

BLAME IT ON THE STATES:

A comparative analysis of the American and the European State Action Doctrines

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Resumo. Este artigo discute a relação entre regulação pública da economia e aplicação do direito antitruste, comparando as "State Action Doctrine" vigentes na União Européia e nos Estados Unidos.

Abstract. This article discusses the relationship between public regulation of the economy and antitrust enforcement. It compares American and European State Action Doctrines.

1. Introduction.

Traditionally, antitrust law² has been concerned almost exclusively with *private restraints* to competition. It is indeed mainly enforced against private agreements or practices that have the effect of limiting competition. This fact is problematic, since the actions carried out by the State itself or by other public entities might produce harms of similar or higher degree. As Timothy Muris puts it, “*attempting to protect competition by focusing solely on private restraints is like trying to stop the flow of water at a fork in a stream by blocking only one of the channels. Unless you block both channels, you are not likely to even slow, much less stop, the flow. Eventually, all the water will flow toward the unblocked channel*”.³

Evidently, enforcing antitrust law exclusively against private restraints will produce the sole consequence of dictating the form by which competition will be restricted. Since private actions are blocked, the undertakings will have an incentive to restrict competition through the public path, by lobbying before public institutions so that *they* will pass anticompetitive regulations.⁴ Such a private-biased antitrust

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² The terms “competition law” and “antitrust law” will be used as equivalents in this dissertation.

³ T. Muris, ‘State intervention/State Action: a U.S. perspective’, in B. Hawk (ed), *International Antitrust Law & Policy: Fordham Corporate Law 2003* (New York: Juris, 2003) 518.

⁴ This is especially problematic because private lobbies are normally exempted from competition law, as they are understood as one of the expressions of Democracy. In the United States, such an idea has given rise to the so-called *Noerr-Pennington Doctrine*, about which some references may be found later in this dissertation. On the acceptance of such a doctrine in the European Union, see A. J. Vossestein, ‘Corporate efforts to influence public authorities, and the EC rules on competition’ (2000) 37 CLMR 1390.

policy would thus be incomplete, formalistic and ineffective in its task of protecting competition.

In this dissertation, I will deal with one kind of public interference with the competitive process: the state regulation.⁵ For the reasons stated above, this issue clearly deserves further attention and study. The dissertation shall then discuss the relationship between public regulation of the economy and antitrust enforcement. Being this issue a large one, further limitation of the scope of our study is needed.

To start with, I decided that a comparative study would be interesting as a means to enhance the critical approach to the issue of the anticompetitive public regulation. The jurisdictions I chose to compare were the European and the American. Whereas in the United States the subject of our study is to some extent well developed, in the European Union the Courts and the commentators started to deal with it only recently.

Furthermore, it should be noticed that there are two kinds of conflict, depending on the source of the regulation.⁶ Considering the enforcement of antitrust law at the federal (US) or community (EU) level, the conflict with the public regulation can be *horizontal* or *vertical*. In the former case, the community/federal regulation is confronted with the community/federal antitrust enforcement. In the latter case, the regulation passed by the States of the American federation or the Member States of the European Union runs counter to the community/federal antitrust policy. I will focus here on the *vertical relationship* between public regulation of the economy and antitrust enforcement. It is within this context that the anticompetitive public regulation is better developed both in the United States and in the European Union. In the former jurisdiction, this issue corresponds to the “State Action Doctrine”. The concept has been imported to the European Union, in spite of the Courts’ reluctance to use it.

Such a limitation of the scope of the dissertation had to be undertaken so that the questions of public restraints to competition could be analyzed with some depth. There is an obvious trade-off between the will of the States to guarantee the fulfilment of some local interests and the goal of a competitive common market and the free-movement of goods and services.⁷ In many situations, particularly those related to the services of general economic interest, the local goals of universal and continuous services are hardly compatible with a free and competitive market. In other cases, the constraints can be a result of social or cultural values, e.g. the regulated labour market.⁸

I divided the issue in two basic problems. The first problem is related to the conditions under which a given state action is deemed legal or illegal before the federal/community competition rules. The second problem concerns the consequences of the anticompetitive regulation to the private actions that are carried out in conformity with it. Under some circumstances, state regulation might exempt from competition law actions that would otherwise be deemed contrary to it. Albeit

⁵ The other kind of such interference is the pursuit or termination of entrepreneurial activities by the State, as noticed by L. Gyselen, ‘Anti-competitive state measures under the EC Treaty: towards a substantive legality standard’ (1993) 19 *ELRev Competition Checklist* 55, para. II.

⁶ C. Salomão Filho, *Direito concorrencial: as estruturas* (São Paulo: Malheiros, 2nd ed, 2002) 211.

⁷ A. S. Aragão, *Agências reguladoras e a evolução do Direito Administrativo Econômico* (Rio de Janeiro: Forense, 2003) 294.

⁸ P. Areeda, *Antitrust Analysis: material, text, cases* (Boston: Little, Brown and company, 1967) 12.

connected, these two problems are of a different nature. And since the intention is to provide a comparison of the way in which two different jurisdictions regulate one issue, it is methodologically adequate to compare equivalent problems.

In this dissertation, these problems will be treated separately. First I shall deal with the conditions of the legality of the state regulation under federal/community competition rules (item 2). Then I will evaluate the conditions for the private exemption from competition law as a consequence of a state regulation (item 3). In the end of each section, I will propose some changes in the approaches of both jurisdictions to the problem of the anticompetitive state regulation. Finally, I will terminate by reviewing the conclusions reached (item 4).

2. The legality of the state action under federal/community competition rules.

In this section of the dissertation I shall deal with the question of the limits and conditions of the legality of the State Action under the community or federal antitrust law rules or principles. The core questions here are: (i) in which circumstances will the regulation passed by the States be deemed unlawful under competition rules and principles in force? (ii) Must the States take into account federal/community competition rules when regulating the economy? (iii) How do the former limit the latter? The answers are not equivalent in the American and European cases.

2.1. The Case of the United States of America.

The first time the Supreme Court had to deal with the legality of a state regulation under federal competition rules was in *Parker v Brown*, in 1943. The State of California had authorized a Committee comprised almost entirely of raisin producers to fix the price of raisins and limit its production, establishing what was called a “state raisin cartel”. A California raisin producer called Brown sued Parker, who was the Director of Agriculture of the State of California and had permanent seat at the aforementioned Committee. In his suit, Brown alleged that this State regulation restrained competition among raisin producers, therefore violating the rules of the Sherman Act. The suit was dismissed on the grounds that Brown had sued an officer of the state, and not the state itself, which was the subject ultimately responsible for the program.⁹

Nevertheless, the suit would not have had a different outcome had it been filed against the State itself for enacting and enforcing a statute that runs counter to a federal law. The Supreme Court was clear in holding that the Sherman Act does not apply to acts by a state and does not prevent a state from imposing a restraint of trade, as an act of government.¹⁰ In fact, the Supreme Court went further stating that the Sherman Act does not prevent “activities directed by the legislature” and that it was never its intention to restrain the states sovereignty to establish whatever policies they deem appropriated. In the Court’s words: “*the state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in*

⁹ *Parker v Brown* (1943) 317 U.S. 351, 352. And also: “*The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by the state*”.

¹⁰ D. C. Hjelmfelt, *Antitrust and regulated industries* (New York: John Wiley & Sons, 1985) 275.

restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit".¹¹

The Court's position privileged American strong federalism and the state sovereignty over federal competition policy. Competition rules are not enforced against states.¹² Thus, the competitors harmed by the states regulation cannot sue them to have it judicially reviewed nor can they claim damages. This is especially true since, under the 11th Amendment to the United States Constitution, citizens cannot file suits against states in federal courts. The upshot is that the states enjoy large immunity to federal competition rules. Whether or not this was the best decision to be taken by the Supreme Court is largely controversial.

Some aspects of this decision are worth highlighting. First of all, it has been said that at the time that this regulation was passed, ninety-five percent of the California raisins were destined for interstate or foreign commerce.¹³ This fact suggests that the protection of the State of California sovereignty in this case ends up having considerable effects *outside* the State of California. The effects of the state action will be felt by the consumers of other states. The question arises whether state sovereignty should be protected even when it harms the citizens of other states or when it restricts other states' own sovereignty.¹⁴ The FTC has long insisted that the State Action Doctrine should not be applied when it results in anticompetitive effects on other states of the American federation – the so-called "spill-over effects".¹⁵ It is in fact nonsense to privilege one state's autonomy over others'. One may wonder if activities whose effects are not constrained to a single state would not be more properly regulated at a federal level, so as to prevent unbalanced results among the states. Nevertheless, the fact is that the mentioned restrictions on standing to the courts in suits against states make the spill-over effects hardly challengeable.

