “set sail on the sea of doubt”, which would exclude agreements with an object to restrict competition, in the U.S. named *Per se*-restrictions. It has been suggested that the EU has for long been drifting on this sea of doubt, as there have been no real clarification as to what are the main objectives of European competition law.⁹⁸

As stated above, the Sherman Act's, as codifying the common law traditions, assimilates in Section 1 a regulatory standard not suitable for modern market dynamics. If the prohibition of “every restraint of trade” was to be read literally, every practice that limits to some extent a party's freedom of action would be declared unlawful under the Sherman Act Section 1.

This is a too extreme consequence, and soon after the enactment of the Sherman Act, the U.S. judges felt the need to interpret such legislative standard in a reasonable way. By this, the Rule of Reason was developed.

In applying the Rule of Reason a complex evaluation of the anti and pro-competitive effects of a practice is performed in order to determine whether the latter prevail on the former and vice versa. In the first case, the concerned practice has to be considered unreasonably restrictive of competition and therefore unlawful, while in the second case it will have to be held reasonable and legitimate.

The assessment also involves that in certain circumstances the anti-competitive effects are of such importance that the appraisal of possible pro-competitive effects is unnecessary and the practice must be regarded as prohibited. This case does to some extent entail a *Per se* condemnation and is therefore related to the procedural aspect of the Rule of Reason as it is a judgment not based on an investigation concerning the substantial aspects of

⁹⁷ Callery, “*Should the European Union embrace or exercise Leegin's “rule of reason”?*”, *European Competition Law Review* (E.C.L.R.), p. 42.

⁹⁸ Pietro Manzini, “*The European Rule of Reason – Crossing the Sea of Doubt*”, *European Competition Law Review* (E.C.L.R.) [2002], p. 392.

the practice but rather a judgment based on an abstract juridical qualification. Still, the rule of *Per se* condemnation, like the Rule of Reason, also applies in relation to the same legislative standard, that is to say the prohibition of unreasonable restriction to competition.⁹⁹

Under the application of TFEU Article 101(1), the Commission is to establish whether the agreement has the actual or potential effect of restricting competition based on:

- Nature/aim/context of the agreement - object or effect?
- Object: presumption of anticompetitive effects.
- Effect: theory of harm backed by economic evidence (incl. quantitative analyses), assessment of the parties' market power/competitive constraints.
- “Ancillarity” and “appreciability” tests.

And for the assessment under TFEU Article 101(3) of an agreements' possibly restrictive effect the defendant(s) is/are to establish whether the efficiencies resulting from the agreement can outweigh its restrictive effects based on:

- Efficiency gains (objective benefits): nature, link, realization, likelihood, magnitude, timing (incl. empirical data and facts).
- Efficiencies must benefit consumers.
- Restrictions must be (reasonably) indispensable to achieve the efficiencies, but at the margin, however, competition trumps efficiencies.¹⁰⁰

Even if the European system undoubtedly is a more form-based system than the American system, reconciliation between EU and U.S. law does seem possible when comparing “object” to “*Per se*”, and “effect” to “Rule of Reason”. However, EU law is more flexible in its potential to approve agreements by way of TFEU Article 101(3), as compared with the U.S. *Per se* approach where a corresponding provision does not exist.

It does not take a very in depth analysis of the two provisions at hand, the Sherman Act Section 1 and TFEU Article 101(1), to realize that the two provisions are not analogous. Article 101(1) does, unlike the Sherman Act Section 1, specify through a non-exhaustive yet significant list which practices are restrictive of competition and in no way admissible. Its legal significance is therefore remarkably different from the Sherman Act's provision.¹⁰¹

Not only does TFEU Article 101(1) create obstacles to the application of a European Rule of Reason, even paragraph 2 of the same article constitutes a problem in this matter. Since Article 101(2) does not limit the possibility to declare an agreement void to those cases prohibited by Article 101(2), on

⁹⁹ Manzini, E.C.L.R., p. 393.

¹⁰⁰ D. Gerard - *The effects-based approach under Article 101 TFEU and its paradoxes*, <http://www.coleurop.be/template.asp?pagename=gclcseventhannual>.

