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EDITORIAL BOARD'S MESSAGE

Faithful to the commitment of the GAR to advance scholarship on international competition law and policy, the 2013 volume covers a wide selection of topics of immense practical and theoretical interest.

As the terms of their interaction continue to be in a state of flux, the relationship between intellectual property and competition law is the subject of two contributions in this volume. An article on the problems in the application of competition principles to the use of Standard-Essential Patents (SEPs) in new technology markets and an interesting insight from Ghana considering the difficulties of enforcing intellectual property rights (IPRs) in the absence of competition laws and of an enforcement institution present two different, yet equally important aspects of the difficult debate.

On a more theoretical note, the connection between constitutional traditions and competition law regimes is the subject of an excellent contribution selected for the 6th volume; comparing the US and Latin American constitutional traditions and competition regimes respectively the author observes that there is an interesting link between these two, worthy of further research. In addition to this variety of topics and amidst the continuing debate on criminalising cartels, some possible guidance is provided by a very informative contribution, which discusses in detail the UK and Australian theory and practice. This volume is complemented by a very instructive essay on the role for the principle of equality as a limit to the Commission's discretion in the context of EU competition law enforcement, and by an enlightening account of the role for merger control in the Greek banking sector. Finally, this issue concludes with an interesting case comment presenting the new approach of the European Commission to competition cases in the energy sector.

As always, we would like to especially thank both the referees for their time and constructive comments and Prof. Maher Dabbah, the director of the ICC, for his invaluable support in our efforts.

We hope you will enjoy this volume, and we already look forward to receiving excellent contributions from all interested young scholars for the next one.

The GAR Editorial Board
December 2013

Patents and Standardisation: Competition Concerns in New Technology Markets

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New technology markets, such as communication technologies or computers, are based on innovation and interoperability. To ensure that competition works properly in these markets, it is essential that market players have access to technologies which are protected by intellectual property rights, such as patents. Accordingly, when a technology is standardized, standard-essential patents (SEPs) owners have an obligation to disclose their patents and ask for fair, reasonable and non-discriminatory (FRAND) fees. But SEPs owners may engage in conducts which contravene these obligations, such as patent ambush, refusal to supply or abusive lawsuits for patent infringement. On the ground of article 102 of the Treaty on the Functioning of the European Union and Section 2 of the Sherman Act, competition authorities subject these practices to the competition principles. But the complexity of these matters and the unsuitability of the legal framework hinder the efficient application of the competition rules. As a result, competition authorities and courts struggle to prove the anticompetitive effects of these conducts and to interpret FRAND commitments.

I. Introduction

The interactions between Intellectual property rules, especially those concerning patents, and competition principles have led to a huge number of decisions from competition authorities and courts. The reason why this issue has raised a large number of concerns is the apparent contradiction between patents and competition concerns. On the one hand, patents, and intellectual property rights (IPRs) in general, give to their owner a legal right to prevent their competitors from using their invention. Thus, patents give to their

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owner a *de facto* monopoly on a technology for a limited period of time (twenty years from the filing date). On the other hand, the fundamental principle of competition is open access to market. Monopolies are broadly considered as potentially anticompetitive. For example, in the context of mergers, the creation of monopolies will always lead to commitments in order to ensure that competition is viable. In the context of abuse of dominance, the mere fact of enjoying a monopolistic position is not an abuse *per se*, but the strong market power of an undertaking will heavily influence the final decision of competition authorities.

Thus, the law seems to be contradictory: it gives to inventors exclusive rights on their invention, but these rights may lead to defiance from competition authorities when they are used in a market. Therefore, in markets based on technology and innovation, which involve a broad use of patents, competition problems are very likely to arise. Two main competition concerns have been identified by the legislator and the courts, both in the United States (US) and in the European Union (EU): agreements between undertakings and abuse of dominant position. When licensing their patents or agreeing to a standard, undertakings adopt collusive behaviour that may influence final prices and production. When refusing to license their patent to a fair, reasonable, and non-discriminatory (FRAND) rate or threatening their competitors by filing court proceedings, undertakings may abuse the dominant position they have acquired with their patents.

The issue of transfer of technology agreements between competitors has given rise to a lot of debates before courts and competition authorities in both sides of the Atlantic Ocean. Bright line rules have been drawn about the kind of behaviours or agreements that are forbidden. In the EU, for instance, the Commission's guidelines on horizontal agreements (hereafter the '2011 Guidelines')[1]and regulation 772/2004[2] on technology transfer agreements give clear rules for law practitioners and undertakings to follow.

More recent and more controversial is the application of anti-monopoly rules to patent owners in new technology markets. Both in the EU and in the US, several attempts to tackle abusive behaviour have been made on the

[1] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1 (2011 Guidelines).
[2] Commission Regulation (EC) Nº 772/2004 of 27 April 2004 on the application of article 81(3) of the Treaty to categories of technology transfer agreements [2004] OJ L123/11.

ground of anti-monopolisation provisions, namely article 102 of the Treaty on the Functioning of the European Union (TFEU) and Section 2 of the US Sherman Act. The central question is whether a patent owner has the right to use its legal monopoly in a way which damages competition, slows down innovation and rises prices. Only a deep analysis of the relevant legal provisions and decisions can lead to an answer.

Another fundamental question is the meaning of FRAND. Competition can only be effective if manufacturers can have access to patented technologies in reasonable conditions. Unreasonable licensing fees may have a negative impact on markets, because they prevent competitors to use and develop technologies and thus limit innovation and production and rise prices to the expense of consumers. Thus, it may be useful to define the notion of FRAND.

Therefore, this article will focus on the dominance created by the grant of a patent and the abuse that have been detected and sanctioned by competition authorities and courts in the US and the EU. The analysis will focus on new technology markets that are driven by innovation and, therefore, patent protection.

For the purpose of this paper, the words 'New technologies' and 'High tech' are used interchangeably to refer mainly to new technology of information and communication and includes electronic devices used for communication and information such as phones, computers or communication protocols.

First, some of the main features of new technology markets will be presented, in order to understand the context in which competition problems are likely to arise (section II). The aim of the second part is to analyse the anticompetitive behaviours of patent owners in the context of standardisation and to demonstrate that anti-monopoly rules are very difficult to apply in this context (section III). Finally, this article will focus on the concept of FRAND and explain why a better definition of this concept would be helpful to efficiently apply competition rules (section IV).

II. The main characteristics of new technology markets

1. Innovation and competition: the importance of IP rights in new technology markets.

a) Patented technologies

With the fast development of new technologies, innovation has become a major concern for high-tech companies, which need to protect their innovative efforts. The best way to protect inventions is to obtain patents, which secure a legal monopoly to the benefit of the inventors. The law, in the US as well as in Europe, gives to patent owners a strong protection for their invention. For example, in the UK, every person which 'makes, disposes of, offers to dispose of, uses or imports the product or keeps it whether for disposal or otherwise' without the consent of the patent owner can be sued for patent infringement.[3]

Patents are the key for innovation because their reward is a strong incentive to innovate. Therefore, patents are very important in the high-tech sector, and smartphones, computers and every new technology devices in general can be defined as bunches of patented components. All these products are made of thousands of spare components and technologies, which are, for the most of them, covered by patents. For example, the number of patents that influence smartphone devices is estimated at several hundreds of thousands.[4]

Moreover, the patent systems in the US and in the EU are now quite flexible about what constitutes a 'new' invention, and programs for computers can be easily patented. In the US, the Supreme Court held in the 1981 landmark case *Diamond v Diehr* that the mere presence of a software element did not make an otherwise patent-eligible process non-patentable, and this position has not been challenged since then.[5] In Europe, the European Patent Office has also adopted a flexible interpretation of the European patent convention, and it is therefore possible to be granted patents for minor technological inventions, including in the field of computer programs as long as they involve a physical hardware embodiment[6]. Moreover, given the complexity of these technologies, it is often very difficult for patent officers to really

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[3] Patents Act 1977, s 60(1).

[4] According to the website TechDirt, more than 250000 patents concern smartphone technology, and they represent about 1 of 6 active patents. See Mike Masnik, 'There Are 250,000 Active Patents That Impact Smartphones; Representing One In Six Active Patents Today' (Techdirt, 2012) <http://www.techdirt.com/blog/innovation/articles/20121017/10480520734/there-are-250000-active-patents-that-impact-smartphones-representing-one-six-active-patents-today.shtml>, accessed 5 December 2013.

[5] *Diamond v Diehr* [1981] 450 US 175.

[6] T 258/03 *Auction Method/Hitachi* [2004], Decision of a Technical Board of Appeal of the European Patent Office.

understand the scope of the inventions or to assess their novelty or inventive step.

Patents protect technologies that may have a great value on the market. Some of them cover core technologies or have a widespread use, and have thus an important value, whereas some others concern minor features or outdated technologies and have a less important value. The value of a patent may also depend on its breadth. A broad patent,[7] which can be used in a large number of devices or which covers a core technology, will usually have a very strong market value and will give an important competitive advantage to its owner, which will have the ability to control the market in that respect. As shown by patent economists Merges and Nelson, broad patents may hinder innovation because they tend to block access to technology by covering a full range of possibilities that were not originally imagined or by limiting the improvement of the protected technology.[8] It is thus essential that the owners of broad patents grant access to their technologies through licensing agreements.

b) Licensing, cross-licensing and pooling

High tech devices usually combine hundreds of different technologies. These technologies are protected by patents, which are owned by different entities. Therefore, it is impossible to build new technology devices without obtaining first the agreement of all the patent owners, through licensing arrangements. In return, patent owners can ask for licensing fees, which are calculated according to the market value of their patents.

Companies can also choose to cross-license their patents. This is a good solution for industrial patent owners, which are involved in the development as well as in the manufacturing of devices. These companies may offer to license parts of their patent portfolio and obtain as a counterpart the right to use patents of other companies, without paying royalties. Thus, the parties are able to use their own patents as well as those of their competitors. This

[7] The breadth of a patent depends on its scope, which is determined by the claims contained in the patent. The broader the scope of a patent, the larger the number of products that are likely to infringe the patent. Broad patents tend to block technologies because companies which try to innovate in the concerned technologies are very likely to infringe these patents and be sued by their owners.

[8] Robert Merges and Richard Nelson, 'Market Structure and Technical Advance: The Role of Patent Scope Decisions' in Thomas M Jorde and David J Teece (eds), *Antitrust, Innovation and competitiveness* (Oxford University Press 1992).

system allows a fast and fair sharing of technologies, and is also an excellent way to combine technologies within devices. Finally, as noted by Shapiro, cross-licensing is also a tool used by competitors to 'clear blocking patent positions amongst themselves'. Instead of wasting time and money in long-standing negotiations on the pricing of large patent portfolios, companies may rather opt for a cross-licensing regime, which give them access to the technologies of their competitors. [9]

A variant of cross-licensing, which is also used to share technology, is patent pooling. Patent pools are created by several companies, usually competitors, which decide to cross-license their patents between each other in order to develop new technologies and products. The specificity of patent pooling is that, usually, the covered patents are managed by a single entity, which license them 'as a package' to third parties.[10] The first patent pool was created in the middle of the nineteenth century as regards the invention of sewing machine. Several individuals hold patents that, combined altogether, allowed the creation of sewing machines with their essential features. After several years of blockage, the patent holders finally decided to pool their patent and license it on fixed fees.[11] Patent pools are now used in the new technologies, especially in the telecommunication or media storage sectors.[12]

It must be noted that patent pools are agreements by which competitors decide to share their technologies and fix a single, flat royalty rate. It is therefore likely to raise competition concerns. However, both in the EU and in the US, competition authorities have acknowledged the procompetitive advantages of such mechanism, and clearance has been granted to most of patent pooling projects.[13] For instance, US competition authorities

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[9] Carl Shapiro, 'Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting' (2001) 1 Innovation Policy and the Economy 119.

[10] ibid.

[11] Intellectual Property Office, 'Patent Thickets, an Overview' [2011], available at http://www.ipo.gov.uk/informatic-thickets.pdf, accessed 5 December 2013.

[12] One example of is the MPEG-2 pool. The MPEG standard is a video standard used to digitally display or store video on televisions, computers or smartphones and most of the industry players are members of this pool. This pool was at the centre of deep antitrust concerns in the US, when its members forced licensors to pay for licences that have expired or were nearly expired.

[13] See, for example, the 'comfort letters' addressed by the EU Commission to patent pools created by competitors as regards licensing programs for the DVD technology ('Commission approves a patent licensing programme to implement the DVD standard', IP/00/1135, 9 October 2000, http://europa.eu/rapid/press-release_IP-00-1135_en.htm) or

recognised that patent pools 'provide competitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation'.[14]

c) Patent thickets and Patent trolls

One of the main features of new technology products is that they use thousands of components, which are, for the most of them, patented inventions. Innovative companies systematically apply for patents every time they invent a technological feature, including minor improvements or modification of former inventions. Consecutively, a large number of licenses can be necessary in order to produce high tech devices.

This multiplication of patented inventions has led to the creation of what is known as 'patent thickets'. The concept of patent thicket has been defined by Shapiro as 'a dense web of overlapping intellectual property rights that a company must hack its way through in order to actually commercialize new technology'.[15]

The main characteristic of patent thickets is that they concern technologies, for instance telecommunication or pharmaceutical products, for which intellectual property rights are highly fragmented between several entities and may overlap. The consequence is that entities which want to develop a technology or to produce a device using a technology may be blocked because of the difficulty to identify all the relevant patents and the risk of patent infringement.

Moreover, high-tech companies now use patents not only as a defensive tool, but also as a commercial weapon: obtaining patents for every improvement or modification of a technology is an easy way to block access to a technology and to obtain money or access to other technologies in return of licensing agreements.

However, there are several backlashes. Because of the fragmentation of IPRs, dozens of patents may concern a single technology. For example, the

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3G mobile technology ('Antitrust clearance for licensing of patents for third generation mobile services', IP/02/1651, 12 November 2002, http://europa.eu/rapid/press-release_IP-02-651_en.htm).

[14] Department of Justice and Federal Trade Commission, 'Antitrust guidelines for the licensing of intellectual property' [1995] section 5.5.

[15] Carl Shapiro, 'Navigating the Patent Thicket' (n 9).

3G communication technology is covered by more than 6 000 individual patents which belong to around 70 different companies or consortia.[16] Then, all the patent owners must agree to license or cross-license their patents to produce a device using this technology, or even to create improvements of this technology (the use of a patented technology must be authorised by the patent owner, even if it is just for research and development purpose, as long as the final purpose is market access).

Patent thicket is widely considered as negative for the development of new technologies. Companies which want to use or work on a new technology may be prevented from doing it because of the difficulty to identify which patents are used in a technology and the high risk of patent infringement. The risk is that some undertakings are preventing from entering a market because they do not have a patent portfolio. In addition, because thousands of licences may be necessary to produce a technological device, the price of production of these products may also increase. Thus, patent thickets are likely to slow down the development and the marketing of new technologies and have a negative impact on final prices.[17]

In a thicket, many different entities with different goals coexist. Some entities are industrial players which create and share technology in order to produce new devices. For example, Apple or Samsung can be identified as leaders in the industry of computers or smartphones. Some other companies do not have any production activity and just buy patented technologies in order to obtain royalties in exchange of the use of their patents. They are only active on a patent market and they usually buy patent portfolios from industrial companies which go bankrupt.

The only goal of these companies, commonly known as patent trolls (or in a more official language 'Patent Assertion Entities'[18]), is to license their patent portfolio to industrial players in order to obtain licensing fees and, in some extreme situations, threaten or sue companies which use their patents. A common practice of patent trolls is to wait for industrial players to

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[16] Isabelle Liotard, 'Persistance et Intensité des Conflits Entre Normalisation et Propriété Intellectuelle: les Enseignements de la 3ème Génération de Téléphonie Mobile' (2008) 22(1) Revue Internationale de Droit Economique 47.

[17] See Intellectual Property Office, 'Patent Thickets, an Overview' (n 11).

[18] Terminology used by the Federal Trade Commission, 'The Evolving IP Marketplace, Aligning Patent notice and remedies with Competition' (2011) available at http://www.ftc.gov/os/2011/03/110307patentreport.pdf, accessed 5 December 2013.

develop, design, and produce new products to then 'holding up' the product by asking for high licensing fees or suing for patent infringement. The consequence is generally that industrial players have no choice but paying these entities, thus depriving the market from resources that could be used for more useful purposes.[19] This phenomenon is now well known, but is quite hard to fight as these patent trolls have the right to sue if the patents they have acquired have been infringed. Among the tools used to tackle this kind of practice, competition law is prominent, but with mixed results as it will be shown in Section III below.

The coexistence, in patent thickets, of industrial players and patent trolls has led to a huge amount of litigation on the questions of patent infringement and FRAND licensing. In particular, the smartphone industry is hit by a wave of legal proceedings which have negative consequences on the market. This problem will also be presented with more details in Section III below.

2. Interconnection and cooperation: interoperability and the process of standardisation

a) The concept of interoperability

The multiplication of technologies has led to a growing need of interoperability between technologies. When a company is considering the use of several technologies in order to create a new product, it is necessary that these technologies are compatible between each other and with the technologies used in other devices. This compatibility requirement is called interoperability, which can be defined as 'the ability of two systems to interoperate using the same communication protocol'.[20] In the landmark competition case regarding Microsoft, the European Court of Justice (ECJ) held that 'interoperability is a matter of degree and that various software products in a system 'interoperate' (at least partially) when they are able to

[19] Subramanian gives the example of the *Blackberry* case, where RIM was sued by the patent assertion entity New Technologies Products and finally entered in a $612.5 million settlement. See Sujitha Subramanian, 'Patent Trolls in Thickets: Who is Fishing Under the Bridge' (2008) 30 European Intellectual Property Review 182.

[20] Thomas Hoehn and Alex Lewis, 'Interoperability Remedies, FRAND Licensing and Innovation: a review of recent case law' (2013) 34(2) European Competition Law review 101.

exchange information and mutually to use the information which has been exchanged'.[21]

Interoperability is particularly important in the telecommunication sector. For example, a phone must use communication technologies and protocols which are compatible with those used in other devices and by network providers. In the same way, a software programmer must create programs which can interoperate with computers and other software. Interoperability creates a network of technologies that can interact between each other. Without interoperability, telephones would not be able to contact each other, Internet websites could not be found from a single computer and computers could only run a limited number of software. Interoperability is thus essential for the development of new technologies and it benefits to the consumer.

However, many competition concerns may arise from interoperability requirements. For example, when Microsoft refused to hand out its computer protocols and patents to competitors, in order to avoid competition from other software designers, the EU Commission and the ECJ ruled that this practice was preventing competitors from creating programs that could interoperate with Microsoft's servers and was contrary to article 102 of the TFEU which prohibits abuse of dominance.[22]

b) The process of standardisation

To achieve interoperability between devices and technologies, it is necessary that market players agree on standards that are used in every device. In many technological areas (telecommunication, but also electronics for electrical norms, and so forth), standardisation processes have been set up.

(i) What is a standard?

A standard can be defined as 'a set of technical specifications that seeks to provide a common design for a product or process'.[23] In other words, standards are norms that apply to a category of technology. Standards can be adopted at a worldwide scale, or only at a regional scale. It is usually the

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[21]Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601 (Microsoft I), para 158.
[22] ibid.
[23] Rolf Weber, 'Competition Law Versus FRAND Terms in IT Markets' (2011) 34 World Competition 51.

interest of industrial players on the market to create products that comply with standards. Products that use non-standardised technologies are generally commercial failures, because consumers want their devices to interact with those of other people. For example, there would be no point in buying a telephone which could not reach telecommunication networks.

The phenomenon of standardisation is quickly and widely developing because the whole world has become interconnected and the communication devices need interoperability. The markets tend to be global, with producers from different countries using different technologies. It is then necessary that technological devices are compatible between each other's.

Academics[24] have identified three ways to achieve standardisation. First, standards can be developed *de facto* 'through market dynamics, as a result of widely spread adoption by purchasers of goods or receivers of services'.[25] A good example is BluRay. This technology was created by Sony and eight other companies in order to compete with the HDDVD format created by Toshiba. HDDVD has been a commercial failure and BluRay format has been adopted as the basic storage format and is now used by every video devices, including those of Toshiba. Secondly, standards can be issued by public authorities, which impose the use of certain technical specifications. Third, the most common standards in the new technology markets are cooperative standards, which are set up by private organisations. These organisations are usually specialised in a particular field of technology (telecommunication, electronics and so forth) and their members are undertakings that are active in this field of technology. In order to develop new products and new markets, the members of standard-setting organisations are incited to comply with these standards. For example, communication protocols and technologies such as GSM or 3G are cooperative standards.

(ii) The standard setting-process

The aim of standardisation is too choose a technology which will then be used by all the players in the market to ensure interoperability between their products. Then, in every market which involves interoperability, it can be necessary to adopt standards. Setting up a standard involves the selection of

[24] ibid.
[25] ibid.

certain technologies. Usually, several technologies are identified, tested, and compared between each other in order to identify which technology better fits the requirements of the market. Together, the selected technologies form the standard.

This selection is made by the companies active on the relevant market and which accept to participate to the standardisation process. In its 2011 guidelines, the European Commission identified three main groups of companies that may be involved in the standard-setting process:[26]

- 'Upstream-only companies that solely develop and market technologies. Their only source of income is licensing revenue and their incentive is to maximise their royalties.'
- 'Downstream-only companies that solely manufacture products or offer services based on technologies developed by others and do not hold relevant intellectual property rights. For these companies, royalties represent a cost and not a source of revenue, and their incentive is to reduce or avoid royalties.'
- 'Vertically integrated companies that both develop technology and sell products. These companies have mixed incentives. On the one hand, they can draw licensing revenue from their intellectual property rights. On the other hand, they may have to pay royalties to other companies holding IPR essential to the standard. They might therefore cross-license their own essential IPR in exchange for essential IPR held by other companies.'

Thus, in standard-setting processes, companies often have different and divergent interests. This divergence creates competition problems, for instance when 'upstream-only' companies adopt fraudulent behaviours to maximize their royalties.

The negotiations to adopt standards take place within Standard Setting Organisations (SSOs), in charge of managing and monitoring the standardisation process, each in a particular field of technology. These SSOs usually have a framework of rules which ensure cooperation and good faith during the negotiations, in order to avoid fraudulent strategies of their members. Some organisations are international and set up norms which are applied internationally. Nevertheless, most have a regional or national scope

[26] 2011 Commission Guidelines (n 1) 267.

of action. In the field of new technologies, some of the most important SSOs are the European Telecommunications Standard Institute (ETSI), the International Internet Engineering Task Force (IETF) or the Institute of Electrical and Electronics Engineers (IEEE).

The technologies that are selected during the standard setting process are covered by patents which belong to private companies. Then, when a patented technology is used within a standard, the patent owner must agree to license its patent to the other members of the organisation. Usually,[27] in order to avoid excessive royalties, the patent owner must give access to its technology on fair, reasonable, and non-discriminatory (FRAND)[28] terms and conditions. In other words, the patent owner must ask for reasonable fees when licensing its patent. Most of the time, a standard involves many different patented technologies and may therefore be covered by hundreds of patents. To ensure that SSO members know which technologies are patented (and must therefore be licensed) and which ones are freely available before adopting a standard, all the companies involved in the standard setting process must disclose those of their patents that may affect the standard.

This collaborative standard-setting process is essential to ensure interoperability and access to technology, but it can also create competition problems because pooling patents may lead to price fixing practices or limit innovation to increase profitability.[29] However, there is now a large consensus about the overall benefits of this kind of process. For instance, the EU Commission recognises that 'standardisation agreements usually produce significant positive economic effects, for example by promoting economic interpenetration on the internal market and encouraging the development of new and improved products or markets and improved supply conditions. Standards thus normally increase competition and lower output and sales costs, benefiting economies as a whole. Standards may maintain and enhance quality, provide information and ensure

[27] For standard-essential patents, see below subsection (iii).
[28] In the US, the acronym RAND is used with no reference to fairness.
[29] See, in the US, *Allied Tube & Conduit Corp. v Indian Head* [1988] 486, US 492: 'There is no doubt that the members of such associations often have economic incentives to restrain competition and that product standards set by such associations have a serious potential for anticompetitive harm. […] An agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products.' In the EU, the Commission also acknowledged the potential anticompetitive effects of standardisation in its 2011 Guidelines, para 263.

interoperability and compatibility (thus increasing value for consumers)'.[30] This position is shared by the American authorities in charge of competition policy.[31]

Nowadays, the competition issue at stake is not whether the standard-setting process is good or bad, but it is how to protect this process against the abusive behaviour of undertakings that own standard-essential patents.

(iii) The concept of standard-essential patents.

Some technologies may be more important than others to set up a standard. Most of the standards are based on core technologies, which are essential to the functioning of the standard. These core technologies do not have any equivalent and it is therefore necessary to have access to them in order to make products which are compatible with the standard. When these core technologies are protected by patents, these patents are called standard-essential patents (SEPs). A complete, technical, and accepted definition of standard-essential patents is provided by the IPRs policy of the ETSI, one of the most important SSO in the field of telecommunication:

> 'Essential' as applied to intellectual property rights means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardisation, to make, sell, lease, otherwise dispose of, repair, use or operate equipment or methods which comply with a standard without infringing that intellectual property right.[32]

Owners of these standard-essential patents are obliged to follow stricter rules as regards intellectual property and competition law, to ensure that they properly disclose their patents and license it on FRAND terms and conditions.

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[30] 2011 Commission's Guidelines (n 1), para 263.

[31] The US Department of Justice (DoJ) and the Federal Trade Commission both consider that joint announcement by industry players of their intended maximum licensing terms are not considered anticompetitive. See Elisabetta Rotondo, 'European Commission Initiates Proceedings Against Samsung for Abuse of Dominance by Failing to License its Standard-Essential Patents on Fair, Reasonable and Non-Discriminatory Terms' (2012) 33(8) European Competition Law review 347.

[32] ETSI Intellectual property rights policy [2012], available at http://www.etsi.org/images/etsi_ipr-policy.pdf, accessed 5 December 2013.

Most of the competition problems occur regarding standard-essential patents, because they give to their owners the power to prevent their competitors from using a technology or to ask for excessive fees, thus giving them an advantage which may go beyond the normal rules of competition. It is however often very difficult to identify which patents are essential for a standard. Undertakings have increased their innovative efforts and tend to apply for patents for each of their inventions, even if these inventions are, in fact, only minor improvements or mere modifications of former technologies.

In this context of patent thicket, identifying those of the inventions which are truly essential may be as looking for 'a needle in a haystack'.[33] The firms themselves may not know which of their patents are essential. Some of them have incredibly large portfolios of patents, and hundreds of patents may relate to a single technology. Therefore, identifying the essential patents may be impossible and antitrust concerns may arise, especially regarding the obligation to disclose essential patents during the standardisation process. As it will be shown in Section III below, patent owners may have an obligation to disclose their standard-essential patents to their competitors.

3. Is the standard-essential patent owner dominant?

The previous paragraphs were dedicated to the description of patents, licensing policies and standardisation. Nevertheless, the central topic of this article is the analysis of this environment under anti-monopoly rules, which is to say under article 102 TFEU and Section 2 of the Sherman Act. Because access to standard-essential patents is necessary to sell high-tech products, standard-essential patent owners may *de facto* block a technological market and limit intra-technology competition if they refuse to disclose or to license their patent on FRAND terms and conditions. To identify whether these conducts may be qualified as abusive or unlawful under TFEU or the Sherman Act, it is necessary to discuss whether standard-essential patent owners may be regarded as dominant on the market. Thus, the question is whether the ownership of a standard-essential patent gives a dominant position or a monopolisation power to the undertaking.

[33] Anne Layne-Farrar, Jorge Padilla, Richard Schmalensee, 'Pricing Patents for Licensing in Standard Setting Organizations: Making Sense of FRAND Commitments' (2007) 74 Antitrust Law Journal 671.

When patents are used in a standard, they become essential to the existence of competition in the markets linked with the standard. The analysis of the EU Commission's 2011 Guidelines[34] and Google/Motorola merger decision[35] reveal that three different markets linked to standard-essential patents may be identified:

- Technological markets, in which a specific technology represents a market (for instance, the Wifi or USB technologies could be analysed as technological markets),
- Product markets, in which competition exists as regards certain products (smartphones or components like chipsets, for example),
- Standard-essential patent markets, where each standard-essential patent is a separate market.

There is no fixed rule about whether the owner of a standard-essential patent is dominant or not on these markets. In the EU, the Commission adopts a case by case analysis, and refuses to find any presumption of dominance, as stated in its 2011 guidelines:

> However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case-by-case basis.[36]

To assess the existence of a market power, the Commission usually bases its analysis on the structure of the market, the nature and the number of competitors as well as the relative importance of the patent compared to others that may be used in the standard.

Following these guidelines, it is possible to state that standard-essential patent owners are dominant on patent markets. The same conclusion can be made as regards technological markets if the technology has been defined through a standardisation process, because once the standard has been defined and uses essential patents, 'the industry becomes "locked-into"

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[34] 2011 Commission's Guidelines (n 1) 261.
[35] *Google/Motorola Mobility* (case COMP/M.6381) Commission decision 2012/1068 [2012] OJ C 75/01
[36] 2011 Commission's Guidelines (n 1) 269.

using those patents'.[37] Consecutively, standard-essential patents give to their owners a very important market power. Finally, as regards product market, it will depend on whether the technology is often included in high-tech products or not.

Thus, in the patent and technological markets, standard-essential patent owners have astrong market power, because they have the opportunity to block access to markets or to license their patents under unfair terms. Competition problems linked with dominance are then likely to arise on these markets, and mostly in technological markets, which are concerned by the standardisation process.

The second part of this article will analyse competition problems met in the context of standardisation. In this respect, the next section will analyse the main competition concerns related to standard-essential patents and the tools used to prevent them (section III) and the last section will focus on the concept of FRAND (section IV).

III. The difficult application of anti-monopoly rules in the context of standardisation

After having identified the main features of new technology markets, this section focuses on the competition concerns that have been identified in the context of standardisation.

The application of article 101 TFEU and Section1 Sherman Act has been extensively detailed in guidelines issued by competition authorities, and bright line rules now apply. Therefore, no further details on this issue will be given in this article.[38]

The question here is not whether standardisation is procompetitive or not (this is another debate), but how dominant undertakings use their market power and threaten this process and what tools can be used in order to tackle abusive practices. The standardisation process can be efficient only if two conditions are correctly fulfilled:

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[37]Elisabetta Rotondo, 'European Commission Initiates Proceedings Against Samsung for Abuse of Dominance by Failing to License its Standard-Essential Patents on Fair, Reasonable and Non-Discriminatory Terms' (n 31).

[38] The 2011 Commission's Guidelines (n 1) contain a lot of information on this issue, and standardisation is now broadly accepted as a positive process for the market.

- First, members of SSOs must agree to disclose their patents before the negotiations take place to choose a standard.
- Secondly, once the standard has been chosen, patent holders must agree to license their patents on FRAND terms.

These two conditions are essential for the standard setting process to work properly. This section will therefore focus on the practices that are contrary to these conditions and identify whether they have been qualified as abusive under competition law and what remedies have been used.

1. The obligation to disclose standard-essential patents

a) Patent ambush: a major concern for SSOs

During the standardisation process, undertakings agree to choose technologies that will be integrated to a standard and to dismiss every other alternative technologies, in order to ensure interoperability between their products. Thus, when a standard is chosen and the manufacturing process has started, it is not possible to switch to another technology. As Culley, Dhanani and Dolmans wrote:

> Selecting a particular technology means committing to that choice for that standard and abandoning research tracks involving alternative technologies that may have been good substitutes ex ante, i.e., before the standard was set. Once an industry has committed itself to go down the agreed road, and investments have been sunk into implementation of the standard (ex post), firms become locked in.[39]

Thus, the *ex ante* disclosure requirement is very important when discussing a standard, especially as regards standard-essential patents. SSOs' members must disclose their standard-essential patents to allow upstream negotiations and avoid patent infringement once the standard is chosen. This obligation can be considered as an expression of an obligation of good faith.

Once standard-essential patents have been disclosed, SSOs' members can start their negotiations with a full knowledge of the state of the art, the position of each manufacturer and the eventual licensing requirements. Indeed, patents are published as soon as they are granted, but given the

[39] Daniel Culley, Malik Dhanani and Maurits Dolmans, 'Learning From Rambus: How to Tame Those Troublesome Trolls' (2013) 57(1) The Antitrust Bulletin 117.

proliferation of patents in new technology markets, general patent disclosures are too numerous to provide effective notice. Moreover, patent protection starts from the filing date of the patent. Thus, a standard essential patent may be pending and remain secret until they are granted.[40]

This is why SSOs are very concerned by patent disclosures and have included disclosure obligations in their IP policies, to force SSO members to disclose their patents to the other members as soon as a technology is discussed. For instance, ETSI, which is the major European standard organisation in the sector of telecommunication, has issued IPR Policies which contains this obligation in its article 4:

> [E]ach Member shall use its reasonable endeavours, in particular during the development of a Standard or Technical Specification where it participates, to inform ETSI of Essential IPRs in a timely fashion. In particular, a MEMBER submitting a technical proposal for a Standard or Technical Specification shall, on a bona fide basis, draw the attention of ETSI to any of that Member's IPR which might be Essential if that proposal is adopted.[41]

The aim of these policies is to avoid what is called 'patent ambush', or 'patent hold-up'. A patent ambush occurs when a SSO's member fails to disclose its relevant standard essential patents during the standard-setting process. The SSO members then agree on a standard which incorporates the hidden patented technology. Thus, the ambusher is in a position in which it can trap the other members of the industry which are locked into the standard they have adopted. Usually, the standard essential patent holder sues its competitors over patent infringement in order to increase the level of its licensing fees.

Patent ambush is an important concern for SSOs, which have identified this practice as particularly dangerous for the success of the standardisation process. It would be a disincentive to the participation of standard-setting activities if members of the SSOs would have the ability to hide their relevant essential patents until a standard is agreed. This is why SSOs have anticipated the problem of patent ambush and took steps to prevent it through their IPR policies. But despite these binding policies, patent hold

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[40] ibid.
[41] ETSI Intellectual Property Rights Policy (n 31).

ups are still likely to happen. Moreover, it must be pointed out that the participation to standard-setting processes is not mandatory. Non-members are not bound by SSOs' IPR policies and may find in patent hold up a good leverage to obtain money using their patent portfolios. Usually, these companies are not involved in research and development or manufacturing activities, but are in patent trolls.[42] In these circumstances, competition authorities have used competition law in order to tackle patent ambush practices.

b) The difficult application of competition rules to patent ambush

Patent ambush practices have been investigated by competition authorities in the EU under article 102 TFEU, which prohibits abuse of dominance, and in the US under Section 2 of the Sherman Act, which prohibits monopolisation. Essential patent owners have a dominant position on the technological and patent markets. Thus, these provisions naturally tend to apply. The question is whether patent ambush may be considered as abusive and to what extent competition law can apply to it.

(i) Application of EU Competition law

In the EU, article 102 of the TFEU prohibits 'any abuse by one or more undertakings of a dominant position' which may consist in 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions' or 'limiting production, markets or technical development to the prejudice of consumers'. Thus, standard-essential patent holders may be in breach of competition principles if, using their patents, they act in a way that contravenes article 102.

The EU Commission has already analysed patent ambush under competition rules. In 2007, it sent statement of objections to the American technology licensing company Rambus for an alleged infringement of article 102 TFEU. Rambus was accused of not disclosing its patents and patent applications during the standard setting process for DRAM chips[43] technology and later claiming that its patents were relevant to the adopted standard, thus asking for excessive royalties.[44]

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[42] See Section II.1(c) above.
[43]Dynamic Random Access Memory.
[44]*Rambus* (case COMP/38.636) Commission Decision [2009].

However, the abusive conduct was not the patent ambush practice itself, but the fact that, according to the EU Commission, Rambus claimed fees for the use of its essential patents at a level which it would not have been able to charge if it properly disclosed its patents during the standard-setting process. The EU Commission considered that the fact that Rambus did not act in good faith and did not respect the patent policy of the standard organisation (JEDEC) was not in itself a violation of article 102 TFUE. The competition concern lies in the fact that, for the Commission, 'the conduct (…) has necessarily influenced the standard process, in a context where suppression of the relevant information necessarily distorted the decision making process within a standard-setting body'.[45]

The Commission held that Rambus captured the DRAM technology and took advantage of this lock-in situation to ask for unreasonable licensing fees, where the intention of the members of the SSO was to design a patent-free standard around the Rambus' patents.[46] It also noted that some alternative technologies might have been chosen if Rambus had disclosed its patents on time.[47] Nevertheless, the Commission did not rule on the application of competition principles to patent ambush practices. In its decision, it did not assess whether the fees received by Rambus to license its technology were unreasonable or not. Similarly, even if the Commission argues that alternative technologies could have been chosen, it does not seek whether another technology would have effectively been chosen in the case where Rambus had disclosed its patents.[48]

Thus, the finding of an abusive conduct lied mostly on two factors: the hypothetical behaviour of the members of the SSO, based on the assumption that their strategy was to limit their costs, and the availability of alternative technologies.[49] However, the Commission does not analyse whether Rambus' conduct had effectively limited the production or the technical development of the DRAM technology and asked for fees which were unreasonably high. This may explain why the Commission finally chose to

[45] ibid, 39.
[46] ibid, 43.
[47] ibid, 46.
[48] ibid.
[49] ibid, 44, 46.

settle the case after Rambus committed out to adopt a worldwide cap on its fees for products compliant with the standard.