Furthermore, it has been alleged that, as a result of the California program, raisin prices rose more than 20 per cent. The fact suggests that the state regulation was established on behalf of the producers rather than the consumers. This outcome is not surprising – it is rather expected from the system established by the Supreme Court's ruling in *Parker v Brown*. Under this system, states are not asked to justify their regulation, nor do they have to pass a test of proportionality: there is virtually no judicial constriction to a state's discretion. The content of the state regulation is protected under the formal justification of the states' autonomy. However, it does not seem that the states autonomy would be harmed if the programs they establish were to be submitted to some sort of soft judicial review. States would still be able to set forth their regulation schemes, but they would have to justify such schemes as a means to achieve the public interest. After all, it should not be forgotten that the protection of the local public interest is the reason for the states' autonomy doctrine in the first place. It should not be protected unless they respect the very reasons for which it has been conceived.

¹¹ *Parker v Brown*, cit, at 352.

¹² A. F. Gagliardi, 'United States and European Union Antitrust versus state regulation of the economy: is there a better test' (2000) 25(4) ELR 355, 356.

¹³ E. M. Fox, 'State action in comparative context: What if Parker v. Brown were Italian?', in B. Hawk (ed), *International Antitrust Law & Policy: Fordham Corporate Law 2003* (New York: Juris, 2003) 466.

¹⁴ Gagliardi, *op cit*, 369-371.

¹⁵ Federal Trade Commission, 'Report of the State Action Task Force' at <http://www.ftc.gov> (last visited 12 May 2007) 02.

The almost unrestrained liberty that the *Parker v Brown* ruling allocates to the states is particularly problematic in face of the *Noerr-Pennington doctrine*. This doctrine is a result of the Supreme Court's judgments in two cases¹⁶ where it had to deal with the legitimacy of private lobbies to the enactment of anticompetitive regulation. Under this doctrine, the "mere attempt" to influence the government to pass regulations that restrain competition is absolutely lawful and is protected by the First Amendment to the American Constitution. In the words used by the courts:

"... the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms"

It is important to notice that the Noerr-Pennington doctrine provides a sort of antitrust immunity¹⁷, one that covers the private acts taken *before* the establishment of a specific regulatory policy and that allows space for a particularly effective way of monopolizing a market: the way of public restraints.

When taken together, the *Parker v Brown Doctrine* and the *Noerr-Pennington doctrine* create a very strong incentive for firms to seek public restraints to competition. On the one hand, the private action that it requires (private lobbies) is deemed lawful and, one might suppose, even encouraged as a means to enhance democracy. This is not the case for the anticompetitive measures taken directly by the firms, which, if caught by authorities, will make them face heavy fines and other kinds of sanctions. On the other hand, public restraints are even more effective than private restraints in foreclosing competition. Unlike private restraints, public restraints do not require secrecy nor the incursion on the costs of conducting a covert cartel.¹⁸ Furthermore, the public regulatory schemes often include a "built-in cartel enforcement mechanism", making unnecessary the private costs of preventing cheating within a cartel: within public restraints, cheaters will be sanctioned through public institutionalized processes.

Interestingly enough, recent studies of the Federal Trade Commission reveal that there has been an undesired expansion to the Noerr-Pennington doctrine, which results in the immunization of conduct that hold no connection whatsoever with the values protected by the First Amendment or with the original border of the doctrine.¹⁹

¹⁶ The cases were *Eastern Railroad Presidents Conference v Noerr Motor Freight* (1961) 365 U.S. 127 and *United Mine Workers v. Pennington* (1965) 381 U.S. 657.

¹⁷ H. Hovenkamp, 'Antitrust and the regulatory enterprise' (2004) CBLR 352.

¹⁸ Muris, *op cit*, 518.

¹⁹ See Federal Trade Commission, 'Enforcement perspectives on the Noerr-Pennington Doctrine' at <http://www.ftc.gov/2006/11/noerr.html> (last visited 12 May 2007).

As we can see from the above, there is a wide scope for anticompetitive regulation in the United States. On the one hand, state regulation cannot be challenged under federal competition law, given the 11th Amendment and the *Parker v Brown* doctrine. On the other hand, the private lobbies promoting the passing of anticompetitive regulation are shielded from competition law, as they are encouraged as a manifestation of democracy. The outcome is that the public way has become the safest and most effective manner to seek restriction of competition in the United States.

2.2. The Case of the European Union.

The European position is rather different. The community competition policy applies to the actions of Member States and thus the relevant provisions of the Treaty impose constraints upon national regulation. In spite of their literal terms, the European Courts were never impressed by the argument that the articles 81 and 82 of the Treaty are addressed only to companies.²⁰ Consequently, member state regulation can be deemed unlawful for violation of European competition rules, in which case it can be judicially reviewed and damages can be claimed by harmed competitors.

State regulation can be unlawful under community competition rules for violation of article 10 or article 86 of the Treaty. In the former, general obligations to the states are established to facilitate the achievement of the Community goals. In the latter, the obligations are specific and are related to the state measures regarding the services of general economic interest (SGEI) or the markets where there are public or “privileged” companies.²¹ The discipline established by the European Court of Justice (ECJ) for each one of these cases is distinct and that is the reason why I shall deal with them separately.

2.2.1. Violation of generic obligations: article 10 of the Treaty.

According to article 10 of the Treaty, “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty”. The article establishes positive and negative obligations. Thus, the Member States *shall take* the measures that are necessary to the achievement of the goals of the Treaty and *shall abstain* from other measures that could jeopardise such goals.²² The question is: when can we say that a specific state measure has violated the community goals or jeopardised their attainment?

The first answer to that question came with the ECJ judgment in *INNO*, in 1977. According to this ruling, the Member States regulation would be deemed to violate the Treaty when it deprives the community competition provisions of their effectiveness.²³ Obviously, this formulation was still far from clear. It did not mean anything specific and it provided little guidance for future assessment of the

²⁰ Gyselen, *op cit*, introduction.

²¹ According to R. Whish, privileged companies are those to whom exclusive (monopolies) or special rights (entry regulated) have been given (in *Competition Law* (London: Lexis Nexis, 5th ed, 2003) 219).

²² One of those goals that must be preserved is the institution of a system “ensuring that competition in the internal market is not distorted” (see article 3, para 1(g) of the Treaty).

²³ Case 13/77 *GB-Inno v. ATAB* [1977] ECR 2115.

lawfulness of a given state action. For a long period afterwards, at least until 1988, the hesitation remained between two different approaches: one that privileges the “effectiveness of competition rules” and other that attempts to preserve and respect the autonomy of the State to restrain competition on behalf of the local public interest.²⁴

The *INNO Doctrine* was finally clarified in *Van Eycke*²⁵, where the ECJ established its commonly repeated understanding that there is a violation of Article 10 of the Treaty, when read in conjunction with articles 81 and 82, when a given state regulation (A) requires or favours the adoption of agreements, decisions or concerted practices contrary to article 81 or when it reinforces their effects, or (B) deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.

(A) The promotion of conducts contrary to article 81.

The first cause by which a given state action may be deemed unlawful is when it promotes the adoption of agreements, decisions or concerted practices contrary to article 81. As the first phase of the *Van Eycke* test tells us, this might happen through the requirement or the favour of such actions or through the reinforcement of their effects.

In *ASBL Vereniging van Vlaamse*²⁶, the ECJ had to deal with a Belgium’s Royal Decree that made a Code of Conduct set up by the Union of Belgian Travel Agents compulsory. Among other things, the Code prohibited discounts, in an explicitly price fixing scheme contrary to Article 81. According to the Decree, it was unlawful to disrespect the prices and tariffs set up in the Code. It also established that the commissions received by the travel agents could not be shared with the clients and provided that the violation of the terms of the Code could lead to the withdraw of the licence to work as a travel agent. Notwithstanding all these threats, one Belgian travel agent gave his clients some discounts and was sued by the Flemish Travel Agents Association for infringing the Code. The travel agent defended himself by claiming that the Code was contrary to the EC Law, setting up a state cartel. The question was referred to the ECJ which ruled that the Decree was incompatible with the EC Law for reinforcing a private agreement and sanctioning a cartel.

Van Vlaamse is an example of a case where the Member State *requires* the undertakings to adopt anticompetitive conduct.²⁷ However, the mandatory provision is not a condition for the state action to be considered unlawful. It would be enough if a Member State encouraged or facilitated a conduct contrary to the competition rules.²⁸ In this latter situation, the private undertakings are not compelled to act against the

²⁴ R. Wainwright and A. Bouquet, ‘State intervention and action in EC competition law’, in B. Hawk (ed), *International Antitrust Law & Policy: Fordham Corporate Law 2003* (New York: Juris, 2003) 542.

²⁵ Case 267/86 *Pascal Van Eycke v ASPA NV* [1988] ECR 4769, para. 16.

²⁶ Case 311/85 *ASBL Vereniging van Vlaamse Reishureaus v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801

²⁷ Disagreeing on the compulsion feature of *Van Vlaamse*, see Gyselen, *op cit*, section 1.1.