¹⁰¹ Manzini, E.C.L.R., p. 394.

the contrary, it extends to “all agreements or decisions pursuant to this Article”, therefore the reference is to Article 101 as a whole, including paragraph 3.¹⁰² This leads to the conclusion that the idea that an European style Rule of Reason should be fit in Article 101(1) is strongly in contrast both with paragraph 1 and with paragraph 2 of Article 101. This leads to the conclusion that a Rule of Reason could only be fit under the application of paragraph 3.

The idea that the assessment under TFEU Article 101 is a formalized Rule of Reason, adopted by the EU from the model system, the U.S. antitrust law, is fueled by the somewhat confusing take on Article 101 by the CJEU.

The Commission’s approach has changed over time, but stands rather clear as of today. Even though guidelines are not binding to actors on the market, but rather soft law instruments, such have been used as an attempt to clarify the EU provisions on prohibited behavior.

In 2004, the Commission communicated the Commission Guidelines on the Application of Article 81(3) of the Treaty (Article 101(3) Guidelines). This was an attempt by the Commission to clarify on what grounds the assessment of what behavior would be considered as incompatible with the TFEU provisions, as the aims for those were clearly stated in the Guidelines:

“The aim of the Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Agreements that restrict competition may at the same time have pro-competitive effects by way of efficiency gains. Efficiencies may create additional value by lowering the cost of producing an output, improving the quality of the product or creating a new product. When the precompetitive effects of an agreement outweigh its anti-competitive effects the agreement is on balance pro-competitive and compatible with the objectives of the Community competition rules. The net effect of such agreements is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals.”¹⁰³

However, the Commission and the CJEU do not seem to share the same opinion on how TFEU Article 101 should be interpreted and applied, and this confused situation is the main reason why the matter on whether an adoption of the Rule of Reason has occurred is still in dispute.

¹⁰² Manzini, E.C.L.R., p. 395.

¹⁰³ Commission Guidelines on the Application of Article 81(3) of the Treaty (Article 101(3) Guidelines), para. 13.

5.2 Rule of Reason in CJEU case law

“[...] In fact, the implementation of the Modernisation ‘package’ took place against a very complex background of case law concerning the manner in which the prohibition clause should be interpreted and especially concerning whether it should provide for some of the elements characterising the ‘standard of reason’ developed by the US.”¹⁰⁴

A disparity of opinion both within case law and within the academic community is evident as to the existence of a Rule of Reason in EU case law. As the Commission has never explicitly recognized a U.S.-style Rule of Reason, commentators have instead looked to examine the CJEU jurisprudence to ascertain whether their economic analysis in “effects” cases was indicative of a Rule of Reason.

Under a Rule of Reason assessment, the court attempts to make a detailed, balanced and economic critique of the disputed agreement and the relevant market. But what would be this analysis role in EU law? Is it to be seen as a tool that is broad enough to encompass other broad Treaty goals? Alternatively, it might be said that a Rule of Reason is non-existent, and that the Courts have just “conflated” TFEU Article 101(1) and 101(3) together in their interpretation of the provision. Indeed, the introduction of a Rule of Reason into EU competition law would definitely render TFEU Article 101(3) useless.

This leads to the ultimate question; does the CJEU case law point us toward, something that is at least very close to, an EU Rule of Reason?

Competition policy is in the EU not a self-sufficient goal. It is related to a set of socio-economic objectives. TFEU Article 9 states that:

”In defining and implementing its policies and activities the Union shall take into account requirements linked to the promotion of a high level employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and protection of human health.”

This should be read with article TFEU 3(3) and Protocol no. 27 on the internal market and competition¹⁰⁵. Since the Treaties do not clearly state a hierarchy of objectives, “taking into account” does not mean that the goals listed in TFEU Article 9 have priority over competition. But now that the confidence in market mechanisms has been eroded by financial crisis and the pressures of globalization it is important to defend the fact that

¹⁰⁴ Book Review - Christopher Townley, *Article 81 EC and Public Policy*, Oxford/Portland, OR, Hart Publishing, 2009, by Arianna Andreangeli, *The Competition Law Review*, Volume 6 Issue 2 pp 287-297. Available at: <http://www.clasf.org/CompLRev/Issues/Vol6Issue2ReviewAndreangeli.pdf>

¹⁰⁵ Protocol (No 27) on the internal market and competition, OJ C 115, 9.5.2008, pp. 309–309.

competition policy contributes to the achievement of the overall objectives, the concept of 'social welfare' may from this perspective be far more convincing.¹⁰⁶

The CJEU taking account of this kind of social factors, which would most likely fall out of the regular assessment under TFEU Article 101(3), is a disputed matter. Community case law does point in different directions, before as well as after the adoption of the Guidelines in 2004.