In the light of the commitment decision, it is unclear whether patent ambush constitutes an abuse of dominance. It could certainly be considered unlawful under article 102 TFEU if the Commission could prove that the licensing fees charged by the ambusher were unreasonable or if the members of the SSO would have chosen another alternative technology. To effectively tackle patent ambush under article 102 TFEU, the Commission could also have adopted a more flexible and dynamic interpretation of this article and consider that patent ambush was in itself abusive, as recommended by Culley, Dhanani and Dolmans:

> To avoid this difficulty, the Commission could have defined a sui generis form of abuse, in addition to or instead of relying on the ban on excessive pricing, recognizing that the abuse in question was the last link of a chain of events, beginning with Rambus's participation in JEDEC, its decision to leave JEDEC, its letter to JEDEC creating the misleading impression that Rambus had and would have no patent reading on the technology that JEDEC considered for the standard, and the adjustment of its patent claims based on the information received from Secret Squirrel—all of which occurred before the industry was locked in and before Rambus became dominant as a result— and continuing with Rambus's decision to demand royalties for its patents once the industry was locked in.[50]

However, this is forgetting that the Commission has adopted an effect based analysis of unilateral behaviors under article 102 TFUE and is not keen on recognizing 'per se' abuses[51] (even if in some circumstances the EU Courts have adopted a more balanced position, for example regarding predatory pricing practices). Moreover, this kind of practice is not listed in article 102. Finally, this seems to be a contractual problem, more than a competition problem. The application of competition law requires that competition be threatened, at the expense of the consumer. It is therefore necessary to demonstrate anticompetitive effects, which the Commission struggles to achieve.

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[50] Culley, Dhanani and Dolmans, 'Learning From Rambus' (n 39).

[51] Communication from the Commission - Guidance on the Commission's priority in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/02.

However, the recent policy of the Commission shows that it intends to keep fighting patent ambush under article 102 of the TFEU. In 16th of December 2012, the EU Commission announced that it opened formal proceedings against Honeywell for patent ambush practices. The investigations focus on failure to disclose essential patents to the Society of Automotive Engineers during the standard selection process of a refrigerant called 1234yf, used in future air conditioning systems.[52]

(ii) Application of US Competition law

In the US, competition authorities also showed concerns about patent ambush and the effects of these practice on competition. Like in Europe, the FTC investigated on Rambus' behavior regarding DRAM essential patents. In its decision of the 2nd of February 2007, the FTC found that Rambus violated Section 2 of the Sherman Act by manipulating the JEDEC standard-setting process and thus gaining monopoly power,[53] which is the criterion for antitrust liability under Section 2.[54] In its decision, the FTC took the hypothetical view that if Rambus had properly disclosed its essential patents to JEDEC, the outcome for the standardisation process 'would have been more competitive',[55] because JEDEC would have been able to negotiate licensing terms ex ante or would have chosen technologies alternative to Rambus's essential patents.

Nevertheless, the judicial authority has set up some limits to the application of antitrust principles to this practice. After Rambus challenged the FTC's decision, the DC Circuit considered that the FTC had not brought enough evidence about the situation that would have been without Rambus' deception. The Court held that 'if JEDEC, in the world that would have existed but for Rambus' deception, would have standardized the very same technologies, Rambus's alleged deception cannot be said to have had an

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[52]EU Commission press release number IP/11/1560. http://europa.eu/rapid/press-release_IP-11-1560_en.htm accessed 5 December 2013.

[53]*In the Matter of Rambus Inc*, Opinion of the FTC [2006], FTC file 9302.

[54] Section 2 of the Sherman Act provides: 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.'

[55] See *In the Matter of Rambus Inc* (n 52).

effect on competition in violation of the antitrust laws'.[56] Thus, as the doctrine noted, 'the general rule that emerges from Rambus is that a patent-holder's deceptive conduct before an SSO will not give rise to liability under Section 2 if such conduct cannot be shown to have caused the SSO to include that technology in its standard over an alternative'.[57]

Needless to say that such causation is difficult, if not impossible, to prove. This case as well as the settlement reached by the EU Commission has evidenced the difficulty to apply competition principles to patent ambush. Patent ambush can be considered as a competition problem (it certainly has anticompetitive effects) with no competition law solution. The study of US case law on this matter shows that other tools can be used to tackle patent ambush.

In the private patent dispute opposing the high tech firms Qualcomm and Broadcom, a solution was found on the basis of contract law.[58] Like Rambus, Qualcomm failed to disclose its essential patents to the SSO JVT and aimed at asking for licensing fees once the standard was adopted. Broadcom which was a member of the same organisation alleged that Qualcomm voluntarily failed to disclose its SEPs and thus violated its commitment to the SSO, which had included a disclosure obligation in its IPR policy. The District Court, as well as the Federal Circuit concluded that Qualcomm's practice was contrary to its commitments to the SSO members and that Broadcom brought enough evidence that, even if the SSO's policy was ambiguous, there was an implied obligation to disclose. Consecutively, the Court made Qualcomm's essential-patents unenforceable against other market players.

This case shows that this approach, based on the contract between SSO members, is much simpler than the one based on competition law, which is blocked by a problem of evidence. The Court did not require that Broadcom proves the impact of Qualcomm's behavior on the outcome of the standardisation process. Thus, as Royal, Tessar and di Vicenzo highlighted, 'the FTC sought but failed to obtain a remedy in Rambus to protect all market participants affected by the challenged conduct. Broadcom, in

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[56] *Rambus Inc v FTC* (2008) 522 3d FC 456, Certiorari denied, 129 S Ct 1318 (2009).
[57] Jonathan Hillel, 'Standards x Patents + Antitrust = co: the Inadequacy of Antitrust to Address Patent Ambush' (2010) 17 Duke Law & Technology Review [i].
[58] *Qualcomm Inc v Broadcom Corp* (2008) 548 3d FC 1004.

contrast, achieved industry-wide relief using a traditional common law defence'.[59]

A similar approach based on contract law could be followed in the EU, with the advantage that no anticompetitive effect has to be proven. However, there are no EU rules on contracts and the EU Commission and the ECJ have no jurisdiction over contract law issues. Breach of a contract may be invoked by victims of patent hold-ups in front of European national courts, but there may be a risk of inconsistent outcomes, which would add to the confusion.

2. The obligation to license standard-essential patents

The other main competition concern regarding standardisation is the licensing of standard-essential patents. Two issues are at stake: licensing is an issue in itself, because some players may refuse to license and thus block access to market. Licensing terms and conditions is another issue, because licensing fees must remain at a reasonable level to ensure competition on markets. Moreover, SEPs holders should not have the possibility to use their position to ask for undue advantages.

This is why SSOs and competition authorities have designed tools to force patent holders to license their essential patents on FRAND terms.

a) An extensive control by SSOs, courts and competition authorities

SSOs and competition authority closely monitor the respect of their licensing obligations by standard-essential patent holders. All SSOs have included in their IPR policies obligations to license on FRAND terms. For instance, Article 6 of ETSI's IPR policy provides:

> When an Essential IPR relating to a particular Standard or Technical Specification is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory

[59] Sean Royall, Amanda Tessar, Adam di Vicenzo, 'Deterring "Patent Ambush" in Standard Setting: Lessons From Rambus and Qualcomm' (2008-2009) 23 Antitrust 34.

> ('FRAND') terms and conditions under such IPR to at least the following extent: [manufacture, sell, lease, dispose, repair or use].[60]

As shown above concerning patent ambush,[61] such clause may be invoked in courts proceedings in order to obtain adequate relief in the case where an essential patent holder would refuse to license its IP rights. In this respect, Geradin and Rato noted that:

> The enforceability of the FRAND obligation results from the fact that it forms part of a private agreement between an IPR owner and an SSO--it is contractual in nature. As we have noted elsewhere, in such circumstances the standard implementer may simply wait and assert defensively that the IP owner has failed to satisfy its obligation to offer FRAND terms, or (under the procedure appropriate in a given jurisdiction) proactively seek a determination through a breach of contract action that FRAND terms have not been offered, and an order requiring compliance with that obligation. If the essential IP owner has in fact failed to offer FRAND terms consistent with its FRAND obligation, then this will represent a breach of contract.[62]

The competition authorities also accept the fundamental role of court proceedings based on contractual commitments to license. For example, the EU Commission, in its decision on the Google/Motorola merger, noted that:

> [A] FRAND commitment cannot be considered as a guarantee that a SEP holder will not abuse its market power. Although a FRAND commitment may influence a company's incentives to significantly impede effective competition, it remains true that the company would still have some ability to do so. However, that ability would ultimately be constrained to an extent by the fact that FRAND is an obligation upon which inter alia courts, arbitral tribunals, or competition authorities may rule.[63]

Thus, in the context of standardisation, contract law and litigation based on breaches of commitments to license are recognised as the dedicated tools to

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[60]ETSI Intellectual Property Rights policy (n 32).
[61]See above Section III 1(b)(ii).
[62] Damien Geradin and Miguel Rato, 'FRAND Commitments and EC Competition Law: A Reply to Philippe Chappatte' (2010) 6(1) European Competition Journal 129.
[63]*Google/Motorola Mobility* (n 31) 113. In the US, see *In re Robert Bosch GmbH* [2012] FTC File 121-0081.

fight refusal to license practices from SEP holders. Nevertheless, this kind of clause is only binding for SSO members, and some standard-essential patent owners, such as patent trolls, may not be part of standard organisations. This is also the case in a situation where a company obtains a patent closely related to a standard after the standard is adopted. In these situations, competition principles may apply and provide an efficient solution.

(i) Application of competition law to refusal to license in the EU

As regards EU competition law, the ECJ agreed that data or IP rights that are necessary to compete on a secondary market, that is to say a market which is dependent and interoperable with a primary market (spare parts for cars for example), should be licensed under reasonable terms.

In the landmark case *Volvo*, which concerned protected designs for cars, the ECJ held that:

> The exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article 82 EC if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.[64]

However, the ECJ also recognised that a refusal to license its IPRs is not in itself abusive and that an IPR holder which would be forced to license its rights would be 'deprived of the substance of his exclusive right'.[65] It is only in 'exceptional circumstances' that 'the exercise of an exclusive right may involve an abuse'.[66]

The ECJ provided details about the kind of exceptional circumstances which could lead to an abuse. It is only if these circumstances exist that the right holder may be forced, under article 102 TFEU, to license its rights to

[64]Case 238/87 *Volvo v Commission* [1988] ECR 6211, para 9.
[65] ibid, 8.
[66]Joined cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743 (Magill), para 50.

competitors. These circumstances were set up in the *Magill* case[67] and used in the *Microsoft* case:[68]

- in the first place, the refusal to license 'relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market';
- in the second place, the refusal to license 'is of such a kind as to exclude any effective competition on that neighbouring market';
- in the third place, the refusal to license 'prevents the appearance of a new[69] product for which there is potential consumer demand';
- In the fourth place, the refusal to license is not 'objectively justified'.[70]

These circumstances could apply to standard-essential patent owners which refuse to license their patent, thus blocking the use of a standardised technology. In this context, access to the standard essential patent is indispensable to use a standardised technology and it excludes effective competition because manufacturers would not use this technology in order to avoid patent infringement. As a consequence, devices which would use the technology using the patented invention would not be marketed, and any justification is unlikely to be found.

Besides this obligation to supply is the respect of FRAND licensing terms, which is also monitored by competition authorities. For example, in the field of merger control, the EU Commission considers that the respect of FRAND commitments is a prerequisite to the clearance of a merger involving SEP holders. FRAND terms will be at the heart of section IV of this article.

(ii) Legal framework of refusal to license in the US

In the US, the legal framework regarding refusal to license is a bit different because the Sherman Act does not prohibit exploitative practices and the burden of proof is heavier for competition authorities or plaintiffs. The Supreme Court considered that no obligation to deal could be imposed on the ground of Section 2 of the Sherman Act as long as no anticompetitive conduct is detected. Absent any anticompetitive behaviour, dominant firms have the right to charge under the terms and conditions they choose.

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[67] ibid.
[68] *Microsoft I* (n 21).
[69] The term 'new' also encompasses improvements.
[70] *Microsoft 1* (n 21), paras 332-333.

In *Trinko*, which is the landmark case on this matter, the Supreme Court heard a complaint based on the refusal of Verizon to give access to its essential telecommunication network to its competitors. Justice Scalia explained that:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element in the free market system. The opportunity to charge monopoly prices--at least for a short period--is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.[71]

In *Pacific Bell*, Chief Justice Roberts considered, in the same reasoning than in *Trinko*, that '[A] firm with no duty to deal in the wholesale market has no obligation to deal under terms and conditions favourable to its competitors'.[72] Thus, a refusal to license can be prohibited on the ground of Section 2 if an anticompetitive behaviour is proven, that is to say if 'an actual or threatened monopoly is being created in the second market'.[73] Applied to the standardisation context, it is not clear weather a standard-essential patent holder that would refuse to license would create a monopoly on the secondary market. This would be true for a vertically integrated firm, which would try to enjoy a monopolistic position on the market as regards manufactured products (smartphones or components like chipsets for instance).

The answer is not clear as regards patent trolls, which do not want to be dominant on a secondary market but just aim at extorting money from other companies. In the US, then, refusal to license is much more difficult to tackle based on antitrust principles than in the EU because the burden of proof is much heavier. However, in this jurisdiction as well as in the EU, the fundamental question of abusive injunctions has been analysed under competition law.

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[71] *Verizon Communs, Inc v Law Offices of Curtis v Trinko*, 540 US 398 (2004) (Trinko).
[72] *Pacific Bell Telephone Co v LinkLine Communications*, No 07-512 (Pacific Bell).
[73] Donald I Baker, 'An Enduring Antitrust Divide Across the Atlantic over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolists' (2009) 5(1) European Competition Journal 145.

b) The Smartphone war and its legal consequences

The smartphone market is characterised by a vast patent thicket. In the last five years, Companies such as Ericsson, Apple, Microsoft, HTC, Samsung, Motorola, LG or Nokia have sued each other for patent infringements or unreasonable licensing fees in several jurisdictions all around the world.[74] The figure in Annex 1 offers a striking representation of the intensity of this patent war, in which all the players on the market are involved. Moreover, patent trolls bring dozens of infringement actions in front of US Courts in connection with standard-essential patents. For instance, in 2013 these entities brought several actions regarding patents covering features of the Wi-Fi technology.[75]

This 'smartphone war' highlights the danger of patent thickets. In the last two years, the total patent litigation expenses related to smartphones have been estimated at 20 billions of dollars[76] and several major firms, such as Apple or Google, have spent more money on litigation and patent acquisitions than on research and development activities.[77] Another consequence is that small high-tech firms which focused on innovation did not resist the financial pressure of these multiple lawsuits and had to stop their activities.[78]

Some companies have lodged complaints in front of competition authorities in the US as well as in the EU on the ground that some of these lawsuits may be abusive and aimed at weakening competitors. For instance, Apple and Microsoft complained to the EU Commission about the injunctions

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[74]Mostly in the US, Korea, Japan, Germany, United Kingdom and several other European jurisdictions.

[75] Matt Rizzolo, 'Non-Practicing Entity Wyncomm LLC Claims WiFi Devices Infringe Former AT&T Patent' (Essential Patent Blog, 11 April 2013) <http://essentialpatentblog.com/2013/04/non-practicing-entity-wyncomm-llc-claims-wifi-devices-infringe-former-att-patent/> accessed 5 December 2013; Matt Rizzolo, 'Intellectual Ventures Sues Motorola Mobility Over Patents Relating to WiFi, Cellular Standards (and Others)' (Essential Patent Blog, 19 June 2013) <http://essentialpatentblog.com/2013/06/intellectual-ventures-sues motorola-mobility/> accessed 5 December 2013.

[76]According to a study of Stanford University. See Charles Duhigg, Steve Lohr, 'The Patent, Used as a Sword', *The New York Times* (New York, 7 October 2012) <http://www.nytimes.com/2012/10/08/technology/patent-wars-among-tech-giants-can-stifle-competition.html?pagewanted=all&_r=0> accessed 5 December 2013

[77] ibid.

[78] ibid.

sought by Motorola in several European jurisdictions[79]. Thus, competition authorities went into applying competition rules against abusive injunctions.

In the US, the FTC has already taken a decision on this issue and obtained from Google to stop seeking injunctions against its competitors. The FTC condemned the practice of abusive injunctions not on the ground of Section 2 of the Sherman Act, but on the Ground of Section 5 of the Federal Trade Commission Act (15 USC §45) which prohibits 'unfair or deceptive acts of practices in or affecting commerce'. This difference may show that the FTC accepted that Section 2 was not an efficient legal basis to prohibit practices linked to the supply of SEPs.

In its Statement, the FTC summarized the effects of abusive injunctions on the standard-setting process:

> The threat of an injunction allows a SEP holder to demand and realize royalty payments reflecting the investments firms make to develop and implement the standard, rather than the economic value of the technology itself. In addition to harming incentives for the development of standard-compliant products, the threat of an injunction can also lead to excessive royalties that may be passed along to consumers in the form of higher prices. Alternatively, an injunction or exclusion order could ban the sale of important consumer products entirely.[80]

In the EU, the Commission expressed the same concerns as regards injunctions sought by standard essential patent holders against their competitors. For example, in the recent merger of Google and Motorola, the Commission emphasised the effects of injunctions on competition and for consumers:

> Depending on the circumstances, it may be that the threat of injunction, the seeking of an injunction or indeed the actual enforcement of an injunction granted against a good faith potential licensee, may significantly impede effective competition by, for example, forcing the potential licensee into agreeing to potentially

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[79] Commission, 'Antitrust: Commission opens proceedings against Motorola' (Press Release, 3 April 2012) IP/12/345, available at http://europa.eu/rapid/press-release_IP-12-345_en.htm accessed 5 December 2013

[80] In the Matter of Google Inc., Statement of the FTC [2013] FTC file 121-0120.

> onerous licensing terms which it would otherwise not have agreed to. These onerous terms may include, for example, a higher royalty than would otherwise have been agreed. Another concern would be that the SEP holder may force a holder of non-SEPs to cross-license those non-SEPs to it in return for a licence of the SEPs. To the extent that injunctions are actually enforced, this furthermore may have a direct negative effect on consumers if products are excluded from the market. Even if exclusion of competing products from the market through injunctions were to be temporary (i.e. there would be a delay only in access to the relevant products until the counter-party of the SEP holder agreed to the commercial terms demanded), in a fast-moving market such as the smart mobile device market, serious harm could potentially be caused by it.[81]

Recently, the EU Commission went further by starting investigations and sending statements of objections to companies which allegedly sought abusive injunctions in several European jurisdictions to prevent their competitors from using SEPs. On the 21st of December 2012, it sent a statement of objections to Samsung for seeking injunctive relief for the use of its SEPs related to the 3G UMTS standard.[82] On the 6th of May 2013, the Commission sent a statement of objection to Motorola[83] for similar practices.

This recent interest of competition authorities for abusive injunctions and the apparent unanimity on their negative effects on competition and prices must not hide the fact that a strict and burdensome legal framework has been built by the courts on this issue.

In the *Promedia* case, the General Court of the EU held that prohibiting injunctions was 'an exception to the general principle of access to the courts, which ensures the rule of law'.[84] Thus, it applied two cumulative

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[81]*Google/Motorola Mobility* (n 35) 107.

[82] Commission, 'Antitrust: Commission sends statement of Objections to Samsung on potential misuse of mobile phone standard-essential patents' (Press release, 21 December 2012) IP/12/1448, available at http://europa.eu/rapid/press-release_IP-12-1448_en.htm accessed 5 December 2013.

[83] Commission, 'Antitrust: Commission sends statement of Objections to Motorola Mobility on potential misuse of mobile phone standard-essential patents' (Press release, 6 may 2013) IP/13/406, available at http://europa.eu/rapid/press-release_IP-13-406_en.htm accessed 5 December 2013.

[84]Case T-111/96 *ITT Promedia NV v Commission* [1998] ECR II-2937, para 61.

criteria to find whether a legal proceeding can be deemed abusive on the ground of article 102 TFEU. To be abusive, a court action by a right holder:

- 'cannot reasonably be considered as an attempt to establish its rights and can therefore only serve to harass the opposite party' ,and must be
- 'conceived in the framework of a plan whose goal is to eliminate competition'.[85]

Even if the Court refused to rule on the correctness of these criteria, which were originally set up by the Commission, the Court applied it as if it had accepted it and these criteria should be accepted as the law.

These two criteria are very strict, and must be construed narrowly.[86] It is quite difficult for the Commission to prove that SEP holders don't want to establish their rights and aim at eliminating competition. However, in the context of standard setting, the fact that SEPs have to comply with FRAND commitments and refuse to do so may help to demonstrate a deliberate attempt to eliminate competition.

Where a commitment to an SSO has been made, the EU Commission may create a presumption of fraud and decide to prohibit injunctions *per se* under competition rules. In this case, the plaintiff would have to prove that it actually attempts to establish its rights and that it licenses its SEPs on FRAND terms. This approach would be close to the one followed by the FTC, and would be less burdensome for the staff of the Commission. However, the compliance of such a presumption with the criteria of the ECJ remains doubtful.

Hopefully, the results of the investigations of the Commission on the injunctions sought by Motorola and Samsung should bring more details on the extent to which competition rules can apply to abusive injunctions. It may also bring more information on the concept of FRAND and when a licensing term is compliant with FRAND or not. It seems that establishing a better definition of FRAND is necessary to find whether a patent holder acts abusively when seeking an injunction. That will be discussed in the next section of this article.

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[85]Ibid, 30.
[86]Ibid, 61.

IV. Defining FRAND to efficiently apply competition rules to standard-essential patents

SSOs focus on technical matters linked to the standard-process. However, they are usually not mandated to take part in commercial negotiations regarding cross-licences and licensing fees. The only rule is that standard-essential patent holders must license their patents on fair, reasonable, and non-discriminatory (FRAND) terms and conditions. Therefore, it is the SSOs' members which negotiate the contractual licensing terms, without any external intervention. Consequently, it is hard to find whether the negotiated terms are effectively FRAND.

This section focuses on the notion of FRAND and explains why the absence of definition limits antitrust intervention regarding SEP licensing obligations. Some attempts to define FRAND will also be presented, but the question of how to calculate FRAND is too complex and too large to be fully treated here. This issue could be in itself the topic of a separate article.

1. An undefined concept

In a large number of occasions, competition authorities and courts explained that one of the main antitrust concerns regarding standard-essential patents was the respect of FRAND commitments. Consecutively, there is an extensive antitrust activity as regards FRAND commitments, to control the behaviour of SEP holders and make sure that they do not hold up the standardisation process or threaten their competitors by filing abusive court actions.[87] Nevertheless, another issue is whether competition authorities have the ability to control directly the compliance of licensing terms negotiated between SSOs members with FRAND requirements.

FRAND terms are negotiated between the licensor and the licensee and are therefore contractual terms that correspond to the will of the parties and bind them. Competition authorities have the power to prohibit contracts that are contrary to antitrust principles (for example exclusivity contracts or discriminatory contracts). Therefore, the intervention of competition authorities should be possible to establish whether the negotiated terms are FRAND compliant or not. For instance, in the EU, the Commission could intervene on the ground of excessive pricing. However, until now there is no

[87] See above Section III.2(b).

example of direct intervention of the competition authorities on this matter.[88]

Competition authorities should be able to assess whether licensing terms are FRAND or not. In other words, a legal definition of FRAND should be given, to create legal certainty and allow an efficient control on licensing terms. This would also be useful, for instance, in the context of patent ambush to prove that ambushers sought unreasonable fees. As explained above, the mere fact of hiding the existence of a patent during the standard setting process is not in itself abusive. What is abusive is to adopt a lock-in strategy to then license standard-essential patents on unreasonable terms. In this context, giving a legal definition of FRAND terms may be useful.

However, until now, competition authorities or courts have given no definition of FRAND. In several occasions, the EU Commission investigated on companies which refused to license on FRAND terms and conditions. For instance, in 2007, the EU commission investigated on whether the American chipset manufacturer Qualcomm failed to license its SEPs on FRAND terms after its patents became essential to the WCDMA standard, used in mobile telecommunication.[89] However, the Commission stopped its investigations after the complainants withdrew their claims.

The most famous case regarding FRAND terms is certainly the *Microsoft* case. The EU Commission fined Microsoft for refusal to disclose and license on FRAND terms its technical specifications and patents that were necessary to interoperate with some of the network functions ('work group server operating systems') of its products. On appeal of the Commission's decision, the General Court of the EU held that in order to ensure interoperability with Microsoft's products, the Commission was right to oblige Microsoft to license its IPRs on FRAND terms, thus giving a confirmation that FRAND was a competition requirement under article 102 TFEU.[90] Then, after Microsoft accepted to license its specifications and patents, the Commission considered that Microsoft did not comply with the

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[88] In a press release, the Commission also announced its intention to examine whether Motorola "*offered unfair licensing conditions*" for its standard essential patents. See Commission, 'Antitrust: Commission opens proceedings against Motorola' (n 78).

[89] Commission 'Antitrust: Commission initiates formal proceedings against Qualcomm' (Press release, 1 October 2007) MEMO/07/389, available at http://europa.eu/rapid/press-release_MEMO-07-389_en.htm?locale=en, accessed 5 December 2013.

[90] *Microsoft I* (n 20), paras 808- 809.

FRAND requirement and ordered Microsoft to modify its licensing policy to comply with FRAND. However, neither the Commission nor the Court gave a more detailed explanation of what constitutes FRAND terms.[91]

The only indication given by the General Court in *Microsoft* is that FRAND terms are not necessarily the same for all patents or for all companies, even for the same technology. But does it mean that no definition of FRAND should be given? In any case, the broad terms used to describe this kind of commitment (no one can exactly state what 'fair and reasonable' mean) and the relative silence of competition authorities have led to uncertainty about the conditions under which essential patent holders should license their essential IP rights to be fully compliant with competition law.

2. Defining FRAND to create legal certainty

Even if there is no accepted competition law definition of FRAND terms, competition authorities and courts gave some guidelines in order to assess the compliance of licensing terms with FRAND requirements. Legal and economic doctrine also presented several theories in this respect, but it is uncertain whether these theories would be accepted in a competition law analysis.

a) Guidelines from competition authorities and courts

The EU Commission in particular gave its vision of FRAND without formally giving a binding legal definition. Its 2011 guidelines contain several examples of how FRAND terms should be determined:

> In case of a dispute, the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR. In general, there are various methods available to make this assessment. In principle, cost-based methods are not well adapted to this context because of the difficulty in assessing the costs attributable to the development of a particular

[91]Case T-167/08 *Microsoft v Commission* (27 June 2012) ('*Microsoft II'*). In this case, the Court dismissed the argument of Microsoft according to which the Commission failed to define what a reasonable rate was. The Court considered that, in this case, there was 'no need for that purpose for reasoning dealing specifically with the possibility of the Commission imposing a periodic penalty payment without first specifying a reasonable rate', para 100.

> patent or groups of patents. Instead, it may be possible to compare the licensing fees charged by the company in question for the relevant patents in a competitive environment before the industry has been locked into the standard (ex ante) with those charged after the industry has been locked in (ex post). This assumes that the comparison can be made in a consistent and reliable manner.
>
> Another method could be to obtain an independent expert assessment of the objective centrality and essentiality to the standard at issue of the relevant IPR portfolio. In an appropriate case, it may also be possible to refer to ex ante disclosures of licensing terms in the context of a specific standard-setting process. This also assumes that the comparison can be made in a consistent and reliable manner. The royalty rates charged for the same IPR in other comparable standards may also provide an indication for FRAND royalty rates. These guidelines do not seek to provide an exhaustive list of appropriate methods to assess whether the royalty fees are excessive.[92]

In the US, a court gave a list of criteria have been used as a basis to determine FRAND terms. In the *Georgia-Pacific* case, the Southern District of New-York listed fifteen criteria that should be taken into account to when calculating what is fair and reasonable for determining damages.[93] This non-exhaustive list is quite complete but the criteria are still hard to construe. However, this is the only case where a court gave its opinion in the topic. These fifteen factors are as follows:

- The level of the royalties paid by the licensee;
- The level of royalties paid by the licensee for other comparable patents;
- The scope and the nature of the licence, whether it is exclusive or not and whether there geographic restrictions or not;
- The licensor's policy as whether it seeks to maintain its monopoly of the technology or it licenses to other licensees;
- The relationship between the licensor and the licensee, especially whether they are competitors or not;
- The impact of the patented technology on the licensee's commercial activity, including whether the patented technology has an impact on the sales of other non-patented products;

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[92]2011 Commission's Guidelines (n 1) 289-290.
[93]*Georgia Pacific Corp v US Plywood Corp* [1970] 318 F Supp 1116, SDNY.

- The duration of the patent;
- The foreseen profitability and popularity of the products using the patent;
- The advantages of the patented products compared to other products used for similar activities or results;
- The nature of the invention covered by the patent;
- The extent to which the licensee uses the invention, whether the licensee just uses bits of the patented technology;
- The portion of the selling price of the marketed products or of the profit that come from the patented elements;
- The assessment of qualified experts;
- The rates that the licensor and the licensee would have agreed upon if they had reached an agreement in the absence of fraud.

Some of these criteria can only be assessed *ex post* and seem to be specially designed to calculate damages (the antepenultimate one for instance), whereas here the idea is to calculate what a reasonable licence is. However part of the doctrine agrees that these criteria could serve as a basis to determine reasonableness. For instance, Layne-Farrar, Padilla and Schmalensee consider that 'the majority of these factors are directly applicable to FRAND evaluations in a standard-setting context, especially for patents with a licensing history prior to their inclusion in a standard'.[94]

The advantage of these criteria is that they give clear rules as to the elements that should be taken into consideration by the competition authorities and the courts. In the EU, the ECJ often repeats that it just has a limited jurisdiction over the economic analyses made by the Commission. However, it is able to control whether the Commission made manifest errors in its analyses or if it took into account all the relevant information when taking a decision. In this context, such a list could be used by the European Courts to be sure that all the relevant factors have been analysed and thus create legal certainty.

b) Theories of FRAND

It is interesting to identify the different definitions of FRAND which have been proposed by lawyers or economists. Many authors contributed to the

[94] Layne-Farrar, Padilla, Schmalensee, 'Pricing Patents for Licensing in Standard Setting Organizations' (n 33).

creation of a standard and accurate method to calculate FRAND rates. Some of these found some echoes in antitrust decisions.

First, the numeric proportionality approach consists in pooling SEPs and then proportionally dividing licensing fees between SEP holders. Following this method, a fixed royalty rate is calculated for the standard. Then, the fees are divided between the SEP holders depending on their contribution to the standard. For example, a company which owns ten SEPs for a standard containing 100 SEPs will get 10% of the global fees. This approach, used in some licensing agreements, is however criticised because it does not take into account the fact that some SEPs may be more important than others in a standard.[95]

Secondly, one of the most important and respected work on the issue is Swanson and Baumol's study on the concept of reasonableness. In their paper, these economists held that 'the concept of a "reasonable" royalty for the purposes of FRAND licensing must be defined and implemented by reference to ex ante competition' and assumed that the *ex ante* level of fees should be determined through an 'auction-like process'.[96]

This definition of FRAND found an echo in decisions of competition authorities. The method proposed by the EU Commission in its 2011 guidelines to compare the *ex post* rate (cost of the patent after the industry is locked into the standard) with the *ex ante* rate (before the industry is locked into the standard) is directly taken from this study.[97] Similarly, in its decision against Rambus, the FTC applied the *ex ante* auction approach in calculating the licensing fees that Rambus may charge for its standard essential patents related to the SDRAM technology.[98, 99].

Finally, a simpler way to assess whether a FRAND commitment is respected could be to adopt a procedural definition of FRAND. Licensing terms would be FRAND compliant if they are freely negotiated after an

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[95] ibid.

[96]Daniel Swanson, William Baumol, 'Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power' (2005) 73(1) Antitrust Law Journal 51.

[97]2011 Commission's Guidelines (n 1) 289-290.

[98]*In the Matter of Rambus Inc* (n 52).

[99] More details about the *ex-ante* auction method are given by Damien Geradin, Anne Layne-Farrar and Jorge Padilla, 'Competing Away Market Power? An Economic Assessment of Ex Ante Auctions in Standard Setting' (2008) 4(2) European Competition Journal 443.

adequate patent disclosure. On the contrary, it would be to the SEP holder to prove that it licensed on FRAND terms if it sues its competitors or if a competitor complains. This presumption would work only if the SEP holder is bound by an SSO's IPR policy.

Whatever the 'best' method to define FRAND is, it should be borne in mind that FRAND may be calculated in different ways depending on the patents, the competitors and the market. As a commentator wrote, 'a one-size-fits-all laboratory solution to FRAND is simply not available'.[100]

V. Conclusion

This overview of the competition problems that influence standard-setting process has highlighted some fundamental points. It shows that competition authorities accept standardisation as a source of innovation that benefits to the consumer. Thus, in the last five years, they mainly focused on the practices which threaten the standardisation process, namely patent ambush and refusal to license standard-essential patents on FRAND terms.

To tackle these unilateral practices, competition authorities used anti-monopolisation rules. However, the application of these rules has proven to be difficult, for several reasons discussed above, and there is a debate about whether competition principles are the most adequate rules to prevent the attempts to block the standard-setting process.

Among the reasons why competition rules are not adapted is the absence of competition definition of FRAND licensing terms. FRAND is an IP as well as competition requirement, thus competition authorities should be able to control that licensing rates for standard-essential patents respect the FRAND requirement. This is why clear rules should be established about the procedure to negotiate FRAND terms (auction system for instance) and the calculation of FRAND terms (market oriented or cost oriented, for instance).

Moreover, some other tools may be used in order to repair the damages of anticompetitive behaviour. Contract law is one of these and is particularly efficient in the context of standardisation, because SSOs adopted IPR policies which bind their members. Competition authorities could also try to

[100] Mikko Valimaki, 'A Flexible Approach to RAND Licensing' (2008) 29(12) European Competition Law Review 686.

create per se prohibitions or presumptions which would lighten the burden of the proof. Another solution, which has not been tried, would be to adopt an *ex ante* control by SSOs or an *ad hoc* authority, instead of an *ex post* one based on court proceedings or action of the competition authorities.

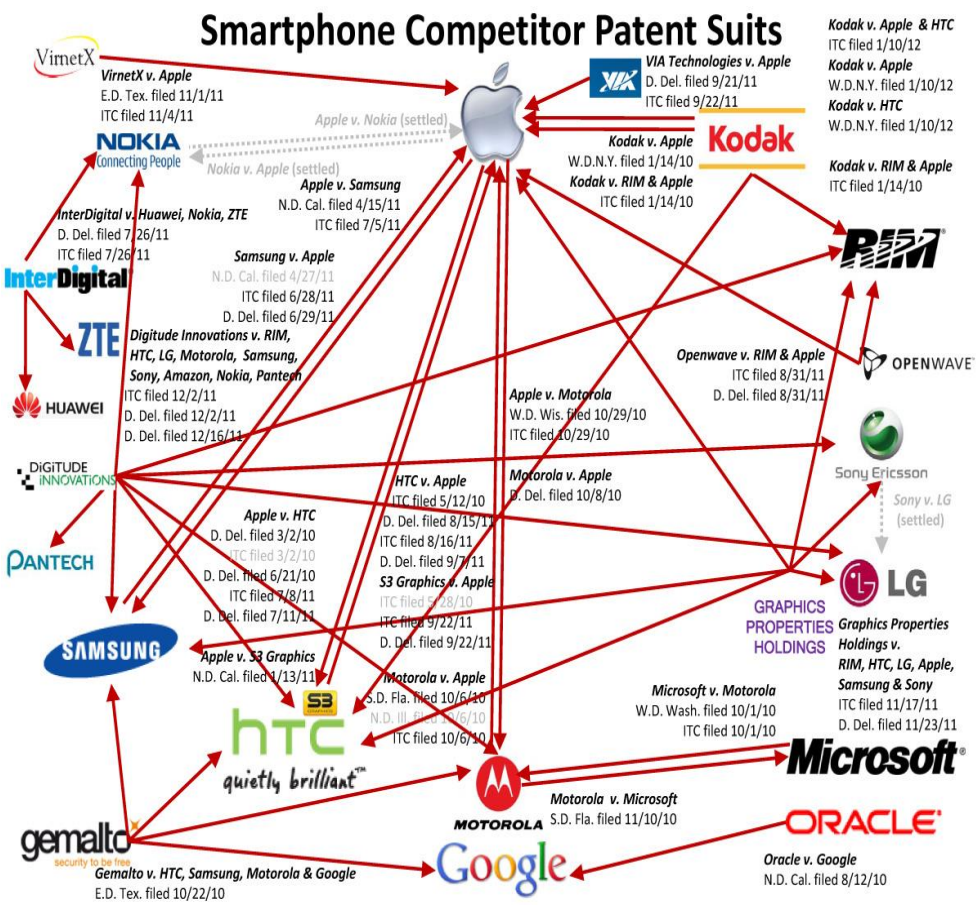
As proposed by an author, a kind of light regulatory system could be created, similar to the system designed in the EU for access to physical telecommunication networks (cables etc).[101] In this system, SEP holders would have the obligation to negotiate for access to their technologies. In the case negotiations fail, an authority or an SSO may force patent holders to license their standard-essential patents on FRAND terms under their control.[102] In this context, the definition of the concept of FRAND remains the heart of the problem.

[101]Parliament and Council directive (EC) 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities [2002] OJ EC L 108/7, articles 4, 5, 8 and 12.

[102]Kamiel Koelman, 'An Exception Standardisation: Do We Need an IP Exemption for Standards?' (2006) 37 International Review of Intellectual Property and Competition Law 823.