²⁸ It will be important to distinguish these situations when it comes to assess the limits of the state action defence, in the next section.

community competition rules. They remain free to not follow the Members State's orientation.²⁹

(B) The delegation of normative powers to private traders.

The second cause by which a given state action in the “simple markets”³⁰ may be deemed unlawful is when it delegates to private traders responsibility for taking decisions that affect the economic sphere. Nevertheless, the case law shows that the ECJ has a peculiar notion of “delegation”.³¹ In *Reiff*³², the German State had delegated the power to fix the road haulage tariffs to a private organization. The organization was comprised by experts nominated by the German Ministry of Transports, following the indication of the regulated companies. The regulatory scheme derived from a request of the regulated companies and the tariffs fixed would have to be abided by the companies that wanted to act in the sector.

The program explicitly restricts competition, by making price competition unlawful. This notwithstanding, the ECJ took some of its features into consideration to decide that no violation to the rules of the Treaty existed.³³ First, the fact that the road haulage tariffs were defined by a group of independent experts who, according to the law, had to take the “public interest” into consideration was relevant to the Court's decision. Moreover, the Court also stressed that the tariff had to be sanctioned by the Minister of Transports, who could also substitute the experts decision with his own, if he deemed it appropriated to do so.

It should be clarified that the powers that remained with the German Minister had never been used. The German Minister of Transports had never fixed the tariffs by himself nor had he censured the tariffs suggested by the group of experts. In spite of that, the provisions allowing him to do so were deemed enough to guarantee the maintenance of the regulatory powers in his hands. Therefore, the ECJ decided that the system introduced by the German Government was compatible with the EU Treaty and that the public authorities *had not delegated their powers* to private economic agents.³⁴ In the words used by the Court:

[The Treaty does] not preclude rules of a Member State which provide that tariffs for the long distance transport of goods by road are to be fixed by tariff boards and are to be made compulsory for all economic agents, after approval by the public authorities, if the members of those boards, although chosen by the public authorities on a proposal from the relevant trade sectors, are not representatives of the latter called on to negotiate and conclude an agreement on prices but are independent experts called on to fix the tariffs on the basis of considerations of public interest and if the public authorities do not abandon

²⁹ For other cases concerning the State reinforcement of pre-existing cartels, see: Case 136/86 *BNIC v Aubert* [1987] ECR 4789; Joined Cases 209 to 213/84 *Ministère Public v Asjes* [1986] ECR 1425.

³⁰ By simple markets I mean the markets where there are no public or privileged companies.

³¹ Gyselen observes that three pre-Van Eycke cases would have fallen in the second branch of its test: *Inno* (1977), *Van de Haar* (1984) and *Leclerc* (1985), where the companies set minimum or maximum retail price for books and tobacco (in *op cit*, section 1.1)

³² Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* [1993] ECR I-5801.

³³ Suggesting that the ECJ decision in *Reiff* is close to the United States Supreme Court's state action doctrine, Gyselen, *op cit*, section 1.1.

³⁴ *Reiff*, cit, para23.

their prerogatives but in particular ensure that the boards fix the tariffs by reference to considerations of public interest and, if necessary, substitute their decision for that of the boards.³⁵

Reiff should be read in conjunction with *Commission v Italy*.³⁶ In the latter case, the state program was considered incompatible with the EC Treaty. Italy had delegated its normative powers to a professional organization that reunited the representatives of professional customs agents, the National Council of Customs Agents (in Italian, *il Consiglio Nazionale degli Spedizionieri*). The Council fixed the compulsory tariffs that would have to be followed by every customs agent. There was no provision on the need to take into consideration the general public interest or the interest of the consumers. The Commission denounced the system and, after Italy appealed, the case reached the ECJ. The Court eventually decided that there had been a “delegation of normative powers to private traders” and the Italian program was deemed incompatible with the Treaty.

Two factors were relevant to the decision. First, the Court highlighted the composition of the Council. While in *Reiff* the entity to which the powers had been delegated was comprised of independent experts, the composition of the National Council of Customs Agents was rather partial, given that the representatives of professional customs agents were in the board. Besides that, “nothing in the national legislation [prevented] the [Council] from acting in the exclusive interest of the profession”.³⁷

The criticism that must be addressed to these decisions is twofold. To start with, it should be noticed that the Court used very interesting terms to treat the cases differently: in its view, there has been a delegation of powers in *Commission v Italy*, but not in *Reiff*. The idea is that the power remained in the government’s hand in *Reiff*, since the ultimate decision was left with the German Minister. The first problem with this view is that it seems to manipulate the concept of “delegation”. It is clear that there have been delegations in both cases, even if the ECJ denies it. The real difference between the programs is that the first one was designed in such a way as would probably lead to the public interest, whereas the second would probably favour the interests of the customs agents over the general interest or the interest of the users of the services. Sharing this view, Harm Schepel notices that the Court has established a “procedural public interest test” by which self-regulatory arrangements are considered immune to antitrust law when “they can make a plausible claim to put the ‘public interest’ over narrow private interests”.³⁸ In such cases the public interest was

³⁵ Ibid para24.

³⁶ Case C-35/96 *Commission v Italy* [1998] ECR I-3851. For other cases concerning the second branch of the Van Eycke doctrine, see Case C-2/91 *Wolf W. Meng* [1993] ECR I-5751; Case C-245/91 *Ohra Schadeverzekeringen NV*. [1993] ECR I-5851.

³⁷ In the Court’s words: “It follows that the members of the CNSD cannot be characterised as independent experts (...) and that they are not required, under the law, to set tariffs taking into account not only the interests of the undertakings or associations of undertakings in the sector which has appointed them but also the general interest and the interests of undertakings in other sectors or users of the services in question” (in *Commission v Italy*, cit, para44).

³⁸ H. Schepel, ‘Delegation of Regulatory Powers to Private Parties Under EC Competition Law: Towards a procedural public interest test’, (2002) 39 CMLR 31.

defined procedurally, to avoid questions of whether the Court could assess the substance of the Member States policies.³⁹

Schepel's interpretation of the Court's decision seems interesting but, by preferring to refer to the cases in terms of delegation or non-delegation, the Court provides little guidance to future decisions by the Member States and, thus, compromises legal certainty. In fact, it is not sufficiently clear which facts the Court could take into consideration to assess whether or not there has been a delegation. In other words, it is not clear which concept of delegation the Court adopts and, therefore, which kind of programme is lawful and which is not.

Secondly, it is disappointing to see that the ECJ's decisions rely on the theoretical architecture of the system, rather than on the way it effectively works. In *Reiff*, the ECJ deemed it enough, to justify the legitimacy of the German regulatory system, that there was a provision whereby the German Minister *could* fix the tariffs by himself or censor the tariffs suggested by the group of experts. The fact that he had never used such competence was simply ignored as if it was irrelevant. Equally, the provision that the "independent experts" would have to take the public interest into account before fixing the tariffs was considered relevant by the Court, although it is out of question that it has very little power to constrain their liberty. Indeed, virtually every decision can be justified in terms of public interest.⁴⁰ A better decision of the Court would be the one that would take into consideration how the regulatory system is actually working. That would be a much more substantial approach than the one taken by the Court. As we have seen so far, though, substantiality is not a quality of the State Action Doctrine, neither in the United States nor in the European Union.

2.2.2. Violation of specific obligations: the article 86 of the Treaty.

Different is the ECJ's approach to the cases that involve public undertakings or undertakings to which Member States grant special or exclusive rights (public or privileged companies). This is particularly the case of state regulation of services of general economic interest (SGEI). In such cases, article 86 applies. This Treaty provision is known for establishing specific obligation to the Member States in terms of anticompetitive regulation. Its first part is redundant: the Member States shall not enact measures contrary to the rules contained in the Treaty. The relevant part of the article is its second paragraph, where it reads:

Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

The way the paragraph was written is misleading. It seems to prevent anticompetitive regulation, but it in fact authorises it. Competition rules (and, more

³⁹ D. Chalmers *et alli*, *European Union Law* (Cambridge: Cambridge, 2006) 1121.

⁴⁰ On the difficult definition of the "Public Interest", see H. J. Escola, *El interés público como fundamento del derecho administrativo* (Buenos Aires: Depalma, 1989); and F. A. Marques Neto, *Regulação estatal e interesses públicos* (São Paulo: Malheiros, 2002).

generally, the Treaty rules) will not apply when it compromises the performance of the tasks that the State has assigned to some undertakings. In other words, and literally interpreted, the State may displace the community rules to achieve some local goals. The article provides no guidance in reference to which kind of goals are acceptable and even if there is any limitation of this kind. Similarly, it says nothing about obligations of proportionality.