Regarding the “object” cases, it has been clear since the ECJ judgment in *Établissements Consten SA & Grundig-Verkaufs-GmbH v. Commission*¹⁰⁷ that there is no need to take account of the effects, even though they may well be pro-competitive in some regard, of an agreement if its object is to restrict competition.

In the Consten case an agreement was entered into by a French distributor and a German manufacturer of electrical goods, whereby the latter protected the former's presence in its French marketplace by ensuring that it was the sole distributor in the market. This was deemed as having the effect of restricting trade between Member States. Accordingly, the agreement was struck down by its “object”, even though it might potentially increase inter-brand competition. The Court's decision led to the fact that Consten could not run any business in the French market, which in reality led to diminished competition in the French market whilst the fundamental EU rule of non-trade barriers between Member States was upheld to protect competition in the common market. For clarification: This would correlate with an American court striking an agreement down as being prohibited *Per se*. Moreover, indeed, such hardcore restrictions may prompt a temptation to compare these with the American *Per se* restrictions.

In effects cases on the other hand, as the *Société Technique Minière v. Maschinenbau Ulm GmbH* (“STM”)¹⁰⁸ the ECJ pronounced that:

“The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute.”

In STM, the Court's findings could be construed as a Rule of Reason, by broadly analyzing the market with and without the agreement in question. It seems as if a broad economic analysis is necessary to fully comprehend whether the agreement would in fact be indispensable for market penetration by a new undertaking. This view was also confirmed in the *European Night Services* case¹⁰⁹, where a weighing exercise was explicitly referred to.¹¹⁰

¹⁰⁶ Govaere, Quick and Bronckers, *Trade and Competition Law in the EU and Beyond*, p. 15-17, "Competition and trade policy and the challenge of globalization", by Jacques Steenbergen.

¹⁰⁷ *Établissements Consten SA & Grundig-Verkaufs-GmbH v. Commission*, Cases 56 and 58/64, [1966] ECR 299.

¹⁰⁸ *Société Technique Minière v. Maschinenbau Ulm GmbH*, Case 56/65 [1966] ECR 234.

¹⁰⁹ *European Night Services and Others v. Commission*, Cases T-374, 375, 384 and 388/94 [1988] ECR II-3141.

Any suggestion, however, that a weighing of pro- and anti-competitive elements could be balanced when applying TFEU Article 101(1) was quashed in *Métropole*¹¹¹.

The *Métropole* case concerned six French television companies that had collectively agreed to form a competitor to the market leader, Canal+. The six French companies asserted that the Rule of Reason should be employed. The General Court struck down this plea and held that:

“[I]n various judgments [the courts] have been at pains to indicate that the existence of a Rule of Reason in Community competition law is doubtful.”

The GC also denounced any suggestion of a Rule of Reason in previous case law, attributing this merely to a “more flexible approach”.

It seems as if though the Commission came to realize that there were severe drawbacks of the CJEU’s broad interpretation of TFEU Article 101, which constituted one of the reasons for the Commission to initiate a modernization process. Commentators complained that the method failed to provide transparent, predictable and operable criteria for businesses to apply.¹¹²

In spite of the fact that the Commission in the Guidelines on the application of Article 101(3) set out its interpretation, post *Métropole*, of the relationship between Article 101(1) and 101(3), and in light of its statement that the objective of Article 101 is to enhance consumer welfare and to ensure an efficient allocation of resources, the ECJ in *Wouters*¹¹³ employed a limited Rule of Reason.