Annex 1

Figure 1: Smartphone patents law suits (It does not include 2013 law suits)



Source: Verizon, published by Forbes (Available at http://www.forbes.com/sites/adamthierer/2012/04/08/regulatory-anti-trust-and-disruptive-risks-threaten-apples-empire/)

Constitutional Traditions and Competition Law Regimes: A Primer

ANDRÉS PALACIOS LLERAS*

What is the connection between constitutional traditions and competition law regimes? This article compares the constitutional traditions of the US and Latin America to show how some of their most salient aspects influenced the development of their respective competition law regimes between the 1910s and the 1990s. In particular, it shows how constitutional doctrines regarding property rights and freedom of contract, and the role of governmental intervention in achieving development contributed to shaping the merits of different competition law regimes. The differences in how the US and Latin American traditions perceive the role of the State vis-a-vis property rights and competition, are useful for understanding particular aspects of competition law regimes. Hence, a comparative approach to the relations between constitutional traditions and competition law regimes can be useful to unveil key underlying ideas about competition law regimes and their particular institutions.

I. Introduction

What are the connections between constitutional traditions and competition law regimes? This article provides a preliminary answer to this broad question. Comparative competition law studies often emphasize how different factors, like the availability of well-trained professionals, shape how their enforcement takes place; competition law is not a stand-alone

legal regime.[1] However, we seldom ask ourselves how constitutional traditions shape competition law regimes and their enforcement.[2]

This article compares the constitutional traditions of the US and Latin America to show how some of their most salient aspects have influenced the development of their respective competition law regimes during their formative periods. In particular, it shows how constitutional doctrines regarding property rights and freedom of contract, and the role of governmental intervention in achieving development, contributed to shape different competition law regimes. Section II of this article describes two different constitutional traditions, protective and aspirational constitutionalism, and traces their intellectual origins in the political theories of John Locke and Jean Jacques Rousseau. These two categories are meant as ideal types, not actual representations of any particular constitution or its history. Section III provides examples of each of these traditions. US constitutional law stands for a good example of protective constitutionalism, while Latin American constitutionalism, as evidenced in the constitutions of México, Colombian and Chile, is a good example of aspirational constitutionalism. In characterising each of the constitutions of these countries as protective or aspirational, it is important to consider that they are not entirely protective or entirely aspirational. Each one of these constitutions is part of a tradition that has protective and aspirational elements, and the differences are more about which one of them becomes salient and which remains latent. Section IV then shows how certain protective constitutional ideas shaped US antitrust law, and compares it with how certain aspirational ideas prevented the full development of competition law in Latin America between the 1910s and the 1990s. Finally, section V offers some conclusions regarding the contingency of the relationships between constitutional law traditions and competition law regimes.

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[1] See for example William E Kovacic, 'Getting Started: Creating New Competition Policy Institutions In Transition Economies' (1997) 23 Brooklyn Journal of International Law 403.

[2] Our scarce knowledge about the relations between constitutional traditions and competition law regimes derives from the fact that in the world's most influential jurisdictions, the United States of America (US) and the European Union (EU), competition law is not strictly speaking a constitutional matter. In the US, competition law (known as antitrust law) appeared in 1890 with the enactment of the Sherman Act, a federal statute. In turn, EU competition law came to be through several regional agreements among western European states, like the European Coal and Steel Community of 1951, and therefore it is considered to be different from the constitutional law of the member states.

Before continuing, it is important to provide two caveats regarding the nature of the arguments sketched here. First, this text is not intended to offer an in-depth analysis of different constitutional traditions or their historical importance. Such analysis would be beyond its intended scope. It does intend, however, to show that particular constitutional ideas and structures were influential during certain moments of time, especially when there were political discussions about the proper role of government intervention *vis-à-vis* markets. Second, the Latin American tradition is not exhausted by the examples from México, Colombia and Chile presented here regarding the development of Latin American constitutional law or competition law. However, the examples of these countries are taken as indicative of the Latin American tradition, although it should be noted that there can be counterexamples that undermine the arguments presented here.

II. Protective and Aspirational Constitutionalism: Definitions and Intellectual Origins

Constitutions embody our normative commitments to build better societies in different ways. Some constitutions are conceived upon the idea that individuals have a series of pre-established rights and freedoms that merit special protection, not only from other individuals, but from their respective governments as well. These constitutions aim to build a better society based on protecting these rights and freedoms by limiting what other individuals and governments can lawfully do. They tend to follow from constitutional assemblies that aim to establish a new legal order based on a political reality that is already in place. Hence, these constitutions are based on 'fixing' in time an 'essence' about the members of the polity that is being constituted, or a series of ideals that are shared and that (supposedly) describes their social relations.[3]

Other constitutions, in turn, are conceived upon the idea that the rights and freedoms that citizens have are defined through the political processes that a community establishes for governing itself, and therefore express the general will of its constituents. The establishment and definition of rights and duties is a political process that involves deliberation and representation

[3] Mauricio Garcia Villegas, 'Law as Hope: Constitution And Social Change In Latin America' (2002) 20 Wis. International Law Journal 353, 353–355; Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models' (2003) 1 International Journal of Constitutional Law 296.

of different views about how society ought to be organized. This type of constitutions usually follow from assemblies that view constitutionalism as a manifestation of a society's will to transform their political relations by establishing new rules about how their future government will be.[4] Their assemblies embody a desire to transform social relations, and as such can embody the promise of beginning from a 'clean slate' or as a rejection of past practices considered as mistaken. For our purposes, we will refer to the idea of conceiving constitutions as protecting pre-established rights and freedoms as *protective constitutionalism*, and will refer to the idea of conceiving constitutions as enabling social transformation through political participation as *aspirational constitutionalism*.[5]

Distinguishing between protective and aspirational constitutional traditions is an exercise that goes beyond the text of the constitutions themselves and that focuses on the political and social contexts that enable this interpretation to take place. While constitutional interpretation can seem straightforward, distinguishing a protective constitutional practice from an aspirational one depends ultimately on their implementation. This is of particular importance because constitutional interpretation changes over time and what might be considered as constitutionally required today may not have been so in the past nor may continue to be so in the future. Just as well, it is important to consider that certain constitutions may not be internally coherent, since certain parts or chapters may result from protective goals, while others may result from aspirational ones. Ultimately, the possibility of incoherence may result from several factors that include the process that led to the constitutional text, the composition and proceedings of the constitutional assemblies, and the amendment processes. Because of these factors, one can hardly expect that a particular constitution is entirely protective or aspirational, and it seems more reasonable to expect that the protective and aspirational strands alternate their preeminence over time. Hence, the

[4] ibid, 299: 'Aspirational Constitutionalism refers to a process of constitution building (a process that includes both drafting and interpretation by multiple actors) in which constitutional decision makers understand what they are doing in terms of goals that they want to achieve and aspirations that they want to live up to. It is a fundamentally forward-looking viewpoint.'

[5] Garcia Villegas (n 6) 353 – 55.

categories of protective and aspirational constitutionalism refer more to ideal types than to the constitutional practice of a given jurisdiction.[6]

Private property rights and freedom of contract occupy a prominent place in protective constitutionalism. This is so because this view considers that they antecede the establishment of a government, and also that government should be limited precisely to avoid undue interference. In turn, aspirational constitutionalism considers that these rights result from the political processes that constitute a government in the first place, and therefore they reflect the general will of the polity. Other negative rights and freedoms, like the right to exercise one's own religion or to express our own views freely, occupy a prominent place as well in both theories. In turn, social and economic rights, like the right to medical assistance or the right to housing, are not formally recognized or are enforced actively in protective constitutional regimes, but may be formally recognized and actively enforced in aspirational constitutional regimes.[7] This difference does not mean, however, that positive rights are unknown in protective constitutions. The difference is not just about the formal recognition of certain rights, but also includes the theories that justify their acknowledgement and enforcement in the first place. In other words, it is more a difference between different rationales for why they are constitutionally protected as well as between how this protection takes place.

The differences in rationale point to the origins of protective and aspirational constitutional traditions, which can be traced back to the prevalent political theories of the 17th and 18th centuries in Europe and the United Kingdom. While each of these constitutional traditions has elements that reflect the influence of different authors and schools of thought, we also evidence the influence of two particular authors, John Locke and Jean Jacques Rousseau. Locke's 'Essay Concerning the True Original, Extent and End of Civil Government' was particularly influential for the development of protective constitutionalism. In this text, Locke argued that individuals in the state of nature are roughly equal and their relations are harmonious, to the extent that they undergo mutually beneficial exchanges of goods and

[6] For a useful discussion and a related typology, see Gunter Frakenberg. 'Comparative Constitutional Law' In Mauro Bussani and Ugo Mattei (eds.) *The Cambridge Companion to Comparative Law* (CUP 2012) 178 – 182.
[7] Garcia Villegas (n 6) 356 – 357.

services to satisfy their needs.[8] Property results from efforts to transform and produce the fruits of the land, and as such follows from the rational actions of individuals.[9] However, they also face the threats of those who behave outside the law of nature and threaten the life, liberty and property of others; hence a civil government resulting from an agreement by all individuals in this state of nature is required to face and punish such threats.[10] At the core of this view of the government lies the consent of the governed, which retain the right to challenge the legitimacy of government if it becomes tyrannical and threatens the rights and freedoms of its constituents.[11] Hence, for Locke the rights stemming from private property and mutual consent antecede the establishment of government, and their protection justifies acts of civil disobedience.

Rousseau viewed the relations between individuals and between them and the State in a different way. To begin with, Rousseau argued that the relations between men in a state of nature were amoral, in the sense of escaping any judgments about their correctness, a judgment which can only be advanced once there is a social agreement about what is acceptable or not.[12] As a result, he did not conceive individual rights, and especially property rights, as pre-existing civil government, because the recognition of such rights entails a notion of correctness.[13] When individuals decide to bond and form a government, they aim to substitute the might resulting from force with the right resulting from common understandings. However, in order to do so they must surrender completely to the political body they will be part of – Rousseau uses the word 'alienate' – knowing that as all the individuals do so, none of them continues to be a threat to each other's life.[14] Citizens acting collectively become sovereign, and their decisions – the 'general will' – should lead to the 'common good' of society.[15] An individual acting out of selfishness against the general will could be

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[8] John Locke, *Essay Concerning the True Original, Extent and End of Civil Government* (first published 1691, Rivington 1824, volume 4) 339 – 342.
[9] ibid, 352 – 354.
[10] ibid, 394 – 411.
[11] ibid 464 – 471.
[12]Jean Jacques Rousseau, *The Social Contract or Principles of Political Right*. (First published 1762, JM Dent 1913; Translation by GDH Cole) 9 'Since no man has a natural authority over his fellow, and force creates no right, we must conclude that conventions form the basis of all legitimate authority among men.'
[13] ibid 19 - 22.
[14] ibid 14 – 16.
[15] ibid.

legitimately punished by force because the law has a moral dimension that justifies punishing departures from it; individuals could be 'forced to be free'.[16] Moreover, for Rousseau inequality is more related with the laws adopted by a society than a consequence of the dynamics between men in their state of nature.[17]

Notably, Locke and Rousseau were highly influential authors among the leaders of the independence revolutions that took place in the American continent. However, even then there was a clear predisposition towards these authors that fell along the lines drawn by the cultural legacies of the colonies. In part this may be due to the fact that by the time that Rousseau's ideas became more influential in the American continent (just after the French Revolution), the former English colonies had already identified themselves with the political tradition that followed Locke's ideas. In fact, not only was Locke's political theory highly influential among the 'Founding Fathers', he also drafted the Constitution of the State of Carolina.[18] The former Spanish colonies, in turn, revolted against Spanish institutions and adopted their French counterparts, thus embracing different ideas about government, including those of Rousseau.[19]

III. From Constitutional Theories to Institutions

1. US Constitutionalism as Protective Constitutionalism

The Lockean idea of conceiving property rights as a limitation to lawful government appears early in American constitutionalism. It can be evidenced in the 1776 Declaration of Independence, the discussions

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[16] ibid 16 – 18.

[17] Jean Jacques Rousseau. *A Discourse On A Subject Proposed By The Academy Of Dijon: What Is The Origin Of Inequality Among Men, And Is It Authorised By Natural Law?* (First published 1754, Project Gutenberg 2004) Note the conclusion that Rousseau presents: 'I have endeavored to trace the origin and progress of inequality, and the institution and abuse of political societies, as far as these are capable of being deduced from the nature of man merely by the light of reason (…) It follows from this survey that, as there is hardly any inequality in the state of nature, all the inequality which now prevails owes its strength and growth to the development of our faculties and the advance of the human mind, and becomes at last permanent and legitimate by the establishment of property and laws.'

[18] They recognized so explicitly on the documents that led to the founding of the University of Virginia and specifically on the course on the US Constitution at that university. See, J David Gowdy, *Thomas Jefferson & James Madison's Guide To Understanding And Teaching The Constitution*. (2nd edn, The Washington, Jefferson & Madison Institute 2011).

[19] JR Spells 'Rousseau in Spanish America' (1935) 15 Hispanic Am Hist Rev 260.

surrounding the ratification processes of the 1787 Constitution, and the constitutional text itself.

To begin with, the connection between Lockean ideas about government and the Declaration is quite straightforward. The Declaration states that all men are created equal and that they are endowed with inalienable rights; that in order to protect these rights men consent to the governments they agree to create, and that any form of government that endangers these rights can be modified or abolished by their citizens.[20] Such a view was revolutionary on many accounts, not the least because it provided legitimacy to the American Revolution.

After the War of Independence, there was a growing awareness that the Articles of the Confederation, also from 1776, were not adequate for governing inter-state matters effectively. The political discussions that followed their amendment led to the 1787 Constitution of the United States.[21] The ratification process of the newly adopted Constitution led to important discussions about the proper role of government *vis-a-vis* individual rights and freedoms. In The Federalist No. 10, for example, James Madison argued in favour of the creation of a republic as detailed by the recently approved Constitution because its structure was much more effective in curbing rival interests than alternative forms of government. Rather than considering the possibility that property rights result from political participation, Madison was concerned with preventing factions from imposing limits on these rights and other interests via governmental action.[22] Hence, he considered that 'The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle

[20] United States of America. Declaration of Independence, July 4 of 1776. The text is the following: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government (…).'

[21] See Bruce Ackerman & Neal Katyal, 'Our Unconventional Founding' (1995) 62 University of Chicago Law Review 475.

[22] James Madison, 'The Federalist No. 10' In John Jay, Alexander Hamilton and James Madison (eds). *The Federalist* (first published in 1788, Liberty Fund 2001).

to a uniformity of interests. The protection of these faculties is the first object of government.'[23]

The concern that government would place undue limits to individuals rights can be appreciated in the substantive content of several of its provisions, including those of the Bill of Rights, as well as in the allocation of law-making authority among the different branches of power created by the Constitution. Regarding the substantive provisions, section 10 of Article 1 of the Constitution states that 'No State shall (…) pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts', a provision meant to prevent States from altering pre-existing contractual obligations to their advantage – a common practice before the Constitution was adopted.[24] Just as well, the 5th Amendment establishes that 'No person shall (…) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.' These provisions, however, were less important than the overall architecture of government and the allocation of law-making authority. For example, section 8 of article 1 of the Constitution establishes that the scope of the laws passed by the Federal Congress was delimitated to subjects that require interstate coordination, and section 3, known as the 'commerce clause', refers to the regulation of interstate commerce.[25] In turn, the 10th amendment establishes that the States retain those powers that the Constitution does not allocate to the Federal government and that are not prohibited explicitly.[26]

Both the substantive provisions and the institutional architecture established by the US Constitution with the purpose of protecting property rights and other related freedoms were transformed with the adoption of the 13th and 14th Amendments after the Civil War. In particular, the 14th Amendment is considered to be about civil or economic rights, and especially property rights and freedom of contract.[27] Section 1 of this Amendment states that '(…) nor shall any State deprive any person of life, liberty, or property,

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[23] ibid 43.

[24] See Robert Hale, 'Some Basic Constitutional Rights of Economic Significance' (1951) 51 Col L Rev 271, 278.

[25] The Constitution of the United States of America. Article II section 8, clause 3.

[26] ibid, 10th Amendment. The texts is as follows: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

[27] Herbert Hovenkamp 'The Political Economy of Substantive Due Process' (1988) 40 Stanford Law Review 370, 394 – 396.

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' The Supreme Court relied on The Due Process clause of article 5 and the 14th Amendment, the commerce clause, and article 10 of the Constitution in order to review the constitutionality of both federal and state-based regulation. However, the Court's interpretation of these provisions has changed in important ways over time. Between the 1870s and the 1930s the Court held that Federal regulation that restricted the entitlements established in the common law of the different States went beyond the constitutional powers vested in the Federal Congress.[28] Moreover, States did not have the prerogative to change common law entitlements either, because doing so would imply trespassing over the individual's property rights and freedom of contract.[29] A good example of this interpretation of the Constitution can be found in the 1906 decision *Lochner v New York*, in which the Supreme Court declared that a New York State law that limited the maximum hours that bakers could work was unconstitutional because it deprived them of their freedom of contract.[30]

In the late 1930s, and as a result of dire political pressure, the Supreme Court adopted a more liberal interpretation of the Constitution. It considered that while the Constitution certainly grants the States the prerogative to maintain common law entitlements, their exercise cannot affect commercial matters that go beyond State limits, even if doing so has intra-state consequences.[31] Furthermore, the States can modify the common law entitlements when doing so is done under the 'police powers' that they have in order to guarantee public safety and other similar goals.[32] For around sixty years the Supreme Court upheld all the Federal legislation challenged before it until the mid-1990s, when it struck down two federal laws that were enacted under section 8 of article 11 of the Constitution.[33] The adoption of the common law entitlements as the basis for addressing the

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[28] See *United States v EC Knight* 156 US 1 (1895) (Holding that the Sherman Act could not reach a monopoly that was organized with the boundaries of a single state).
[29] *Lochner v New York* 198 US 45 (1906) .
[30] ibid.
[31] *NLRB v Jones & Laughlin Steel Corp* 301 US 1 (1937) (Upholding a national labor legislation because of its effects on commerce).
[32] *West Coast Hotel v Parish* 300 US (1937) (Upholding a State legislation that imposed minimum wages for women).
[33] *United States v Lopez* 514 US 549 (1995) (Holding that the Gun-Free School Zones Act of 1990 exceeded the commerce clause) and *United States v Morrison* 529 US 598 (2000) (Holding that Violence Against Women Act relates to non-economic activity).

extent to which Federal legislations is unconstitutional was very important for the development of several fields of law,[34] antitrust among them.

This quick glance of US constitutionalism shows why it can be considered an example of the protective type. However, it is also important to consider that during particular periods of time US constitutionalism has adopted ideas that are closer to those of aspirational constitutionalism. A particular decision that was significant for this change in constitutional interpretation was *West Coast Hotel V Parish*, in which the Supreme Court upheld a Washington State law that established minimum wages for women. In this decision, the Court challenged resorting to common law entitlements as a way of determining the constitutionality of a law.[35] Notably, recognition of the constitutionality of reforms regarding minimum wages and other similar social programs led to the establishment of a 'new property' composed by entitlements established in both federal and state regulations. These entitlements resulted from political processes established by the Constitution or acknowledged by it, and therefore can be placed along the lines of aspirational constitutional theory.[36] Moreover, the legacy of President Roosevelt's New Deal and the advent of the modern administrative government in the US marked an important change in the US constitutional tradition.[37]

2. Latin American Constitutionalism as Aspirational Constitutionalism

Just as US constitutionalism is a good example of protective constitutionalism, 20th century Latin American constitutionalism, exemplified in the constitutions of México, Colombia and Chile, stands as a good example of aspirational constitutionalism.[38] However, in order to

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[34]Cass R Sunstein, 'Constitutionalism After the New Deal' (1988) 101 Harvard Law Review 421.

[35] *West Coast Hotel v Parish* 300 US (1937) (Upholding a State legislation that imposed minimum wages for women).

[36] For a general view, see Charles Reich, 'The New Property' (1964) 73 Yale Law Journal 733.

[37] See Robert L Rabin, 'Federal regulation in historical perspective' (1986) Stanford Law Review 1189.

[38] One of the particular difficulties of grouping the constitutions of different Latin American states under the heading of 'Latin American constitutionalism' is that doing so is a process that tends to generalize particular traits while foreclosing others that may be different and politically significant in their own jurisdiction. Because there is considerable diversity within Latin American constitutionalism regarding their intellectual baggage and day-to-day practice, this sub-section will touch mostly on influences that are common to all

understand why this is so, it is important to consider briefly the development of the interplay between protective and aspirational traits that took place during the 19th century.

The French Revolution of 1789 provided the Spanish colonies in Latin America with important ideas about law and government that legitimised the wars of independence that were fought shortly after. Among them were Rousseau's influential ideas about popular sovereignty.[39] However, these ideas became under increasing attack by both conservative factions, which embraced elitist ideas about governments and moral perfectionism through religion, as well as by liberals, who feared that they fueled 'radical' politics that would eventually obliterate individual rights. As these ideas were transformed into constitutional institutions, the emerging landscape was a constitutionalism that blended ideas about almost absolute property rights and popular sovereignty, bicameral parliaments and a strong executive branch, and a judiciary with relatively weak powers. By the end of the 19th century, Latin American constitutionalism was more conservative and liberal than egalitarian or 'radical'.[40]

During the same period of time, the Constitutions of México, Colombia and Chile established explicitly that property rights acquired according to the laws had to be respected by the government and could not be affected by later legislative enactments. The constitutional protection of property rights raised the symbolic importance of the civil codes, which were considered to embody the most important aspects of French and German private law.[41] Moreover, the civil codes were considered to be the only necessary body of law required to regulate the relations between citizens, as they covered topics that ranged from family law to contracts and torts. Beginning with the Civil Code of Oaxaca (Mexico), promulgated between 1827 and 1829, Latin American governments of different political affiliations adopted civil codes

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of them, knowing that such generalizations can be to some extent unmerited, even if what they reveal is useful for understanding larger patterns of legal and social change.

[39] Spells (n 22). Also Maria del Carmen Borrego Plá & Leopoldo Zea, *America Latina ante la Revolución Francesa* (UNAM 1993).

[40] Roberto Gargarella, 'The Constitution of Inequality: Constitutionalism in the Americas 1776–1860' (2005) 3 International Journal of Constitutional Law 1. Also Roberto Gargarella, 'Towards A Typology Of Latin American Constitutionalism 1810–60' (2004) 39 Latin American Research Review 141.

[41] Matthew C Mirow, 'The Code Napoleon: Buried But Ruling in Latin America' (2005) 33 Denver Journal of International Law & Policy 179, 183.

of their own until the early 20th century.[42] Their adoption was convenient from different perspectives. On the one hand, the original 1804 *Code Civil* adopted by Napoleon addressed the core subjects of private law, and adopting it entirely (albeit minor changes) was much more convenient than to enact piecemeal legislation to address all the issues covered by it.[43] On the other hand, the local elites identified themselves closely not with Spain but with France and its institutions, and they viewed the *Code Civil* as being better suited for the conditions that the former colonies faced at the time.[44] Following the example of the *Code*, the civil codes enacted in Latin America established private law regimes dealing with property rights and freedom of contract. They also included provisions regarding conflict of laws and the hierarchy of other legal rules *vis-a-vis* the codes themselves which placed them in a predominant position.[45] Because of their cultural importance, they became the 'protective' counterpart to the 'aspirational' constitutional changes that were to take place in the coming decades.

In spite of the diversity that can be appreciated during this period, presidentialism became a common trait among the different constitutional regimes of the time.[46] The importance of strong executive branches among Latin American countries can be appreciated in the role that executive decrees and administrative agencies had during the 20th century in the development and implementation of economic regulation. One of the keenest adherents to presidentialism was Simon Bolivar, who fought for and contributed to the independence of several South American countries. Bolivar revealed his views on presidentialism when criticizing the 1811 Venezuelan Constitution, which he considered weak because it divided the executive branch into three main offices.[47] Throughout the 19th century, different Latin American constitutions endowed the office of the President with the capacity to dictate laws during special emergencies and other

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[42] Bolivia (1831), Costa Rica (1841) Republica Dominicana (1845), Chile (1855) Venezuela (1862) Uruguay (1868) Argentina (1869) México (1870, 1928) Colombia (1873, 1887).

[43] Mirow, 'The Code Napoleon' (n 44) 182.

[44] ibid 183.

[45] See, with a special reference to Colombia, Mauricio Garcia Villegas, 'Apuntes sobre codificación y costumbre en la historia del derecho colombiano' (2005) 4 Opinión Jurídica 53.

[46] Miguel Schor, 'Constitutionalism Through the Looking Glass of Latin America'(2006) 41 Texas International Law Journal 1, 21.

[47] Gargarella, 'The Constitution of Inequality (n 40) 5, 10.

qualified legislative powers.[48] Also, the laws approved by the congresses of several Latin American countries enabled the President to name the directors of administrative agencies and to regulate through ordinary decrees particular aspects of their operations. These prerogatives have been used since then to promulgate particular rules that regulate economic activities and coordinate the participation of private actors in these activities.[49] In particular, this institutional trait will become very important for the development of competition law regimes across Latin America.

The political revolutions that took place between the late 19th century and the early 20th century challenged the predominance of the institutions that enshrined property rights and the special place of the civil codes across Latin America. It is during this period that the aspirational ideas regained momentum and were translated into constitutional provisions that remain valid today. Beginning with the Mexican revolution against the rule of Porfirio Diaz (1876 – 1910), these movements challenged the political and economic status quo and the legal protection they received. The Mexican Constitution of 1917, with its emphasis on popular sovereignty and state-oriented management of resources, was meant to charter the development of the Mexican State by providing a common ground based on the compromise of antagonistic social interests. Overall, the intellectual foundations of the new constitution have been described as 'democratic socialism' with nationalist undertones.[50]

Articles 27 and 28 of the 1917 Constitution are of particular interest because they deal with property rights and competition concerns explicitly. The original text of article 27 stated that the Nation could limit property rights in the name of the 'public interest' and regulate privately held natural resources in order to distribute wealth fairly and ensure the preservation of

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[48] See Jose Antonio Cheibub, Zachary Elkins and Tom Ginsburg, 'Latin American Presidentialism in Comparative and Historical Perspective' (2011) 89 Texas Law Review 1.
[49] See in general Albert Fishlow 'The Latin American State' (1990) 4 Journal of Economic Perspectives 61; Howard J Wiarda, 'Law and Political Development in Latin America: Toward a Framework for Analysis' (1971) 19 American Journal of Comparative Law 434. Regarding the Colombian case, Diego Eduardo López Medina, 'El Sueño Weberiano: Claves Para Una Comprensión Constitucional De La Estructura Administrativa Del Estado Colombiano'. (2006) 19 Revista de Derecho Público 1.
[50] Raymond Duncan, 'The Mexican Constitution Of 1917: Its Political And Social Background' (1963) 5 International American Law Review 277.

the latter.[51] In the years to follow this article was modified several times to justify massive land reform programs and industrial expropriation processes.[52] In turn, article 28 explicitly forbids monopolies and anticompetitive practices that we identify today with abuses of dominance.[53] Moreover, the prohibitions included in this article framed monopolies and abuses of dominance as practices that were fundamentally unfair and exploitative. These two articles constitute an excellent example of the way property right and competition law concerns are framed in the tradition of aspirational constitutionalism.

A similar change occurred in Chile with the drafting of the 1925 Constitution. Section 10 of article 10 of this Constitution establishes that no individual shall be deprived of their property rights without due process of law, or unless it is required for achieving a public purpose as defined by the law, in which case the owner is entitled to compensation.[54] Following this, it states that property rights are subject to 'public utility' limitations required for maintaining and achieving social order, and therefore the law may impose restrictions 'in favour of the interests of the State, the health of the citizens and the public well-being'.[55] The notion of subduing private property to these 'public interests' resulted from the discussions that took place in the 1925 constitutional assembly chaired by President Arturo Alessandri.[56] Within the assembly, members of the Radical Party argued that property rights could not be absolute, and that they should fulfill a 'social function', while members of the Liberal-Moderate and Conservative parties defended notions of property rights that were closer to the protective tradition. As the discussions ensued, President Alessandri proposed a draft of article 10 that appeased the contending parties. While the protective formulation of property rights was maintained, the idea of limiting them in the name of 'public well-being' was also included as a way of showing that Chilean constitutionalism was keeping up with the social changes of the

[51] Constitución Política de los Estados Méxicanos, Art 27. Article 14 also states that no individual may be deprived of his liberty, his possessions or his property without a trial before tribunals previously established, in which the essential formalities of the procedures are met and following laws adopted before the facts tried.
[52] For an interesting account, see Luis J Creel, 'Mexicanization: A Case of Creeping Expropriation' (1968) 22 Southwestern Law Journal 281.
[53] Constitución Federal de los Estados Méxicanos de 1917, Art 28.
[54] Constitucion Politica De La Republica De Chile, Art 10.
[55] ibid.
[56] President Alessandri resumed his first presidential term in 1925 after two military interventions, one to oust him of office and other to reinstate him in it.

time.[57] Underlying this was the intellectual influence of René Duguit, whom Alessandri quoted often while explaining the text he proposed. Eventually, the notion of the 'social function' of property embedded in this article was used for wide-ranging land reform and industrial development programs throughout the 20th century.[58]

A similar trend to limit property rights in the name of the 'public interest' is also appreciated in Colombian constitutionalism. However, the adoption of this view resulted from a different political logic than that of México and Chile; it was not preceded by revolutionary upheavals or by disruptive interventions in political affairs. Instead, it took place mostly because the Liberal Party government elected in 1934 considered that the 1886 Constitution protected property rights in such a way that it was too individualistic and therefore obtrusive to mayor social reforms.

When presenting the text of the constitutional amendment to Congress in 1935, president Alfonso López Pumarejo both emphasized that property rights should be guaranteed and that their exercise should be understood in terms of the 'social function' that they should fulfill. The proposed text establishes a protective clause, according to which lawfully acquired property rights cannot be modified or curtailed by later legislation, and that when a law based on 'public utility'' or social interests conflicted with private rights, the private interest will cede before the public or social interest. And added: 'Property is a social function that brings about duties'. [59] In 1936 the Colombian congress promulgated the proposed amendment, and it became the cornerstone of the land reform policies that President López began to implement.[60] The amendments of 1945 and 1968 further entrenched these ideas and established the notion that the State directs the nation's economic activities.[61]

Beyond the local political shifts that led to new constitutions, as in Mexico and Chile, or to important amendments to established constitutions, as in

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[57] Mathew C Mirow, 'Origins of the Social Function of Property in Chile' (2011) 80 Fordham Law Review 1183, 1201 - 05.
[58] ibid 1205 – 14.
[59] Republica de Colombia, Acto Legislativo 01 of 1936, Diario Oficial No 23.263 de Agosto 22 de 1936.
[60] Daniel Bonilla, 'Liberalism and Property in Colombia: Property as a Right and Property as a Social Function' (2011) 80 Fordham Law Review 1135.
[61] ibid, 1149 – 59.

Colombia, lies a deeper current of change regarding how law was understood. This change can be appreciated in the impact that authors like León Duguit had in legal theory during the first half of the 20th century. Duguit gave a series of conferences in Argentina in 1911 in which he presented his work 'General Transformations of Private Law Since the Code Napoléon'; it was there that he asserted that 'property is not a right; it is a social function.'[62] His work was part of a current of antiformalist legal thought that revolted against the individualism embedded in the 1804 French *Code Civil*. This movement viewed law as a means to social transformation, as opposed to universalist or ahistorical views about law and rights present in natural law (as in social contract theory).[63] While this movement originated in Europe it acquired a particular significance in Latin America that it didn't have in its original context.[64] In particular, Duguit was very careful in distinguishing his ideas from socialist theories of law; by claiming that property rights were a 'social function' he was not aiming to present a new theory of how these rights should be, but rather proposing an analytical framework for understanding the social transformations he witnessed.[65] However, his theory was used in Chile and Colombia as a justification for the implementation of large-scale reforms regarding the use of land and industrial development.[66]

The reception of the work of Duguit meant an intellectual break with the prevailing views about private law and property rights in Latin America and became part of administrative law theories concerning the role of the State in economic affairs. Rather than considering the State as necessary for the protection of pre-existing rights, the Latin American constitutional tradition developed the view that the State should take an active role in the definition of a common social project, namely, the development of the nation.[67] Such a

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[62] Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* (2d ed. 1920) 21. Quoted in: Matthew C Mirow, 'The Social-Obligation Norm of Property: Duguit, Hayem, and Others' (2010) 22 Florida Journal of International Law 191.

[63] See Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' In: David M. Trubek, and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal*. (CUP 2006).

[64] An excellent explanation of this phenomenon can be found in Diego E López Medina. *Teoría Impura Del Derecho. La Transformación De La Cultura Jurídica Latinoamericana*. (Universidad de los Andes, Legis & Universidad Nacional de Colombia 2004).

[65] Mirow, 'Origins' (n 59) 1192.

[66] Regarding Chile, see ibid. Regarding Colombia, see Bonilla, 'Liberalism and Property' (n 62).

[67] Schor, 'Constituionalism' (n 49).

task, however, implies an institutional allocation of law-making authority that contrasts with that of US constitutionalism. The Latin American states attempted to incorporate the interests of different social groups – labor, industrialists, the military, the Catholic Church and others – by creating special regulatory spaces through which their conflicts can be mediated. As Howard Wiarda points out, there is a general affinity between the 'social function' theory of property rights and corporativism (as a theory of government).[68] Because the state embodies the interest of the whole society, it can confiscate, expropriate or curb severely the exercise of an individual's property rights in order to obtain the common good. In doing so, the state acts as an arbiter between competing claims to resources posited by different actors in order to accommodate and prevent conflicts rather than to foster disorder.[69] As the next chapter will show, the corporativist structure of the Latin American state is key for understanding the development of competition law regimes in this region.

IV. How Constitutional Ideas and Structures shaped US Antitrust and Competition Law in Latin America

1. US Antitrust Law and the Imprint of the Lochner Era.

As mentioned before, by the end of the 19th century the Supreme Court interpreted the Constitution and the 14th amendment in a narrow way, condemning both federal and state-level regulations that altered the property rights as defined by the common law of the time.[70] A similar doctrinal process took place during the formative years of antitrust law.

The antitrust decisions adopted by the Supreme Court between 1890 and 1911 show a gradual evolution towards an interpretation of the Sherman Act that highlighted its common law elements while downplaying other important elements.[71] This process was not smooth, for the Act's text is not

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[68] Corporativism can also be a political theory (and not a fact, as Schmitter describes it) according to which the government should incorporate and accommodate different conflicting interest present in society in order to avert unnecessary conflict. See Wiarda, 'Law and Political Development' (n 52) 446 – 447.

[69] ibid, 446. It seems, however, the in making this connection Wiarda is also assuming that Duguit had an agenda for social change when he presented his concept of social function of property, rather than merely describing the changes of the exercise of these rights.

[70] Cass R Sunstein, 'Lochner's Legacy' (1987) 87 Columbia Law Review 873.

[71] Among the most important of these decisions are: *Trans-Missouri Freight Association* 166 US 290 (1897), *United States v Joint Traffic Association*, 171 US 505 (1898),

entirely a reinstatement of the common law doctrine of restraints of trade. On the one hand, its wording is deferential to the common law, and the enforcement structure it established is adjudicatory and adversarial, and therefore its development depends on cases being brought before courts. On the other hand, the Sherman Act differed in important aspects from the common law. To begin with, while the common law established that agreements in restraint of trade were unenforceable, the Act considers them a criminal offense, subject to fines and imprisonment. Furthermore, the Act establishes a remedy under federal jurisdiction for the victims of the alleged conducts; in doing so, it implicitly acknowledges that the anticompetitive behaviours that occur in markets are not self-correcting, at least in the short term. Also, the sanctions enabled governmental intervention through enforcement as a way to improve the outcomes resulting from market forces. Because of these innovations, the Sherman Act can be better understood as a compromise between different views about markets and the role of governmental intervention than as simply a federal reinstatement of the common law.[72]

The decisions that settled how the Sherman Act should be interpreted were *Standard Oil Co of New Jersey v United States* and its companion case *American Tobacco*.[73] Justice White, who had dissented in past decisions, wrote for the majority that the language of the Sherman Act requires the exercise of judgment in order to differentiate between reasonable and unreasonable restraints of trade. The Act '(…) called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated.' [74] Such an exercise was the 'standard of reason' as developed in the common law and 'was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided'.[75]

Addystone Pipe & Steel Co v United States, 175 US 211 (1899), and *Northern Securities Co v United States*, 193 US 197 (1904).

[72] See William H Page, 'Ideological Conflict and the Origins of Antitrust Policy' (1991) 66 Tulane Law Review 1, 37.

[73] *Standard Oil Co of New Jersey v United States*, 221 US 1 (1911).

[74] ibid 60.

[75] ibid. It is important to note the affinity between this idea and *Lochner* especially the idea that the common law could be takes as a legitimate baseline for assessing private

The *Standard Oil* decision can be properly understood as a development of the *Lochner* era because in it the Supreme Court endorsed an interpretation of the Sherman Act based on the common law doctrine of restraints of trade, even when the Act itself reflected a different view. In this sense, the Act was interpreted following the same ideas that were used for interpreting the Constitution and the 14th amendment.[76] However, it is also important to note that there were other different possible interpretations of the Act, and that the interpretation established since then sets aside the literal wording of the Act and instead privileges considerations of reasonableness. In fact, categories like the 'rule of reason' and 'per se illegal' are judicial creations that resulted from this interpretation. The 1911 *Standard Oil* decision was a subject of much political discussion, and when Congress enacted in 1914 the Federal Trade Commission Act and the Clayton Act, it did so apparently under the motivation of improving the enforcement system and curbing the effects of this decision.[77]

2. Latin America, Protectionism and Competition (1910 – 1990)

Until now we have offered a general panorama of Latin American constitutionalism and the doctrines surrounding the protection of property rights during the late 19th century and the early 20th century. More often than not, the path to development was considered to be about transforming the structure of the local economies by fostering export-based industrialization. As a consequence, there was little space for conceiving and enforcing laws about competition locally. This general outlook explains why the adoption of the first competition laws between the 1910s and the 1990s were seldom enforced.