The rules contained in article 86 are as abstract and empty as the ones of article 10. It is therefore necessary to see how the Courts have been applying them. Unfortunately, however, not even doing that can we have more clear guidance on what is lawful and what is unlawful regarding anticompetitive state regulation. The European Court of Justice has not set an overall doctrine that can be broadly applied. It rather considers each case in its peculiarity. Different authors have struggled to find a rationality that underpins the ECJ approach to article 86, but the immense variety of opinions shows that it is not an easy task.⁴¹ In the following lines, I will present the classification proposed by the Advocate General Jacobs in his Opinion in *Albany*.⁴² It has the merits of simplicity and authority. According to AG Jacobs opinion, the ECJ's approach to the cases under article 86 can be divided into three groups, whose names refer to the leading case of each of them: *ERT*, *Höfner* and *Corbeau*. The first two types of cases are more closely related to article 86(1), whereas the last type concerns specifically article 86(2).

(A) *The ERT-type cases*

The first type of cases includes those where the Member State gives exclusive or special rights to some undertakings and, at the same time, allows them to act in another market, where they compete with undertakings that depend on their services. In *ERT*, one Greek undertaking held two exclusive rights that led to a conflict of interest. It was the only undertaking that could broadcast its own programmes, but it was also the only undertaking that could retransmit foreign broadcasts. The situation pushed the undertaking to favour its own programmes over the foreign ones.⁴³ A similar conflict arose in *Raso*.⁴⁴ An Italian regulation granted some dock-work companies the exclusive right to supply temporary labour to other companies but simultaneously allowed the former to compete with the latter, which depended on their services. Also in this case, there was a clear situation of conflict of interests.

Two things are noteworthy in the ERT-type cases. Firstly, the granting of exclusive or special rights is not in itself unlawful. It is precisely the ancillary features of the regulatory program that make it unlawful, by making the abuse of dominant position very likely. Secondly, there is no need for the undertakings to actually abuse their dominant position so that the regulation can be deemed unlawful. The mere

⁴¹ Some commentators even suggest that no rationality exists. This is the opinion of the Advocate General Fenelly: “*I do not think that any general test can be enunciated for determining in advance the existence of such a link. Instead, in each individual case, it will be necessary to assess the impact of impugned national rules in the economic and factual circumstances in which they operate*” (in Case C-163/96 *Silvano Raso* [1998] ECR I-533, para. 65).

⁴² See Advocate General Jacobs opinion in the Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

⁴³ Case C-260/89, *Elleniki Radiophonia Tileorassi (ERT) AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925.

⁴⁴ Case C-163/96 *Silvano Raso* [1998] ECR I-533.

probability of the abuse in view of the conflict of interests that arises from the regulation is enough for the Courts to declare it incompatible with the Treaty.

(B) The Höfner-type cases

In the second type of cases, the establishment of a dominant position by the State is deemed enough to justify the reprehension of the regulation, due to some characteristics of the relevant market. That might suggest a substantial limitation to anticompetitive state regulation – it would not be possible in some markets. Here, the Court has considered that the privileged undertaking would have no option but to abuse of its dominance. The abuse would be committed by the mere exercise of its activity. One of the most recurrent forms of this kind of infraction is when the Member State grants exclusive rights to an undertaking that will not be able to face the demand for the pertinent services.

In *Höfner*, the Court assessed the compatibility with the Treaty of a German law that reserved the employment procurement to a public agency. The regulation was challenged by a German company that intended to hire some executives. The company alleged that the agency could not provide this service properly and without delays. The ECJ agreed with it and reprehended the regulatory program as incompatible with the Treaty rules.⁴⁵

The *ERT* and *Höfner* types of cases are similar in that the state regulation ends up producing an abuse of dominant position. The terms used by the Court in each of them are slightly different, though: whereas in the *ERT* type of cases the abuse is “very likely” due to the existing conflict of interest; in the *Höfner* type of cases, the undertakings holding the dominant position “cannot avoid” abusing it, given the features of the market. The fact that in some cases it will be difficult to distinguish between these two situations is not problematic, since whatever the grounds of the illegality, the consequences are the same.

Here also, some comments are needed. Firstly, the Court’s approach in these type of cases establishes that, if the Member State wants to grant monopolistic rights to an undertaking, it must make sure that the relevant service will be efficiently provided. Secondly, there is an undeniable tension between this type of cases and the wording of the art. 86(1), according to which the mere granting of exclusive rights could not in itself be deemed incompatible with the Treaty.

(C) The Corbeau-type cases

In the Corbeau-type cases, the European Court of Justice adopts a very curious position: it assesses directly the defence of the article 86(2), even before verifying the existence of an infraction to the Treaty rules. This procedure might suggest that the Court understands that in the cases where the exception of the article 86(2) applies, the Member States’ granting of privileges to public or private undertakings is always justifiable.⁴⁶ This provision would then be understood as a derogation of all the state’s obligation within the Treaty and not necessarily connected to the article 86(1).⁴⁷ Indeed, as we have seen, according to this provision the rules of the Treaty apply to

⁴⁵ Case C-41/90 *Höfner & Elser v Macrotron GmbH* [1991] ECR I-1979.

⁴⁶ V. Korah, *An introductory guide to EC Competition law and practice* (Portland: Hart, 2004) 194.

⁴⁷ According to Chalmers *et alli*: “the Corbeau type cases are those where the Court begins by considering whether EC law applies rather than considering whether there is a breach of EC Law law which may be justified” (*in op cit*, 1132).

the undertakings entrusted with the operation of services of general economic interest only *in so far* as that does not obstruct the performance of the tasks assigned to them. In other words, the Treaty rules are set aside when they could obstruct the attainment of the national goals that correspond to the services of general economic interest.

In *Corbeau*, the Court assessed the compatibility with the Treaty of a Belgian legal monopoly of postal services.⁴⁸ The *Régie des Postes*, a public postal operator, held the exclusive rights to distribute mail within Belgium. The relevant national legislation predicted criminal penalties for other undertakings who disrespected these monopolistic rights. The law was challenged by the businessman Paul Corbeau, in his defence on a criminal action brought against him for violating the aforementioned Belgian law. Corbeau offered an specific postal service. His company collected mail within the city of Liège and delivered them by the following morning (door to door express service). Corbeau alleged that the Belgian legislation violated the competition rules of the Treaty.

In its decision, the Court observed that the article 86(2) of the Treaty allows the Member States to entrust some companies with the operation of services of general economic interest and, by doing that, to displace the competition rules of the Treaty *in so far as their application obstructs the performance of the tasks assigned to them*. It then moved on to evaluate whether competition would, in the case of the Belgian postal services, prevent their proper provision. The classic situation where this could happen is where the regulatory program entails a system of cross-subsidisation, whereby the less profitable postal services (say, the deliverance of regular mail to hardly accessible places) are subsidised by more profitable postal services. The rationale behind this program is to guarantee universal access to some essential services.⁴⁹ In its absence, the price of sending a basic correspondence from (or to) a hardly accessible place would be prohibitive and it would probably deprive their inhabitants of this service.⁵⁰ Such an idea underpinned the Belgian postal services regulation; the scheme was imagined as a way to establish a cross-subsidisation between the postal services and to avoid the “cream skimming” by companies that would be interested in offering only the profitable services.

Nonetheless, the Court stated that the exclusion of competition would not be justifiable in the case of services that are not provided by the public postal operator and, thus, did not contribute to the financing of the other services. In the Court’s words, “*such specific services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right*”.⁵¹ The ECJ left it to the Belgian Criminal Court to evaluate whether the Belgian case met these criteria.⁵²

⁴⁸ Case C-320/91 *Procureur du Roi v Paul Corbeau* [1993] ECR I-2533.

⁴⁹ In his opinion to *Glöckner*, the Advocate General Tesouro stressed the importance of the universal service obligation in the context of postal services. According to Tesouro, the fulfilment of such obligation would contribute to the promotion of “social cohesion”. See Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089.

⁵⁰ On the cross-subsidisation schemes, reasons and forms, see G. Davies, ‘Competition, Free Movement and Consumers of Public Services’ (2006) EBLR 95.

⁵¹ *Glöckner*, cit, para19.

⁵² L. Flynn and C. Rizza inform that the Belgian Criminal Court decision is not fully available, though it is know that Corbeau was absolved from the criminal penalties (“classé sans suite”). See ‘Postal

The argument of the ECJ, though, is unsound. The fact that the services offered by Corbeau are not provided by the Régie des Postes does not mean that they *could not* be provided by this public company nor does it mean that allowing other companies to offer it would have no effect in the Belgian regulatory scheme. The services offered by Corbeau are *perfect substitutes* to some services that are in fact provided by the Régie des Postes. Given that Corbeau is not facing the costs of fulfilling the universal service obligation, he may offer those services for a lower price. Consequently, it is reasonable to expect that some of the usual customers of the Régie des Postes would prefer to start purchasing Corbeau's services, thus harming the solidarity scheme established in the Belgian Law.