The *Wouters* case concerned not only consideration of non-competition factors, but also social and political factors. It has been argued that this enthusiasm of applying a Rule of Reason might, again, have occurred due to the cases regulatory context, rather than having a commercial context as the previous cases did.¹¹⁴

This case has attracted a wide range of academic commentary and it has been suggested that the *Wouters* case serve to overrule *Métropole* as concerns a Rule of Reason.¹¹⁵

Wouters concerned rules adopted in the Netherlands which prohibited members of the Bar practicing in full partnership with accountants. The

¹¹⁰ Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011] , p. 195.

¹¹¹ *Métropole Télévision SA v. Commission*, Case T-112/99 [2001] ECR II-2459.

¹¹² Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011] , p. 194.

¹¹³ *Wouters and Others v. Algemene Raad van de Nederlandse Orde van Advocaten*, Case 309/99 [2002] ECR I-1577.

¹¹⁴ Callery, *E.C.L.R.*, p. 47.

¹¹⁵ *Ibid.*

question was if these national rules were compatible with the EU rules on competition and freedom of establishment.

In the *Wouters* case, the ECJ employed a Rule of Reason assessment, finding that even though TFEU Article 101(1) was offended, the Rule of Reason-approach meant that consultation of Article 101(3) was unnecessary.

The *Wouters* case is very special in that sense that it invites not merely a balance of pure competition factors, but also the consideration of non-competition factors, such as social and political concerns.¹¹⁶ When these social concerns outbalance the rule's restrictions, Article 101(1) does no longer seem applicable. Such application of the competition rules seems to not be in line with the Commissions stated approach to competition, but yet a number of its decisions seem to take such concerns into account. For example, the ECJ did again, in the more recently ruled case of *Meca-Medina v. Commission*¹¹⁷, not refer to the ECJ ruling in the *Métropole* case, and did instead apply a limited Rule of Reason. Though again, as in the *Wouters* case, applied when assessing matters related to regulatory issues rather than purely economic issues.¹¹⁸

In the *Meca-Medina* case, the Court balanced between the legitimate objectives of the provision and the restriction of competition and stated:

“[...] even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective. Such a limitation is inherent in the organization and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes.”¹¹⁹

What is apparent in the *Wouters* case as well as the *Meca-Medina* case is the “public interest justifications”, which the CJEU has seen fit to approve, in contrast to the commercial justifications put forth in cases such as *Consten* and *Métropole*. It seems as if though the CJEU is inclined to adopt a European kind of Rule of Reason, where the restrictions at issue are regulatory and there is public interest in making a detailed analysis under TFEU Article 101(1). Whether this is to be seen as the adoption of antitrust principles, as meaning the Rule of Reason, is doubtful.

Coming to the conclusion that, in line with more recent case law as well as the Commission's more recent statements on the objectives of TFEU Article 101, some weighing of pro and anti-competitive effects is permitted under Article 101(1) in ‘effects’ cases is however not at all unproblematic. The

¹¹⁶ Callery, E.C.L.R., p. 47.

¹¹⁷ *Meca-Medina v. Commission*, Case C-519/04 P, [2006] ECR I-6991.

¹¹⁸ Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011], pp. 236-239.

¹¹⁹ *Meca-Medina v. Commission*, para. 45.

difficulty with such a conclusion is that it does not mesh well with the current Article 101 scheme and it would seem to demand procedural and legislative changes. According to scholarly writing, such changes are most unlikely to occur.¹²⁰

5.3 An European Rule of Reason?

Even though TFEU Article 101(3) in fact contains all the elements of a Rule of Reason, the issue still lies in the fact that TFEU Article 101(1) holds the possibility to make a detailed economic assessment. This causes confusion since the Treaty regrettably does not elucidate precisely where the assessment should occur.¹²¹

A European Rule of Reason could possibly be implemented in the TFEU provisions from Article 101(1) and 101(3) read together, it could be a possible way of justifying the way of reasoning in an American way, but yet in compliance with the TFEU provisions. In this perspective, the anti-competitive effects singled out when applying the first of the two provisions may be balanced with the possible pro-competitive effects identified on the ground of the parameters contained in the second.