The case of México is particularly telling. Since 1857, Mexican constitutions contain provisions that explicitly address concerns regarding competition. Article 28 of the 1857 Mexican constitution prohibits private monopolies, 'estancos' (monopolies explicitly awarded by law), and special protections to national industries. The exceptions to this prohibition

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arrangements and public interventions in the economy. For a more detailed account of the influence of the *Lochner* ideas in *Standard Oil*, see Alan J Meese, 'Standard Oil as Lochner*'s* Trojan Horse' (2012) 85 Southern California Law Review 783, 797 – 798.

[76] See also Hovenkamp,' The Political Economy' (n 30). James May, 'Antitrust in the Formative Era: Political and Economic Theory in Constitutional And Antitrust Analysis 1880 – 1918' (1989) 50 Ohio State Law Journal 257.

[77] Rudolph J R Peritz, *Competition Policy in America: History Law Rhetoric* (OUP rev edn 2001), Chapter 2.

concern, on the one hand, the monopolies concerning the issuance of currency and postal service held by the State, and on the other, the rights of pecuniary rights of inventors. While the 1917 constitution superseded its 1857 predecessor, its article 28 builds upon the prohibitions established there while adding some important elements as well. It maintains the prohibitions against private monopolies and the exception regarding the State monopoly over currency and the postal service. As mentioned before the new article also expands the prohibitions against a series of practices, which we would identify today as abuses of dominance, but which are framed in terms of social justice because it emphasizes their unfairness and exploitative character. Regarding the exceptions, article 28 included an exception concerning labor unions and cooperatives established by producers of goods.[78] These exemptions suggest to some extent the influence of the 1914 Clayton Act.[79]

The strong tone of article 28 was curbed through its implementation, or lack thereof. Beginning in the 1920s the Mexican government issues a series of laws that enabled it to set the prices and commercialization conditions of particular goods and services. In 1934, the government issued a law developing this constitutional mandate, but the law focused only on some sectors and considered a series of situations in which the government could limit competition. The law also established an unclear enforcement mechanism, according to which the federal government could impose a sanction if the National Economic Council considered it necessary, but did not clarify which of the many organs of the executive branch was responsible for doing so. As a result, the law was enforced sparingly. In 1934, the congress issued a new law that curtailed this article considerably, limiting it to certain sectors and allowing the government to determine the number of competitors in a market. Later on, in 1950, the congress passed another law that allowed the government to set prices for an important number of sectors, thus leading to a governmental control of the main economic activities.[80] However, article 28 continues to be in force and in spite of several modifications (none of which address the core prohibitions) it remains the cornerstone of contemporary competition law enforcement in this country. Only until 1992 did competition law became politically

[78] Constitución Federal de los Estados Méxicanos de 1917. Articulo. 28.
[79] Manuel Gonzales Oropeza & Francisco Borja Martinez, 'Articulo 28' In *Constitución Política de los Estados Unidos Mexicanos Comentada* (UNAM 1994). 140
[80] ibid, 141 - 42

relevant once more with the enactment of the Ley Federal de Competencia Económica. However, competition law was neglected for most part of the 20th century.

The historical antecedents of competition law in Colombia contrast with those of México. By the time the first competition law was enacted – 1959 – Colombia was already in a well-established path of governmental control over the economy. Notably, the starting point of this trajectory was not the original constitution of 1886, but the constitutional amendments that were passed in 1936 and 1945. The 1886 constitution allowed congress to issue especial protections for businesses considered of some merit.[81] The 1936 amendment redefined the Constitution's definition of property rights as having a social function[82] and establishing that government can intervene, according to the procedures established in laws, in production processes underwent by private firms in order to 'rationalize the production, distribution and consumption of wealth (…)'.[83] As Colombia experienced the toll of World War II, President López persuaded Congress to issue law 7 of 1943, which established a general system of price controls and exchange rates. The rules pertaining to the price controls were developed through decree 928 of 1943, in which the government banned the hoarding and speculation over goods of essential necessity.[84] In 1945, a new constitutional amendment asserted the capacity of the government to intervene in economic affairs, but curtailed the special powers that could be vested in the president in order to do so.[85] However, political violence between the Conservative and Liberal parties became more intense, and after the short military rule of General Gustavo Rojas Pinilla (1953 – 1957) both parties agreed on a series of power-sharing arrangements to end political violence. Only then, the government of liberal President Alberto Lleras Camargo adopted law 155 of 1959, which was the first competition law regime in Colombia.

In a sense, the adoption of law 155 of 1959 was a considerable political feat in a country where economic planning and well-organized business associations had a well-established legal and political support. Perhaps this

[81] Constitución Política de 1886, Arts 76 (18) and art 78 (5).
[82] Acto Legislativo 1o de 1936 (n 61).
[83] ibid, Art 11.
[84] Decreto 928 de 1943.
[85] Acto Legislativo 1 de 1945, Art 28.

is also why the law has been sparsely applied, except for a provision that exempts its application to practices if recommended by the government in office. In general terms, the law deals with i) anticompetitive agreements, either with competitors or suppliers, ii) mergers, iii) vertical restraints, iv) interlocking directories, and v) unfair competition.[86] Also, the law establishes an enforcement system that relied initially on the Ministry of Industrial Development and later on was assigned to the current enforcer, the Superintendence of Industry and Commerce (SIC), which is an agency that depended on the Ministry back then.[87] However, this Ministry was also in charge of establishing price controls for different goods and services, and SIC was in charge of verifying that the controls were followed (among other things, to curb inflation).[88] In spite of the political significance of this law's enactment, the protection of competition in Colombia was not a matter of governmental priority until the 1990s, because members of the ministries and, overall, the political forces, were much more in line with protecting national industries.[89] Some parts of this law are in force today, although important changes took place in 1992 with the issue of Decree 2153 of 1992 and with law 1340 of 2009.

The development of competition law in Chile has important similarities with that of Colombia. The 1925 Chilean constitution does not address directly any competition concerns, but did establish the general capacity of the government to intervene in economic affairs by establishing that property rights have a 'social function'.[90] Like Colombia, Chile adopted laws that established the different ways in which the State would contribute to the development of the national economy, especially as inflation became a matter of deep concern in the late 1950s.[91] The government of President Ibañez hired the consulting firm Klein-Saks in order to design a series of policies for coping with the economic situation of the country at the time. Among other things, the 1958 report issued by the Klein-Saks mission proposed that

[86] Ley 155 de 1959.
[87] Decreto 3307 de 1963.
[88] As a matter of fact, SIC was created precisely to control the following of price controls. See Superintendencia de Industria y Comercio 'Reseña Historica' <http://www.sic.gov.co/es/historia> accessed 10 October 2013.
[89] Rudolf Hommes, 'Regulation, Deregulation And Modernization In Colombia' (1996) Inter-American Development Bank - Office of the Chief Economist (Working Paper #316) 5.
[90] Constitución Política de la Republica de Chile, Art 10.
[91] Ricardo Paredes, 'Jurisprudencia De Las Comisiones Antimonopolios en Chile'(1995) 58 Estudios Públicos, 229.

governmental price controls should be abolished and the adoption of a competition law regime should be pursued.[92] However, the government of Ibañez did not follow the conclusions of this mission.[93] During the government of President Jorge Alessandri, a conservative, the Chilean congress adopted law 13.305 of 1959, which contains provisions of all sorts regarding economic regulation, and are similar to those proposed by this mission.[94]

Title V of law 13.305 of 1959 contains the provisions relevant to competition law and its enforcement. Article 173 established a general prohibition aiming to capture different sorts of anticompetitive behavior. Although it is a general rule, it is more precise than its Mexican or Colombian counterparts because it describes the practices forbidden in terms closer to competition theory; it refers explicitly to tying arrangements, production quotas, allocation of markets and the like. Like its North American and Mexican counterparts, it establishes that the violation of these prohibitions has criminal consequences, thus giving the law a criminal status.[95] Notably, articles 174 and 181 also allowed for the continuation of the price control system that the establishment of a competition law regime sought to replace. The former empowered the president to authorize acts or agreements that affect competition in the name of economic stability, development and the national interest, while the latter stated that price controls would remain in force.[96]

Another novel introduction of law 13.305 of 1959 was the enforcement system. Article 175 created a competition commission within the Superintendence of Insurance, Stock Corporations, Liability Societies and Brokers that was in charge of enforcing the law. This commission could review the acts and contracts submitted by the businesses and begin investigations by its own accord or following a complain, a procedure that could end with acquittals, orders to amend contracts, orders to end particular practices, the dissolution of businesses, pecuniary fines, or criminal investigations. The Chilean Supreme Court could review the commission's

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[92] ibid.
[93] Dale Furnish, 'Chilean Antitrust Law' (1971) 19 American Journal of Comparative Law 464, 465.
[94] Paredes, 'Jurisprudencia' (n 95) 229.
[95] Chile, Ley No 13.305 de 1959, Art 173.
[96] ibid, Arts 174 and 181.

decisions.[97] In 1963 the law was amended, expanding the powers of the Commission and creating the figure of the economic public prosecutor within the commission (called 'fiscal económico') and who was in charge of presenting the cases before the commission and defending its decisions before the Supreme Court, thus partially distinguishing between prosecution and decision-making functions.[98]

Between 1959 and 1973 the competition commission reviewed 121 cases, most of which were decided in its first three years. By 1965, however, the commission had only reviewed seven. According to Dale Furnish, this change in pace resulted from the government's decision to return to price control agreements and similar mechanisms in order to address particular economic issues.[99] In part, this reverses begun during Alessandri's own government, which gradually resorted again to the aforementioned mechanisms. When liberal candidate Eduardo Frei became president in 1964, these mechanisms became even more common, and so Chile continued along the path of economic planning.[100] In 1973, a military junta toppled elected president Salvador Allende and General Augusto Pinochet assumed the government; it was then that competition law enforcement in Chile became prominent again with the enactment of Decree Law 211 of 1973.

As in the case of México and Colombia, the dwindling interest in competition law in Chile during this period of time has been attributed to a lack of political support.[101] Simply stated, the constitutional frameworks that were in place at the time in these countries contributed to the development of political arrangements that viewed industrial development as contrary to competition. Moreover, this state of affairs resulted from a combination of doctrines that viewed the regulation of property rights in the name of development with presidentialist systems that gave executive branches an important role in economic affairs. The result, for most part of the 20th century, was a system in which governments and business associations attempted to dictate the outcomes of markets.

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[97] ibid, Arts 175, 175(a), (b), bis(a) and Art 177.
[98] ibid, Art 175 bis, modified by Ley 15.142 de 1963.
[99] Furnish, 'Chilean Antirust Law' (n 97) 480 – 481.
[100] ibid, 483.
[101] ibid, 230.

V. What are the relationships between Protective and Aspirational Constitutionalism and Competition Law Regimes?

In the previous sections of this article we have highlighted some of the substantive arguments and institutional features of both protective and aspirational constitutionalism. We have also shown how these different elements are exemplified in the constitutional traditions of the US and in Latin America, with special focus on México, Colombia and Chile, and how they are played out in the development of their respective competition law regimes between the 1910s and the 1990s. Based on the account presented until now, in this final section we will suggest in broad terms how different constitutional traditions shape competition law regimes.

Regarding protective constitutionalism, one way to assess this relation is to consider, first, structural issues concerning the allocation of law-making authority, and then examine how they interact with substantive arguments. Since protective constitutionalism is concerned with guaranteeing the pre-established rights of individuals from the intrusive forces of government, then the architecture of government itself is paramount in understanding how this goal is achieved. As US constitutionalism shows, this type is based on the idea that the separation of powers is an institutional 'failsafe' that prevents governments from encroaching over the rights of individuals.[102] However, once this failsafe is overcome, substantive considerations become relevant because they also establish limits to what governments can do. The nature of these limits is particularly important as well. They should not aim to transform radically the nature of the rights or freedoms enjoyed, because doing so would be in fundamental dissonance with why government was established in the first place. Under this Lockean logic, governmental intervention should only aim to maintain and preserve the rights individuals have and correct those situations that merit interventions without affecting property rights and other freedoms.

From this perspective, protective constitutionalism brings about competition law regimes that interfere with markets only under certain conditions, considered exceptional. After all, competition law regimes establish duties

[102] Regarding the case of the US, consider this statement of James Madison in *The Federalist* 'No. 47' (n 25): 'Unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.'

that limit how property rights are exercised and what sort of contracts can be negotiated; to place a limit on them requires very demanding justifications. Because of this characteristic, a competition law regime within a protective constitutional tradition should only aim to intervene in a narrow set of scenarios and after overcoming requirements that leave little doubt of the necessity of such interventions.

This insight is useful for considering how competition law regimes allocate different functions among legislatures, enforcement agencies and courts. Allocating investigative and adjudicatory functions to different bodies, with no direct inherence over each other, suggests a concern for preventing arbitrary results that harm rather than strengthen the rights of individuals. Once this institutional capacity is in place, then we can consider the requisites that the claims presented before courts by enforcement agencies or individuals according to the rules laid out by legislatures should fulfill in order to be properly decided. Placing relatively high requisites for standing (such as that only persons affected directly by anticompetitive practices, instead of third parties that claim to be affected indirectly), the burden of proof (concerning which party should prove the harm), and standard of proof (concerning the nature of the harm and how to prove it) work as a filter that separates meritorious causes from those that are not. When considered altogether, these aspects about procedure and evidence establish the conditions that justify intervention in the name of competition under a rather strict scrutiny.[103] The advantage of this system is its stability, resulting from its own cumbersome procedures; its limitations result from rigidity, which eventually leads to the preservation of institutions that become outdated.[104]

While we can conclude that protective constitutionalism is most likely to bring about competition law regimes that rely on how markets work rather than to attempt to correct them, it is hard to reach a similar conclusion for aspirational constitutionalism. This is so because there is no 'natural' or necessary connection between conceiving rights as the result of political processes within the State, and competition. Placing property rights under

[103] For a conscious reflection of these issues in the US, see William F Baxter, 'Separation of Powers, Prosecutorial Discretion, and the Common Law Nature of Antitrust Law' (1981) 60 Texas Law Review 661.

[104] An inspiring analysis can be found in see Reza Dibadj, 'Saving Antitrust' (2004) 75 University of Colorado Law Review 745.

considerations of 'public interest' or conceiving them as having a 'social function' does not point unequivocally to either the protection of competition or its abandonment. In this sense, aspirational constitutionalism provides several starting points for understanding the relationship between property rights and competition, and it is not inclined to adopt one or the other. Simply put, its conception of property rights is not determinate enough to suggest that competition should be protected and strengthened or abandoned. Hence, from this theoretical perspective aspirational constitutionalism can lead to different structural and substantive considerations regarding how constitutionalism and competition are related. Just as well, the examples of particular regimes within the aspirational tradition suggest that particular constitutions can be aspirational and protect competition, while others can renounce to it. Therefore, aspirational constitutionalism does not lead unequivocally to one type of competition law enforcement or the other, as is most likely the case of protective constitutionalism.

Even so, it is important to comment briefly on the development of competition law in Latin America from this perspective. In the case of the countries considered here, the enforcement of competition laws as well as of regulatory regimes has been historically assigned to the executive branch. Undoubtedly this is a manifestation of the presidentialist doctrines developed in Latin America. In some historical periods the idea of having a strong executive to command the resources necessary for development has been translated into government dirigisme, while in others it has led to establishing market-friendly legal regimes that are coupled with the protection and promotion of competition. Latin American States have embraced both protectionism and free markets through the development of administrative structures in charge of their supervision and regulation. Both protectionism and competition are not ingrained in the aspirational tradition. This would explain why Latin American countries like México, Colombia and Chile adopted competition law regimes and have enforced them depending on the prevailing views about the interplay of competition and industrial promotion (and the period considered here exemplifies the decision not to enforce them). Moreover, the prevalence of maintaining regulation within the sphere of the executive branch over other considerations (like the protection of property rights) could explain why the enforcement bodies have been historically administrative in nature, concentrated investigative and punitive functions, and relying more on fines

than on damages awards. The advantage of this system is its flexibility, and its limitations are largely due to the continued demand for political support. Table 1, in Annex 1, summarizes the main elements considered here.

Future research about how constitutional traditions shape competition law regimes can bring further light on the issues analyzed here. So far, we have identified three research venues that may be particularly interesting from this perspective. First, it would be interesting to know more about other constitutional traditions than the ones commented here. Clearly, protective and aspirational constitutional traditions encompass more than the US and Latin America, and one could conceive other traditions that do not fit these two categories, but that nonetheless have their own institutional designs that shape their own competition law regimes. Second, even within these two traditions there are important issues that deserve further clarification. One of these has to do with the nature of the duties created by the competition law regimes. While the regimes that follow from protective constitutional traditions create negative duties to market participants, competition law regimes that follow from the aspirational tradition are likely to create positive duties for the States as well as negative duties to market participants. This difference could suggest that in regimes that follow the aspirational tradition competition law enforcement may be along the lines of the enforcement of social and economic rights, which also create positive duties. Finally, in third place, it seems that the time is ripe for understanding the role that human rights play in the enforcement of competition law regimes. In some jurisdictions investigated parties may challenge the legality of the proceedings undergone by competition enforcement authorities by claiming, inter alia, that they violate their rights to the secrecy of their correspondence.[105] We should expect that since rights are viewed differently in each of the traditions considered here, they should affect the enforcement proceedings differently; practitioners and scholars would benefit enormously from future research that describes these differences and explains how they take place. The research of constitutionalism and competition law has other venues of research; this article has tackled some of the most obvious ones in order to show the possibilities that lay ahead.

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[105] Arianna Andreangeli, 'Competition Law and Human Rights: Striking a Balance Between Business Freedom and Regulatory Intervention' in Ioannis Lianos and D Daniel Sokol (eds) *The Global Limits of Competition Law* (SUP 2012).

Annex 1

Table 1: Constitutional Traditions and Competition Law Regimes

	Protective Constitutionalism	**Aspirational Constitutionalism**
Influential Authors	John Locke	J.J. Rousseau
Views about property rights and other freedoms	Property and freedom of contract antecede government	Property and freedom of contract result from collective decision-making
Examples	US constitutionalism	Constitutionalism in México, Colombia, Chile
Views about government intervention **(as detailed in the examples)**	• The structure of government prevents encroachment of private property and other freedoms • Substantive considerations prevent redefining property rights	• Strong executive branches that are in charge of economic regulation in the name of development. • 'Public interest' and 'social function' theories that justify limiting them.
Examples of Competition Law Regimes	US Antitrust	Competition law regimes in México, Colombia and Chile
Influence of constitutional tradition?	Implicit; the Sherman Act was interpreted by referring to the common law, thus assuming that it is a justifiable baseline. Similar to Substantive Due Process doctrine.	• Explicit; article 28 of the 1917 Mexican Constitution forbids monopolies, abuse of dominance and establishes exceptions. • Implicit; competition law stems from the government's constitutional prerogatives to limit private property and regulate economic activities.
Main traits of competition law regimes (formative periods)	• Competition law is understood according to private law entitlements, thus enforceable only after findings of 'unreasonableness'. • Enforcement under limited conditions related with scope of government intervention.	• Coexisted with other forms of economic regulation, like price controls • Sparse enforcement when in conflict with other economic policies • Anticompetitive behaviors viewed as unfair and exploitative (México)
Allocation of	Adjudicative structure; plaintiffs bring	Administrative; administrative agencies

enforcement activities	cases before courts, who can award damages	investigate and decide cases. Reliance on remedies.
Areas	Collusion, cartels & monopolization. No exemptions.	Collusion, cartels, abuse of dominance & mergers (Colombia). Exemptions regimes include governments and businesses in certain sectors.

The Complexity of Enforcing Intellectual Property Rights in the Absence of Antitrust Legislation and a Related Enforcement Institution: A Classic Policy Failure in Ghana

THADDEUS MANU*

Owing to the fact that TRIPS provides for a stringent enforcement of IPRs, this article examines the consequences of enforcing IPRs in the absence of an antitrust legislation and a related enforcement institution in Ghana. The article takes the view that such an absence undermines economic rights of Ghanaian consumers because unruly corporations are able to undertake predatory anti-competitive behaviour unnoticed. Although the author acknowledges the philosophical complexity in validating consumer protection as a complete human right subject matter, for the purpose of this article, a human right claim is made for consumer protection. This claim is founded on evidence that several multinational corporations operating in Ghana infringes antitrust laws in Europe. Given the understanding that antitrust legislations and its enforcement institutions offer a critical vehicle for protecting human rights, this article seeks a complete evaluation of a legal remedy, and the outcome is a logical conclusion for a legislative intervention to establish an enforcement institution to monitor antitrust undertakings in Ghana in order to protect consumers against the exploitation of IPRs by private corporations.

I. Introduction

Intellectual property rights (hereinafter 'IPRs') and competition laws are both the creation of a domestic policy. The interaction between an antitrust policy and the concept of IPRs are complex. This relationship has over the years become contentious, sparking philosophical tension in legal thinking, even though both serve a modifying social purpose of keeping markets

open. IPRs encourage creativity by recompensing innovators with exclusive rights.[1] This is in the hope that innovators would be induced to venture into undertakings that would ultimately improve the living standard of consumers.[2] On the other hand, antitrust legislations are cautious of the exercise of a right that seeks to limit the welfare of consumers.[3] With their distinctive locus and vast reach, both pursue the same line of objectives of ensuring consumer welfare.[4] Though these two bodies of law have assumed greater significance in governments' policies, some scholars still contest them as non-conforming to each other.[5]

Historically, the discussion of the intersection between IPRs and antitrust legislations has focused on the exercise of abusive market power by private corporations and their potential pernicious effect on consumer welfare.[6] The common presumption is that markets require no interruptions if perfect conditions exist for it to work satisfactorily in the interest of consumers. However, given the profit ambitions of modern businesses, it is expected that some multinational corporations (hereinafter 'MNCs') are likely to abuse their dominant positions in sidestepping weaker competitors and consumers for profit.[7] Presumably, this underlines the common sense position that several corporations are indeed complicit in violating human rights.[8] This is even exacerbated, as the free trade market continues to push forward the global economy. Consequently, holding corporations

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[1] Ludmila Striukova, 'Patents and Corporate Value Creation: Theoretical Approach' (2007) 8(3) Journal of Intellectual Capital, 431-443.

[2] Christine Greenhalgh, Mark Rogers, 'The Value of Intellectual Property Rights to Firms and Society' (2007) 23(4) Oxford Review of Economic Policy, 541-567. See also Carlos Braga, Carsten Fink and Claudia Sepulveda, Intellectual property rights and economic development (2000) TechNet Working Paper, < http://www.iatp.org/files/Intellectual_Property_Rights_and_Economic_Deve.pdf> accessed 08 December 2013.

[3] Valentine Korah, 'The Interface Between Intellectual Property and Antitrust: The European Experience' (2002) 69 Antitrust Law Journal 3, 801-839.

[4] Beatrice Dumont, Peter Holmes, 'The Scope of Intellectual Property Rights and their Interface with Competition Law and Policy: Divergent paths to the same goal?' (2002) 11(2) Economics of Innovation and New Technology, 149-162.

[5] Donna Gitter, 'The Conflict in the European Community Between Competition Law and Intellectual Property Rights: A Call for Legislative Clarification of the Essential Facilities Doctrine' (2002) 40(2) American Business Law Journal, 217-300.

[6] Steven Anderman, *The Interface Between Intellectual Property Rights and Competition Policy* (Cambridge University Press 2007).

[7] Richard Whish and David Bailey, *Competition Law* (7th edn. Oxford University Press 2012).

[8] Jordan Paust, Human Rights Responsibilities of Private Corporations (2002) 35(3) Vanderbilt Journal of Transnational Law, 801-825.

accountable for their poor practices become a difficult proposition because MNCs are working harder than ever to cover abuses instead of preventing them. Significantly, the current territorial model for confronting those abuses are inadequate in circumventing gross human rights violations by transnational corporations, since MNCs continue to gain unprecedented market power to influence governments' policymaking.[9] Unfortunately, the absence of a standardised global competition treaty similar to IPRs has made the creation of uniform antitrust legislations more complex, and by implication, the inability of LDCs to stop MNCs activities that breach human rights.

The free trade rhetoric that perhaps called for a global regulation of IPRs has met resistance.[10] Proponents of IPRs are struggling to rescue several credibility questions hovering its conception, particularly, on grounds that a global IPRs system does not strike the right balance in least developed countries (hereinafter 'LDCs') for economic development.[11] It is because IPRs, which were simpler in the pre-TRIPS era, have thus become more complex for LDCs that were already lacking capacity to produce technology for development, this in turn placed the regulation of IPRs into the hands of the WTO.[12] Following the introduction of the TRIPS Agreement,[13] the concept of IPRs is witnessing a progressive change for both current and future Members' of the WTO who are obliged to adopt non-discriminatory

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[9] Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat' (2004) 5(1) Melbourne Journal of International Law, 37-65.

[10] Keith Maskus, 'Normative concerns in the International Protection of Intellectual Property Rights' (1990) 13(3) The World Economy, 387-409.

[11] Carlos Correa, 'New Intellectual Standards for Intellectual Property: Impact on Technology Flows and Innovation in Developing Countries' (1997) 24(2) Science and Public Policy, 79-92.

[12] Keith Maskus, '*Private Rights and Public Problems: The Global Economics of Intellectual in the 21st Century*' (Peterson Institute for International Economics 2010).

[13] See the Agreement on Trade Related Aspect of Intellectual Property Rights, 15 April 1994. Annex 1 C Legal instrument-result of the Uruguay round vol. 31, 13 I.L.M (1994) establishing a multilateral agreement creating a minimum standard for various forms of Intellectual Property Rights among Member States. For more on the TRIPS Agreement, see Laurence Helfer, Regime Shifting, 'The TRIPS agreement and new dynamics of international intellectual property law-making' (2004) 29 Yale Journal of International Law, 2-62. See also Daniel Gervais, '*The TRIPS Agreement: Drafting history and analysis'* (vol. 2, sweet & maxwell, 1998); Christopher May, Susan Sell, *Intellectual property rights: A critical history* (Lynne Rienner Publishers 2006).

minimum standards for enforcing IPRs.[14] Just as IPRs have been experiencing transformation within the international trading system, the TRIPS Agreement has also been undergoing serious global scrutiny regarding its current purpose and future possibilities for LDCs.[15] Nevertheless, LDCs have had no choice but to accede to diplomatic pressures to remodel their IPRs to the same standards as developed countries under the ambiance of the WTO jurisprudence.[16] While several LDCs have started implementing their obligations under TRIPS in compliance with the transitional arrangement,[17] majority of them have failed to find analogous antitrust regimes in order to monitor probable anticompetitive undertakings involving MNCs who will exploit IPRs.

This article extends the line of inquiry by relating this debate to the consequences of the longstanding absence of antitrust legislation and its enforcement institutions in Ghana. In so doing, it addresses the main features of the TRIPS Agreement by pointing out the debate on the consequences of enforcing IPRs without an antitrust legislation and its enforcement institutions. Although, at the heart of this article, there are several fundamental questions, it ultimately seeks to answer the question of why Ghana has tended to ignore the siren call for an antitrust legislation and a related enforcement institution given the years of awareness on the problem. This article approaches to the question with a hypothesis arguing that consumer protection remains counterproductive without a precise antitrust legislation and a related enforcement institution for the appropriate operation of IPRs in Ghana. In this respect, it will rely on evidences of gross

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[14] Duncan Matthews, *Globalising Intellectual Property: The TRIPS Agreement* (Routledge, 2002).

[15] Bernard Hoekman, Michel Kostecki, *The political economy of the world trading system: from gatt to WTO* (Oxford University Press, 1995). See Also Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003).

[16] Peter Drahos, 'When the weak bargain with the Strong: Negotiations in the worlds Trade Organisation' (2003) 8 International Negotiation, 79-109. See importantly Peter Drahos, 'Negotiating Intellectual Property Rights: Between Coercion and Dialogue', in Peter Drahos, Ruth Mayne eds. *Global Intellectual Property Rights: Knowledge Access and Development* (Basingstoke: Palgrave Macmillan, 2002).

[17] The WTO/TRIPS General Council Decision of 8 July 2002 on Least-Developed Country Members-Obligations Under Article 70(9) of the TRIPS Agreement with Respect to Pharmaceutical Products (WT/L/478 12 July 2002). Pursuant to Article 66(1) of the TRIPS Agreement, LDC Members Group of the WTO requested for an extension of the TRIPS Transitional arrangement on 5 November 2012. See WTO/TRIPS Doc. IP/C/W/583. On 11 June 2013, TRIPS Council confirmed further extension from 1 January 2016 until 1 July 2021. See also WTO/TRIPS Official Document IP/C/64.

violations of antitrust legislations in Europe by some MNCs operating in Ghana today, with the mind-set of making a human right claim for consumer protection. Accordingly, the logical conclusion is the need for a legislation intervention to initiate antitrust legislations and its enforcement institution to protect consumers.

The structure of the article is as follows. Section II discusses the economic growth theory that informed the culmination of TRIPS into the WTO jurisprudence. In addition, it evaluates human rights emphasis of IPRs, and then reviews literature against the legitimacy of IPRs in LDCs. Section III outlines the framework underpinning antitrust regimes. It considers TRIPS and its relevant enforcement provisions for antitrust as found in Articles 8 and 40, including a discussion of the World Bank's suggestion for a consistent national action on consumer protection. Section IV therefore, examines the extent to which consumer protection could be claimed as integral part of human rights in order to enhance its protection in Ghana. To conclude section V assesses the antitrust legal landscape in Ghana, mainly from the notion that Ghana's Constitution ignores consumer protection. Again, evidences that some MNCs operating in Ghana today have been found guilty of antitrust violations in Europe are considered to show the political failure to create antitrust regimes despite the years of policy considerations.

II. Understanding the WTO jurisprudence on IPRs

1. Introduction

Intellectual property (hereinafter 'IP') refers to the creation of inventions resulting from the exercise of creativity to which the inventor has rights, and for which a State must provide protection.[18] It falls principally into several bands such as; copyrights, trademarks, design rights, and patents.[19] IPRs, which aim to reward intellectual creations, derive its framework directly from the concept of knowledge ownership that underpins the innate desire for the inventor to be recompensed as a matter of commutative justice.[20]

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[18] Peter Drahos, *A Philosophy of Intellectual Property* (vol. 223, Aldershot: Dartmouth, 1996).

[19] Lionel Bently, Brad Sherman, *Intellectual Property Law* (vol. 59, Oxford University Press, 2001).

[20] For theories of justice, see Brain Barry, *Theories of justice* (vol. 16, University of California Press, 1989).

Titleholders are thus, able to prevent unauthorised use while subjecting the content of the subject matter to exploitation.[21] From an economic perspective, IPRs could lead to significant economic growth.[22] Therefore, the inception of the TRIPS Agreement into the international trading system remains consequential to this standpoint.[23] Primarily, the social purpose of IPRs is to provide protection for the result of investments regarding the development of new knowledge, and thereby giving the incentive and means to finance research and innovation.[24] The fundamental principle reinforcing the idea that IPRs are bound by economics of innovation has led to several shades of fragmented opinions against such a presumed ideological line.[25] While the socio-economic objective of IPRs is outlined, it should also be noted that such exclusive rights are generally amenable to certain limitations for adjusting the balance that has to be found between the legitimate interest of a right holder on one hand, and the interest of the public on the other.[26]

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[21] See, for example in the Canada-Patent protection of pharmaceutical products case, the WTO panel stressed that the exclusion of *'all forms of competition'* is the essence of patent rights. It held that

> The normal practice of exploitation by patent owners, as with owners of any other intellectual property right, is to exclude all forms of competition that could detract significantly from the economic returns anticipated from a patent's grant of market exclusivity . . . Patent laws establish a carefully defined period of market exclusivity as an inducement to innovation, and the policy of those laws cannot be achieved unless patent owners are permitted to take effective advantage of that inducement once it has been defined.

Report of the WTO Dispute Panel (WT/DS/114/R, para. 7.55).

[22] David Gould and William Gruben, The role of intellectual property rights in economic growth' (1996) 48 Journal of Development Economics, 323-350. See also Kai Wu, Hong Cai, Renai Jiang and Gary Jefferson, 'Trade and Intellectual Property Rights as channels for Economic Growth' (2013) 20 Asia-Pacific Journal of Accounting & Economics, 20-36.

[23] Robert Merges, *Justifying intellectual property* (Harvard University Press 2011). See also Josef Zweimuller and Ted O'Donoghue, 'Patents in a Model of Endogenous Growth' (2004) 9 Journal of Economic Growth, 81-123.

[24] Eric Hippel, Georg Krogh, 'Free Revealing and the Private-Collective Model for Innovation Incentives' (2006) 36(3) Research & Development Management, 295-306. See also Ove Granstrand, 'Innovation and intellectual property rights' (2005) The Oxford Handbook of Innovation, 266-290.

[25] Birgitte Andersen, 'If 'Intellectual Property Rights' is the Answer, What is the Question? Revisiting the Patent Controversies' (2004) 13(5) Economics of Innovation and New Technology, 417-442.

[26] Article 31 of TRIPS. US Statute Code Title: 28 USC 1498(a). Regulation (EC) No 816/2006 of the European Parliament and of the Council of 17 May 2006. See Reiko Aoki, John Small, 'Compulsory Licensing of Technology and The Essential Facilities Doctrine' (2004) 16(1) Information Economics and Policy, 13-29. See also Jerome Reichman, Catherine Hasenzahl, 'Non-voluntary Licensing of Patented Inventions: Historical Perspective, Legal Framework under TRIPS, and an Overview of the Practice in

The next part of the article discusses the economic growth theory that informed the culmination of TRIPS into the WTO system. In addition, it assesses the human rights emphasis of IPRs, and then reviews literature against the legitimacy of IPRs in LDCs.

2. The Economic Growth Theory

Prior to the TRIPS Agreement three attempts were usually made to justify IPRs, these being natural rights, distributive justice, and consequentialism, which together elaborated a so-called logic of entitlement.[27] These were predominantly, rooted on the impression that a person who labours upon resources that are either not owned or held in common has a natural IP protection to the fruits of her/his labour, and that States have duties to respect such rights. More importantly, in view of the success of globalisation, it was extremely difficult for the world at large to ignore the eruptive activism, which sought to push for a global treaty meant to protect the interest of innovators.[28] This necessitated the reconstruction of IPRs in a way that befits it newfound significance regarding the future economic success of countries.[29] The 'economic growth theory' then emerged as a substantive validation of IPRs, which footholds the view that IPRs remain catalysts for socio-economic development.[30] This theory recognises technology as central ingredient in economic welfare, similar to human capital, alongside the classical factors of production, land, labour and capital stock.[31] The theory also advances the argument that corporations would be reluctant to invest in innovation in the absence of financial incentives.[32]

3. A Human Right Emphasis of IPRs

Canada and the USA' (2003) Issue Paper 5 UNCTAD-ICTSD Project on IPRs and Sustainable Development Series, 1-41.

[27] William Fisher, *Theories of Intellectual Property: New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001).

[28] Jose M. Martin, 'The WTO TRIPS Agreement' (2004) 7(3) The Journal of World Intellectual Property, 287-326.

[29] Rod Falvey, Neil Foster, David Greenaway, 'Intellectual Property Rights and Economic Growth' (2006) 10 Review of Development Economics, 700-719.

[30] Arthur Lewis, *Theory of Economic Growth* (Routledge, 2013).

[31] Alfred Taubman, 'TRIPS Jurisprudence in the Balance: Between the Realist Defence of Policy Space and a Shared Utilitarian Ethic. Ethics and Law of Intellectual Property: Current Problems in Politics, Science and Technology' (2011) ANU College of Law Research Paper No. 08-10.

[32] Gideon Parchomovsky, Peter Siegelman, 'Towards an Integrated Theory of Intellectual Property' (2002) 88(7) Virginia Law Review, 1455-1529.

The rise of knowledge economy has in no doubt facilitated the unavoidable ever-expanding use of IP related goods. In this regard, proponents of IPRs have over the years drawn on diverse arrays of international legal venues to map up a human right claim for IPRs.[33] Despite this development, the interface between IPRs and human rights are still not clear.[34] It is not surprising to see how the debate has played into the hands of critics who are seeking to influence their line of understanding to delineate the conceptual edges of IPRs from the primacy of human rights.[35] Nevertheless, scholarly analysis of IPRs as a human right suggests it finds legitimate support in certain international human rights instruments.[36] This has often impelled most progressive countries to accept the persuasive end of IPRs as human rights within their constitutional provisions.[37] Human rights justification of IPRs thus, begins from Article 17.1 of the Universal Declaration of Human Rights (hereinafter 'UDHRs'), which specifies a right to own property.[38] Article 27.2 of the UDHRs, and Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights (hereinafter 'ICESCRs') confirms the right of everyone to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which the person is an inventor.[39] Similarly, the African Charter on Human and People Rights also guarantee the right to own property.[40]

4. Literature against the Fundamental Legitimacy of IPRs

The controversy surrounding the exponential expansion of IPRs to a global reach opened the floodgate for counterclaims, some of which are probing

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[33] Laurence Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40 University of California Law Review, 971-1020.