Anyway, to the national court was left the complex task of evaluating the necessity and proportionality of the regulatory scheme in order to fulfil the universal service obligation. This assessment is indeed indispensable, as the article 86(2) only shields from the Treaty competition rules the cases where their application would compromise the particular tasks assigned to the relevant undertakings. The main questions for the Corbeau case were: to what extent is the cross-subsidisation actually occurring and to what extent is the universal service obligation, rather than public company inefficiency, being financed? In any case, as Valentine Korah notices:

It is not clear what the petty criminal court in Liège should do. Should it work out how great a profit the post office needs on each letter within a substantial town in order to subsidise delivery at a distance or to areas where few people live? Such a task would be difficult for a regulatory Commission and virtually impossible without one. If the national court does not do this, would the postal service have to decide the matter itself, subject to review by the Commission which could make a decision under Article 86(3)?⁵³

Finally, it is noteworthy that the Court's ruling in Corbeau has some similarities with the one in Höfner. In the former case, the Court might have stated, as it did in the latter, that if the public operator cannot meet the specific demand of some of its customers, those services would have to be liberalised.

Anyway, *Corbeau* must be contrasted with *Glöckner*.⁵⁴ In the latter case, the article 86(2) provision was applied to the benefit of a German law regarding ambulance services. According to this law, one company held the exclusive rights for two different services: (i) the first was the emergency ambulance service, which was non-profitable, though socially essential; (ii) the other was the non-emergency ambulance service, this one being very profitable. The idea was that the costs to provide the first service would be offset by the income from the second service. *Ambulanz Glockner*, a company wishing to offer the profitable service, challenged the German law, alleging incompatibility with the competition rules of the Treaty. The action was dismissed by the Court, in view of the exception of the article 86(2).

Services and Competition Law: a Review and Analysis of the EC Case-Law', (2001) 24 *World Competition* 478.

⁵³ Korah, *op cit*, 194. L. Flynn and C. Rizza suggest that the burden of proof of the necessity and proportionality rests upon the Member State that passed the regulation and restrained the competition (in *op cit*, 479).

⁵⁴ *Glöckner*, cit.

Here too the assessment of the necessity and proportionality of the regulatory measure was needed. There is in fact a high probability that the income generated in the profitable service does not correspond precisely to what would be needed to finance the other, less profitable, one. In the case where the difference is relevant, one may wonder whether competition, or at least an alternative and more proportional measure, would not be desirable.

The interpretation of the Court's ruling in the Corbeau-type cases challenges European commentators. Several readings are possible. One interesting view is the one that considers the possibility of a political approach by the Court: it would be more rigorous in those cases concerning less relevant services (the temporary supply of dock-work being an example), and more lenient where the case concerns socially relevant services.⁵⁵ There is a special sensibility in the questions related to the services of general economic interest. They touch on the issue of the Member-States autonomy to organise the provision of services that are essential to their citizens.⁵⁶ This circumstance justifies a more cautious approach by the European Court of Justice.

2.3. The legality of the state action: what if Parker and Brown were European?

In her article comparing the American and the European State Action Doctrines, Eleanor Fox places an interesting question, one that I want to repeat here: what if Parker and Brown were Italian?⁵⁷ The mention of Italy is a reference to the case *Consorzio Industri Fiammiferi* (CIF), where the ECJ has established the limits for the State Action Defence in the European Union. As I have stated in the introduction, this issue of the antitrust immunity that results from the anticompetitive state measures will be dealt with in the third (and next) section of this dissertation. Beforehand, we shall consider the problem of the legality of the state action.

Let us first reverse Fox's question and wonder what would have happened if, for example, INNO, Van Eycke, Van Vlaamse, Reiff, ERT, Hoffner and Corbeau were all American. The answer is straightforward: the state regulation in all of these cases would be deemed unchallengeable under the federal competition rules. As we have said, in the United States any attempt to scrutinize state action is seen as a violation of its autonomy. The State's intention to displace competition is not contrasted with the benefits that a competitive market could potentially provide to its citizens.

On the other hand, were Parker and Brown European, the outcome of their case would be hard to tell, at least in what concerns the legality of the state action. In Europe, *Parker v Brown* would certainly fall under article 81 combined with article 10. It is, indeed, a case of "state-produced cartel", which triggers the applicability of the *Van Eycke* doctrine. In my opinion, the European cases whose facts are the most

⁵⁵ Chalmers *et alli*, *op cit*, 1133. See also M. M. Mendes, 'State intervention/State Action: a U.S. and EC Perspective from Cassis de Dijon to Altmark Trans and beyond: trends in the assessment of state intervention by the European Courts', in B. Hawk (ed), *International Antitrust Law & Policy: Fordham Corporate Law 2003* (New York: Juris, 2003) 498.

⁵⁶ The European Commission defines the services of general economic interest in very broad terms: "market services which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion" (in "Communication from the Commission, Services of General Interest in Europe", OJ 2001 C17/4 Annex II).

⁵⁷ Fox, *op cit*.

similar to the ones in the American case are *Reiff* and *Commission v Italy*. *Parker v Brown* seems to be somewhere in between these other two cases. In all of them, the regulatory power to set the prices of the goods/services involved (raisins/road haulage tariffs and customs agents services) were in the hands of an organization, not in those of the central government of the relevant State. The ECJ relied on the features of these organizations to decide whether or not the program was lawful.

In *Parker v Brown* there was a representative of the State of California in the Committee who was entrusted with the power to fix the price of the raisins and limit its production. In fact, the Director of Agriculture of the State of California (Brown) had a permanent seat there. Would this be enough for the ECJ to consider that no delegation of the regulatory powers actually occurred? To reach such a conclusion in *Reiff*, the ECJ stressed the fact that the German Minister of Transports held a seat in the organization that fixed the road haulage tariffs. However, that was not the only feature deemed relevant by the Court. First, there was the fact that the tariffs were sanctioned by the German Minister, who could fix it himself, when appropriate. Second, the organization was comprised of a group of independent experts, even though they were appointed by the regulated companies. Finally, the pertinent legislation required the experts to take the “public interest” into account, when fixing the tariffs. None of these features were present in the Californian Raisin Program.

It is then probably the case that *Parker v Brown* is closer to *Commission v Italy* than to *Reiff*. Much like in the former case, in *Parker v Brown* the organization entrusted with the power to fix the price of the goods/services was comprised of representatives of the regulated companies. In addition, in neither of these two cases did the relevant legislation compel the mentioned organization to take the public interest into account. So we might be able to conclude that if Parker and Brown were European, the outcome of their case would have been different: the Raisin Program idealised by the State of California would be in breach of the article 81, taken together with article 10.

2.4. An alternative: the test of legitimacy and proportionality of the state measure.

From the previous paragraphs stems the conclusion that the European Union deploys more severe treatment than that of the United States against the anticompetitive state measures. It is then more difficult for a given European Member State to interfere in the competitive market than it is for the American States. This suggests that, at least in this issue, competition is better protected in the EU than in the US. Although agreeing with this view, I would add that competition is not sufficiently protected in either of the jurisdictions.

In fact, in none of them are the reasons of the regulatory programmes important to dictate their lawfulness. Whereas in the United States the intention to judicially review the state regulation is quickly dismissed as a violation of its autonomy, in the European Union, the Courts will go no further than a theoretical and procedural approach to the regulatory programs. That raises the question of whether a more substantial test would be desirable. Those who advocate that it is not would probably argue that such substantial approach would have the effect of substituting the State’s discretion with that of the Courts. In such case, an accountability deficit would arise, as the Courts are certainly not the institutions best suited to deal with

issues that involve important political decisions.⁵⁸ I would reply that this seems to be an unnecessary “all-or-nothing” view. To claim for a more substantive approach in the case of anticompetitive state regulation is not the same as to advocate a very intrusive approach by the Courts. A proportionality-based “soft-look” review of the state regulation is possible and, in my view, desirable.

In such case, the state regulation would be exempted from the antitrust scrutiny when it can claim to seek a *legitimate and proportionate economic policy*. This is the test I propose. By “legitimate” economic policy I understand those decisions that will serve the public interest, rather than the interests of the regulated companies. By “proportionate”, I mean that three different features are needed. First, the state measure would have to be *adequate*, in the sense that the means chosen are suitable for the purpose of achieving the policies goals. Second, the state measure would have to be *necessary*, in the sense that there are no less restrictive way to achieve the same goals or that the state did not go beyond what was needed to achieve them. Finally, the state measure would have to be *strictly proportional*, by which I mean that the state would have to show that the public interest at stake overrides the concerns of the competition policy.⁵⁹ This three prong understanding of the “principle of proportionality” (*Verhältnismäßigkeitsprinzip*) is extracted from the tradition of the German Supreme Court.⁶⁰ The state measure would have to meet all these conditions to be deemed lawful.⁶¹

It does not seem to me that this test would constitute a deep interference by the Courts into the State’s autonomy.⁶² If applied in the United States, the States would remain holding the power to restrain competition, in order to put forward a policy in the interest of their local population. The Courts would not assess the convenience of the state policy. This political decision would remain in the states’ hands. They would only have to show (i) that the displacement of competition is *necessary* for the achievement of the goals of such policy; (ii) that the measure they want to establish is *adequate* to attain them; and (iii) that the local goals it is trying to protect are relevant enough to justify the restriction to competition. Without violating the state’s autonomy, the proportionality test would help to avoid public restrictions to competition whose only goal are to protect the companies that lobbied for it. This is particularly helpful in the United States, in view of the aforementioned *Noerr-Pennington Doctrine*, which creates strong incentives for private lobbying.