However, from the Community case law another rule emerges, the rule that precludes that “[...] wholly abstractly and without drawing any distinction”, all agreements restricting the freedom of action of one or more of the parties necessarily fall under the prohibition laid down in Article 101(1) of the Treaty. And, as stated above, even though this provision has sometimes been confused with a Rule of Reason, it is in reality completely different.¹²²

It seems as the express mention of U.S. terminology, in EU competition law, especially by the CJEU, only serve to compound problems and confusion. Transatlantic comparison of the two legal systems regarding the assessment of agreements’ possible restrictions on competition may possibly sacrifice legal certainty, since it risks conflating Article 101(1) and 101(3) into one, akin to the Sherman Act Section 1.

5.4 Concluding remarks

The Commission has played the central role in determining the focus and shape of EU competition law development and enforcement. Unlike the situation in the U.S. where private suits make the courts the key determinant of enforcement activity and conceptual development, the Commission

¹²⁰ *Ibid.*, p. 239.

¹²¹ Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011], p. 189.

¹²² Jones, Alison: *Analysis of Agreements under the U.S. and EC Antitrust Law – Convergence or Divergence*, 51 *Antitrust Bulletin*, p. 691 [2006]. Available at: http://heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/antibull51&div=47&collection=journals&set_as_cursor=0&men_tab=srchresults

largely steered these developments throughout the early years of EU competition law. The CJEU has also influenced substantive law in a variety of ways, they have supported some conceptual developments while blocked others. EU competition law uses economic analysis as a tool in the application of competition law, but the context of that law is the aims and objectives of the Treaty of Lisbon.

One of the most complex issues for competition law to handle is the apparent tension between producer welfare and consumer welfare. This applies to any competition law system. The structure of TFEU Article 101 does not only cause confusion as to what is to be considered, possibly, it is the most obvious evidence of the confused view on competition of the EU. There is no crystal clear answer since the aims of the provision are not clearly stated anywhere. The taking into account of the overall aims of the EU when assessing possible restraints on competition seems difficult to reconcile with the purely economic formulation of TFEU Article 101(3), and the guidelines provided by the Commission for the interpretation of the provision.

Recent case law have not served to clarify what justifications for an agreements restraining effect on competition is accepted under the TFEU provisions, but rather increased the confusion. This confusion is not good for commercial practices.

A narrow view, that only improvements in economic efficiency can be taken into account under TFEU Article 101(3), is certainly the one that sits best with the Commission's view of Article 101's objectives and how Article 101(1) and 101(3) now interact. However, as seen in the Wouters case, even social welfare justifications have been employed to justify a restriction on competition. It is conceivable that, despite Article 101's actual wording, the criteria set out in Article 101(3) might be interpreted broadly against the backdrop of the wider EU aims and objectives. One effect that such an interpretation could have would be the authorization of agreements that provide benefits from a regional, social, environmental, cultural and/or industrial perspective. This is a step away from the rather economic approach that is clearly stated in the TFEU Article 101, and even more a step away from possibly being inspired by the purely economic approach to competition that is the foundation of American antitrust law.¹²³

What seems to be the only rational conclusion to draw from the confused situation is the need for an end to the adoption of terminology from American antitrust law to EU competition law, as long as a full adoption of the assessment theory is not being carried out.

The adoption of terminology from one system to another seems to have done more to confuse than to clarify since it has invited misleading comparison with antitrust analysis in the U.S. Such conduct of comparison

¹²³ Jones & Sufrin, *EU Competition Law, Text, Cases and Materials* [2011], p. 245.

only serves to render confusion in the legal society and amongst the actors on the economic market. It seems as if the adoption of terminology has been done to name legal a phenomenon that is not comparable as they, the American Rule of Reason and the European style variant, do serve the same purpose.

The purpose of the employment of the Rule of Reason in the U.S., as well as in TFEU Article 101 in the EU, is to regulate what behavior is all too restraining on competition. However, throughout the two systems this is done by taking several different factors into account and, what seems to be the most significant conclusion, that the aims of the provisions are most likely not comparable.