[34] Ruth Gana, 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18(2-3) Law and Policy, 315-354.

[35] Paul Torremans, 'Is Copyright a Human Right' (2007) Michigan State Law Review, 271-291.

[36] Robert Ostergard, 'Intellectual Property: A Universal Human Right?' (1999) 21(1) Human Rights Quarterly, 156-178.

[37] Laurence Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40(3) University of California Davis Law Review, 971-1020.

[38] Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A (III), 3 U.N. G.A.O.R. (Resolutions, part 1), U.N. Doc.A/810 (1948).

[39] International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976), G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), p. 49, U.N. Doc. A/6316 (1966).

[40] African (Banjul) Charter on Human and Peoples' Rights adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force 21 October 1986), art 14.

the validity of incentives affording IPRs a global protection.[41] The very fundamental notion suggesting IPRs carry the persuasion for innovation is the relic of the provocative scholarship driving almost all the speculative insurgencies aimed at repairing the misconception about the winners and losers of IPRs.[42] This is premised on a contrary belief that even though there is a minimum standard for a global protection of IPRs, it does not lead to a uniform economic growth but rather escalates social costs and the loss of balance for consumers in LDCs.[43] This viewpoint also extends to a correction made in order to carry into effect the actual intention of IPRs in global economy with an argument asserting in a straightforward manner that IPRs afford MNCs the power to employ voracious commercial tactics in defence of their profit motives.[44] The proper context is that stringent enforcement of IPRs in LDCs would intently override consumer safeguards in favour of MNCs. This is because the TRIPS Agreement submits to loose consumer protection against the uncompromising IPRs enforcement supportive of MNCs some of whom lobbied global policymakers for the extension of IPRs as a global trade issue.[45]

As a result, LDCs by contrast, who are generally users, and not producers of formal technology have condemned IPRs from a differing hypothetical neatness arguing that it potentially, restricts their access to technology.[46] Nonetheless, the important subject stricken in our intellectual conscience brings forth a deeper issue of whether global minimum standards for

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[41] Jerome Reichman, 'Universal minimum standards of intellectual property protection under the TRIPS component of the WTO Agreement' (1995) 29(2) The International Lawyer, 345-388. See Also Gary Lea, Peter Hall, 'Standards and Intellectual Property Rights: An Economic and Legal Perspective' (2004) 16(1) Information Economics and Policy, 67-89.

[42] Frederick Abbott, 'Are the competition rules in the WTO TRIPS Agreement adequate?' (2004) 7(3) Journal of international economic law, 687-703. See Also Peter Lloyd, Gary Sampson, 'Competition and Trade Policy: Identifying the Issues after the Uruguay Round' (1995) 18(5) The World Economy, 681-705.

[43] Donald Richards, *Intellectual Property Rights and Global Capitalism: The Political Economy of the TRIPS Agreement* (ME Sharpe Incorporated, 2004).

[44] Hanns Ullrich, 'Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective' (2004) 7(2) Journal of International Economic Law, 401-430.

[45] Peter Drahos, John Braithwaite, 'Intellectual property, corporate strategy, globalisation: TRIPS in context' (2002) 20(3) Wisconsin International Law Journal, 451-480. See also David Levy, Aseem Prakash, 'Bargains Old and New: Multinational Corporations in Global Governance' (2003) 5(2) Business and Politics, 131-150.

[46] Yongmin Chen, Thitima Puttitanun, 'Intellectual Property Rights and Innovation in Developing Countries' (2005) 78(2) Journal of Development Economics, 474-493.

enforcing IPRs are still relevant, amid the diminutive innovation activities among LDCs.[47] Evidence suggests otherwise, given the probable shift towards private interests in developed countries.[48] Moreover, the fact that the global enforcement of IPRs emerged in 1994 further diminishes the role of IPRs as tools for economic development. This is because industrialised countries, which promoted the inclusion of IPRs on the global trade agenda, were already developed in 1994. The same uncertainty regarding IPRs as mechanisms for economic growth prompted the United Nations Conference on Trade and Development's (hereinafter 'UNCTAD') criticism of the current construction and operations of IPRs as antithesis to competition.[49]

On the basis of the preceding angle, the idea of IPRs becoming a trade issue has also not been spared for lacking conceptual certainty.[50] This criticism falls on the idea that TRIPS is interventionist treaty pursued by some industrialised countries to defend the commercial interest of their MNCs knowing that the knowledge content of LDCs remains untradeable.[51] Knowing that IPRs push the frontier of innovation towards an extreme web of intricate global legal structures that tends to place knowledge in the hands of private agents as opposed to knowledge as public goods, corporations could exploit exclusive rights to frustrate competition.[52] Consequently, there is a difficult end to reach a workable global IP system, which works for the benefit of all, since enforcing IPRs to a level that could enliven innovation

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[47] Africa's Technology Gap: Case Studies on Kenya, Ghana, Uganda and Tanzania (UNCTAD, 2003: UNCTAD/ITE/IPC/Misc.13).

[48] Keith Maskus, 'The International Regulation of Intellectual Property' (1998) 134(2) Review of World Economics, 186-208.

[49] Workshop on Developing Local Productive and Supply Capacity in the Pharmaceutical Sector: The Role of Intellectual Property Rights (The United Nations Conference on Trade and Development (UNCTAD), Addis Ababa, 19-23 March 2007).

[50] Gail Evans, 'Intellectual property as a trade issue: The making of the agreement on trade-related aspects of intellectual property rights' (1994) 8(2) World Competition, Law and Economics Review, 137-180. See also Keith Maskus, Mohan Penubarti, 'How Trade-related are Intellectual Property Rights?' (1995) 39(3) Journal of International Economics, 227-248.

[51] Susan Sell, 'Intellectual property and public policy in historical perspective: contestation and settlement' (2004) 38(1) Loyola of Los Angeles Law Review, 267-322. See also James Bassen, Eric Maskin, 'Sequential Innovation, Patents, and Imitation' (2009) 40(4) The RAND Journal of Economics, 611-635.

[52] Peter Drahos, 'The regulation of public goods' (2004) 7(2) Journal of International Economic Law, 321-339. See Also Michael Blakeney, Getachew Mengistie, 'Intellectual Property and Economic Development in Sub-Saharan Africa' (2011) 14(3-4) The Journal of World Intellectual Property, 238-264.

in LDCs would potentially overstep consumer protection.[53] This explains the existence of fundamental variances in academic opinion on the topic of IPRs, such as whether it provides justice for all, given that LDCs rely on imported solutions. At this point, it should be considered that the presumed difficulties faced by LDCs on the understanding of a global minimum standard for enforcing IPRs in itself undermines the trust required by LDCs to manage their multilateral ties.

III. The empirics of antitrust legal frameworks and its related institutions for enforcement

1. Introduction

The word 'antitrust' denotes traditionally, a broad term covering several aspects of legal and institutional infrastructures for monitoring impropriety in commercial actions intending to obstruct consumer welfare.[54] The underlying rationale behind antitrust policy in a State is meant to preserve its commercial environment free from anticompetitive transactions that tend to circumvent its structural economic welfare.[55] This makes the regulation of competition a quintessential component of a modern economy in order to optimise an economic growth.[56] It is against this backdrop that of late civilised countries everywhere adopt proactive statutory instruments as part of national actions to regulate and at the same time monitor possible restrictive business practices. Notwithstanding, it follows on from the perception that IPRs heighten the predatory powers of MNCs who are able to dictate tough terms of the market to the inconvenience of consumers.[57]

Though some scholars may have somehow over-elaborated the fluidity about the destructive signs of IPRs, a common school of thought is that if a State enforces IPRs without a sanitised competition policy, such a country would fail to foster the interest of its people. The progressive view in light

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[53] Sol Picciotto, 'Private Rights vs. Public Standards in the WTO' (2003) 10(3) Review of International Political Economy, 377-405.
[54] Brian Harvey, Deborah Parry, *The Law of Consumer Protection and Fair Trading* (4th edn. Butterworths, 1992).
[55] Kip Viscusi, Joseph Harrington, John Vernon, *Economics of Regulation and Antitrust* (4th revised edn. MIT Press, 2005).
[56] Jonathan Baker, 'The Case for Antitrust Enforcement' (2003) 17(4) The Journal of Economic Perspectives, 27-50.
[57] Christopher May, 'Unacceptable Costs: The Consequences of Making Knowledge Property in a Global Society' (2002) 16(2) Global Society, 123-144.

of this is a call for an exhaustive legal framework to balance consumer interest against the profit interest of MNCs.[58] Notably, this call has in recent years found meaning in judicial reasoning given that aggressive commercial transactions by MNCs are capable of undermining consumer welfare.[59]

This is why the recognition of strict rule-based antitrust policies has spread, in order to avoid potential abuse by MNCs who are always tempted by their ever-widening profit ambitions to exploit consumers in an open market.[60] The next part of the article outlines the framework underpinning antitrust regimes. It considers TRIPS and its relevant enforcement provisions for antitrust as found in Articles 8 and 40 with a discussion of the World Bank's suggestion for a consistent national action on consumer protection.

2. A Brief History of Antitrust Legislations

The conceptual underpinnings of antitrust regimes rest on a viewpoint that markets alone as a loose system offers the opportunity to powerful MNCs to intimidate weaker competitors.[61] The United States (hereinafter 'US') pioneered the enactment of antitrust legislation to regulate commercial undertakings that impose illicit limits on competition with the view to promote the interest of consumers.[62] This follows public reaction over trusts, which were dominating the US manufacturing and mining sector in the late-nineteenth-century. It is believed that common law failed to restraint aggressive monopoly. In effect, this lapse brought the contrasting models of the market and the State into sharp collision with the end result, the promulgation of the first antitrust legislation in the US known as the Sherman Act.[63] The Sherman Act embodied a statutory compromise for a

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[58] Shahid Alikhan, Raghunath Mashelkar, *Intellectual Property and Competitive Strategies in the 21st Century* (Kluwer Law International, 2004).

[59] Geraint Howells, Stephen Weatherill, *Consumer Protection Law: Markets and the Law* (2nd revised edn. Avebury, 2005).

[60] Marc Allen Eisner, *Antitrust and the triumph of economics: institutions, expertise, and policy change* (University of Carolina Press, 1991). See also Giorgio Monti, *EC Competition Law* (Cambridge University Press, 2007). Refer to Anti-Competitive Agreements under EU Law found in Consolidated Version of the Treaty on the Functioning of the European Union Articles [101 and 102], 2008 O.J. C 115/47.

[61] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004).

[62] Eilliam Kovacic, 'The Modern Evolution of US Competition Policy Enforcement Norms' (2003) 71(2) Antitrust Law Journal, 377-478.

[63] The Sherman Anti-Trust Act of 1890 (15 USC.A. § 1 et seq.). See Clayton Act of 1914 (15 USC.A. § 12 et seq.). The Robinson-Patman Act of 1936 (15 USC.A. § 13 et seq.). See

healthy competition in the market, which was understood as fundamental machinery for the allocation of resources.[64] It countered the long held view that the perfection of conditions in the market is not the function of governments, and therefore, requires no intervention. By 1990 the use of antitrust policy to regulate commercial undertakings in markets has become a common phenomenon across the globe.[65]

3. Articles 8 and 40 of the TRIPS Agreement

The idea that IPRs are prone to animate over-ambitious MNCs to undertake abusive actions to the detriment of consumers has not been disputed empirically.[66] Even the TRIPS Agreement acknowledges the extent to which IPRs could distort competition. To this end, TRIPS offered its Members the cardinal discretion to adopt antitrust precautionary measures for consumer protection.[67] Primarily, Articles 8, and 40 of the TRIPS Agreement enjoins Member States to take consistent, and appropriate measures to prevent undertakings intended to unreasonably restrain competition. Thus, the TRIPS Agreement seeks to match the implementation of IPRs with legislative and institutional developments that ensure MNCs do not over exploit IPRs to insulate their interests. The reality, however is that the enforcement provisions for safeguarding consumer protection, as contained in the TRIPS Agreement are permissive in nature, rather than mandatory. Hence, they do not require minimum standards to be applied by Member States as in the case of other provisions dealing with substantive IPRs protection. Article 8.1 of the TRIPS Agreement provides as follows:

> Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their

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also the regulatory agency to administrate and enforce the law, under the Federal Trade Commission Act of 1914 (15 USC.A. §§ 41--58).

[64] William Page, The Ideological Origins and Evolution of US Antitrust Law in Wayne Dale Collins (ed.) *Issues in Competition Law and Policy* (ABA Antitrust Section 2008).

[65] For example the Antimonopoly Act of Japan, officially the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of April 14, 1947. See also James Fry, 'Struggling to Teethe: Japan's Antitrust Enforcement Regime' (2000) 32 Georgetown Journal of International Law, 825-858.

[66] Herbert Hovenkamp, Mark Janis, Mark Lemley, *IP and Antitrust* (Wolters Kluwer Law & Business, Aspen Publishers, 2002).

[67] Eleanor Fox, 'Competition Law and the Millennium Round' (1999) 2(4) Journal of International Economic Law, 665-665.

> socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.[68]

Of particular importance is Article 8.2:

> Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices, which unreasonably restrain trade or adversely affect the international transfer of technology.

Article 40 of the TRIPS Agreement also states:[69]

> (1) Members agree that some licensing practices or conditions pertaining to intellectual property rights, which restrain competition, may have adverse effects on trade and may impede the transfer and dissemination of technology. (2) Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

4. World Bank's view on the impact of TRIPS Agreement and competition

The economic purpose of IPRs has dominated government policies of LDCs to the extent that it has overshadowed the distributive understanding of IPRs, and its overriding discontents on consumer protection. Social norms and moral considerations have often presumed that if IPRs were applied without a parallel antitrust legislations and its enforcement institutions,

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[68] Article 8 of TRIPS emphasises on Members' discretion to prevent the abuse of IPRs.
[69] Article 40 of TRIPS enjoins Members' to control anti-competitive practice.

MNCs are highly likely to be tempted to circumvent consumer welfare.[70] Different states have dissimilar reasons for the adoption of antitrust policies. Some states consider internal reasons, such as national economic reforms. Others reacted to external pressure by international institutions, such as the World Bank. The World Bank, in particular, places weights on the impact of IPRs regimes on consumer protection. While developed countries could easily deploy antitrust regimes to monitor destructive effects of IPRs, the possibility that MNCs would exercise momentous market power using IPRs as shields is practical in LDCs. As a result, the World Bank responded to this reality of MNCs violating antitrust laws by recommending a redefinition of a total symmetry between antitrust legal frameworks and its institutional re-orientation in order to reduce the degree at which TRIPS may impair competition to the detriment of consumer welfare. The World Bank stated that:

> Unless countries rapidly establish adequate competition frameworks and regulatory institutions that also address monopoly abuse of intellectual property rights, it is possible that increasing intellectual property right protection could result in welfare losses from monopoly demeanour.[71]

Additionally, the WTO is likely to put pressure on LDCs to implement their TRIPS obligations to apply sturdier IPRs which may weaken consumer protection. The World Bank's report forewarned in particular LDCs to intervene quickly to implement appropriate antitrust regulatory frameworks in their jurisdictions. The World Bank is convinced that enforcing IPRs without a comparable statutory infrastructure for antitrust and a related enforcement institution would make LDCs run the risk of harming consumer rights. Since, in the absence of a well-defined antitrust legislation and a related institution exercising competition supervision, industry cannot be trusted to voluntarily play by commercial rules. Even if it were to put matters too high, the alternative position is that the approach to develop a suitable legislative landscape to address gaps in competition policy in

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[70] Katlin Cseres, *Competition Law and Consumer Protection* (vol. 49, Kluwer Law International, 2005). See also Case C-48/69 *ICI Ltd v Commission* [1972] ECR 619 paras 64-68.

[71] Keith Maskus, Mohamed Lahouel, *Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement* (The World Bank Global Conference on Developing Countries and the Millennium Round, Geneva, September 1999).

predominantly, an LDC jurisdiction remains unrealistic proposition. Moreover, conventional wisdom is against the odd that policy developments in this direction are rather less optimistic, as institutional immaturity issues alone stand to deteriorate the already prevailing capacity constraints confronting LDCs.

IV. Human rights emphasis of consumer protection

1. Introduction

The United Nations Guidelines for Consumer Protection (hereinafter 'UNGCP') was adopted in 1985.[72] It featured a comprehensive list of objectives described as 'legitimate needs' including the right to safety, the promotion of sustainable consumption patterns, and the advancement of economic interest of consumers. Even though several of these objectives appear to have their origins in human rights treaties, they are often not treated as part of the operational content of human rights.[73] Invariably, while the relevance of consumer protection has shown signs of great importance in policy considerations of several governments, decorating consumer protection as an obligatory human right is bound to face several philosophical ambiguities. Therefore, it seems premature to characterize the same as mandatory human rights as opposed to permissive or soft rights, and clearly, arguing otherwise would not achieve a precise outcome in the midst of ideological resistance. Theoretical uncertainties together with other notional opposition makes it daunting to supply adequate philosophical presumptions to support its acceptance and practice as overriding human rights. One fundamental objection is that the admission of new rights into the already over-filled human rights instruments could create a damaging climate in terms of the value and validity of existing human rights.[74]

Furthermore, substantive and procedural analysis of human rights support the broadening of the definition of a consumer protection in the same thread as rights bestowed to individuals in human rights instruments. In this regard, consumer protection as a human right ought to be given intellectual hearing,

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[72] United Nations Guidelines for Consumer Protection: G. A. Res. A/RES/39/248 (16 April 1985).

[73] Shaoping Gan, 'Consumer Rights: A Part of Human Rights' (2008) 1(1) Journal of International Business Ethics, 18-20.

[74] Phillip Alston, 'Human Rights and Basic Needs: A Critical Assessment' (1979) 12(19) Human Rights Journal, 55-56.

since there are already sufficient compromises both at the international and national levels to accept its conceptual legitimacy.[75] In the absence of this, violations of consumer rights by MNCs would not be accompanied by grave consequences, in contrast to what may be the case if governments, and its administrative bodies were to infringe consumer rights. Taking fundamental assumptions of comparative approach into consideration one is able to conclude that the power position of IPRs titleholders are enhanced by virtue of legal protection, which allows them to dispose of the subject matter within the confines of exclusive rights. Given this situation, invoking a human right, as a balancing exercise, ought to be accepted as a necessity in order to counterbalance the private control of IPRs in contravening public interest. Thus, the next part of the article examines the extent to which consumer protection could be claimed as a vital part of human rights in order to overly enhance its protection in Ghana. To that aim, the article implies to widen the claim that consumer protection must be acknowledged as derivative rights or a right considered integral to the larger substantive economic rights.

2. The Development of Consumer Protection as Human Rights

Consumer protection comprising economic and social rights was recognised by the UDHRs based on the United Nations Charter, which put emphasis on consumer protection.[76] Article 25.1 of the UDHRs intended to enhance the standard of living, and the well-being of the individual as a consumer. In today's real world, it forms the philosophical background to a defence of consumer protection as part of wider rights that States have a responsibility to protect. The UNGCP, which were unanimously approved by the UN General Assembly, constitutes an important project for the recognition of consumer protection as a human right at the international level. Although in principle the UN General Assembly lacks a complete legal authority to enter into a binding treaty, the UNGCP is the first international statement of purpose by the UN to explicitly acknowledge consumer protection with a common international language. The understanding of the concept of law reflected in position of the UNGCP suggests it lacks a binding legal force,

[75] Portuguese Constitution April 25, 1976 first revision in 1982: under Title III. Chapter I, Economical, social and cultural rights and duties, Article 60 declares consumer rights as basic constitutional human rights.

[76] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Article 55(a) declares that '[t]he United Nations shall promote: a higher standards of living, full employment, and conditions of economic and social progress and development.'

nonetheless, the approach reconciling status differences now is not even critical. Since, the normative power of the UNGCP has already paved the way for the current definition that protecting the right of a consumer should be considered a human right. Section 1 of the guidelines provision states the objective that:

> Taking into account the interests and needs of consumers in all countries, particularly those in developing countries; recognizing that consumers often face imbalances in economic terms, educational levels, and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development, these guidelines for consumer protection have the following objectives (…).

Of particular importance is Section 1(d), which states that: '[t]o assist countries in curbing abusive business practices by all enterprises at the national and international levels which adversely affect consumers.' Section 13 imposes obligations on States to promote the economic interest of its consumers. It also leaves States with the freedom to institute measures for fair business practices based on countries own priorities, and in accordance with the economic, and social circumstances of its people.[77] In July 1988, the UN Economic and Social Council (hereinafter 'ECOSOC') passed a resolution urging all governments to implement the UNGCP Guidelines.[78] Again, in 1990, the ECOSOC passed another resolution requesting the UN Secretary-General to develop a programme of action for reviewing the Guidelines in its tenth anniversary of its adoption; this was as a result of LDCs failure to implement the Guidelines.[79]

Currently, general statements about private corporations and economic, and social rights provide the indispensable foundation for a more detailed examination of specific human rights issues arising in the private sector involving, predominantly MNCs. The UN has noted lately the issue of private corporations' involvement in the abuse of consumers and has

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[77] David Harland, 'The United Nations Guidelines for Consumer Protection' (1987) 10(3) Journal of Consumer Policy, 245-266.
[78] Consumer Protection, ESC Res. 1988/61, UN ESCOR, 2d Reg. Sess., Supp. No. 1A, UN Doc. E/1988/88/Add.1 (1988) 15).
[79] Consumer Protection, ESC Res. 1990/85, UN ESCOR, 2d Reg. Sess., 37th Plen. Mtg., Supp. No. 1A, UN Doc. E/1990/90/Add.1 (1990) 27.

expressed concern on corporate responsibility and human rights.[80] In June 2011, the UN Human Rights Council endorsed an all-inclusive guiding principles on business and human rights.[81] This, *inter alia*, provides guidance for businesses on how to implement their corporate responsibility programmes to respect human rights, which represent a key element of the global compact principle.[82] It outlined a need for MNCs to adopt human rights-sensitive approach to their businesses models. In a related development the Special Representative of the UN secretary-general on the issue of human rights and transnational corporations and other business enterprises observed that:

> It is essential to achieve greater conceptual clarity with regard to the respective responsibilities of States and corporations […] In doing so we should bear in mind that companies are constrained not only by legal standards but also by social norms and moral considerations.[83]

Appreciatively, the UNGCP entered into the domains of another UN agency, the UNCTAD, who announced the revision of the UNGCP

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[80] The Sixty-First Session of the Commission on Human Rights 2005, Resolution 2005/69 recommended that the UN Secretary-General appoint a Special Representative to review the whole matter of corporations and human rights. See Also David Weissbrodt, Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights' (2003) 97(4) The American Journal of International Law, 901-922.

[81] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. This Guiding Principles was developed by the Special Representative to the UN Secretary-General on the issue of human rights, and transnational corporations and other business enterprises. The Guiding Principles was endorsed in a Resolution A/HRC/17/L.17/Rev.1 on 16 June 2011. See Also Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (E/CN.4/Sub.2/2003/12/Rev.2).

[82] The UN Global Compact initiative was lunched on July 26, 2000 to encourage businesses worldwide to adopt sustainable and socially responsible policies, and to report on their implementation in ten principles in the areas of human rights, labour, the environment and anti-corruption. The UN General Assembly has recognized the UN Global Compact on a number of occasions. For example, Resolution (A/RES/60/215). In 2005 World Summit, UN Member States provided unanimous political support to the Global Compact (see paragraph 175 of the World Summit Outcome-A/RES/60/1). See also Andreas Rasche, Georg Kell, (eds.) *The United Nations Global Compact: Achievement, Trends and Challenges* (Cambridge University Press, 2010).

[83] The UN Special Representative on Guiding Principles, which was annexed to his final report to the UNHRC Doc. A/HRC/17/31.

Guidelines scheduled for July 2014 with the view to make its operation relevant to LDCs.[84]

3. Supplying the Philosophical Context of Consumer Protection as a Human Right

Consumers are entitled to accountability and greater consistency in the enforcement of their rights against unconscionable conducts. For decades consumers have not received adequate protection from corporations. This is because the over-reliance on a market-oriented approach has failed to serve as a definite avenue to define a right-based consumer concept. One way to resolve this problem is the adoption of a new legal approach premised on the fundamental-rights based thinking. This has already offered some countries the platform to broaden the scope of consumer protection to include a social dimension.[85] A closer look at these legal frameworks suggests consumer rights are an integral part of human rights and vice versa. This understanding takes the view that actually, there is no contradiction between citizens and consumers, and for that reason, consumer protection requires no fine demarcation from human rights.

Not only that, in the recent years, consumer protection has found logic in legal discussion, it has significantly become part of a modern social expectation; as a result, it is too risky to ignore its relevance within human rights treaties. Particularly, when its essential characteristics could easily survive both the substantive and procedural tests central to human rights reasoning. Therefore, it is time to supply the theoretical background for the recognition of consumer protection as a human right, since several features of consumer protection conform to the precepts of human rights. The starting point is that consumer protection is an individual (rather than a communal) right. Consumer protection remarkably, satisfies the substantive test of fairness inherent to human rights values, which provides a solid ground for its recognition on merit. These conceptual characteristics set the individual consumer protection in the same legal context as the already established human rights.

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[84] *UNCTAD Ad Hoc Expert Meeting on Consumer Protection* (Delhi, India 2013).

[85] The Spanish Constitution was approved by a Joint Session of Parliament on October 10, 1978 and ratified by a referendum on December 6, 1978, which received the Kings assent on December 27, 1978. Article 51 is an illustration of the acknowledgement of basic consumer rights as human rights.

The intention of antitrust laws and its enforcement institutions fit within the accepted view that governments must protect consumers in line with international human rights principles, which demand mandatory actions from States to protect its citizens. Even though human rights bind governments and its administrative bodies, it makes judicial sense that, if a corporation assumes the responsibility of infringing consumer protection, it is fair, just, and reasonable to impose liability thereof.

Moreover, another point, which calls for an absolute consumer protection as a human right, reflects the apprehension of the fundamental responsibility of a State to protect its consumers from arbitrary abuse by MNCs. This falls within a wider part of the primary function of a State, not only for the purpose of economic efficiency, but also as part of the quest for social justice.[86] While dissenting views may dispute the relevance of consumer protection emphasis of human rights, the question of States accepting to be bound by obligations to protect its people does not only flag the very foundation of this argument rather it also adds weight to its cogency. Well-accepted doctrines of protecting human dignity as the baseline for human rights can also serve as another basis to broaden the definition of human rights in order to constructively include consumer protection.

4. Claiming consumer protection as human rights

Human rights are traditionally divided into two main groups of civil, political rights, and of economic, social and cultural rights. Human rights are claimable upon a proper theory backed by intellectual evidence to establish its legal context before UN institutions could declare its status, subsequent a publication in the international bill of human rights.[87] Claiming consumer protection as a human right would not only be a question of norm setting rather such a solution involves many philosophical aspects, mainly on a notion that human rights ought to be advanced on a theoretical idea. In reality, theory and practice are interdependent.

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[86] John Ruggie, 'Business and human rights: the evolving international agenda' (2007) 101 American Journal of International Law, 819-840. See also Robert Lowe, Geoffrey Woodroffe, *Consumer Law and Practice* (3rd edn. Sweet & Maxwell, 1991).

[87] International Bill of Human Rights is a comprehensive treaty document of the United Nations including the International Covenant on Economic, Social and Cultural Rights (ICESCRs), the Universal Declaration of Human Rights (UDHRs) and the International Covenant on Civil and Political Rights (ICCPRs) including all Optional Protocols. See Fact Sheet No. 2 (Rev.1) The International Bill of Human Rights, UN OHCHR. June 1996.

Additionally, while human rights foundation rests on theoretical presumptions, justifying consumer protection as human rights should not present severe conceptual difficulty, on an assumption that theories are shaped by practice just as practice are also influenced by theories.[88] The status of IPRs as a human right in international law is not in dispute. These rights are enforceable by individual human beings, and juristically by corporations. It is against this foundation that, if corporations are made juristic persons, and could lay claim to rights reserved for human beings, such as IPRs, which are now a significant part of the WTO architecture, then protecting consumers who are human beings and also citizens of States have a better chance of becoming human rights. On this basis of the foregoing, the conceptual foundation of consumer protection has reached a point in legal philosophy that justifies it as a human right.

This raises a fundamental question about the importance of recognising consumer protection as a human right. The tendency to broaden the scope of individual consumer protection and to include it as a constitutional right furthers the argument that if consumer protection were not admitted as a human right, they would be overridden when in conflict with other statutory rights such as IPRs.[89] It is indisputable if the aggressive institutions of IPRs by the WTO, and evidence on gross violations of antitrust laws by MNCs with high levels of impunity is considered. The fear is that enforcing IPRs alone without antitrust legislations and its enforcement institutions would present additional licence for MNCs to abuse dominant positions, which will eventually affect consumer welfare. It seems that, notwithstanding its feeble legal status as a human right, consumer protection can still benefit from being acknowledged as part of economic rights in relation to which States have responsibilities to protect. The idea of proposing consumer protection to be recognised as a separate or derivative branch of human rights is the result of the attitude of some MNCs who are consistently violating antitrust laws with somehow greater freedom.[90] Therefore, in a civilised consumer-oriented society, consumer protection must be professed

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[88] Sinai Deutch, 'Are consumer rights human rights?' (1995) 32 Osgoode Hall Law Journal, 538-578. See also Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111(3) Yale Law Journal, 443-466.

[89] William Meyer, 'Human Rights and MNCs: Theory versus Quantitative Analysis' (1996) 18 Human Rights Quarterly, 368-397.

[90] On 6 December 2012, the Court of Justice of the European Union (CJEU) upheld the European Commission's decision fining AstraZeneca (AZ) 60 Million Euros for abuse of a dominant position. See Case C-457/10 P *AstraZeneca v Commission* [2012] ECR I-0000.

as part of the overall duty to maintain human dignity, especially, imposing a legal responsibility against threats of anticompetitive behaviour by MNCs ought to be accepted as inevitable.[91]

There is no alternative choice for States not to establish the necessary antitrust legal framework to protect its citizens against would-be infringements of MNCs. If a State fails in discharging its responsibility in this perspective, then it in question must shoulder a greater human right responsibility should the relevant circumstances arise.[92] Accordingly, it is legally daunting to implement consumer protection as human rights given its weak conceptual justification. However, rather than arguing on to recognise consumer protection as entirely new rights, the key objective here is that they could be elaborated as derivative human rights contingent on economic rights. This idea is already obvious from several jurisdictions that have designated consumer protection as a specific human right subject matter of which scope is relatively clear-cut in their constitutional provisions.[93]

V. Enforcement of antitrust law in Ghana

1. Introduction

The principal output of a State's legal system is information, upon which both its citizens and commercial agents rely to form expectations that meet their prospective aspirations. In the context of Ghana, political mandates are not reserved for the creation of effective policies in this direction. Ghana on the contrary is not up-to-date with the same mind-set that shaped the evolutionary understanding that legal landscape, which is reliant solely on common law rules, is incapable of monitoring commercial interactions among innovative corporations.[94]

Despite years of advocacy in favour of competition policy, several antitrust bills are stagnated in policy archives, which have failed to move into a

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[91] David Kinley, Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6(3) Human Rights Law Review, 447-497.
[92] Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6(2) Northwestern Journal of International Human Rights, 304-326.
[93] *Ibid*.
[94] See generally Mark Palim, 'The Worldwide Growth of Competition Law: An Empirical Analysis' (1998) 43(1) Antitrust Bulletin, 105-145.

concrete political process in line with Ghana's economic transition.[95] This significantly, discounts logic as to why bills that passed through several phases of political considerations have failed to migrate into legislative processes that translate them into enforceable laws. To this end, the debate on the need for a comprehensive policy on antitrust is gradually becoming a forgotten subject in Ghana, since policymakers are often expected to depart from the common sense position, which calls for a legislative intervention. In its five decades of independence from British colonial rule, Ghana has gone through different cycles of economic and political evolutions.[96] Figures-wise, observers believe that the transition into lower middle-income league of countries is impressive.[97] However, Ghana's socio-economic, infrastructural, and innovation developments are punctuated by abysmal performance.[98]

There is nothing like a substantive antitrust law that is vested in a specific enforcement institution in Ghana. The country is at present experiencing a total erosion of legitimate authority to make a collective decision that promotes the interest of its people. Despite Ghana's success in creating somehow workable institutional frameworks to regulate some sectors of its economy,[99] the current approach to monitor anticompetitive acts of corporations is not going to yield any credible result. This is because Ghana's jurisdictive landscape is nothing but trouble band, which is not only operating under unconvincing diffused system, but more worrying a confused legal infrastructure as well made up of exhausted bureaucratic institutions with old mandates meant to oversee contemporary antitrust undertakings involving very innovative MNCs. Thus, the next part of the article assesses the antitrust legal landscape in Ghana, mainly from a notion that Ghana's Constitution that ignores consumer protection. Again, evidence on that some MNCs operating in Ghana today have been found guilty of

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[95] For example the Draft Competition and Fair Trade Practices Bill in 2004 went through parliamentary readings but failed to become law due to the lack of practical political will.

[96] Ghana is the first Black African nation to achieve independence from the British on 6 March 1957.

[97] The World Bank classified the Economic Status of Ghana as Lower Middle-Income in 1 July 2011. See also Todd Moss, Stephanie Majerowicz, 'No longer poor: Ghana's new income status and implications of graduation from IDA' (2012) Centre for Global Development Working Paper 300.

[98] John Kwakye, *Ghana's Middle-Income Reality Check Part II: Social and Infrastructure Dimensions* (Institute of Economic Affairs, Monograph No. 30, 2012).

[99] For example The Public Utilities Regulatory Commission Act, (Act 538) 1997. See Also the National communication Authority Act, (ACT 524) 1996.

antitrust legislations in Europe is considered in contention with a political failure to have found a specific legal framework for antitrust regime despite years of policy considerations.

2. Overview of the Consumer Protection in Ghana

Given Ghana's level of political maturity in Africa's standard, it is alarming to find out why there exists no compacted antitrust regime in a country whose political elites regard the direction of its governance as a beacon of Africa's development. Ghana adopted its current Constitution in 1992.[100] Exclusively, the Constitution overlooked consumer protection, which falls within economic rights of its people, as against several constitutional provisions safeguarding political rights.[101] The Constitution adopted bifurcated systems of British and US strings of constitutional foundations, making it very easy to spot the confusion created by the wisdom of a modern constitution that ignores consumer protection as adopted by other countries. [102] Surprisingly, in Ghana, consumer protection is under the watchdog of a non-governmental organisation which has no statutory authority to enforce compliance.[103]

Understandably, the exercise of a right over an IP alone does not create violations of antitrust law. However, this conventional view only works within a restricted assumption that IP rights holders would operate within a laid down antitrust legal framework. Nevertheless, the reason why this represents a middle ground for concern is the absence of a substantive antitrust legislation and a related enforcement institution from the legislative radar of a country like Ghana, which according to many socio-economic commentators leads Africa's agenda to its future prosperity. The only legislation in Ghana, which appears to enforce some elements of competition law, is embodied in about 10 short Sections.[104] Act 589 was promulgated in the year 2000 with the view to protect businesses, rather than consumers. Almost all the 10 Sections of Act 589 focus on the offense

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[100] The 4th Republican Constitution of Ghana 1992.
[101] *Ibid* 99. See Chapter 5 of Ghana's Constitution.
[102] The Constitution of the Republic of Poland adopted on April 2 1997 by the Polish National Assembly and approved by the Polish people in a referendum on May 25, 1997: Article 76 impose an obligation on the State to protect consumers.
[103] Ghana Consumer Association in an NGO formed in 1984, which has ever since taken a very active role in advocacy on issues on competition and consumer welfare.
[104] Protection against Unfair Competition Act, (Act 589) 2000.

of damaging the goodwill or reputation of a company by another, Section 3 seems to loosely impose liability in the event that companies mislead the public. However, the fundamental fairness in this context is that Section 3 is theoretically defective in legal terms subsequent the Section 8 remedy proviso, emerging to make misleading the public a civil liability.[105]

3. Evidence of Antitrust Undertakings among MNCs Operating in Ghana

Globalisation-induced competition has provoked the influx of MNCs across national boundaries in search of markets. This has given rise to gross violations of antitrust legal provisions by MNCs wanting to meet their over-stretched commercial ambitions.[106] Policymakers are still making a timid transition towards legislative intervention, despite the fact that concentrated industries seem to enjoy unopposed market dominance in Ghana.[107] The current status quo is not sustainable because several MNCs operating in Ghana today have violated antitrust legislations within several jurisdictions, such as the European Union, even though Europe has stricter antitrust laws and enforcement institutions. Circumstantial evidence suggests a culture of anticompetitive behaviour by the Heidelberg Cement group of companies operating in Ghana.[108] Heidelberg Cement was found guilty of price-fixing in Poland making it highly nervy to exonerate Ghacem from impropriety of bribery allegations.[109] These violations of antitrust laws involving the same

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[105] See Act 589.

[106] On 5 December 2012, the European Commission fined seven companies nearly 1.5 billion Euros for their role in ten-year long cartels fixing prices involving cathode ray tubes used in television and computer monitors. See Commission Decision, *TV and Computer Monitor Tubes* (COMP/3943).

[107] *State of Competition Regime in Ghana, Preliminary Country Paper* (Institute of Statistical, Social and Economic Research, 2008).

[108] Germany's Competition Authority, the Federal Cartel Office, found Heidelberg Cement and others guilty of anti-competitive behaviour with 660 Million Euros fine on the 14th April 2003. Scancem the parent company of Ghacem became part of the Heidelberg Cement in 1999.