In the European Union, this test would be equally helpful. For one thing, it would provide the desirable theoretical basis for the European Court’s approach to the anticompetitive state regulation. In one simple sentence: state regulation that restricts competition is lawful under the competition provisions of the Treaty when it entails a

⁵⁸ See on this subject H. Rasmussen, *On Law and Policy in the Court of Justice* (Hague: Martinus Nijhoff, 1986); and C. Harlow, ‘European Governance and Accountability’, in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford: Hart, 2003).

⁵⁹ In the words of G. Vedel and P. Delvolvé: “*Les réglementations doivent être limitées à ce qui est nécessaire pour obtenir le résultat d’ordre public et ne pas aller au-delà*” (in *Droit administratif* (Paris: PUF, 1992) 706).

⁶⁰ On this subject, see H. B. Ávila, *Teoria dos princípios* (São Paulo: Malheiros, 2003) 104; and L. V. A. Silva, ‘O proporcional e o razoável’ 25 *Revista dos Tribunais* 798.

⁶¹ J. Schwarze, *European Administrative Law* (London: Sweet and Maxwell, 1992) 687.

⁶² In the same sense, G. Nolte, ‘General Principles of German and European Administrative Law: A comparison in Historical Perspective’ (1994) 57 *MLR* 193.

legitimate and proportionate economic policy.⁶³ This simple statement would replace the messy and unsystematic current approach. The outcome of such a change is a gain in legal certainty. Of course, the claim for proportionality is still very abstract and requires further clarification. However, it is beyond any doubt that it establishes the parameters of the discussion on the lawfulness of a state measure under Competition Law. Under the test of proportionality, the parties do know what they must demonstrate to prove their case: they have to discuss the *necessity*, *adequacy* and *strict proportionality* of the state measure.

In addition, the mentioned test would resolve most of the problems in the current European case law, that I indicated above. The unclear second branch of the Van Eycke's doctrine (the delegation of regulatory powers), which does not necessarily stem from the provisions of the Treaty, could be replaced by the requirement of the *legitimacy* of the state policy. In that case, the state would have to prove that its measure was designed to achieve public goals. It could do that by assessing the features of the legislation that delegated the regulatory programs. As we have seen from Schepel's comments, that is what the Courts have been currently doing, even though they use their peculiar notion of "delegation", which makes things obscure. Moreover, the "adequacy" requirement of my test would allow the Court to scrutinize more concretely some of the theoretical provisions of the state program.

As for the ECJ's approach under article 86, it would also be covered (and made uniform) by the *legitimate and proportionate state policy* test. In fact, the ERT-type cases would be caught under the *strict proportionality* requirement, since there certainly are less restrictive ways to pursue the local goals than those that create a conflict of interest that ends up harming the consumer's interests. In a very simple example, the company entrusted with the task of supplying temporary labour to other companies should not simultaneously be allowed to compete with them, as it was the case in *Raso*. Equally, the state measures in Hoffner-type cases are clearly *inadequate* to achieve their goals, given that they entail an unavoidable abuse of dominant position, as in the cases of inability to meet the demand.

As for the Corbeau-type cases, they could not be more fit to the *legitimate and proportionate state policy* test. In fact, the article 86(2) itself explicitly requires a proportionality evaluation. According to its terms, competition and other Treaty provisions could be displaced only *in so far* as their application does not obstruct the performance of the particular tasks assigned to them (this requirement is similar to our "necessity" limb). Furthermore, its last sentence requires a non-excessive affection of the development of trade, and this corresponds to the "strict-proportionality" limb of our test. Thus, the Court could have argued in *Corbeau* that the absence of competition to the services provided by him was not *necessary* to fulfil the universal service obligation. And under the strict-proportionality branch, the Court would be able to assess whether the reservation of the non-emergence ambulance service in

⁶³ The test I propose here is similar, though not identical, to the one proposed by L. Gyselen, according to which the following questions would have to be posed before prohibiting state measures as contrary to competition law: (i) does the regulation at stake distort competition? (ii) If so, does it aim at achieving genuine economic or monetary policy objectives? (iii) If it does not, does it aim at achieving other legitimate objectives that could override the concerns of the competition policy? See *op cit*, section 1.2. The legitimacy test proposed by A. F. Gagliardi is also similar to our test, though it does not include the proportionality assessment. See *op cit*, 372.

Glöckner was not excessive way to finance the provision of the emergence ambulance service (*strict proportionality*).

I should add that the legitimacy and proportionality test is absolutely compatible with the relevant Treaty provisions. To start with, the European Court of Justice has acknowledged that the principle of proportionality is a part of the European legal order.⁶⁴ Moreover, as I have just showed, the test I propose is very close to the terms of article 86, which set the conditions under which the Treaty provisions can be set aside on behalf of local goals. Finally, it is also compatible with a reasonable interpretation of article 10, when taken together with articles 81 and 82. I say “reasonable interpretation” because it is obvious that article 10 cannot be interpreted literally, since such a reading would deprive article 86 of any sense.

In addition, the adoption by the Courts of the test I propose here would have the additional merit of coherence with its position under the free-movement of goods (article 28).⁶⁵ According to the ECJ’s ruling in *Keck*, the state restrictions to the movement of goods between the Member States are prohibited “*unless their application can be justified by a public-interest objective taking precedence over the free movement of goods*”.⁶⁶ This is an undeniable application of the strict-proportionality requirement, which corresponds to the third limb of our test. Given that the free-movement and the competition provisions are complementary to the goal of establish a common market,⁶⁷ the Court should approach them in an equivalent manner.

To sum up, it seems to me that the adoption of this *legitimacy and proportionality test* would contribute to improving the treatment of anticompetitive state regulation in both jurisdictions. In the case of the United States, it would make sure that only those measures that were passed on behalf of the public interest and without excessive restriction to competition would be cleared. In the case of the European Union, it would maintain and improve the current protection to competition, as well as make the Court’s approach to the anticompetitive state measure uniform and coherent, with gains to legal certainty.

3. The consequences of the anticompetitive state measures to the undertakings: the limits of the state action defence.

In most cases, the goals of the anticompetitive policies set by the States can only be achieved through the private actions that are required, encouraged or favoured by the relevant regulation. In other words, the State intended policy becomes reality through the actions of the undertakings. The question follows as to the applicability of the competition rules and principles to these conducts which would *a priori*

⁶⁴ See, for instance, Case C-21/85, *Maas v BALM* [1986] ECR-II 3537, 3556; and Case C-122/78, *Buitoni v FORM* [1979] ECR-II 677, 685. See also K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union* (London: Sweet & Maxwell, 2005), 109-115; and Schwarze, *op cit*, 677-689.

⁶⁵ Gagliardi, *op cit*, 365.

⁶⁶ Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-06097, paragraph 15. On the exceptions to article 28, see P. Oliver, *Free movement of goods in the European Community* (London: Sweet & Maxwell, 2003) 91-156.

⁶⁷ J. B. Cruz, *Between competition and free-movement: the Economic Constitution Law of the European Community* (Oxford: Hart Publishing, 2002) 86-91. See also G. Druesne, *Droit materiel et politiques de la Communauté européenne* (Paris: PUF, 1986) 159; and R. J. Van den Bergh and P. Camesasca, *European Competition Law and Economics: a comparative perspective* (London: Sweet & Maxwell, 2006) 39.

contravene them. In this section of the dissertation, I shall focus on the limits of the *State Action Defence* in each of the jurisdictions analyzed. The *State Action Defence* is a defence strategy put forward by undertakings accused of violation of the antitrust rules. It consists of claiming antitrust exemption on the grounds that the conduct challenged was backed up by a state policy.

The rationale behind this defence is twofold. From the public perspective, the absence of a state action defence would undermine the effectiveness of the state's intended policy to displace competition. Indeed, if the undertakings were punished for undertaking the conduct authorised, required or encouraged by the public regulation, they would probably refrain from doing it, in which case the state's goal would not be achieved and the state's autonomy to put its policy forward would be compromised. From the private perspective, the clear explanation to the *State Action Defence* is the protection of legal certainty and legitimate expectations.⁶⁸ In one example, it is not fair that a company should be held liable for the mere fact of complying with a State imposition. It should not be forgotten that public acts in general enjoy a presumption of legitimacy. Thus, private conduct that conforms to them is a consequence of the confidence that the citizens have on their lawfulness. It is not reasonable to expect that a company will disrespect the state's determination and ignore the relevant sanctions, only in the name of their interpretation of the competition rules of the Treaty.