Even though the European modernization process aimed to adjust the procedural anomaly, it seems as the matter regarding the existence of a European Rule of Reason is still in dispute. The courts' role in competition law of the EU could be debated; are they administering or shaping the law? This is more of an institutional arrangement issue, but points out one crucial matter regarding the EU, namely that the creation of institutions is highly a developing process. As is competition law.¹²⁴

¹²⁴ Odudu, Okeoghene: *A New Economic Approach to Article 81(1)?* [2002] 27(1) European Law Review, p. 105.

6 Analysis

Modern competition law is global competition law. Some may perceive globalization as a threat to employment by imports and dislocation, but access to markets abroad is a condition for preserving our standard of living.¹²⁵

Modern competition law differs from traditional competition law in that it reflects the dominance of the economic model of analyzing antitrust and competition policy. Economics seem to have developed in to a common language worldwide as a shift seems to have occurred in both the U.S. and the EU; legal models that once included a wide range of consideration, do now seem to have embraced an exclusively economic method, based on the aim of maximizing consumer welfare.¹²⁶

This conclusion can be drawn from an overview of the legal provisions and case law regulating competition law throughout the two systems. Yet, there are unresolved issues to be found in both systems. Since competition is a field of law that has seen a remarkably rapid development over the last decades, the view on what constitutes the correct way to approach competition also seems to have been changing constantly.

One main challenge for a competition law system is to design a set of transparent and predictable rules which can be used to determine, as accurately as possible, and at a tolerable cost, which agreements are so restrictive of competition that they should be prohibited and deterred. It seems as if this has been one great challenge to EU competition law, both with regards to the problematic lack of clarity over TFEU Article 101's objectives, and its structure.

Starting from different intellectual roots and traditions, EU competition law has moved towards U.S. antitrust law in some ways, but not in others. In recent years, with an enhanced focus from the beginning of the 20th century, the economic approach to competition law, as developed and applied in the U.S., has been followed in EU competition law.¹²⁷ However, differences on the procedural and institutional level remain fundamental, involving very different conceptions of how competition can, and should, be implemented.

Some major differences between U.S. antitrust law and EU competition law are the fact that the latter has, throughout its development, had to compete for legitimacy and support with entrenched attitudes favoring an active role for the state in the economy. In contrast to the U.S., where competition as a

¹²⁵ Govaere, Quick and Bronckers, *Trade and Competition Law in the EU and Beyond*, p. 3 "Competition and trade policy and the challenge of globalization", by Jacques Steenbergen.

¹²⁶ Elhauge & Geradin, *Global Competition Law and Economics*, p. V.

¹²⁷ Commission Notice: Guidelines on the Application of Article 81(3) of the Treaty.

value has long been not only accepted but also strongly supported, EU competition law has faced some real challenges.

These challenges have consisted mainly in having to construct and maintain competition as well as develop the attitudes and values that support it at the same time as competition law often encountered strong resistance.

Another major difference, almost too obvious to even mention, is the civil law system that dominates the European Union legal tradition. The traditional format of the civil law system, that divides public law and institutions from private law institutions and principles, has numerous consequences for the competition law development. Having taken this into consideration, one may even come to the conclusion that the two systems are hardly comparable, with legal traditions as fundamentally divergent from each other as the civil law tradition as the common law system are. However, again, in a globalized world, legal systems seem to have found another common language than law, namely economics. Competition of today is as much of a tool in economics as a field of law, which seems to render difficulties for all actors on the competition law stage.

In addition to this, the market-building function that competition law has had in European countries is something that is largely absent from the U.S. experience. In most European countries, competition law has been conceived and implemented as a part of an effort to develop the national economy and as a tool of economic development. This has both shaped the substantive law and the institutional arrangements. Furthermore, European competition law has developed under the influence of global factors, while U.S. antitrust law has developed with limited concern for international issues until fairly recently.¹²⁸

EU competition law is different from U.S. antitrust law in that other than purely economic values have had to be respected in the application of the legal provisions from the inception of EU competition law. European competition politics integrated social respects into the legal provisions when adopting them, and the provisions are therefore founded on a policy that is fundamentally different from the U.S. perspective that is purely economic. The EU competition law provisions are to be seen in relation to the general aims of the EU and as a complement to the fundamental principles of freedom and the creation of the internal market. In Europe, competition has traditionally been seen as a tool, not as an aim in itself.¹²⁹

It has been stated that European competition law need to revise the application of a principle, suggested to have been borrowed from the antitrust system, and that the Rule of Reason need to be applied as originally intended in U.S. competition law to function properly. The consideration of the fundamental aims of the EU, such as social welfare and the unification of the common market, are suggested to be contrary to the fundamental

¹²⁸ Gerber, *Global Competition, Law, Markets and Globalization*, p.160.