[109] The Polish Office for Competition and Consumer Protection imposed a record fine of 26 Million Euros on some companies including Heidelberg Cement owners of Ghacem in Ghana. *See* Brian O'Mahony, *Polish regulator fines CRH 26 million euros* (Irish Examiner Friday, December 2009).

MNCs operating in Ghana leaves open that Ghanaian consumers may be at risk.[110]

Though several Ghanaian public officials implicated in the Scancem bribery scandal have refuted these damaging allegations,[111] such analytical formulation of allegations of bribery against public officials who are meant to protect consumers is worrisome. More significantly, the prevailing policy position, which implies that in the absence of an antitrust legal framework, Ghana would be able to promote a balanced level of antitrust enforcement matters, is not practically cogent. A closer scrutiny of the aggressive breaches of antitrust legislations in Europe by the same MNCs operating in Ghana lends a thoughtful credence that must pause Ghanaian policymakers to shift to a new conviction of resetting their future political agendas in line with the economic interest of its people.[112]

Given the comparative lens that modern MNCs face stiff competition to realise their commercial intentions, anticompetitive behaviour will always be a major theme of their strategies. Hence, the critical preoccupation is that it would be impossible for Ghana to interrupt anticompetitive undertakings in the absence of antitrust legislations and its enforcement institutions.[113] This is because little remedy exists through the long and expensive practice of using the normal common law judicial process as a safeguard mechanism for antitrust cases, which has similarly, failed to correct anticompetitive practices in the US before the end of the nineteenth century.[114]

4. Historical Confirmation of Policy Failure in Ghana

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[110] Vodafone is a big player in the telecommunication industry in Ghana. The Competition Regulators in Netherland fined Vodafone 3.71 million Euros for breaking anti-trust rules in 2001.

[111] Scancem Bribery Trial in Asker and Bærum District Court (Case No. 06-147582TVI-AHER/1/08.09.2006).

[112] EU Competition Watchdog imposed a fine of 732 Million USD on Microsoft, and this amount represents just a 1% of Microsoft annual revenue. In total, EU Competition Watchdog has fined Microsoft a total of 2.2 Billion USD for anti-competitive breaches See Wall Street Journal, Wednesday 6 March, 2013 Edition).

[113] James Kanter, Europe Fines Intel $1.45 Billion in Antitrust Case (The New York Times, 13 May 2009).

[114] James May, The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History (1990) 59 Antitrust Law Journal, 93-107. See also Keith Hylton, *Antitrust law: economic theory and common law evolution* (Cambridge University Press, 2003).

Over twenty years of constitutional stability, regulatory bodies in Ghana are still struggling to migrate from licensing services to policing antitrust standards. In the face of several warnings, Ghana is one of the countries in Africa still fighting its own political shadows in order to become forward-looking on matters of consumer protection.[115] It is no longer secret that Ghanaian policymakers lack the practical understanding that antitrust legislation and a related enforcement institution offer a realistic prospect to ensure that markets work efficiently to deliver economic welfare. This fading hope to found a substantive antitrust legislation and a related enforcement institution do not only emanate from the exercise of consistent poor intellectual balance but clearly, an evolving liberal interpretation also suggests weak political calculation is one of such fundamental issues perpetuating the uncertainty to protect Ghanaian consumers. Consequently, it further indicates that national economic policies in operation are subject to synthetic luck rather than thought out. The absence of judicial records of large-scale antitrust violations in Ghana is due to the absence of antitrust legislation and a related enforcement institution, which are necessary to investigate these violations.

One of the much speculated reasons for the unacceptable delay to found antitrust legislation and a related enforcement institution points to the fact that policymakers prefer to utilise the prevailing weaker legal system as a vehicle to attract foreign direct investment (hereinafter 'FDI'). However, in following up such a political decision failure, it is submitted that such a hypothetical excuse of subjecting Ghanaian consumer protection, as a subclass of FDI is ill conceived. Knowingly, it is not easy to rule out the earlier suggestion that opposition from some business lobbying groups have been behind the absence of antitrust legislation and a related enforcement institution in Ghana.[116] Accordingly, Ghana's case is, nonetheless, a typical example of a domestic policy failure, since evidence exists to underscore the fact that antitrust bill(s) have been on the political agenda for well over

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[115] Long before 2001, several international organisations were informing African governments on the need for consumer protection. For example, Competition and Consumer Policies*: Regional Consumer Seminar for Africa* (UNCTAD Technical Assistance Activities, Accra-Ghana, 20-21 August 2001).

[116] See generally Karen Ellis, Rohit Singh, Peter Quartey, and Elvis Agyare-Boakye, *Assessing the Economic Impact of Competition: Findings from Ghana* (UK:Overseas Development Institute 2010).

twenty years.[117] The logical deduction is that the Ghanaian political landscape is populated with several ordinary politicians who do not understand the kind of policies required to move the country forward. This is why Ghana desperately needs not just common politicians but those with forward-thinking political mind-sets.

5. A Demand of Political Responsibility

It is time to discount the over politicisation of the importance of IPRs. Accepting to be bound by the TRIPS Agreement is not only meaningless but also counterproductive, since this may not lead to any precise outcome in economic growth. IPRs do not produce economic effect on their own without sound economic policies. Ghana cannot begin to reap the benefit of IPRs in the absence of other critical institutional development to commensurate the functioning of it. In other words, the use of IPRs as a tool for economic development requires certain legal and administrative structures, such as antitrust legislation and a related enforcement institution to check MNCs that would exploit IPRs for profit.[118] Perhaps the most straightforward path that can be desirable for Ghana to mitigate the impact of the TRIPS Agreement on consumer protection could also undermine the very condition by which the WTO seek to protect the commercial interest of private corporations. Notably, the existence of chaotic arrangements within the history of the administration of IPRs in Ghana adds weight to the long held view that policymakers do not clearly understand the huge difference between the pre-TRIPS era of IPRs as pursued by States to facilitate innovation for socio-economic development, and the contemporary IPRs as pursued by the WTO as a rent seeking system for MNCs.[119]

The fact is LDCs policymakers did not have the opportunity to consult from well-informed sources regarding their States burden in enforcing the TRIPS

[117] The Trade Practices Draft Bill, 1993 also failed to become law due to the lack of political will.
[118] Howells and Weatherill (n 59).
[119] For example Ministerial responsibility for Copyright matters changed from Ministry of Information to the National Commission on Culture following PNDC Law 238, 1990. In 2005, ministerial responsibility again, shifted to the Ministry of Justice. On TRIPS activation on 1 July 2013, IPRs matters are expected to be under the Ministry of Trade but their technical legal functions as usual will be within the Ministry of Justice, whilst the TRIPS Council meetings and Trade Rounds will be attended by Ministry of Foreign Affairs.

Agreement.[120] Policymakers were instead swayed by seemingly, the half-baked rhetoric that led to a justification of IPRs as forming an 'insurance policy' for economic growth.[121] In contrast, the cost of protecting IPRs within LDCs could outweigh its benefits derived from enforcing the same. It therefore, follows that Ghana is unable to survive the reality of affording strong legal protection to corporations through the vehicle of IPRs without extending the same to its people, in a country sprang by MNCs some of whom are culprits of antitrust legislations in Europe. Ghanaian policymakers often get the politics right but not the policies, which means that the country deliberately denies its people the right to defend their economic interests. This begs the question of why Ghana is even perceived as a gateway to Africa, while it cannot even implement an antitrust law and a related enforcement institution. This is why it seems quite urgent to commence a debate on legal enforceable means of protecting consumers, unless Ghana wants to experience the negative side of IPRs to propagate anticompetitive behaviour.

It must be noted in principle that individuals form society and therefore, remains the beneficiary of a State's policy. Upon the other hand, corporations are creatures of States, incorporated presumably for the benefit of the public. Even if corporations receive certain special privileges they still must hold themselves subject to the laws of the State. Particularly note, that individual rights precede that of corporations. Therefore, without a legal framework, which will serve as checks and balances like in the case of Ghana, it is possible for corporations to operate outside the basic principles inherent in consumer protection. Whilst this elementary idea is widely accepted, most fundamentally, understanding the general conceptual difference between legal provisions and its enforcement is even critical, noting that in Ghana laws are hardly enforced even if they visibly exist. Therefore, it still proves difficult to pin down exactly the kind of antitrust laws and its enforcement institutions that count as appropriate for a country like Ghana to protect its people given that MNCs wield too much power to manipulate policymakers.

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[120] Thaddeus Manu, 'The Social Cost of Criminalizing a Civil Act: TRIPS Section 5 Obligations in Africa' (2012) 1(2) International Journal of Arts and Humanities, 112-132.
[121] Robert Bird, 'Defending Intellectual Property Rights in the BRIC Economies' (2006) 34(2) Journal of American Business Law, 317-363.

Nonetheless, the complete difficulty is when one reads through the already recorded cases of violations in antitrust legislations. In light of the foregoing, consumer protection must be viewed and bracketed in a refined social expectation in the same broader human rights context. This reinforces the notion that Ghana could no longer retreat from a forward-thinking path to promulgate antitrust legislations, since the long-term cost of exclusion could be dangerous.

VI. Conclusion

Innovation benefits consumers.[122] This, in principle geared up the conclusion of the TRIPS Agreement in order to release the entrepreneurial energies of innovators to strive after economic efficiency.[123] Both antitrust and IPRs policies is complementary, and not intrinsically in philosophical conflict.[124] In fact, competition is the periphery on which IPRs incentivise innovators to be creative.[125] Despite these two legal fields strongly interrelated, clearly the relationship between them is still not an easy one to approach. IPRs' basis in natural law lies in the power of private agents, whereas antitrust legislations extend the authority of the State to defend the economic rights of its consumers.[126] Nevertheless, it follows from the foregoing consideration that despite the manifestation of somehow a twisted end of the debate on the importance of IPRs in economic growth, the seminal methodology for measuring the generic impact of IPRs on competition and consumer welfare within an LDC economy remains a question of evidential difficulty. It is upon this basis, supporters maintain that concerns over IPRs on consumer protection are unfounded. They argue that criticisms of IPRs in that direction are just over-simplistic

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[122] Hall Bronwyn, 'Business and Financial Method, Patents, Innovation, and Policy' (2009) 56(4) Scottish Journal of Political Economy, 443-473.

[123] John Barton, 'Global trade issues in the new millennium: the economics of trips: international trade in information-intensive products' (2001) 33(3-4) George Washington International Law Review, 473-1063. See generally Pamela Samuelson, 'Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections' (2004) 71(1) The University of Chicago Law Review, 223-239.

[124] Frank Machovec, *Perfect Competition and the Transformation of Economics* (Routledge, 1995).

[125] Gustavo Ghidini, *Innovation, Competition and Consumer Welfare in Intellectual Property Law* (Edward Elgar Publishing, 2010).

[126] Neil Averitt and Robert Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74(1) Antitrust Law Journal, 175-264.

characterization aimed at miscasting its concept as unorthodoxy to consumer welfare.[127]

This paper has examined in detailed the legal basis for claiming consumer protection as human rights by delving into legal justifications for it, especially, as a means for promoting the dignity of individual consumers. Depending on which end of the spectrum one finds his or her ideological comfort zone, this article may be striking as strange to some degree, as overemphasising the demand for consumer protection by equating this to a human right. Consistent with the hypothesis, this article has discussed not only the legal but economic and political remedies by contending that not much would move further in safeguarding consumer protection until a complete antitrust legal infrastructure is unearthed within Ghana's judicial landscape. Considering the difficulty of reading in between the lines of the impact of IPRs on consumer welfare, the logical balance is a requirement of a positive edge for Ghana to defend the economic rights of its people in order to place its citizens at the centre of a realistic national economic development for its current and future generations.

[127] Edward Hettinger, 'Justifying Intellectual Property' (1989) 18(1) Philosophy and Public Affairs, 31-52.

Criminalising Cartels: Theory and Practice in the UK and Australia

HUSEYIN COSGUN*

The inadequacy of the traditional administrative enforcement mechanisms has been the driving force behind the tendency to criminalise cartels for the purposes of combating them. Although cartels have been criminalised in prominent jurisdictions, the theoretical basis and the practical design of their criminalisation do not seem so straightforward. As some empirical studies demonstrate, the two main justification theories, as based on deterrence and retribution respectively, are not wholly satisfactory in that respect. As a result, a hybrid approach to criminalising cartels appears to be in question. From a practical perspective, the position in the UK and Australia reflects the difficulty in designing concrete norms. An examination of the physical and mental elements of the cartel offence and the possible defences against it in the UK and Australian jurisdictions suggests that there are significant divergences which may affect the expected efficiency of criminalisation as a tool in the fight against cartels.

I. Introduction

The purpose of this article is to explore the answers to two interrelated questions regarding the criminalisation of cartels. These are: (i) on which theoretical basis it might be justified; and (ii) how cartel offences are designed at a practical level in the United Kingdom (UK) and Australia in this context? From a theoretical perspective, the underlying theories and approaches will be examined, while from a practical perspective, the elements of the offence will be addressed in a comparative analysis.

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The criminalisation of cartels has been a rising global trend, which is now embraced by more than thirty countries, as a result of the inadequacy of the classic administrative enforcement model to combat cartels. However, to design a criminal cartel offence on sound grounds, it is crucial to comprehend the theoretical grounds behind the process of criminalisation. Moreover, this alone is not sufficient. The actual design of a cartel norm is also of great importance, as its way of formulation may be determinative in practice. To this end, the UK and Australian jurisdictions in particular may provide valuable insights into this point, as the former has substantially reformed its cartel offence recently, while the latter has lately adopted criminal sanctions for participation in a cartel.

This article is structured as follows. First, the deterrence and retribution theories that provide the theoretical basis for the justification of criminalisation will be discussed in the context of cartels. Moreover, an important reconciling approach and studies providing data on the public's view of the subject will be reviewed. Secondly, the article will explore the physical elements of the offence in both jurisdictions with a view to discovering which 'act' forms the basis of criminal responsibility, the rules on attributing liability to corporations and the basic types of such responsibility. Thirdly, the article will describe the fault elements of the offence with a view to evaluating which 'mental state' is required for an offender to commit a cartel crime. In this context, the highly controversial dishonesty element, which does not currently exist in either jurisdiction, will also be discussed. Fourthly, the article will examine the defence/exemption mechanisms provided in both jurisdictions as the last ingredient of the designing exercise with a view to demonstrating the arguments that the undertakings may invoke in order to escape criminal responsibility. Finally, the article will offer some final conclusions on the theoretical basis and practical articulation of a cartel offence as drawn by the comparison between the UK and Australian jurisdictions and will identify potential areas for further research.

II. The Theoretical Framework for Criminalising Cartels

1. The Concept of Criminalisation

Before looking into the theories underpinning the criminalisation of cartels, it would be helpful to explore the concept of criminalisation generally.

Determining the scope of criminal acts[1] is a challenging task.[2] The literature points towards different views. Ashworth emphasises 'serious wrongful behaviour'.[3] Wills refers to criminal intent,[4] moral condemnation,[5] criminal powers of investigation, criminal rights for defence and a criminal penalty in order to distinguish criminal wrongdoings from civil ones.[6] Freiberg and MacCallum argue that existing criminal offences are no worse than civil wrongdoings and remark the fallaciousness and inconsistency of both of them by pointing to the basis for characterising the conduct.[7] For instance, the English Anti-Social Behavior Order providing criminal offences for the breach of civil orders[8] supports this argument.

Being a supranational judicial body, the approach of the European Court of Human Rights's (ECtHR) providing an autonomous interpretation of the notion of 'criminal charge' may also be helpful to understanding the concept of criminalisation. In *Engel v Netherlands* [9] and *Benham v United Kingdom,*[10] the Court determined that a person will be deemed as charged with a criminal offence, if (a) a public authority is pursuing the proceedings, and (b) there is a culpability requirement, or (c) there are potentially severe consequences (such as imprisonment and heavy financial fines). Considering that a severe consequence, so as to say, a heavy financial penalty may be also imposed by a regulatory authority, it seems that for the purposes of understand criminalisation, it is limb (b) which mostly sheds some light. Although there is no explicit definition, the requirement for

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[1] See Glanville Williams, 'Definition of Crime' (1955) 8 Current Legal Problems 107; RA Duff, *Answering For Crime* (Hart Publishing 2007); John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2008).

[2] R Williams, 'Cartels in the Criminal Law Landscape', in C Beaton -Wells and A Ezrachi (eds), *Criminalising Cartels Critical Studies of an International Regulator Movement* (Hart Publishing 2011) 289, 290.

[3] Andrew Ashworth, *Principles of Criminal Law* (6th edn, Oxford University Press 2009) 1,2.

[4] Grant Lamond, 'What is Crime?' (2007) 27 Oxford journal of Legal Studies 609.

[5] John C Coffee, 'Paradigms Lost: The Blurring of Criminal and Civil Law Models-and what can be done about it ?' (1992) 101 Yale Law Journal 1875, 1878.

[6] Wouter PJ Wills, 'Is Criminalization of EU Competition Law The Answer ?' in Katalin J Cseres, Marteen Pieter Schinkel, Floris OW Wogelaar (eds), *Criminalization of Competition Enforcement* (Edward Elgar 2006) 61-63.

[7] A Freiberg and RC McCallum, 'The Enforcement of Federal Awards: Civil or Criminal Penalties' (1979) 7 Australian Business Law Review 247, 259-264.

[8] Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72 Modern Law Review 936.

[9] (1976) 1 EHHR 647.

[10] (1996) 22 EHRR 293.

moral culpability and the severity of the sanction may be generally pertinent. In addition, both natural and legal persons may be covered by the scope of criminal offences.[11]

2. Criminalisation of Cartels

2.1. Cartels: The Subject of the Process

Different approaches have been adopted in defining cartels. These are commonly defined as agreements between rivals to limit production or otherwise vitiate competition.[12] Some other definitions ascribe them an equalizer role for the disturbance of industry,[13] while some others describe them as 'dictation of price',[14] or as 'simple economic racketeering'.[15] Regulatory approaches also add some elements in the definition of cartel, such as 'secrecy',[16] 'naked practices and delinquency'.[17] The OECD uses the term 'hardcore cartel' and defines it as:

> A hardcore cartel is an anticompetitive agreement, anticompetitive concerted practice or anti competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas or share or divide markets by allocating customers, suppliers, territories or line of commerce (involving) (…) the most egregious violations of competition law.[18]

Joshua and Harding define cartel as 'an organization of independent enterprises from the same or similar area of economic activity, formed for the purpose of promoting common economic interests by controlling

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[11] Vikramaditya S Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 Harvard Law Review 1523.
[12] Robert H Palgrave, *The Dictionary of Political Economy* (Vol 1, Macmillan 1919) 229..
[13] R Liefmann, Report on International Cartels. In *Weltwirtcshaftliches Archiv* (English Translation, 1927) 82 cited in Christopher Harding and Julian Joshua, *Regulating Cartels in Europe*, (2nd ed, Oxford University Press 2010) 14 fn 6.
[14] Debora Spar, *The Cooperation Edge: The Internal Politics of International* Cartels (Cornell University Press 1994) 2
[15] Michael O'Kane, *The Law of Criminal Cartels Practice and Procedure*, (Oxford University Press 2009) 1.
[16] For notes of Office of UK Director General see Harding and Joshua (n 11) 15.
[17] Mario Monti, 'Fighting Cartels –Why and How?' Opening Address at 3rd Nordic Competition Policy Conference, Stockholm, (11.09.2000) <http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm?locale=en> accessed 27.6.2013.
[18] OECD, Recommendation of Council Concerning Effective Action Against Hard Core Cartels (1998); Mark Furse and Susan Nash, *Cartel Offence* (Hart Publishing 2004) 12.

competition themselves'.[19] Harding, elsewhere, also emphasizes that the contestable point may be not only the anti-competitive result. As he notes, 'deliberate, covert, and knowingly unlawful collective scheming and planning' are also important for understanding cartels.[20]

As we will demonstrate later, these definitions may provide some hints regarding the design of the cartel offence. For instance, the term 'hardcore' used by the OECD seems worth emphasizing, as it intrinsically refers to a 'seriousness' level for condemnation. Similarly, secrecy may be important since, as is the case in the UK jurisdiction, not to conceal a cartel agreement may constitute a potential defence against the offence.[21]

2.2. Justification for the Criminalisation of Cartels

In a capitalist system, competition is the cardinal driver, so the need to contemplate mechanisms against undesirable conducts like cartels that are 'ready instruments for fascist state'[22] or 'property crime like burglary or larceny'[23] seems axiomatic.[24] Considering that their harm costs billions of dollars,[25] as a matter of choice[26] criminal sanctions for corporations and individuals,[27] especially imprisonment, may be seen as suitable vehicles.[28] The deterrence theory and the retribution theory are the two main theories

[19] Harding and Joshua (n 13) 13.
[20] Christopher Harding, 'Forging European Cartel Offence: The Supranational Regulation of Business Cartel Conspiracy' (2004) 12 European Journal of Crime, Criminal Law and Criminal Justice 275, 278.
[21] See Williams (n 1) 107; Duff (n 1); Gardner (n 1).
[22] Christopher Harding, 'Business Cartels as a Criminal Activity: Reconciling North American and European Model Regulation' (2002) 9 Maastricht Journal of European and Competition Law 393, 396.
[23] Gregory J Werden, 'Sanctioning Cartel Activity Let the Punishment Fit the Crime' (2009) 4 European Competition Journal 23.
[24] Furse and Nash (n18) 12.
[25] OECD, 'Report on Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws' (2002); OECD, 'Report on Hard Core Cartels: Third report on Implementation of the 1998 Council Recommendation' (2005).
[26] For countries preferring 'decriminalisation', see Wills (n 6) 74.
[27] Oliver Guersent, 'The EU Model of Antitrust Enforcement Against Global Cartels: Evolving to Meet Challenges' (2006) *European Competition Law Annual* 213, 218.
[28] Julie Clarke, 'The Increasing Criminalisation of Economic Law A Competition Law Perspective' (2012) 19 Journal of Financial Crime 76.

which aim to explain the justification for the criminalisation of cartels.[29] In addition, a hybrid approach[30] will be described.

2.2.1. Deterrence Theory

(a) The Basis of the Deterrence Theory

The deterrence theory, based on a utilitarian philosophy,[31] requires a reason for any suffering unless a social benefit can be derived from its imposition.[32] Accordingly, only precluding or allaying a future crime is deemed as justification,[33] and moral outrage is not the main element that should be taken into account in this regard. Therefore, it is possible to state that this theory advances a prospective and consequentialist approach, which is the aim of deterring the crime. Becker incorporated economics into the theory to analyze its deterrence effect on a wealth maximization basis.[34] Rationality and economic efficiency are two legs of this approach. The first assumes that individuals are rational. Accordingly, if the cost of a conduct is more than its benefit to them, they will be deterred from doing it. The second requires that conduct to be prevented if its costs outweigh its benefit to society.[35]

However, this theory may have two drawbacks. The first one is that it may cause the punishment of innocents due to a failure to consider the limits of individual responsibility and the second one is that it may employ unrealistic calculation methods regarding the level of the punishment.[36]

From the angle of the deterrence theory's consequentialist approach, it is argued that the primary objective of criminalizing cartels is to increase deterrence, based on the *malum prohibitum* (wrong by virtue of law)

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[29] Peter Whelan, 'Morality and Its Restraining Influence on European Antitrust Criminalisation' (2009) 12 Trinity College Law Review 42.
[30] Peter Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) 4 Competition Law Review 8.
[31] See John Stuart Mill, *Utilitarianism* (2nd ed, Hackett Publishing 2001).
[32] Jeremy Bentham, 'The Principles of Penal Law', in John Bowring (ed), *The Works of Jeremy Bentham*, (Thoemmes Continuum 1997) 165-166.
[33] Nigel Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Barnes & Noble 1980).
[34] Gary Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169.
[35] Whelan (n 30) 11.
[36] ibid 17.

category rather than the *mala in se* (wrong in itself) category.[37] The inadequacy of monetary fines alone to deter[38] and the fact that companies usually compensate their employees if imprisonment is not provided for individuals[39] are used as the main reasons to support this argument. Concerning the level of monetary fines, it should be emphasised that merely increasing the fine might lead to nothing but bankruptcy, which is by itself a factor lessening competition. Thus, imprisonment sanctions may be a very effective solution to this problem. However, this approach has been questioned, as may be seen below.

(b) Surveys of the Public Opinion about the Deterrence Theory

Based on some empirical evidence, Parker claims that the deterrence theory does not consider the sophisticated normative and social structure of cartel conduct and enforcement.[40] The 24 empirical studies he published between 1967 and 2009 showed, *inter alia*, that the deterrence of imprisonment may not be seen as a scientific reality because (i) the perceived possibility of being caught is more determinative than the objective severity and subjective luridness of the punishment; (ii) third parties' (like stock markets) reactions may be a stronger motivation to comply; and (iii) many cartelists feel that in fact they have a legitimate excuse for non-compliance and their moral evaluation affects their risk analysis.[41]

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[37] Donald J Newman, 'White Collar Crime and Correction' (1958) 23 Law and Contemporary Problems 735, 738-39; John J Flynn, 'Criminal Sanctions under State and Federal Antitrust Laws' (1967) Texas Law Review 1301, 1315.

[38] Katalin J Cseres, Marteen Pieter Schinkel, Floris OW Wogelaar, 'Law and Economics of Criminal Antitrust Enforcement' in Katalin J Cseres, Marteen Pieter Schinkel, Floris OW Wogelaar (eds), *Criminalization of Competition Enforcement* (Edward Elgar 2006) 7-8; Wills (n 6) 177-192; Stephen Calkins, 'Coming to Praise Criminal Antitrust Enforcement' in CD Ehlerman and I Atanasiu (eds), *European Competition Law Annual 2006 Enforcement of Prohibitions of Cartels* (2007 Hart Publishing) 346-351; B Wardhaugh, 'Closing The Deterrence Gap: Individiual Lability, The Cartel Offence and BIS Consultation, (2011) 10 Comp L J 182. cf. T Calvani and T Calvani, 'Cartel Sanctions and Deterrence', (2011) 56 (2) The Antitrust Bulletin, 185, 187.

[39] Donald I Baker, 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid Rigging' (2001) 69 *George Washington Law Review* 693, 705.

[40] Christine Parker, 'Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality' in Caron Beaton-Wells and Ariel Ezrachi (eds) *Criminalising Cartels Critical Studies of an International Regulator Movement* (Hart Publishing 2011) ch 11.

[41] ibid 257.

A more recent survey, conducted by the Cartel Project Team of University of Melbourne in December 2010,[42] showed that (i) only 22.9% of attendees knew that cartel was a criminal offence leading to imprisonment; (ii) the perceived probability of being caught was 5.05 on a 1 to 10 likely-unlikely scale; (iii) 29% of attendees thought that criminal sanctions, including imprisonment, did not lead to deterrence; and 10% of respondents thought that criminal sanctions would not deter them from engaging in cartel activity themselves.

Based on another survey, Beaton-Wells and Parker argue that being in agreement with the essence of the law and considering its legitimate and fair implementation act as the main driver of deterrence, which undermines the self-cost/benefit analysis in the theory.[43] There are arguments parallel to the result of the above-mentioned surveys which emphasise how mental bias[44] and moral evaluations[45] may affect people's perceptions of costs/benefits. Apart from surveys, it may be argued that people's perceptions may be influenced by legislation. As Coffee stated, 'public learns what is criminal from what is punished, not vice versa',[46] and this creates illegitimacy in the eyes of the addressee even if he thinks that conduct is otherwise legitimate.[47] However, Kadish[48] has some concerns, as this approach may undermine public obedience if the situation does not reflect the public's judgment.

(c) Evaluation of the Deterrence Theory

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[42] The University of Melbourne, The Cartel Project Report on a Survey of Australian Public Regarding Anti-cartel Law and Enforcement (2010) <http://www.law.unimelb.edu.au/files/dmfile/SurveyReportFinalDec131.pdf> accessed 26.6.2013.

[43] Beaton-Wells C and Parker C, 'Justifying Criminal Sanction for Cartel Conduct A Hard Case', (2012) 1 J Antitrust Enforcement 8, 13-14; See also Caron Beaton-Wells, 'Criminal Sanctions for Cartels—The Jury is Stil Out' in Ariel Ezrachi (ed), Research Handbook on International Competition Law (Edward Elgar 2012) 266.

[44] Paul H Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioral Science Investigation' (2004) 24 Oxford Journal of Legal Studies 173.

[45] John T Scholz and Neil Pinney, 'Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior' (1995) 39 American Journal of Political Science 490.

[46] Coffee (n 5) 1889.

[47] Harry V Ball and Lawrence M Friedman, 'The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View' (1964) 17 Stanford Law Review 197, 217.

[48] Sanford H Kadish,'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1963) 30 University of Chicago Law Review 423.

The deterrence theory seems to have a direct and result-oriented approach which considers criminalisation as a very attractive and valuable part of the arsenal for combating cartels. However, it is questionable that this approach completely reflects reality.

First, the aforementioned empirical studies cast doubt on the deterring ability of the criminalisation of cartels. It is especially striking that even imprisonment may not preclude people to commit the offence. Second, such doubt may also arise with regard to the real life application of the rationality principle of the theory, since it may operate in a different way in cartel cases, and businessmen may have different motives apart from pure rationality. Third, ignoring the moral values of a society may risk the sustainability of the theory, especially where efficiency concerns are the only drivers, because this may lead to the punishment of 'morally' innocents. Fourth, the deterrence theory may complicate the determination of liability, since the criminalisation of cartels may include companies as well as individuals; thus, it may be necessary to set definite liabilities. In this context, the reliability of economic data used to determine a suitable level for deterrence, in other words, to determine the appropriate punishment, may be another significant problem That said, Coffee's suggestion regarding 'shaping the mind of society' in favour of criminalisation by legislation seems highly important. Such an approach may contribute to fill the gap between the immediate moral requirement of the society and the practical needs for the formulation of the norm.

2.2.2. Retribution Theory

(a) The Basis of the Retribution Theory and Delinquency Suggestions

The retribution theory focuses on the act of the person that is deemed wrong by the public and provides that a person must get what he deserves when he commits a wrongdoing.[49] This theory does not however concern the future prevention of the prohibited act. The nature of the prohibited act[50] and retribution for the breach of moral codes are regarded as the main elements

[49] Herbert L Packer, *The Limits of the Criminal Sanction* (Oxford University Press 1968) 37.
[50] RA Duff and David Garland, 'Introduction: Thinking about Punishment', in RA Duff and David Garland (eds), *A Reader on Punishment* (Oxford University Press 1994) 4.

of this theory.[51] The retribution theory suggests using punishment as a way of conveying the inherent wrongness of the act to society [52] and considering culpability for the level of punishment,[53] thereby also ensuring the proportionality between the aggravation of the act and the punishment. However, this theory has been criticized for failing to explain why delinquency should be criminalized[54] and should be subject to criminal punishment.[55]

In the case of offences such as theft, it is so straightforward that there is an inherent immorality. Although the existence of such clear immorality is questionable for cartels,[56] it is claimed that cartels are also 'morally reprehensible' and so, appropriate for criminalisation,[57] and that white-collar crimes (in this context, cartels) are not morally neutral.[58]

Before discussing the moral delinquency/culpability element, it seems useful to refer to a work of Green that 'maps'[59] the concept. Having stated that the absence of any of these elements may cause doubts about the criminal character of a conduct, Green classifies the interrelated elements of morality in the context of white-collar crimes as culpability, harmfulness and wrongfulness.[60] Culpability concerns the state of mind of the offender and does not consider acts and results.[61] Harmfulness is about the degree to which a criminal act causes harm or creates the risk of harm'[62] and has a broad meaning including the collective interest of society, such as harm to

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[51] Denis James Galligan, 'The Return to Retribution in Penal Theory', in CFH Tapper (ed) Crime, *Proof and Punishment: Essays in Memory of Sir Rupert Cross*, (Butterworths 1981) 144.

[52] Andrew von Hirsch, 'Proportionate Sentences: A Desert Perspective', in Andrew Ashworth and Andrew von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing 2000) 170.

[53] Mark Jephcott, *Law of Cartels* (2nd edn, Jordans, 2011) 344.

[54] Karen Yeung, *Securing Compliance A principled Approach* (Hart Publishing 2002) 76; Ashworth (n 3) 37.

[55] N Walker, 'Modern Retributivism', in Andrew Ashworth and Andrew von Hirsch (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing 2000) 157.

[56] Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31 Melbourne University Law Review 675, 689.

[57] Clarke (n 28) 81

[58] See Stuart P Green, *Lying, Cheating and Stealing A moral Theory of White Collar Crime* (Oxford University Press 2006) 31.

[59] Beaton-Wells (n 56) 679.

[60] Green (n 58) 33.

[61] Stuart P Green, 'Why It is a Crime to Tear the Tag of Mattress: Over criminalisation and the Moral Content of Regulatory Offences' (1997) Emory Law Journal 1533, 1547-8.

[62] ibid 1550.

competition and consumer welfare.[63] Wrongfulness was defined as 'intrinsic violation of freestanding moral rule or duty rather than act's consequences'.[64]

There are different approaches to the definition of the delinquency element. Harding and Joshua,[65] like Kadish,[66] use the terms conscious defiance, collusive action and trickery to define this element. Beaton-Wells and Fisse,[67] however, refer to the subversion of competitive process as an inherent and self-sufficient[68] factor and view cartels the same as cheating, deception and theft. Williams uses 'exploitation' similar to dishonesty.[69] Feinberg seeks loss, gain and coercion.[70] However, there are also authors, like Hirsch, who do not rely on pure moralism, since it fails to explain the employment of criminal law for wrong behaviour and demand a prudential disincentive to reinforce moral censure.[71]

(b) Surveys of Public Opinion about the Retribution Theory

The Melbourne University's empirical study may be revisited herein to assess public opinion on the source of criminal condemnation.[72] The results indicate[73] that (on average, for cartel modalities) more than 69.7 % of the attendees think that cartels are illegal. The support for its criminal character is on average 41.1%, support for jail sanction is only 15.8% and, among others, support for fine payments is 71%. The character of the conduct is seen as deceiving and dishonest respectively by 61.6% and 64.5%. Regarding the harms of the cartel, 51.1% of attendees think that it is harmful to competition; the support for the reason that cartel conduct is theft is 49,5%; and regarding aggravating factors respectively, 81.1% and 76.3% of

[63] Beaton Wells (n 56) 689.
[64] Green (n 58) 39-45.
[65] Harding and Joshua (n 20) 277.
[66] Kadish (n 48) 445.
[67] Caron Beaton-Wells and Brent Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press 2011) 22.
[68] Beaton-Wells (n 56) 698.
[69] Williams (n 2) 300.
[70] J Feinberg, *Harmless Wrongdoing The Moral Limits of Criminal Law* (Vol 4 Oxford University Press 1990) 176.
[71] Andrew von Hirsch, *Censure and Sanctions* (Calenderon Press 1993) 13.
[72] See (n 42).
[73] For categorizations see Beaton-Wells and Parker (n 43) 16, 17.

attendees think that bullying another company and trying to conceal the conduct makes the situation more serious.[74]

(c) Evaluation of the Retribution Theory and Concluding Remarks

The retribution theory seems more structured and realistic than the deterrence theory, particularly with regard to limiting the responsibility of the person who committed the offence in the context of the proportionality principle corresponding – in Green's terminology – to the culpability element of cartel offences. This approach is in favour of also considering the intention of the person committing the offence when setting a convenient level. Under this theory, the harmfulness element of the cartels, which is also an indicator of the seriousness of the violation, does not seem problematic. As a concrete and verifiable fact, the harm that the cartels cause to the society is obvious. However, concerning the third element, wrongfulness, it is less straightforward to arrive at a definite conclusion that ensures a persuasive solution to both the immorality that will provide a basis for criminalisation of cartels, and the notional pattern(s) that may be employed. This point raises very crucial questions regarding the application of this theory. What kind of criteria should be employed to qualify cartels as wrongful and criminalise them? Is it sufficient to use a moral reason, such as dishonesty? What if an allegedly dishonest cartel has legitimate aims, such as keeping jobs or surviving in a devastating crisis? Empirical studies demonstrate that there is an entrenched majority that regards cartels as dishonest, treats them in the same way as theft and considers their concealment an aggravating factor. However support for their criminalisation is still weak. Hence, it is possible to argue that the mere existence of a wrongful act is not adequate for the criminalisation of cartels. It should also be explained why that act should be subject to criminalisation. Therefore, it seems that the retribution theory in itself is also not so persuasive when it comes to justifying the criminalisation of cartels.

In this regard, an approach developed by Whelan is worth mentioning. He employs the deterrence theory as the 'existence reason of the criminalisation'. In this way, the need to set a moral base disappears.

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[74] An older study demonstrates that %10 of Britons believe that cartel is a criminal offence and % 60 of them consider it as dishonest. See Andreas Stephan, 'Survey of Public Attitudes to Price Fixing and Cartel Enforcement in Britain' (2008) 5 Competition Law Review 123.

Whelan then uses the retribution theory as the balance element of the equation, in other words, as a 'weighing' factor providing proportionality and morality.[75] The first part of the approach explains the existence reason by referring to the preventative character of criminal law.[76] As it is argued, since 'it provides a relief from the necessity of *ex ante* establishing a moral offensiveness, rationality is more acceptable in cartels, optimal fines including imprisonment will be obtained'.[77] The second part of the approach relies on the retribution theory to limit responsibility and set the seriousness level of the punishment.[78] The first part revokes the understanding of Beaton-Wells and Fisse that refers to Green's analysis which concludes that cartels are inherently bad. This approach was criticized on the ground that it fails to establish the necessary links between the two theories and underestimates the intrinsic values of human beings by ignoring retribution for the justification of the existence of the offence.[79] These critics suggest that the focus of criminalisation should be on moral values, even though it is true to a certain extent that 'rationality' on which the deterrence theory is based may be unreliable sometimes. Considering the functions of the two different parts of the approach, this criticism seems less persuasive.