The main questions of this part of the dissertation are: (i) under which circumstances can the undertakings rely on the public regulation to defend themselves from an accusation of violation of competition rules? (ii) When is private anticompetitive action to carry out a state program shielded from federal or community competition laws? My objective is to compare the answers in the United States with those in the European Union, as well as to criticize them and suggest alternative approaches.

3.1. The Case of the United States of America.

According to the case law of the American Supreme Court, the private immunity to competition rules depends on the application of a biphasic test. The state policy would have this effect when it is (i) clearly articulated and (ii) actively supervised. Thus not only does its theoretical architecture matter; its actual operation is also important. If we recall that the *ratio* of the antitrust immunity is the preservation of the effectiveness of the states' policy, it is easy to understand that the above mentioned test is a means to verify whether the conduct shielded is a consequence of the state programme.

The biphasic test is usually referred to as the "Midcal Test" for it was firstly stated in the Supreme Court's ruling in *California Retail Liquor Dealers v. Midcal Aluminium*⁶⁹, following hesitant drafts in previous cases.⁷⁰ In *Midcal*, a Californian law obliged the local producers of wine to fix the resale price to be applied by the

⁶⁸ The protection of the legitimate expectations is one of the core principles of the European Union Administrative Law. It is enshrined in the Code of Good Administration, adopted by the European Parliament in 2001, and has been recognized as enforceable by the European Courts in cases like T-70/99 *Alpharma v Council* [2002] ECR II-347, para 100; Case T-13/99 *Pfizer* [2002] ECR II-3305; and Cases 205-215/82, *Deutsche Milchkontor* [1983] ECR 2633, 2668. See also Nolte, *op cit*, 195.

⁶⁹ See *California Retail Liquor Dealers v Midcal Aluminium* (1980) 445 U.S. 97.

⁷⁰ See, for instance, *Goldfarb v Virginia* (1975) 421 U.S. 773; *Cantor v Detroit Edison* (1976) 428 U.S. 579; *Bates v State Bar of Arizona* (1977) 433 U.S. 350.

retailers. According to the legal provision, the retailers would be sanctioned if they disrespected such a determination. Nonetheless, the state had no control whatsoever over the price that was established for the wines, not even over its reasonability. In its decision, the Supreme Court noticed that, despite the fact that the policy was *clearly articulated* in the relevant law, it was not actively supervised by the State of California. The prices fixed by the wine producers were immediately valid. Therefore, there was no evidence that they were fixed according to the interests of the consumers and not only in the benefit of the producers. The programme did not pass the second phase of the test and thus did not result in any antitrust exemption.

3.1.1. The required “clear articulation”.

According to the first phase of the Midcal Test, the state policy must be *clearly articulated and affirmatively expressed* so that the antitrust immunity can apply. This first requirement seems to be connected to the need of making sure that the immunity in question is a consequence of a *deliberate state intention* of setting competition rationale aside.⁷¹ It reconciles the State’s autonomy to set its local policies with the national policy favouring competition by guaranteeing that the antitrust law will not be supplanted where this was not the intention of the State, and that the States will be free from the limitations of the antitrust law when their intended policy conflicts with it.⁷²

There is no well-defined method to verify the clear articulation, although the foreseeability of the anticompetitive effects of the programme is not rarely taken as indicative of the state’s deliberate intention to displace competition. One could imagine that competition would have to be *explicitly* set aside in the state policy, but the Supreme Court has already considered the first requirement to be accomplished in cases where the State had implicitly (albeit clearly) intended to displace competition.⁷³ In any case, it is clear that under such circumstances, the defender will probably have more problem in proving the clear articulation of the program and in convincing the judge that the restriction to competition is necessary to the effectiveness of the state policy.

It seems important to stress that, when antitrust immunity is not a necessary consequence of the state policy, it should not be granted. That means that competition is the rule and the conditions that justify the immunity must be understood as an exception and, therefore, interpreted restrictively. As a recent report of the Federal Trade Commission has shown, the Courts have been applying the *Midcal Test* in a very lenient way and that might produce outcomes that are harmful to competitors and consumers.⁷⁴

3.1.2. The required “active supervision”.

The second element that must be verified for the antitrust immunity to be applied has a factual nature: the state that passed the regulation must actively

⁷¹ The Federal Trade Commission has criticized some lower Courts for applying the antitrust exemption with little or no evidence that the state intended to restrain competition (in Federal Trade Commission, ‘Report...’, cit, 01). Accordingly, see Muris, *op cit*, 531-532.

⁷² P. Areeda and H. Hovenkamp, *Antitrust Law: an analysis of antitrust principles and their application* (Aspen Pub, 2nd ed, 2000) 374.

⁷³ See *Town of Hallie v City of Eau Claire* (1985) 471 U.S. 34, 42-43; and *City of Columbia v Omni Outdoor Advertising* (1991) 499 U.S. 365.

⁷⁴ See Federal Trade Commission, ‘Report...’, cit, 02.

supervise the private action that is promoted in accordance to it. The goal is to guarantee that the consequences of the state policy remain under the state's control, avoiding the risk of the policy ending up by exclusively protecting the interests of the regulated companies.

The important feature of this requirement is its factual nature: a “sufficient”, “effective” and “independent” control of the private conduct must be shown so that immunity can be granted. It will not be enough to show that the legislation provides for institutions and mechanisms of control; it will be necessary to show that these powers provided theoretically are indeed used by the competent institutions so that the antitrust law immunity can be granted. That is a great progress in relation to the theoretical approach put forward by the European Court of Justice in *Reiff*, for example.

3.1.3. The amplitude of the antitrust immunity in the United States.

Until the mid 80s, there was some controversy in American legal literature about the amplitude of the antitrust immunity that is a consequence of the State Action Doctrine. Some authors advocated that antitrust immunity would only be applicable to the conduct that was *compelled* by the state regulation. In the case that a given action was merely authorized, approved or even encouraged – whenever there was some margin and autonomy to the undertakings – it would be subject to the antitrust law.⁷⁵ This understanding derived from ambiguous Supreme Court decisions.⁷⁶

In its ruling in *Southern Motor Carriers v. United States* in 1985, however, the Court itself clarified that the compulsoriness of a given private action is not a requirement of antitrust immunity applicability – the immunity will depend solely on the above mentioned biphasic test. In the Court's words: “*Although we recognize that the language in Goldfarb is not without ambiguity, we do not read that opinion as making compulsion a prerequisite to a finding of state action immunity*”.⁷⁷

3.2. The Case of the European Union.

We have seen that the exemption applied by the American Supreme Court as a consequence of the State Action Doctrine is rather broad. Whenever a private action is promoted in accordance to a clearly articulated and actively supervised state policy that displace competition, the antitrust immunity applies. The European Union approach to the same question was clarified in November 2003, in the European Court of Justice ruling in *Conorzio Industri Fiammiferi (CIF)*⁷⁸ and is much more nuanced than the American one. This is an obvious result of the fact that the assessment of the legality of the state action is itself nuanced in the European Union.

⁷⁵ This was the understanding of Hjelmfelt, *op cit*, 287.

⁷⁶ See, especially, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1973); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) e *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

⁷⁷ *Southern Motor Carriers v. United States*, 471 U.S. 48 (1985). In *Town of Hallie v City of Eau Claire* (1985) 471 U.S. 34, 64-65, the Court reaffirmed its position.

⁷⁸ Case C-198/01 *Conorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055. On this case, C. Rizza, ‘The duty of national competition authorities to disapply anti-competitive domestic legislation and the resulting limitations on the availability of the state action defence (Case C-198/01 CIF)’ (2004) 25(2) ECLR 126.

The *Consorzio Industri Fiammiferi* was a group of Italian match producers created by a Royal Decree that conferred to it the exclusive rights (monopoly) to produce the matches that were necessary to the Italian national market. By a convention annexed to the Decree, Italy agreed to fix the price for the matches and to prevent any match producer outside the consortium from acting in the Italian market, whereas the CFI was suppose to guarantee the payment of the relevant taxes. The original content of the programme suffered some alterations along the time, but the main limitations remained. The case was then brought before the Italian competition authority (*Autorità garante della concorrenza – AGDC*) by a German match producer that denounced difficulties in entering the Italian market and argued that the Italian rules violated the competition rules on the Treaty establishing the European Union. The AGDC referred the case to the European Court of Justice.

According to the ECJ's decision, when an anticompetitive state regulation is lawful, the action promoted in accordance to it will always be lawful. Thus, the state action defence in this case is unlimited. The private undertaking will be able to defend itself from the accusation that it is in breach of the community competition law. Conversely, where that the state regulation is deemed contrary to the Treaty, then the application of the antitrust immunity to private conduct will depend on whether the regulation (i) compels a given private action or (ii) merely authorizes, facilitates or favours it. It is equally important to separate the cases where (i) the private action was promoted before the decision that the regulation was unlawful; (ii) it was implemented after such decision.