¹²⁹ Bout, *Lamy Droit Économique*, p. 316.

principles of antitrust that are the freedom and liberty on the economic market.¹³⁰

Another issue that serves to complicate the development of EU competition law is that there seems to be confusion as to what EU institution is the main authority in the field of EU competition law. As the Commission has taken a quasi-legislative role while in the adoption of soft law instruments to clarify fundamental issues of EU competition law enforcement, the CJEU seems to take on a role much like the American courts in making Rule of Reason inspired assessments of agreements. What is evident is the lack of continuity in the application of the provisions, rendering confusion to the economic society. Another concern is the behavior by the Commission, while functionally amending EU primary and secondary law contradicts the principle of democracy strengthened in the Treaty of Lisbon.

The above-mentioned issues are all factors that have made the application of the fundamental competition law provision of the EU, TFEU Article 101, and more specifically, what is regarded as a restraint on competition, somewhat a mystery. In doctrine, the matter is widely debated, and more recently, some scholars have argued that there is a lacuna way too broad for the EU competition law to function effectively.

The employment of a, limited but still, Rule of Reason-inspired assessment has been done by the CJEU in several cases. In those cases the judges seem to have approved agreements which do contain restrictive elements, but which are seen as being supplementary to the overall purpose of such agreements. This employment of a Rule of Reason inspired weighing exercise by European judges has fueled the debate that U.S. antitrust law has inspired EU competition law to the extent that an adoption of principles has been performed.¹³¹

And, possibly, the application of a doctrine that seem to be closely related to the Rule of Reason may indicate that the EU is adopting U.S. antitrust principles into EU law, at least into case law, by actions of the CJEU.

European development, non-Americanized, may also be that the CJEU has simply “conflated” TFEU Article 101(1) and 101(3) together. Introducing a Rule of Reason into EU law would effectively render Article 101(3) superfluous, possibly even useless.¹³²

Such a development could be what the EU is facing, but not only due to American influence, but rather because of globalization, and a changing market. Regarding EU law and the assessment of agreements, the “old” European four step test for approval, as stated in TFEU Article 101(3) may well still be functional, and should probably not be regarded as all too

¹³⁰ Catherine Prieto, *La Condamnation de Microsoft ou l'Alternative Européenne à l'Antitrust Américain*, Recueil Dalloz, D. 2007, p. 2884.

¹³¹ Callery E.C.L.R., p. 45.

¹³² *Ibid.* p. 46.

influenced by American antitrust principles. Yet, this provision is not as well functioning when it comes to competition cases concerning other interests than purely economic ones.

For future clarity, the EU should probably either fully embrace “fuzzy” American principles, including the Rule of Reason, for the CJEU to handle all competition cases under this more vague assessment, with support from the TFEU. Alternatively, the EU should use its own terminology and develop some kind of definition to what cases may be assessed under some other criteria, as the wider aims of the EU, such as social welfare, etc.

As Zweigert and Kotz writes: “In law, the only things that are comparable are those that fulfill the same function.”¹³³ This might be stating the obvious, but still, for the comparative purposes, this leads to the main conclusion: The EU is not adopting the U.S. principle of Rule of Reason.

The assessment of agreements under EU law is possibly inspired by, due to globalization and the traditional role of the U.S. to serve as a model for competition law, American antitrust law. But EU competition law was still developed to suit different aims, and still is. TFEU Article 101 is not a codification of the Rule of Reason but a by-product of a different philosophy.

If the EU should adopt the principle, due to constant development of the EU and competition law, in combination and the increased impact of globalization on markets, is however, an interesting matter. What is evident though is that the express mention of U.S. terminology might only serve to compound problems.¹³⁴

In summary; Reconciliation between U.S. and EU law does seem possible when comparing “*Per se*” to “object”, and “Rule of Reason” to “effect”.¹³⁵ However, this is not to be regarded as pure adoption of U.S. principles, but rather an effect of the need for adjustment to changing conditions, globally.