In conclusion, it is possible to state that none of the two theories scrutinized are adequate to justify the criminalization of cartels alone. However a hybrid approach, which seeks to establish deterrence as the reason for the offence and to limit liability by using the proportionality principle of the retribution theory, may be useful in providing a more solid basis for the justification for criminalising cartels. On this point, accepting that cartels are inherently bad may also be a catalysing factor. Additionally, the 'shaping' function of the criminal law to convince society is another important argument to take into account.

In the following sections, the elements of the cartel offence in the UK and Australia will be discussed with a view to establishing further links between the aforementioned theories. For instance, the consideration of the harm element in the articulation of physical elements may indicate reliance on the deterrence theory in both jurisdictions. As to the fault element, intent

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[75] Whelan (n 30) 18; Whelan (n 29) 45.
[76] Herbert L Hart, *Punishment and Responsibility* (Clanderon Press 1968) 6.
[77] Whelan (n 29) 45.
[78] Whelan (n 30) 19.
[79] ibid.

(previously dishonesty) in the UK and intent, knowledge or belief in Australia may be based on the retribution theory. Regarding defences, the joint venture exemption in Australia requiring a cost-benefit analysis may be evaluated in light of the deterrence theory, and the open agreement defence provided in the UK may be related to the distribution theory.

III. Physical Elements of the Cartel Offence in the UK and Australia

1. The Concept of the Physical Element

The physical element (*actus reus)* may be a specific form of conduct (an act, omission, state of affairs) which occurs in specified circumstances and which has specified results or consequences. Ashworth states that 'it consisted of prohibited behavior or conduct including any specified consequences'.[80]

This definition may raise the question of what should be prohibited: the conduct itself or its consequences. Based on the theories discussed above, matches may be set between a conduct-oriented norm and the deterrence theory that has a per se[81] character, and between a result-oriented norm and the retribution theory that requires harm in addition to delinquency, as Fletcher also pointed out.[82] As alternative approaches, Feinberg suggests that 'tend to harm' should be the core of the physical element,[83] while Harding supports the attachment of the delinquency element not only to the outcome, but also to the conduct and suggests punishing 'deliberate, covert, and knowingly unlawful collective scheming and planning to achieve anti-competitive ends'.[84]

2. Physical Element of the Cartel Offence in the UK

Section 188(1) of Enterprise Act (EA) 2002 states that 'An individual is guilty of an offence if he agrees with one or more other persons to make or

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[80] Ashworth (n 3) 84.
[81] For the concept of per se, see Oliver Black, *Conceptual Foundations of Antitrust* (Cambridge Univ Press 2005) 62.
[82] George P Fletcher, 'The Right Deed for Wrong Reason: A Reply to Mr Robinson' (1975) UCLA Law Review 302.
[83] Joel Feinberg, 'Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments against It' (1995) 37 Arizona Law Review 117, 122.
[84] Chris Harding, 'The Anti-Cartel Enforcement Industry: Criminological Perspectives on Cartel Criminalisation' (2006) 14 Critical Criminology 181.

implement, or cause to be made or implemented, arrangements of following kind relating to at least two undertakings'. S.188(2) lists the types of arrangements, briefly, as direct or indirect price fixing, output restriction (limiting supply or preventing production), market allocation (dividing costumers or markets) and bid rigging. The norm provides sanction only for individuals,[85] but not for corporations, following the Penrose Report recommendation and parliamentary comments.[86]

The physical element of the offence is 'to agree'[87] on making the arrangements stated in the section. The Act itself provides no definition of the term 'agreement'. O'Kane, by setting a parallelism with statutory conspiracy definition[88] and the cartel offence, argues that guidance may be obtained from case law regarding conspiracy.[89] He states that the level of agreement should be lower in conspiracy than in contract law, although a decision to engage in unlawful conduct should be sought as held in the *R v Webster* case.[90] This line of argument may be welcome[91] in order to justify some approaches, such as, for example, deeming indirect contact as sufficient to establish an agreement[92] and the 'cartel as a whole' as modality,[93] an approach which is also embraced in the *Marine Hose* case, where the offenders pleaded guilty for the whole agreement including price fixing, market sharing and bid rigging.[94] It is possible to say, however, that there is no clear division between criminal and civil law for determining the meaning of the term 'agreement', because O'Kane also refers to civil law as a guide.[95] Joshua and Harding state that, in terms of substantive law, the concept of 'agreement' should comprise terms such as 'collusion',

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[85] See s.190 of EA 02 for imprisonment penalty.

[86] Proposed Criminalisation of Cartels in the UK – a report prepared for OFT by Sir Anthony Hammond and Roy Penrose, 2001 OFT 365 (Penrose Report <http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft365.pdf> access 10.07.2013; House of Commons Standing Committee, 23 April 2002, col, 174; Mark Furse, *The Criminal Law of Competitinon Law in UK and in US* (Edward Elgar 2012) 52.

[87] Penrose Report (n 86) para 2.7.

[88] Criminal Law Act 1977 s.5.

[89] For a similar approach, see Ali Nikpay, 'UK Cartel Enforcement-Past-Present- Future' Speech to Law Society Antitrust Section, 11.11.2012 <http://www.oft.gov.uk/shared_oft/speeches/2012/1112.pdf> accessed 10.07.2013.

[90] *R v Webster* [2003] EWCA Crim 1946.

[91] O'Kane (n 15) 57-58.

[92] *R v Mintern* [2004] EWCA Crim 07. Herein, O'Kane emphasizes the need of common design'. See (n 13) 57.

[93] *R v Cooke* [1986] 2 All ER 985, HL.

[94] *R v Whittle and others* [2008] EWCA Crim 2560, para 15.

[95] O'Kane (n 15) 58-61.

'concentration' or 'concerted practice' and 'conspiracy'.[96] The authors refer to the inchoate offence of conspiracy for the commitment of crime, and emphasise that the meeting of minds may occur 'in pursuance of a criminal purpose held in common',[97] while they indicate that transmission by all defendants may be unnecessary as long as there is 'a link conspirator'.[98]

In addition to agreeing to 'make' an arrangement, agreeing to 'implement' an arrangement and causing to be made or implemented arrangements' also fall within the scope of the cartel offence. As regards the 'cause to be made' condition, the case law requires an individual to want an action to be conducted and this is to be done under his authority or as result of him exercising control or influence over another person.[99]

The cartel offence does not normally cover vertical agreements. However, if a vertical agreement is used to conclude an agreement at the horizontal level, it is argued that it can fall under the cartel offence.[100]

3. Physical Elements for the Cartel Offence in Australia

3.1. Making a contract/arrangement, arriving at an understanding and giving effect to it

There are two types of cartel offence under Trade Practices Act (TPA). The first is to make a contract or arrangement or to arrive at an understanding containing a cartel provision' (s 44ZZRF), and the second is to give effect to a cartel provision in a contract, arrangement or understanding (s 44ZZRG).[101] As may be inferred, the physical elements of these two types of offences are 'to make a contract or arrangement or arrive at an understanding' and 'to give effect to a contract, arrangement, understanding'.

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[96] See Julian Joshua, 'A Sherman Act Bridgehead in Europe, or Ghost Ship in Mid-Atlantic? A Close Look at the UK Proposal to Criminalise Hardcore Cartel Conduct' (2002) 5 European Competition Law Review 231, 243.
[97] *Meyrick Case* (1929) 21 Cr. App. R.94.
[98] Julian Joshua and Christopher Harding, 'Breaking Up The Hardcore: The Prospects for Proposed Cartel Offence' 2002 Criminal Law Review 933, 940-41.
[99] *AG of Hong Kong v Tse Hung-lit* [1986] AC 876, PC.
[100] O'Kane (n 15) 61.
[101] Beaton-Wells and Furse (n 67) 69.

With regard to individuals, the TPA provides principles on complicity and inchoate liability.[102] The physical elements of complicity are stated as aiding, abetting, counseling or procuring, or being concerned in the commission of principle offence.[103] As to inchoate liability, the physical elements are attempt, conspiracy, inducement and attempted inducement.[104] Beaton-Wells and Fisse argue that inchoate liability for the cartel offence is unsatisfactory because of the deviation of the TPA from the Criminal Code.[105]

Before dealing with the terms in the TPA, it must be emphasized that the terms used regarding the cartel offence are the same as those used in civil prohibition. That said, the courts' jurisprudence points out that identical wording will be interpreted in the same way for both civil and criminal processes.[106]

Whereas there is no definition for 'making' under the TPA, 'arrive at' is defined as to reach or enter into.[107] In the *Leahy* case, it was stated that the verb 'make' means leading to a contract or arrangement that should include some form of express communication, while 'arrive at' refers to reaching a flexible understanding.[108] In *Trade Practices Commission v Nicholas Enterprises Pty Ltd*, it was held that 'understanding' included communication between the parties and an undertaking of mutual obligations.[109]

As for the physical element under the TPA, 'giving effect to' is defined as including doing an act or thing in pursuance of, or in accordance with, enforcement or the purport to enforce.[110] This verb has its ordinary meaning[111] and includes a 'single or series of act or omissions',[112] 'unilateral or concerted conduct',[113] and 'conducts of the person who just

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[102] Principle and vicarious liability also have the physical elements stated above. For a detailed analysis, see ibid 161-65.
[103] s.79 (1) (a) – (c).
[104] ss.79(1) (aa) , 76(1) (b), 79 (1) (b), 79 (1) (d) , 76(1) (d), 76(1) (f).
[105] Beaton-Wells and B Fisse (n 67) 180.
[106] *Waugh v Kippen* (1986) 160 CLR 156, 165.
[107] s 4(1).
[108] *ACCC v Leahy Petrolium Pty Ltd* (2007) 160 FCR 321, 331.
[109] (1979) 26 ALR 609, 39-41.
[110] s 4 (1).
[111] *ACCC v FFE Building Services* [2003] ATPR 41-926, 46, 878 [12].
[112] *Bray v Hoffman LaRouche* [2002] 118 FCR 1, 48-9 [158- 161].
[113] *Dowling v Dalgety Australia* (1992) 32 FCR 109.

implement the provision without being a party to the contract, arrangement or understanding'.[114]

In the *Leahy* case, the terms contract, arrangement and understanding were defined.[115] 'Contract' has a classical common law meaning. 'Arrangement' is defined as a dealing 'lacking of some of the essential elements that would otherwise make it a contract'. 'Understanding' is defined as to 'connote a less precise defining then either contract or arrangement'. Current law requires communication, consensus, and commitment criteria for the last two concepts[116] that might be used synonymously.[117] The Australian Competition and Consumer Commission (ACCC) sought to replace the commitment element with a list of factual matters that the courts might use. However, that attempt was criticized, *inter alia*,[118] on the ground that it remained silent with regard to criminal liability.[119]

The 'purpose' element common for both offences is deemed to be the subjective purpose of the parties to the contract.[120] From the criminal liability perspective, this element may be treated as a fault element.[121] The 'effect or likely effect' element may be an issue only for price fixing and may seem controversial as to what extent it may form the basis of criminal liability, especially having regard to the ambiguity in the case law, even for the purposes of determining civil liability.[122]

3.2. Attribution of Physical Elements to Corporations

The TPA provides rules for the attribution of the conduct of individuals to corporations in order to determine the physical elements for them, since they are also subject to criminal sanctions. Accordingly, any conduct engaged in on behalf of a corporation (i) by a director, employee or agent of the corporation within the scope of the person's actual or apparent authority

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[114] ibid.
[115] (n 106) para 25, 26, 27.
[116] Beaton-Wells and Fisse (n 67) 43.
[117] Ian Tonking, 'Belling the CAU: Finding A Substitute for "Understandings" about price' (2008) 16 Competition and Consumer Law Journal 46, 59.
[118] Ian Wylie,' Understanding "Understandings" under TPA – an enforcement Abyss? (2008) 16 Trade Practices Law Journal 35
[119] Beaton-Wells and Fisse (n 67) 47.
[120] See cases referred at Beaton-Wells and Fisse (n 64) 91 n 91.
[121] Caron Beaton-Wells and Brent Fisse, 'Criminalising Serious Cartel Conduct: Issues of Law and Policy' (2008) 36 Australian Business Law Review 190.
[122] Beaton-Wells and Fisse (n 67) 93.

or (ii) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the corporation, where the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent, shall be deemed, for the purposes of this act, to have been also engaged in by the corporation.

4. Concluding Remarks

To start with, a significant difference between the UK and Australia is that unlike the UK, in Australia not only individuals but also corporations may have criminal liability. Though it is beyond the scope of this article to conduct a deep analysis, this approach favours the expansion of the scope of criminalisation as a desired notion on one hand,[123] but may cause problems with regard to defining the 'act' of the corporations on the other hand. Stigmatizing natural persons may make a contribution at the general awareness level. The attribution rules may be practical, but employing terms like 'consent' may cause ambiguity with regard to determining liability. In addition, potential complexities that may stem from parallel criminal and civil enforcement can create significant problems.

The cartel offence provisions in both jurisdictions seem to prohibit the conduct itself and do not require any harm to occur or any benefit to be obtained.[124] Therefore, they appear to be formulated based on the deterrence theory in this respect. Moreover, in both jurisdictions the formulation of the cartel offence provisions includes not only agreeing to make an arrangement' or 'to make a contract, arrangement or understanding', but also 'agreeing to implement', 'to cause to be made or implemented' and 'to give effect'. Such a formulation makes it possible to capture those who are not a party to the agreement, but who nonetheless use their power for an agreement to be concluded or implemented. Especially this second part may be very useful for catching directors in the upper level of the hierarchy who will seek to avoid responsibility. It is believed that this design will contribute to deterrence substantially.

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[123] Beaton-Wells and Fisse (n 67) 213. For UK's position preferring individual liability, see Julian Joshua, 'The UK's New Cartel Offence and its Implications for EC Competition Law: Tangled Web', (2003) 28 European Law Review 620, 623.

[124] In the UK, the 'detriment to consumer' element caused by dishonest intention was suggested but because of its negative effect to deterrence it was not accepted. See HL Deb, October 15, 2002, col 836.

In conclusion, regarding the physical element of the offence, it is possible to state that both jurisdictions embrace an approach based on the deterrence theory by prohibiting the act without considering its harm. The formulation of the cartel offence provisions which makes it possible to reach other parties besides the original ones seems sensible. Moreover, by allowing for criminal liability of corporations, the Australian jurisdiction favours a wider scope for the application of the cartel offence. However, the wording of the rules attributing liability and the use of the same wording also for civil contraventions may cause complexity, focus problems and uncertainty.

IV. Fault Elements for the Cartel Offence in the UK and Australian Jurisdictions

1. The Concept of the Fault Element

The fault element (*mens rea*) concerns the mental state of the offender. It has subjective constituents, such as intention, knowledge and recklessness, and objective ingredients, such as negligence.[125] Although there are jurisdictions, such as Ireland and the US, which do not mention any fault element explicitly in their relevant laws, its existence and design is important in order to determine criminal responsibility.

2. Fault Element of the Cartel Offense in the UK

2.1. Before the Reform – 'Dishonesty'

Dishonesty was the fault element of the cartel offence before the reform in the UK and it was preferred instead of setting a direct link between the infringement of a civil prohibition and committing an offence.[126] The legal test for dishonesty established by the *Gosh* case[127] was two-fold. First, the conduct should be dishonest according to the standards of ordinary people (objective criterion) and secondly, the defendant should know, according to this standard, that the conduct was dishonest (subjective criterion).[128]

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[125] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (LBC Services 2001) 173.
[126] O'Kane (n 15) 46.
[127] *R v Gosh* [1982] QB 1053 [1982] 2 All ER 689. See also In *R v Feely* ([1973] 1 QB 530, 537; Julian Joshua, 'Can UK Cartel Offence be Resuscitated?' in Caron Beaton-Well and Brent Fisse (eds), *Criminalising Cartels*, (Hart Publishing 2011) 129, 147.
[128] [1982] 2 All ER 689, 696.

Regarding this concept, it is worth mentioning the *Norris* case.[129] This was a conspiracy to defraud case regarding the extradition of defendants fixing prices in the US on the basis of dual criminality.[130] The ruling of the court was viewed as perplexing with respect to the dishonesty element since the price fixing itself, in other words the cartel, was not found to be dishonest in the absence of some aggravating factors, such as intimidation.[131]

The case law regarding cartel offence sheds no light on the dishonesty element. In the *Marine Hoses* case,[132] since the defendants pleaded guilty in the US, there was no clue as to how the dishonesty element would have been evaluated by the jury. Similarly, the *Virgin* case[133] which was withdrawn by the OFT after the detection of vital procedural deficits,[134] did not provide any explanations on the interpretation of the concept.

In addition to the lack of judicial guidance, dishonesty was also highly controversial among scholars. Bailin defended it by arguing that 'it remained the clearest possible distinction between criminal offence and civil prohibitions and their respective penalties'.[135] MacCulloch pointed out the deficiencies of the 'subjective test' by emphasizing the ability of businessmen to rationalize their conduct and by referring to empirical studies conducted in the US and Australia.[136] Nikpay argued that it caused problems in complicated white-collar crimes, had no 'seriousness' contribution, required more economic evidence and was not necessary for dividing criminal and civil.[137] Joshua indicated that the dishonesty rule based on theft was inappropriate and caused complexity for juries.[138]

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[129] *Norris v Government of the United States*, [2008] UKHL 16, [2008] 2WLR 673.
[130] See Andreas Stephan, 'The UK Cartel Offence: Lame Duck or Black Mamba?' University of East Anglia ESRC Centre for Competition Policy Working Paper 08-19, 11<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310683> accessed 12.07.2013
[131] O'Kane (n 15) 51-52, 81-85. See also Maya Lester, 'Prosecuting Cartels for Conspiracy to Defraud' (2008) Competition Law Journal 134.
[132] See (n 94).
[133] *IB v R* [2009] EWCA Crim 2575.
[134] See Nicholas Purnell, Christopher Bellamy, Nicole Kar, Daniel Piccinin and Priya Sahathevan, 'Criminal Cartel Enforcement- More Turbulence Ahead? The Implication of BA/Virgin Case (2010) Competition Law Journal 313, 316.
[135] Alex Bailin, 'Doing Away With Dishonesty?' (2011) Competition Law Journal169.
[136] Angus MacCulloch, 'Honesty, Morality and Cartel Offence' (2007) 28 European Competition Law Review 355-363, 360.
[137] Nikpay (n 89).
[138] Joshua (n 123) 625.

Harding and Fisse stated it was confusing and unnecessary.[139] Stephan argued that, due to the ambiguity of the 'standards of other people', the Ghosh test would create difficulties, while [140] Riley further indicated that the non-objective norm of the test provided a defence for the defendants.[141]

Considering these criticisms and with a view to improving the prosecutability and increasing deterrence,[142] the UK government proposed abolishing the dishonesty test and instead suggested four options: introducing guidelines for prosecutors, issuing a white list for allowed conduct, using the secrecy element and excluding openly made agreements.[143] The government indicated its preference for the last option since it would prevent recourse to complex economic analysis by defendants, it would create a balance between excluding agreements that may offer benefits under civil law and it would avoid the norm being understood as a national competition law rule.[144] Following consultation, dishonesty was removed through the Enterprise and Regulatory Reform Bill; provisions as to situations in which the offence will not be committed (s 188(A)), defences (s 188(B)) and the publishing of prosecution guidance (s 190(B)) were deployed.[145]

2.2. After the Reform – 'Intent'

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[139] Joshua and Harding (n 98) 938; Brent Fisse, 'The Proposed Australian Cartel Offence: The Problematic and Unnecessary Element of Dishonesty' (Legal Studies Research Paper 06/44, Sydney Law School, 2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946288> access 12.07.2013

[140] Andreas Stephan, 'How Dishonesty Killed The Cartel Offence' (2011) Criminal Law Review 446, 448.

[141] Alan Riley, 'Outgrowing the European Administrative Model? Ten Years of British Anti-Cartel Enforcement' in Barry Rodger (ed) *Ten Years of UK Competition Law Reform,* (Dundee University Press 2010) 278.

[142] Department for Business Innovation & Skils, A competition Regime For Growth: A Consultation on Reforms, June 2011 (Consultation) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11-657-competition-regime-for-growth-consultation.pdf> accessed 10.07.2013, 10-11.

[143] ibid.

[144] Department of Business Innovation & Skils, Government Response to Consultation, March 2012 (Government Response) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf> accessed 10.07.2013, para 7.3.

[145] Enterprise and Regulatory Reform Act 2013 ch 47.

Following the abolishment of the dishonesty element, intention seems to be at the core of the fault element of the offence. O'Kane refers to the 'intention' of the parties to the cartel agreement and specifies that the knowledge of the parties regarding their infringement of Chapter 1 of the Competition Act (CA) 98 or Art 101 of The Treaty of the Functioning of the European Union (TFEU) is unnecessary.[146]

There is no legislative definition for criminal intention. Ashworth notes that the courts seem reluctant to provide a definition to protect flexibility.[147] However, he also points out that the approach used in the *Woolin* case,[148] providing that 'an intention to bring about a result may be found if it shown that defendant thought that the result was a virtually certain consequence of his/her action', may be considered to indicate the courts' position.[149] The term may simply purport the aim, purpose or objective of the defendant with regard to the action conducted.

O'Kane indicates that the intention of the parties must have a specific character such as fixing prices, sharing markets, restricting output and rigging bids and states that, if this condition is not met, an offence will not occur.[150] Regarding the intention element, s 188(3) seeks reciprocity between the parties for price fixing and the limitation of supply and production agreements.

As a final point, it may be stated that the implementation of the agreement has no importance[151] and that the relevant standard of proof is 'beyond a reasonable doubt'.[152]

3. Fault Elements of Cartel Offences in Australia

3.1. Rejection of the Dishonesty Element

In Australia, 'dishonestly obtain a gain' was contemplated as the fault element of the offence, considering that it would, among other things, include deception, it would secure the seriousness of the offence and the

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[146] O'Kane (n 15) 63.
[147] Asworth (n 3) 174;*Gillick Case* 1986] AC 112
[148] [1999] AC 82
[149] ibid para 176.
[150] O'Kane (n 15) 63.
[151] O'Kane (n 15) 63.
[152] ibid 74.

dishonest intent would be proved according to the Ghosh test.[153] However, this suggestion was questioned on the ground that the dishonesty was incapable of limiting the situation to serious cartel offences and the test deployed was ambiguous,[154] as it did not provide any distinction between criminal and civil matters and the essence was subverting competition, not acquiring gain or a causing harm, so dishonesty could not catch that essence.[155] The position of the ACCC is worth mentioning. The ACCC firstly supported the introduction of the dishonesty element because it would qualify cartels as 'morally reprehensible'.[156] However, when formulating the offence itself, the ACCC did not include any element pointing out moral wrongfulness in the text.[157] Ultimately, the dishonesty element was rejected, considering that enforcement problems were likely to arise.[158] The difference between conduct that would constitute a civil breach and conduct that would be treated as an offence was left to prosecutorial discretion. The exercise of this discretion was to be guided primarily by economic factors.[159] In this respect, Beaton-Wells and Parker state that 'moral condemnation remained and remains a significant feature of ACCC advocacy concerning the need for tough measures against cartels'.[160]

3.2. Fault Elements - Intent, Knowledge or Belief

Under the Australian law, there are two fault elements for cartel offences. The first one is intention which is not stated in the TPA. However, the

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[153] Australian Treasury, Criminal Penalties for Serious Cartel Behavior , Press Release 2 February 2005.
[154] Brent Fisse, 'Cartel Offence: Dishonesty' (2007) 35 Australian Business Law Review 235.
[155] Beaton-Wells and Fisse (n 67) 21-2; Julie Clarke, 'Criminal Penalties for Contraventions of Part IV of TPA' (2005) 10 Deakin Law Review 141, 162.
[156] A Fels, 'Regulating in High-Tech Market Place' Paper presented at Australian Law Reform Commission, Penalties: Policy, Principles and Practice in Government Regulation Conference, Sydney, 9 June 2001 <http://www.accc.gov.au/system/files/Fels_ALRC_short_9_6_01%5B1%5D.pdf> accessed 10.07.2013
[157] Beaton- Wells (n 56) 695.
[158] Beaton-Wells and B Fisse (n 67) 6.
[159] Caron Beaton-Wells and Fiona Haines, 'Making Cartel Conduct Criminal: A Case-Study of Ambiguity
in Controlling Business Behaviour' (2009) 42 ANZJ Crim 227-36.
[160] Beaton-Wells and Parker (n 43) 198.

default fault provisions of the Criminal Code require it.[161] The other fault element is knowledge or belief which is stated in the TPA.

For the first offence designated under s 44ZZRF, the defendant must intend to make a contract, arrangement or understanding and must know or believe that it includes a cartel provision. Similarly, for the second offence specified under s 44ZZRG, the defendant must intend to give effect to a provision and must know or believe that the contract, arrangement or understanding includes a cartel provision.

The term 'intention' is defined as follows: 'a person has intention with respect to conduct if he or she means to engage in that conduct' under the Criminal Code.[162] 'Knowledge' refers to a situation in which 'a person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events'. 'Belief' has no definition under the Criminal Code. Case law defines it as the 'inclination of the mind towards assenting to, rather than rejecting, a proposition'.[163]

The intent to make a contract, arrangement and understanding must be considered in close relation with the physical elements of the offence. In other words, it is stated that 'in relation to physical element under s 44ZZRF(1)(a), the defendant must intend that the relationship with the other relevant party have ingredients required for contract, arrangement or understanding, including consensus and commitment'.[164]

An example may be given to clarify the situation. Suppose that one of the parties informs the other about his future prices, but the latter replies exigently about his future conduct, an understanding requiring the commitment/consensus of the defendant is not established. In this case, it will not be possible to set a criminal liability. However, if the parties agree to share prices between them without committing to fix prices upon this information, there is still an arrangement which may be a cartel offence since it has the likely effect of controlling the price and the parties know the existence of that provision. It is pointed out that the intention to arrive at an understanding does not have the effect of requiring the intention of the

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[161] Criminal Code s.5.6 (1)
[162] See Bernadette McShery, Bronwyn, Naylor, *Australian Criminal Laws: Critical Perspectives*, (Oxfod University Press 2004) 69-74.
[163] *George v Rockett* (1990) 170 CLR 104, 116 .
[164] ibid 140.

parties to fix prices[165] Therefore, for price fixing, it seems that intention may be replaced by the knowledge or belief element based on the 'likely effect' element and the wording of the provision does not allow any other option.

As to knowledge or belief, the defendant must know that there is a cartel provision in the relevant agreement. The knowledge or belief about the cartel provision must include the presence of facts adequate to establish the meaning of provision,[166] the purpose/effect condition and the rivalry condition mentioned in the related section.[167] In the Guide for Practitioners, published by the Attorney General of Australia (The Guide), a consciousness criterion is developed for the knowledge element.[168] Concerning the belief, it seems to be the most obscure part of the fault element. It does not require being sure and includes faith.[169] However, there are also opinions positing the necessity for conviction of the defendant.[170] The Guide states that 'belief might be taken to require something less than the degree of conviction required for knowledge, but something more than the pallid substitute of mere suspicion'.[171]

Another topic that may be approached is the position of the managers who are 'wilfully blind'. It is specified that people who purposely refrain from investigating the probability of a cartel cannot be held liable under the knowledge or belief element.[172]

As a final issue, it may be pointed out that, whereas a mistake of fact is a preposition removing responsibility, ignorance or mistake of law is no excuse.[173]

3.3. Attribution of Fault Elements to Corporations

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[165] ibid 141.
[166] Provision is defined under s. 4(1) as ,"in relation to an understanding, means any matter forming part of the understanding."
[167] Beaton-Wells and Fisse (n 67) 143.
[168] Guide for Practitioner, < http://www.ag.gov.au/Publications/Documents/GuideforPractitioners.pdf> accessed 15.07.2013.
[169] Beaton-Wells and Fisse (n 67) 145.
[170] Stephan Odgers, *Principles of Federal Criminal Law* (Lawbook, 2007) 43.
[171] I Leader-Elliot, The Commonwealth Criminal Code: A guide To Practitioners, Attorney General's Department (2002) 6.
[172] Baeton-Wels and Fisse (n 67) 150.
[173] ibid 152-155.

Parallelly to the physical elements, s 84(1) of the TPA provides the attribution of the fault elements to corporation. Accordingly, to be able to establish the state of mind of the corporation, it is sufficient to show that: (i) a director, employee or agent of the body corporate engaged in that conduct, (ii) the person mentioned acted within the scope of his/her actual/apparent authority, and (iii) that the person mentioned had the state of mind to commit the cartel offence.

4. Concluding Remarks

Dishonesty was intended to serve as a strong morality element providing the wrongfulness of the cartel offence. However, its implementation model, which is based on the ambiguous and impractical Ghosh test, as discussed above, bears the risk of paralyzing the whole process and causing the complete loss of the deterrence effect of criminalisation. Therefore, it seems reasonable to abolish it if the negative effect of the test is not proved empirically and the test is defended as a sharp division between criminal and civil liability.

It should be acknowledged that its absence weakens the effect of the retribution theory in the cartel offence provision. Here, as Williams pointed out, the question of whether there is a need to state the moral element explicitly may arise. Though there are contrary examples, for the elements such as intent, knowledge, etc., the answer may be yes to secure a minimum visible degree of certainty. However, to reflect the wrongfulness, following Beaton-Wells's approach that construe Green's categorization, accepting an inherent wrongfulness, seems reasonable. This preference will lead to a reliance on prosecutorial discretion; however, it is still evaluated as a reasonable trade-off, at least, rather than blocking all of the proceedings. Defences[174] designed as an exculpating mechanism may also be a vehicle for indicating the wrongfulness of the conduct in an *argumentum a contratio* interpretation. As a reinforcing factor, enacting a provision in this format may also be useful in the context of the 'shaping function of criminal law' to develop the perception of society about the malicious character of cartels. Nonetheless, of course, prosecutors must be well informed about the negative effects of hardcore cartels and eager to combat them.

[174] See Chapter 4 of TPA.

Having this determination in mind, the culpability elements may be analyzed. Criminal intent[175] is common for both jurisdictions. As for the UK, even though it does not have a statutory definition and the case-law is reluctant to provide one, the ordinary usage of the concept may be sufficient if the mentioned specifity condition is met. Here, it may be pointed out that the existence of other intents which are irrelevant, for instance stabilising market conditions, have no importance for the purposes of the cartel norm. As for Australia, due to the 'likely effect' proposition of cartel provision, it is possible to argue that replacing intent by knowledge is possible for price fixing modality[176] It may become even more tangled if recklessness, even though it is not mentioned in the TPA like intent, becomes involved due to the default operation of criminal law. This kind of shifting between the elements of a criminal provision seems unsuitable in light of the need for legal certainty.

Knowledge or belief is not an element in the UK, unlike in Australia. However, during legislation debates, it was suggested to add knowledge about the breach of a civil norm[177] or replace dishonesty with 'knowingly or recklessly'.[178] However, these suggestions were rejected on the ground of potentially causing unprosecutability under a 'beyond of reasonable doubt' system[179] and of being likely to widen the scope of the offence.[180] Setting a connection with civil law may not be appropriate when designing a criminal provision and deployment of the recklessness may cause immoderate expansion in terms of the fault elements. However, adopting 'knowledge' associated with the offence itself and its elements may provide a stronger culpability element that contributes to the justification on the basis of the retribution theory. Moreover, it may be argued that there is no reason to believe that this is incompatible with the criminal standard of proof. For the belief element, however, due to its wide and obscure scope, this may enable potential escape routes for defendants.

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[175] See Donald Robertson, 'The primacy of "purpose" in competition law. –Part 1' (2001) 9 Competition and Consumer Law Journal 1.
[176] The reason explained as departure of Australia from common law definition of criminal conspiracy, which requires common design in addition to intention. See Beaton-Wells and Fisse (n 66) 141 n 33.
[177] HL Deb, 15 October 2002, col. 836.
[178] House of Commons Standing Committee , 18 April 2002, Col 134.
[179] (n 177) Col 837-8.
[180] ibid

As a conclusion, it may be stated that accepting an inherent wrongfulness may be a better option than blocking the whole process with ambiguity, so the abolishment or rejection of dishonesty is pertinent. Criminal law's shaping function and design of defences may contribute to the process, and the eagerness of the judicial posts is also crucial. Intent as the basic of the fault element may be an efficient distinguisher between criminal and civil matters; however, it should be designed in a form that does not allow its replacement with knowledge as is possible now in Australia. Knowledge, strongly associated with the elements of the offence, may provide a reliable vehicle in addition to intention, and so may be suggested for the UK. Employing 'belief' may cause vagueness and enable defendants to construct tricky defences, so its abolishment in Australia may be suitable for the purpose of promoting certainty.

V. Defences against the Cartel Offence in the UK and Australian Jurisdictions

1. Concept of Defence

Criminal law's classical means[181] may not be suitable for the cartel offence, thus the need for specific defence mechanisms may arise. Despite the contra-arguments,[182] as Williams indicates, defences may be necessary to avoid broadly drafted provisions and to secure moral credibility.[183] This approach seems consistent with the OECD's recommendation to exclude efficiency creating agreements.[184]

There are two approaches to designing defences. In the first, a broad definition of the prohibited activity is given and then related defences are stated. In the second, the provision is defined in a narrow sense that already excludes the activities that may be qualified as a defence otherwise.[185] However, this situation causes controversy over whether there is a particular distinction between the definition of the offence and that of the defence.[186]

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[181] Generally see Joel Samaha, *Criminal Law* (11th edn, Wadsworth 2013).
[182] Richard Posner 'An Economic Theory of Criminal Law' (1985) 85 Columbia Law Review 1193-1232, 1206.
[183] Williams (n 2) 307.
[184] OECD (n 16) .
[185] ibid
[186] Glanville Williams, 'Offences and Defenses' (1982) 2 Legal Studies 233, 256; George P Fletcher, *Rethinking Criminal Law* (1st eds Brown& Co 1978) 566-568.

2. Defences in the UK

After the reform, two main defence categories were created under the UK law. The first one stipulates the conditions that prevent the commitment of the offence and the second one specifies the defences that may be employed.

2.1. Grounds Preventing the Commitment of the Offence

The basic requirement provided in s.188 (A) to prevent the commitment of the offence may be summarised as 'to give information'. The information that should be given by the offender includes the names of the companies, nature of the arrangement and affected products/services. Depending on the three situations enumerated in the Act, the addressee of the information varies. For instance, in the case of bid-rigging, providing information to the person requesting the bid relieves the potential offender. Moreover, with regard to arrangements affecting supply of goods or services, customers should be informed before the parties enter into that arrangement. Finally, the Act gives authority to the Secretary of State in any case to envisage the way that the information will be published before the arrangement is implemented.

Another ground that removes the responsibility of the offender in the mentioned section is to make an arrangement in order to comply with a legal requirement. However, it should be emphasised that due to a reference in paragraph 4 of this section, civil prohibitions, in other words, Ch1 and Ch 2 of Competition Act (CA 98) is excluded from the legal requirement rule.[187]

2.2. Defences

In addition to the provisions mentioned above, s 188(B) of the Act also introduces additional defences. Accordingly, the defendant may firstly rely on the defence that he did not intend to conceal the nature of the agreement from the customers at all times before they entered into the agreement. The section also provides that the defendant may avoid punishment if he shows that he did not intend to conceal the nature of the arrangements from the Competition and Markets Authority at the time of making the agreement. The second defence envisaged in the section requires the defendant to show that reasonable steps were taken to ensure that the nature of the arrangement

[187] See Explanatory Notes to Enterprise and Regulatory Reform Act 2013, para 359.

would be disclosed to a professional legal adviser for the purposes of obtaining legal advice before their conclusion or implementation.

3. Exemptions for Cartel Offences in Australia

In Australia, exemptions for criminal liability are articulated with the same wording as those provided for civil liability. The term 'exemption' is preferred because those provisions have the effect of preventing the application of the prohibition rather than providing a defence. Although there are various exemptions for criminal liability, not all criminal law exemptions will be examined here.[188]

Unlike the UK regime, Australian jurisdiction gives the ACCC a kind of marker/evaluator role for the applications made to it for obtaining an exemption. When fulfilling its duty, the ACCC weighs the public benefit stemming from the agreement against the harm resulting from lessening of competition.[189] The ACCC makes such an analysis, for example in applying the authorization exemption which is subject to a prior notification and available for contracts, but not for arrangements or understandings.[190] A similar analysis is also conducted for sector specific the liner shipping exemption which requires all benefits to be for the registered Australian exporters on importers.[191] Another exemption is the joint venture exemption.[192] To benefit from this the applicant is required to make a notification 28 days before the implementation of the agreement. Similarly to the authorisation exemption, for the joint venture exemption, the cartel provision in an arrangement or understanding is not sufficient, however the belief of the parties that the cartel provision took place in a contract is deemed enough.[193] The ACCC assesses herein whether there is a fake joint venture agreement to mask a secret cartel agreement. There is another exemption type that provides an automatic release from criminal liability.

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[188] For defenses like as mental impairment, duress emergency, see Beaton-Wells and Furse (n 67) 261, fn 14-16.
[189] Beaton-Wells and Fisse (n 64) 325.
[190]Generally see ACCC, Authorization Guidelienes June 2013, <http://www.accc.gov.au/system/files/Authorisation%20guidelines.pdf > accessed 15 July 2013.
[191] See Beaton-Wells and Fisse (n 67) 319.
[192] See s 44ZZRO.s
[193] The lack of regulation for understanding and arrangement was criticized; see A Madialia, 'Cartel Law Changes "Miss Point"', *The Australian Financial Review*, 14 May 2009.