Let's first consider the case in which an anticompetitive conduct was compelled by the national regulation. The general principle was firstly stated in *Ladbroke*, where the Court held that the competition rules of the Treaty “*apply only to anticompetitive conduct engaged in by undertakings on their own initiative*”.⁷⁹ However, the ECJ clarified that this exemption is only valid for the conduct taken prior to the decision that established the illegality of the state regulation. After this decision, the undertakings can no longer rely on the state action defence to escape from the antitrust liability. They will have to ignore the national regulation, otherwise they might be held liable under EC Law.

The Court was less lenient with the case of conduct that was not compelled by the national regulation, but merely authorised, favoured, facilitated or encouraged by it. Under these circumstances, there is no antitrust exemption, neither prior to nor after the decision of its illegality. When the national regulation leaves any space whatsoever for the undertakings to decide what to do and they opt for the anticompetitive conduct, they shall be punished by their infraction. In such cases, the private action will be considered to be restricting the *residual competition*.⁸⁰ The ECJ clarifies, though, that depending on the circumstances of the case, the penalty to be applied might be attenuated.⁸¹

In reference to the situations where the state regulation was considered legal under competition rules, the Court is right to grant antitrust immunity to the

⁷⁹ Cases C-359/95 and 379/95P *Commission and France v Ladbroke Racing Ltd.* [1997] ECR I-6265, para. 33.

⁸⁰ Rizza, *op cit*, 128.

⁸¹ R. Wainwright and A. Bouquet take the view that “*such attenuating circumstance can of course only be contemplated where there is some doubt about the unlawfulness of the agreement or behaviour*”(in *op cit*, 553-554).

undertakings that act in accordance with it. The reasons have been given in the introductory part of this section: the effectiveness of the state policy and the protection of the undertaking legitimate expectation.

I also agree with the understanding that the immunity should be granted whenever the state regulation compelled or required a given action, even in the cases that such regulation is later judged to be contrary to the competition rules of the Treaty. The European Commission disagrees. It has stated in *Ladbroke* that in such cases the undertakings should be obliged to contest the national rules, because of the primacy of community law.⁸²

That is an unrealistic and excessively harsh demand. It is undisputed that the verification of an antitrust law violation is a hard task. In most of the cases, one would need to recur to not easily accessible market information and proceed with difficult economic evaluation. Even after that, the actual violation of the antitrust rules is very frequently subject to high controversy. As a result, there is a considerable degree of uncertainty as regards the application of competition law. Given that situation, to require that the undertakings assess the legality of the State's regulations under the Community competition law and then refrain from respecting it corresponds to pushing them further down the problem of the lack of legal certainty. More importantly, in the dynamic and competitive environment of business, it is not reasonable to expect that the undertakings will go to the national courts whenever they think that a State regulation might be in breach of the community rules and then wait the case be judged before acting. It should not be ignored that this judicial claim would probably be referred to the Community Courts, in which case it would take even longer to be concluded. As the Advocate General Jacobs has stated, the Commission's suggestion corresponds to "*imposing on undertakings the duty to enforce Community law which rather belongs to Community and national authorities*".⁸³

I also disagree with the ECJ on the issue relating the conduct that was not compelled, but merely authorised, favoured, facilitated or encouraged by the national regulation. The Court argues that since there was some space for the undertakings to decide by themselves what to do, they should be sanctioned when they opt to breach the Community competition law. I do not see how this argument can be coherent with the Court's protection of the legitimate expectation, which it treats as a fundamental right.⁸⁴ It is obviously legitimate to expect that a state measure be legal. Thus, the undertakings would have to be protected from any negative consequence of the confidence they deposit on the national legislation. In any case, I would expect the divergence to be mitigated by the Court's statement that the national competition authority might take the features of the case into account to attenuate the penalties to be applied.

⁸² *Ladbroke*, cit.

⁸³ Opinion of the Advocate General Jacobs, Case C-198/01 *Conorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055, para. 50.

⁸⁴ Schwarze, *op cit*, 867.

Finally, as another attenuation of the Court's ruling, the undertakings that are ultimately damaged by their reliance on the state regulation might be able to claim damages against the Member States, under the *Francovich* doctrine.⁸⁵

3.3. The antitrust immunity: what if Parker and Brown were European?

I shall get back to Eleanor Fox's interesting question: what if Parker and Brown were Italian? Now it is time to deal with the consequences of such a nationality change to the antitrust immunity that may result from the anticompetitive state action. In the United States, the Californian Raisin Program was found legal and the raisin producers could not be sued under the competition law. What would have happened in Europe? I have concluded above that the Californian Raisin Program would have been considered incompatible with the Treaty provisions, under the second limb of the *Van Eycke* doctrine, regarding the delegation of regulatory powers to the undertakings. However, the conduct of the raisin producers was compelled by the State of California. Indeed, violations to the program were punishable by fines and jail.⁸⁶ To these cases, the ECJ's would apply the antitrust immunity, exempting the undertakings of any liability or penalty for the conduct *taken before the decision of the illegality of the program*. Differently to what happened in the US, though, Antitrust rules and sanctions could be applied after the Raisin Program was deemed unlawful. Also unlike his American counterpart, the European Brown would have been able to claim damages from the State of California, under the *Francovich* doctrine.⁸⁷

And what if the *Consortio Industri Fiammiferi* was in fact the "Californian Match Producers Association"? Then the important questions would be (i) if the relevant legislative provisions were a result of a clearly articulated policy and (ii) if such policy was effectively supervised by the State. The facts of the case make clear that the Italian policy was "clearly articulated and affirmatively expressed", in the sense that it corresponds to a clearly intended displacement of competition. The fact that the correspondent Royal Decree established the consortium of domestic match manufacturers and conferred on it the exclusive right to manufacture and sell matches to the Italian market is conclusive.⁸⁸ As for the existence of an "active supervision" of the program by the Italian government, the answer is not equally straightforward. I will make reference here to the original features of the CIF, which are the most intrusive ones. These features were changed and the program was gradually attenuated in the following decades, due to some rulings of the Italian National Courts.

The operational details of the CIF were set in its agreement with the Italian State which was attached to the relevant Royal Decree. According to it, the decisions concerning the allocation of match production quotas were taken by a special committee. Among the five members of the Committee, there was one representative of the Italian State, an official of the State Monopolies Board (*Amministrazione dei Monopoli di Stato*), who was its chairman. The other members of the Committee were

⁸⁵ See Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, as well as Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029. See also Rizza, *op cit*, 129.

⁸⁶ Fox, *op cit*, section II.

⁸⁷ *idem*, section V.

⁸⁸ *CIF, cit*, para3.

representatives of the CIF itself and of the member undertakings. The decisions were taken by majority vote and then were communicated for the approval of the State Monopolies Board. In addition to that, certain decisions, such as those concerning the transfer of quotas, would have to be communicated to and approved by the Ministry of Finance.⁸⁹

It is uncertain whether these control mechanisms would have been deemed enough to characterise the State supervision. Anyway, as I have previously stated, such potential or theoretical supervision in itself is not enough to justify the granting of the antitrust immunity. The American Supreme Court's requirement of an *active* supervision means that the State must be effectively controlling and supervising the program, for example, through the *actual* scrutiny of the CIF decisions by the State Monopolies Board or the Ministry of Finance. There is no such indication in the factual narrative in the ECJ's judgement. I would thus believe that the CIF would not have been granted the antitrust immunity by the American courts. In this case, the United States would have been stricter than the European Union, which indicated that exemption should be granted regarding the facts prior to the decision declaring the illegality of the program.

4. Conclusion.

Unfairly neglected by the American and European legal commentators, the issue of public restraints to competition deserves further attention. In this dissertation, I focused on one of the problems that might arise within this context: what happens in the United States and in the European Union when the States are the ones to blame for the restriction of competition? The text was divided into two main problems: (i) the limits of the legality of the state action; (ii) the immunity consequences of the state action to private parties.

Although the European position seems to be a little more protective of competition than the American one, I suggested that neither of them protect it enough. To the problem of the limits of the legality of the state action, a *legitimacy and proportionality* test was proposed. I argued that this test is absolutely compatible with both jurisdictions and that it would help to avoid regulation that has been passed to the interests of the regulated companies only. By the same token, *legitimate and proportional* state regulation would not find limits in competition law.

As for the issue relating the state action defence, I showed some inconsistencies with the Courts positions in other matters and suggested the means to correct it. In most of the cases, this dissertation's contributions have been extracted from the Administrative Law. Notions like proportionality, legitimate expectation, legal certainty and state liability have an important role to play in the development of the American and European State Action Doctrine.

There is still a long way to go until the treatment to public restraints to competition can be considered satisfactory. Hopefully, this dissertation can be seen as a step in this direction.

⁸⁹ *ibid*, para7.

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