Legal transplants, i.e. the adoption of a legal solution from one legal system to another, without in depth studies of the legal system from which the solution is adopted, and adjustments of the solution to the new legal culture and order, may not only be a mistake, but possibly even harmful to the adopting system.

However, concerning the possible adoption of an American approach to competition law, and particularly the Rule of Reason in the assessment of agreements this does not seem to be a major issue, after all. This rather bold conclusion is drawn from the fact that the problems that the EU has in deciding what the criteria are for a lawful agreement seems to stem purely

¹³³ Zweigert & Kotz, *An Introduction to Comparative Law*, p. 31.

¹³⁴ Callery, E.C.L.R., p. 42.

¹³⁵ *Ibid.*

from confusion regarding the motives for the competition provisions, in relation with the attempt to adjust to globalization.

The problem that the EU is left with, on the other hand, is ultimately a completely different one. Namely, the confusion of what are the criteria to be considered the European aims of competition law.

From this presentation, the general analysis would be that EU competition law is in the process of a changing in what are the aims of the competition law applicable to the Member States of the EU. This conclusion is drawn after having taken into account case law, as well as legislation, legal development over time and future prospects of competition law as a field, intimately connected with economic development and the globalization of trade. With a more global and economic perspective being applied to future deals and regulations, the adoption of a Rule of Reason institute into European competition law is not necessarily harmful to the system, but could even be developing and facilitate trade.

So what is then the likely development in EU competition law? As stated in this thesis, throughout history, the basic aims for the competition regulations of the two systems compared have been rather different. Protecting the weak against abuses of power by the strong has run through much of European competition law thought and practice until recently. This represents arguably the most fundamental difference between U.S. and European competition law.

Until the 1970s, the U.S. antitrust system relied on a network of *Per se* rules, created and established by case law since the inception on the Sherman Act. Then a shift occurred, the courts began to expand the scope of the Rule of Reason. Today, the importance of *Per se* rules is diminished and one can only guess that this development is a direct response to the increased demand for flexibility when assessing agreements, as globalization is emerging.

This need for increased flexibility has undoubtedly found its way also into European legal thinking and law enforcement. In some cases, the CJEU has applied principles for assessing agreements that are not compatible with the legal provisions of the TFEU. However, uncertainty as of what is lawful under EU competition law, regarding an agreements possibly restricting effect on competition, has also caused harm to the economic society. Increased flexibility seems to be at the expense of legal certainty.

As Europe is subject to the changing environment of the European integration process and of economic globalization, the move toward the more economic approach seem to have been, in part, a response to the perception that economic globalization called for such a move.

Even if an important policy emphasis in the EU was on “catching up” with the U.S., putting European firms in a position to compete effectively on

global markets, the confusion over possible adoption of U.S. legal principles for judgment seem to have had the reverse effect, it was not a shortcut but rather a cause of harm to the market.

However, since the economic crisis of 2008, and even more with the current ongoing economic instability, voices have been raised for a less economic approach to competition law. This may be regarded as a reaction to the “more economic approach” in EU competition law. A “less economic approach” should, instead of using economics as the normative reference point for competition law, favor consumer welfare, medium sized enterprises and prevent environmental degradation since law should be about justice. Yet, one constant challenge to the legislators of the European Union is the disparity in the view of what is considered fair and just throughout Europe. This is why economics is a solid ground for decision-making.¹³⁶

Indeed, this less economic view on competition is a renaissance for the aims of the EU. Yet, justice as a criterion for what is to be deemed as lawful under TFEU Article 101 would most certainly be sacrificing legal certainty, again, as it is a too vague criterion to be the fundament of EU competition policy. However, those thoughts seem to lead the EU competition law on its own path, away from purely economic perspectives for the development of EU competition law.

¹³⁶ Gerber, J. David, Anthropology, History and the "More Economic Approach" in European Competition Law - A Review Essay, *International Review of Intellectual Property and Competition Law*, 4/2010, volume 41, p. 441 Et seq.

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