With respect to the collective bargaining, acquisition or joint advertising exemption, if the ACCC does not contest the notification of the parties for a certain period, it will be regarded that an exemption is granted. However, bid-rigging cases are not within the scope of this exemption.[194]

In addition to the above mentioned ones, the anti-overlap exemption must also be mentioned.[195] This exemption rule applies to arrangements which are prohibited by other rules and therefore are not subject to criminal liability. Resale price maintenance and exclusive dealing cases may be given as examples of that kind of arrangements.

4. Concluding Remarks

In UK law, the defendant may rely on some grounds which are considered to prevent the commitment of the offence. These grounds seem to be based on providing information and so ensuring the transparency of the agreements. With an *argumentum a contratio* interpretation, this approach may be evaluated as an extension of the dishonesty element, and the exclusion of clandestine agreements may be seen as a moral link to the retribution theory.

The way of conveying information is left to the evaluation of the Secretary of State for other prohibition types. It must be emphasised that 'publishing', rather than 'informing' is required in this context. Cartelists are expected to make a self-assessment of their activity. This may cause uncertainties about the sufficiency of the information provided. Regarding the 'complying with legal requirement' condition, excluding civil prohibitions seems appropriate. By doing so, unlike Australian law, a certain distinction between criminal and civil may be drawn. However, the provision may be viewed as unrealistic because a price fixer, for instance, is very unlikely to publish a price fixing/market sharing agreement concluded with a rival.

As to the defences under s 188(B), it is possible to trace openness and dishonesty as well.[196] The section may be considered as being highly in

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[194] See ss 44ZZRL and 44ZZRV.

[195] See generally Stephen Corones, *Competition Law in Australia* (5th edn, Thomson Reuters 2010) 321.

[196] The absence of intention to conceal was regarded as the absence of intention to mislead. See Peter Whelan, 'Does the UK's New Cartel Offence Contain a Devastating Flaw?' <http://competitionpolicy.wordpress.com/2013/05/21/does-the-uks-new-cartel-offence-contain-a-devastating-flaw/#_ftn3> accessed 21 July 2013.

favour of the defendant because the defendant does not have to do anything in order to benefit from this exemption since this may be the securest way of showing the 'intend not to conceal'. Perhaps the offence will be committed due to a lack of following s 188(A); however, as long as he/she stays inactive, he/she may be still able to benefit from the defence. Therefore, the wideness of this design may be criticized because it provides the opportunity to avoid the responsibility just by being motionless, but on the other hand it may also be thought of as a balance mechanism for broad prohibition.

A more problematic defence is to seek legal advice or more precisely to take reasonable steps to ensure that the nature of the arrangements would be disclosed to a professional legal adviser for the purposes of obtaining advice before their conclusion or implementation. This defence potentially invites more problems than the Ghosh test of the dishonesty element, because accepting just seeking legal advice as a defence will probably undermine its deterrence, given that it would be very easy to prove that legal advice was sought. For example, if a defendant claims that an e-mail was sent to the lawyer asking for legal advice but the lawyer did not reply, the defendant might meet the necessary requirement envisaged in the Act. In addition, this defence is provided independently of the content of the advice. Even if the advice is misleading, it will be sufficient to benefit from the defence. Stephan states that, when considering the legislation debate on the defence, it is seen clearly how business world put pressure to create a balance after the abolishment of the dishonesty.[197] He also suggests that 'taking reasonable measure to follow legal advice' might be the intention of the parliament and not following the advice would 'hardly be legitimate'.[198] Though there is no clear indicator for accepting the intention of the parliament in this way, this suggestion seems reasonable.

Australian law utilises a different approach as it does not provide any defence in the sense of the UK law. Rather, it sets out some exemptions that preclude the application of criminal offence provisions. This exemption system in Australia also relies on notification from the defendant and may require economic analysis. As in UK law, expecting a cartelist to be so

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[197] Andreas Stephan, 'The UK's New Cartel Offence: It Could Be Alright on the Day' Competition Policy Blog <http://competitionpolicy.wordpress.com/2013/07/09/the-uks-new-cartel-offence-it-could-be-alright-on-the-day/> accessed 21.7.2013.
[198] ibid.

naïve and to notify the agreement does not seem realistic. Moreover, it may negate the criminalisation of cartels process, as creating a very broad defence area. Of course, distinguishing cartels from legitimate trade conduct is crucial and undertaking an economic analysis may be necessary; nevertheless, this is not sufficient to justify such a broad exemption. Instead of all those details, a simple notification rule could be provided. On this basis, it seems possible to state that the Australian exemption system is based on the deterrence theory, especially given its economic analysis approach.

VI. Conclusion

This article analysed the theoretical and practical aspects of the criminalisation of cartels in the UK and Australia. It looked into the two theories for justifying the criminalisation of cartels and found that none of these theories is sufficient alone. The deterrence theory neglects the determination of individual responsibility properly and relies heavily on the rationality of the offender, which is also undermined by surveys. The retribution theory lacks an explanation of why a conduct, even if it is immoral, must be subject to criminal sanctions and weak support in surveys demonstrates that deficiency. As an attempt to find a more solid theoretical basis, the hybrid approach discussed above seems notably practical. This approach takes deterrence as a starting point for the existence of the offence and employs the retribution theory as a limiting factor in order to eliminate an immediate need for the delinquency element.

The formulation of the cartel offence provision provides insights to comprehend the theory embraced. In this context, the article explored how these provisions are designed in the UK and Australian jurisdictions.

Regarding the physical elements, it may be said that both jurisdictions prohibits the act itself and ignores its actual harm, so they seem to embrace the deterrence theory in this context. Another common point is the efficacious design that makes it possible to capture also the third parties, which is highly pertinent. Australia, unlike the UK, adopts sanctions also for corporations and applies the same wording as civil contravention. This position may lead some difficulties in parallel enforcement and create complexities due to the ambiguities of the concepts.

As regards the fault elements, abolishing or rejecting the dishonesty element may be welcomed because it has potential to block the prosecution of cartels. The existence of intent in both jurisdictions seems a strong criminal indicator. However, ambiguity in the UK law regarding the term 'intent' and its substitutability with knowledge depending on the conditions in Australia is remarkable. The adoption of "knowledge" in the UK may provide a sounder basis for culpability, and the determination of liability and omission of 'belief' in Australia may create greater certainty and avoid tricky arguments. The absence of dishonesty in both jurisdictions may indicate departure from the retribution theory in terms of wrongfulness. However, intend and knowledge still provide a sound link in terms of culpability. Therefore, the suggested amendments regarding fault elements may strengthen the current position of the retribution theory in both jurisdictions.

Regarding the defence element of the offence, norm designs differ considerably in two jurisdictions. In the UK, giving or publishing relevant information regarding the arrangement is a factor preventing the commitment of the offence. Not to intend to conceal the arrangement and taking reasonable steps to seek legal advice are potential defences. Both of these aim at transparency and openness. In Australia, exemptions are used to prevent the application of both criminal and civil sanctions. The basis of this system is notification and economic analysis. The system in the UK may be considered as unrealistic because the offender cannot be expected to declare cartel arrangements, and as ineffective because of the weakness of the not to conceal and to seek legal advice defences. In Australia, the compatibility of the exemption system with criminal law seems controversial, the exemptions and 'public benefit' criteria for economic analysis are so broad. Instead, a basic rule regulating notification and a clearer sense of public benefit may be suggested. All in all, the openness objective and using the 'not to conceal' approach as moral element make the UK system closer to the retribution theory. Although the Australian model's notification system appears to embrace this theory, relying on economic analysis makes it closer to the deterrence theory.

The Principle of Equality: A Limit to the Commission's Discretion in EU Competition Law Enforcement?

KATHARINA VOSS*

This article deals with whether the principle of equality has a limiting effect on the Commission's enforcement of EU competition law. Analysing the Commission's discretion during the enforcement of EU competition law and examining the principle of equality will build the foundation for the article. One can distinguish between situations where two parties to the same case are treated differently and where two parties to different cases are treated differently. In these two situations, the limitations of the principle of equality on the discretion of the Commission will be discussed with regard to the remedies used and the magnitude of fines imposed. It is concluded that the principle of equality has very little influence on the Commissions' actions in the field of EU competition law enforcement and some improvements are suggested to ensure transparency in the enforcement process.

I. Introduction

Principles are used in law to explain rules. According to Sir Gerald Fitzmaurice, principles lie under the surface of a rule, explaining its existence. They answer the question 'why', while rules answer the question 'what'.[1] In the EU law, the Court of Justice of the European Union (hereinafter 'the Court') has recognised a number of principles which are

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[1] Gerald G Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law' (1957) 92 Collected Courses of the Hague Academy of International Law 1, 7.

binding upon the EU institutions and the Member States.[2] General principles are now even cited in the Treaty.[3] Recognised general principles include, among others, the principles of legal certainty, proportionality, legitimate expectations, and equality.[4]

The principle of equality in European Union law (hereinafter 'EU law') holds that '[s]imilar situations shall not be treated differently unless differentiation is objectively justified'.[5] This principle has several functions. The overarching function is a regulatory one: in Law and Economics, it ensures that the internal market can function and that neither state actors nor private actors distort the free movement.[6] In administrative law, it prevents public authorities of the Member States and the EU from making arbitrary decisions.[7] Moreover, in non-discrimination law, it performs a gap-filling function where the codified safeguards against discrimination fail to work.[8]

Since, equality '[i]s one of the fundamental principles of community [now EU] law',[9] it affects all areas of EU law. A simple illustration of a situation where the principle of equality could affect EU competition law enforcement is the recent acceptance of commitments offered by Apple and four book publishers. The commitments simply stated that the concerned parties would cease their potentially anti-competitive behaviour.[10] In many other cases, the European Commission (hereinafter 'Commission'), would have investigated the case for several years in order to impose a high fine on those undertakings. Why the Commission took this particular decision in

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[2] See, for example, Case C-397/03 P *Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd v Commission of the European Communities* [2006] ECR I-4429; Case T-155/06 *Tomra Systems ASA and Others v European Commission* [2010] ECR II-04361.

[3] Treaty on the Functioning of the European Union [2008] OJ C83/47, art 340(2).

[4] Takis Tridimas, *The General Principles of EU law* (2nd edn, Oxford University Press 2006) 6

[5] Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen and Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753, para 7.

[6] Tridimas (n 4) 45.

[7] Paul Craig, *EU administrative law* (2nd edn, Oxford University Press 2012) 526.

[8] Tridimas (n 4) 78.

[9] Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen and Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753, para 7.

[10] European Commission, 'Antitrust: Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books' (Press Release IP/12/1367, 13 December 2013) <http://europa.eu/rapid/press-release_IP-12-1367_en.htm> accessed 07 December 2013.

this case is not known, but one can wonder if it has followed the principle of equality. While the Commission retains a wide margin of discretion to decide in which cases and with which undertakings to settle a case or from which undertakings to accept commitments, this does not mean that it can ignore the principle of equality. It is therefore interesting to evaluate which influence the principle of equality has on the Commission's enforcement of EU competition law.

The goal of this article is to weigh the principle of equality against the discretion enjoyed by the Commission when enforcing EU competition law. Sections II and III therefore outline in parallel the discretion of the Commission with regard to the enforcement of EU competition law and the functions as well as application of the principle of equality by the Court. To tie these two strings together, section IV highlights four different situations questioning if and how the principle of equality limits the discretion of the Commission in enforcing EU competition law. Section V concludes.

II. The Commission's Discretion as an Enforcer of EU Competition Law

The Commission has three combined functions in the enforcement of EU competition law: It investigates breaches of EU competition rules, imposes, and enforces penalties for breaches. In this article, the focus is on the use of remedies by the Commission, or 'outcome discretion' as Petit calls it.[11] Three measures can be named in that regard: (1) Decisions according to Article 7 of Regulation 1/2003 finding an infringement of Article 101 or 102 TFEU; (2) Decisions according to Article 9 of Regulation 1/2003 accepting commitments; and (3) Settlements in cartel cases according to the settlement notice.[12] The following sections will explore the discretion enjoyed by the Commission with regard to these three remedies.

1. Decisions Finding an Infringement of Article 101 or 102 TFEU

A decision regarding Article 7 of Regulation 1/2003 (hereinafter an 'Article 7 decision') finds an infringement of Article 101 or 102 TFEU and requires

[11] Nicolas Petit, 'How Much Discretion do, and should, Competition Authorities enjoy in the Course of their Enforcement Activities? A Multi-Jurisdictional Assessment' (2010) Concurrences: Revue des Droits de la Concurrence 44, 56.

[12] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1.

this infringement to be ceased. The Commission can also impose structural and/or behavioural remedies that are necessary to put an end to the infringement. Furthermore, a fine is usually imposed on the infringing undertaking.[13] The Commission must however ensure that the punishment for the infringement is proportionate.[14] There are no restraints on the Commission's discretion to adopt an Article 7 decision as soon as it considers that the conditions in Article 101 or 102 TFEU are fulfilled.

2. Decisions Accepting Commitments

A decision regarding Article 9 of Regulation 1/2003 (hereinafter an 'Article 9 decision') accepts commitments in a form of settlement with the Commission. However, an Article 9 decision does not formally find an infringement of EU competition law, nor does it find that no infringement has taken place.[15] The advantage of a commitment decision is that the proceedings will be resolved quicker and at a lower cost for both the Commission and the undertaking. Furthermore, it is in the interest of the concerned undertaking because no infringement is formally found. A disadvantage is that the Commission needs to monitor whether the undertaking is in compliance with the commitment and if there is no compliance it may have to reopen the proceedings.[16] Furthermore, the Commission does not set a precedent by accepting commitments, because no breach of EU competition law is formally found.[17]

The discretion of the Commission to take such a decision seems to be limited in a number of ways. *First*, the undertaking in question must offer commitments to the Commission, i.e. both the Commission and the undertaking must consent to such a decision. This is because Article 9 mixes the public law nature of EU competition law enforcement with a contractual component: The Commission and the undertaking must negotiate and mutually agree on a way to solve the case.[18] This means that the

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[13] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] [2003] OJ L1/1, art 23(2).
[14] ibid.
[15] Commission, 'Antitrust Manual of Procedures' (2012) para 16 <http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf> accessed 07 December 2013.
[16] Regulation 1/2003 (n 13) art 9(2).
[17] Petit (n 11) 59.
[18] Florian Wagner-von Papp, 'Best and even better practices in commitment procedures after Alrosa: The dangers of abandoning the "struggle for competition law"' (2012) 49 Common Market Law Review 929, 933.

Commission cannot *force* an undertaking to offer commitments. Undertakings cannot *force* the Commission to accept commitments.[19] However, the Commission may be able to *pressure* an undertaking to offer commitments by threatening the imposition of fines.

Second, the Commission may not take an Article 9 decision if it '[i]ntends to impose a fine'.[20] According to the Regulation on best practices, this refers to the 'nature of the infringement' which may or may not call for a fine.[21] As Petit points out, this limitation may appear somewhat strange, because it would eliminate the incentive for undertakings to offer commitments, namely the threat of a fine.[22] However, pursuant to Wils, it seems that this clause should be interpreted as the Commission cannot accept commitments when its investigations have reached a stage where an infringement has been found and a fine should thus be imposed.[23] This interpretation seems to make more sense, since this would prevent the Commission from taking commitment decisions, where a decision according to Article 7 of Regulation 172003 should be made and a precedent should be set. Nevertheless, this leaves a wide discretion to the Commission to decide whether a case 'calls' for a decision according to Article 7 of Regulation 1/2003 or not.[24]

Third, the Commission does not accept commitments in cases that involved 'secret cartels', meaning the great majority of cases concerning an infringement of Article 101 TFEU would be excluded.[25] The exception may be cases such as the abovementioned, where Apple and several book publishers offered commitments, which would likely have been a case under Article 101 TFEU.[26] Another example is the commitments accepted by the Commission in the *Sky Team Case* which concerned the cooperation of airlines.[27] Nevertheless, these cases appear to involve an open business

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[19] C-441/07 P *European Commission v Alrosa Company Ltd* [2010] ECR I-5949, para 94.
[20] Regulation 1/2003 (n 13) recital 13.
[21] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C208/6 para 116.
[22] Petit (n 11) 58.
[23] Wouter P. J. Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003' (2006) 29 World Competition 345, 365.
[24] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C208/6, para 116.
[25] ibid.
[26] Commission, 'Antitrust: Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books' (n 10).
[27] BA/AA/IB (Case COMP/39.596) [2010] OJ C278.

arrangement rather than a secret cartel that was considered problematic with regards to EU competition law by the Commission. Thus, these cases are deemed to be suitable for a commitment decision.

Last of all, the Commission must ensure that commitments are proportionate.[28] This requirement is clarified by the judgment of the Court in *Alrosa*.[29] The Court held that Article 7 and Article 9 of Regulation 1/2003 have different aims[30] and that:

> There is therefore no reason why the measure which could possibly be imposed in the context of Article 7 of Regulation No 1/2003 should have to serve as a reference for the purpose of assessing the extent of the commitments accepted under Article 9 of the regulation, or why anything going beyond that measure should automatically be regarded as disproportionate (…).[31]

The Court thus considers that the Commission's duty with regard to the principle of proportionality in Article 9 decisions only covers a duty to check if the commitments dispel the Commission's concerns about the behaviour of the undertaking in question.[32] The Court justifies this by arguing that in this way undertakings whose commitments are accepted avoid being found to have infringed EU competition law.[33] Hence, there is only a weak constraint on the Commission with regard to what kind of commitments would be accepted under the principle of proportionality.

Even though there are a number of constraints on the Commission when deciding whether to accept commitments, none of them impose a strong limit on the Commission's discretion. Furthermore, as compared to an Article 7 decision, the procedural requirements are reduced and the *Alrosa* judgment shows that the review carried out by the Court in cases resolved by commitments is very limited.

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[28] Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C208/6, para 115.
[29] C-441/07 P *European Commission v Alrosa Company Ltd* [2010] ECR I-5949.
[30] ibid, para 46.
[31] ibid, para 47.
[32] ibid, para 42.
[33] ibid, para 48.

3. Settlements in Cartel Cases

Where the Commission finds an infringement of Article 101 TFEU and intends to adopt a decision according to Article 7 of Regulation 1/2003, it may consider settling the case with the undertaking concerned.[34] A settlement differs from an Article 7 decision in two ways: (*i)* the undertaking will receive a 10% reduction of their fine;[35] and (*ii)* the undertaking must admit the infringement to the Commission.[36] Thus, this measure has advantages: *(i)* the case is likely closed quicker than under usual circumstances, *(ii)* both sides incur reduced costs, and *(iii)* the undertaking receives a lower fine. The disadvantage for the undertaking is that it must admit the infringement to the Commission. Settlements are currently only made in cases concerning Article 101 TFEU, not cases concerning Article 102 TFEU.[37]

The Commission has a wide discretion to ask parties in Article 101 TFEU cases whether they are interested to settle a case or not.[38] However, it has the duty to ask all parties to a certain case if they are interested in a settlement in case a settlement is considered as suitable for that particular case.[39] In order to decide on the suitability of settlement, the Commission considers whether the settlement procedure will be a gain in efficiency, i.e. whether it will be less burdensome to settle the case as opposed to the adoption of an Article 7 decision. It may also consider if the case will set a precedent with an Article 7 decision, for example where novel questions or unclear case law are concerned.[40] Thus, the discretion enjoyed by the Commission with respect to settlements in cartel cases is very wide and only constrained by the obligation to offer a settlement to all parties to the same case.

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[34] Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18, art 10a(1).
[35] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1 (Settlement Notice), para 32.
[36] ibid, para 20(a).
[37] Reg 773/2004, art 10a(1).
[38] Reg 773/2004, art 10a(1); Settlement Notice (n 10) para 5.
[39] Settlement Notice (n 10) para 6.
[40] ibid, para 5.

III. The Principle of Equality

On the basis of the above discussion on the discretion of the Commission, the below section will introduce the principle of equality, first from the general point of view of EU administrative law and then from that of EU competition law enforcement.

1. EU Administrative Law

References to the general principle of equality can be found in numerous places within the Treaty on European Union (hereinafter 'TEU').[41] It is first mentioned in the abstract in recital 2 of the preamble to the TEU and then again in Article 2 TEU. Specifically, Article 3(3) TEU refers to equality between men and women, Article 4 TEU to equality between the Member States and Article 9 TEU to equality between EU citizens. Furthermore, the Charter of Fundamental Rights of the European Union holds in Article 20 that 'Everyone is equal before the law'.[42]

As explained in the introduction, the use of the principle of equality varies from field to field in which it is used. However, it is worth repeating that it '[c]onstrains the regulatory choices that can be made by the administration'.[43] This means that authorities must (*i)* justify their actions and (*ii)* that they cannot take arbitrary actions.[44] In this sense, the principle of equality interacts with other principles of EU law. For example, the principle of legitimate expectations and the principle of proportionality are related to the principle of equality in their functions, but are different in their specific content. The difference lies in the test that is carried out by the Court. It assesses if the principle of equality has been breached in two steps: (*i)* whether the party in question has been treated different from another party in a similar situation; and *(ii)* if there is an unequal treatment, whether there is an objective justification for that treatment.[45]

An exemplification of this test is the *Ruckdeschel* case: Union Regulation did no longer provide for production refunds to producers of quellmehl, but

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[41] Treaty on European Union [2010] OJ C83/01.
[42] Charter of Fundamental Rights of the European Union [2010] OJ C83/389.
[43] Craig (n 7) 526.
[44] Tridimas (n 4) 41.
[45] Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen and Diamalt AG v Hauptzollamt Itzehoe* [1977] ECR 1753, para 7.

did so for producers of starch. The reason was that quellmehl and starch were no longer considered substitutable products.[46] The Court held that the defendants in the case, the Council and the Commission, had not produced any evidence to support that claim. Accordingly, it was not possible to distinguish between quellmehl and starch.[47] The Regulation was thus in breach of the principle of equality.[48]

A further example provides the *Denkavit*[49] case: After a revaluation of the German currency, the *Deutsche Mark*, the agricultural sector suffered a loss. A Council Regulation aiming at remedying this loss provided that state aid to agricultural producers up to a certain amount would be allowed.[50] The applicant in this case was an industrial breeder of livestock who claimed that he should be included in the definition of the term 'agricultural producer'.[51] The Court held that it was possible to differentiate between agricultural sectors, if this is based on objective criteria which are not arbitrary.[52] In this case, industrial breeders of livestock were in a different situation than agricultural livestock breeders because the former were able to obtain their animal feed from international markets whereas the agricultural breeders were dependent on their own land. For that reason, industrial breeders were independent of a currency revaluation.[53] The unequal treatment between livestock producers could thus be justified.[54]

2. EU Competition Law Enforcement

As the above cases illustrate, both the EU institutions and the Member States are required to treat persons and undertakings equally if they are in the same situation. Naturally, this also applies to the enforcement of EU competition law by the Commission.

A recent case on the treatment of different parties to the same cartel illustrates how this discretion is limited by the principle of equality. In the *Alliance One* case the Commission decided to hold certain parent companies jointly and severally liable for the participation of their subsidiaries in a

[46] ibid, para 6.
[47] ibid, para 8.
[48] ibid, para 10.
[49] Case 139/77 *Denkavit Futtermittel GmbH v Finanzamt Warendorf* [1978] ECR 1317.
[50] ibid, paras 4-5.
[51] ibid, para 6.
[52] ibid, para 15.
[53] ibid, para 17.
[54] ibid, para 18.

cartel fixing prices for raw tobacco.[55] The Commission, in this particular case, did not only apply the presumption that ownership of (nearly) 100% of the shares of the subsidiary meant that the parent could be held responsible for the actions of the subsidiary. Instead, the Commission applied the so-called 'dual base' approach where it also checked if there was evidence indicating actual control of the parent over the subsidiary.[56] Thus, the Commission had concluded that several of the parent companies involved could not be held responsible for the cartel, with the exception of Transcontinental Leaf Tobacco Corp. Ltd. This undertaking was held responsible for the conduct of its subsidiary, World Wide Tobacco Espana, SA, solely based on the fact that it held almost all the shares of that subsidiary.[57] The General Court held, and the Court of Justice confirmed on appeal, that the decision constituted an infringement of the principle of equality.[58] While the Commission was free to decide which undertakings to address in their decision according to Article 7 of Regulation 1/2003, it must make such assessment on an equal basis for all parties concerned in a certain cartel, unless the undertakings are not in comparable situations.[59]

While parties to the *same* case can request the Commission treats them equally where they are in the same situation, as in the *Alliance One* case; the General Court's judgment in *Compagnie générale maritime* shows the principle of equality has a clear limit, since:

> [t]he fact that the Commission has not imposed a fine on the perpetrator of a breach of the competition rules cannot in itself prevent a fine from being imposed on the perpetrator of a similar

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[55] Case T-24/05 *Alliance One International, Inc and others v Commission* [2010] ECR II-5329, paras 13-19.
[56] ibid, paras 140-141.
[57] ibid, paras 217-218.
[58] ibid, paras 2118-219; Joined Cases C-628/10 P and C-14/11 P *Alliance One International Inc., Standard Commercial Tobacco Co. Inc v Trans-Continental Tobacco Leaf Corp. Ltd, European Commission and European Commission v Alliance One International Inc., Standard Commercial Tobacco Co. Inc., Trans-Continental Leaf Tobacco Corp. Ltd* [2012] OJ C295/6.
[59] There is a number of other cases concerning the setting of fines and the principle of equality in cartel cases, see for example, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré SA and Others v Commission of the European Communities* [2007] ECR II-947; *T-13/03 Nintendo Co., Ltd and Nintendo of Europe GmbH v Commission of the European Communities* [2009] ECR II-975.

> infringement. The principle of equality of treatment cannot be invoked where there is illegality.[60]

The principle of equality cannot be invoked to complain about the amount of fines. One can also reflect that it is not possible to invoke the principle of equality where parties in *another* case have been treated differently.[61] As a result, the considerable powers of the Commission as the first-instance enforcer of competition law are thus constrained by the possibility of undertakings to appeal the Commission's decisions to the General Court and the Court of Justice who can then apply general principles of EU law, such as the principles of equality. However, such a constraint is always dependent on the parties' decision to appeal their case to the Courts.

IV. Assessment of Different Situations

The *Alliance One* case shows that the Court will carefully scrutinise the Commission's actions against several parties in one and the same case. At the same time, as *Compagnie générale maritime* shows, the illegal nature of infringements of EU competition law limits the application sphere of that principle.

Nevertheless, there is very little case law from the Court discussing the issue of equality in the context of EU competition law enforcement. It is thus difficult for both the Commission and the concerned undertakings to know exactly when and to what extent the principle of equality applies in a given situation. The question to be considered in this discussion is thus in how far the discretion of the Commission is limited by the principle of equality when deciding on the outcome of cases concerning EU competition law. Two situations are possible:

1. The undertakings in question are parties to the same case; or
2. The undertakings in question are parties to different cases

In the assessment of these situations two stages of enforcement must be distinguished:

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[60] Case T-86/95 *Compagnie générale maritime and Others v Commission of the European Communities* [2002] ECR II-1011, para 242.
[61] See *infra* section IV.

1. The choice of remedies used by the Commission. That is, whether a case is resolved by an Article 7 decision, Article 9 decision or settlement ('the remedy'); and
2. The choice whether or not the Commission imposes a fine on an undertaking and the magnitude of said fine ('the punishment').

Thus, the following matrix can be used to show which combinations of situations are possible:

	Remedy	**Punishment**
Parties to the same case	*Situation A*	*Situation B*
Parties to different cases	*Situation C*	*Situation D*

1. Situation A

With regards to the resolution of a case where several undertakings are parties to the same case, an infringement under Article 101 TFEU will generally be at stake. This situation is easily resolved by reference to EU legislation: In such a case the Commission has committed itself in the settlement notice to offer a settlement to all parties to one case.[62] Even if this were not the case, the Commission would have to act in the same way, because the principle of equality requires the Commission to treat undertakings equally in the same situation. The very nature of a cartel is to bind several undertakings to act in a certain, agreed way. Thus, undertakings that are parties to the same Article 101 TFEU case will usually be in the same situation and must therefore be treated equally. However, the Commission is not obliged to grant a settlement to each of the parties if they do not cooperate with the Commission as necessary.[63] This can lead to so called 'hybrid-decisions' where the Commission settles with some of the parties to a case but takes an Article 7 decision against others.[64] Furthermore, drawing an analogy from settlements, the Commission would

[62] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1, para 6.
[63] Commission Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18, art 10a.
[64] See, for example *Animal Feed Phosphates* (Case COMP/38866*) [2010] OJ C 111/15.*

presumably be obliged to offer the possibility to propose commitments to all parties to one case where Article 101 TFEU is at stake.

2. Situation B

Where several parties to the same case are to be fined, the calculation of the fine will consider the circumstances of each undertaking separately. Pursuant to the notice on the calculation of fines, this includes, *inter alia*, the turnover of the concerned products, the duration of the infringement and possible mitigating and aggravating circumstances.[65] Thus, the amount of the fine for each party can vary significantly. The only condition that the principle of equality imposes on the Commission is that fines have to be calculated and allocated on the same basis, as the *Alliance One* case shows.[66] This leaves a large discretion to the Commission in determining fines. Numerous soft law instruments describe the procedure followed by the Commission in detail aiming at creating transparency about the process for the concerned undertakings.[67] Nevertheless, the practice of the Court shows that the Commission had a wide discretion, even where the interpretation of its own soft law instruments is concerned. In *Amann & Söhne*, where the importance of certain criteria when calculating a fine was at issue and the Court held that:

> (…) neither Regulation No 1/2003 nor the Guidelines provide that the amount of fines must be determined in direct relation to the size of the affected market, that being only one relevant factor among others. (…) in assessing the gravity of an infringement the Commission must have regard to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case (…).[68]

Consequently, the principle of equality only restricts the discretion of the Commission in cases of gross inequality, such as in the *Alliance One* case.

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[65] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 [2006] OJ C210/2, paras 19-33.
[66] See *supra* section 3.2.
[67] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 [2006] OJ C210/2; Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1.
[68] Case T-446/05 *Amann & Söhne GmbH & Co. KG and Cousin Filterie SAS v European Commission* [2010] ECR II-01255, paras 174-175.

3. Situation C

The most difficult and uncertain situation is probably the one where undertakings are parties to different proceedings where the resolution of a case takes different forms. One could argue that cases with very similar facts should be treated the same, at least in the sense that the Commission should offer the concerned parties a settlement or a commitment decision. Whether or not such a decision is actually taken depends very much on the cooperation of every single undertaking. However, the mere possibility of settling a case or offering commitments should exist in cases concerning similar infringements as such infringements where settlements or commitments were previously accepted. In such cases, both parties would be in comparable situations and should thus be treated equally, unless other conduct is objectively justified.

However, examining previous case law shows that it seems unlikely that the Commission would be obliged to offer a settlement or commitments to an undertaking because it has done so in a previous case. In *ABB*, the General Court considered that the Commission is not bound by its previous decisions with regard to the consideration of certain mitigating factors. More recently, in *Visa*, the General Court held that Visa could not claim that the Commission should adopt the same approach in this case as in *MasterCard* and *Cartes Bancaires*.[69] The Court adds that this may '[a]mount to a plea that they should benefit from an unlawful act committed in favour of a third party, which would be contrary to the principle of legality'.[70] It is thus unlikely that the Commission would accept any claim to the principle of equality, even if the facts of two cases were very similar.

In any case, it is difficult to assess how similar cases should be to impose a duty on the Commission to offer a settlement or a commitment decision to an undertaking. The fact is no case resembles exactly the other and therefore it will be easy for the Commission in most cases to distinguish them on the facts. For instance, market structures might differ, therefore that a structural remedy that was suitable in one case would not be possible in another, except they are similar cases. In essence, unless an infringement concerns

[69] Case T-461/07 *Visa Europe Ltd and Visa International Service v European Commission* [2011] ECR II-1729, paras 216-218.
[70] ibid, para 219.

the same market and takes exactly the same form, undertakings will always be in somewhat different situations, thereby making the application of the principle of equality difficult for both the Commission to apply, and parties to claim and the Court to assess. Therefore, the principle of equality does not constrain the Commission's power to decide on a resolution route in each separate case.

4. Situation D

The situation where a punishment is imposed on parties to different cases is the same as Situation B. The amount of fines can vary significantly according to the individual infringement. In addition, as in the *Compagnie générale maritime* case, undertakings cannot use the principle of equality to escape fines.[71] Furthermore, as the Court held already in *Musique Diffusion*, undertakings cannot use the previous level of fines imposed by the Commission to make claims with regard to the principle of equality. The Commission is empowered to raise the level of fines at any point if it finds that the previous level is not sufficient to ensure a deterrent effect of fines.[72]

5. The Limitation of the Commissions' Discretion by the Principle of Equality

On the basis of the above case studies, the principle of equality only really limits the Commission's actions in the field of EU competition law enforcement where there are several parties to the same case, which brings about the obligation to treat these parties equally. Usually, as such will be Article 101 TFEU cases. Article 102 TFEU cases will only concern the party whose situation cannot be compared to the situations of parties to other cases. However, even in cases concerning Article 101 TFEU, the application of the principle can be hindered where a party does not decide to appeal the Commission's decision to the Court of Justice. Thus, the constraints imposed on the Commission by the principle of equality are very small and uncertain for the undertaking concerned.

The wide discretion provided to the Commission can be justified by the need for flexibility on the side of the Commission. Infringements of EU

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[71] Case T-86/95 *Compagnie générale maritime and Others v Commission of the European Communities* [2002] ECR II-1011, para 242.

[72] Joined Cases 100 to 103/80 *SA Musique Diffusion française and others v Commission of the European Communities* [1983] ECR 1825, paras 108-09.

competition law are serious matters causing damages to both the functioning of the internal market in general and consumers in particular. There is a good reason to argue that not all cases *should* be closed with a commitment decision or a settlement, in order to set precedents, clarify the application of EU competition law, and punish hard-core cartels.[73] In this way, the Commission is afforded by the necessary flexibility to assess each case on its individual merits. It also allows the Commission to adjust its enforcement technique due to the developments in economic theory, new kinds of infringements as well as societal preferences. However, in the view of the on-going criticism of the Commission as a first-instance enforcer of EU competition law,[74] it is difficult to expect the Commission improve its enforcement.

A clarification on the rules concerning commitments could be an improvement on the transparency of the actions taken by the Commission. In the same vein is the notice on settlements in cartel cases, the Commission should adopt detailed guidelines with regards to commitment decisions in order to be clear what exactly is meant by the current 'where the Commission intends to impose a fine' condition and to give more detailed guidance on the cases where commitments may be accepted. For example, conditions could be related to the infringement in question, the behaviour of the undertaking when cooperating with the Commission, or even the previous record of the undertaking. Such distinctions between different undertakings are unlikely to violate the principle of equality, since they are not in similar positions. For example, an undertaking that has been found guilty of an infringement of EU competition law cannot be compared with an undertaking without such a history. Likewise, the Commission could give some more guidance on their requirements concerning the kind of commitments that the Commission may accept, depending on the individual case of course. These conditions should explicitly be understandable by undertakings in advance. The Commission can adopt such conditions in the form of soft law, that is to say a notice or a communication. If this were to be done, the Commission would be bound by its own conditions, by being

[73] Petit (n 11) 59.

[74] See further Wouter Wils, 'The Combination of the Investigative and Prosecutorial Function and adjudicative Function in EC Antitrust Enforcement : a legal and economic analysis' (2004) 27 World Competition 201; Ian S. Forrester, 'Due Process in EC Competition Cases: a Distinguished Institution with Flawed Procedures' (2009) 34 The European Law Review 817.

subject to review by the Court, in case they are breached.[75] This would have the advantage of introducing more transparency into the Commission's actions in this field.

Admittedly, one could argue that soft law comes with its own set of problems. Commission Guidelines and Communications are often written in a general manner to cover as much ground as possible. This becomes problematic when the terms of the soft law are too general and not very helpful for undertakings or when the Commission is able to diverge from it depending upon specific features of the case.[76] In this respect, nothing can be won by the adoption of soft law. Legal certainty may even be endangered where undertakings trust that a case falls under a soft law instrument when this opinion is not shared by the Commission. However, this would be assuming the worst possible outcome from the adoption of a new soft law instrument. A well-drafted soft law instrument can assist undertakings to assess their own conduct and lead them to cooperate with the Commission in an enforcement situation in the best possible way.[77] Besides, the adoption of a soft law instrument appears to be the best, albeit not only, option to improve the transparency of the acceptance of commitments by the Commission.

V. Conclusions

Indeed, the Commission enjoys a wide discretion when deciding on the outcome of a case concerning Article 101 or 102 TFEU. This discretion is only limited to the cases where parties to the same case should equally be treated in considering a settlement or a commitment decision. Thus, although the principle of equality is meant to constrain the Commission's actions, it only applies in a limited way to the enforcement of EU competition law. Even worse the correct application of this principle may also require an appeal to the EU Courts. Thus, it would be desirable to determine a set of rules, possibly through a soft law instrument, regarding in which cases and under which conditions the Commission settles a case or

[75] Case T-380/94 *Association internationale des utilisateurs de fils de filaments artificiels et synthetiques et de soie naturelle & another v Commission* [1996] ECR II-2169, para 103.
[76] Nicolas Petit and Miguel P.L. Rato, 'From Hard to Soft Enforcement of EC Competition Law - A Bestiary of 'Sunshine' Enforcement Instruments' (2008) 19 <http://ssrn.com/abstract=1270109> accessed 07 December 2013.
[77] ibid, 18.

considers accepting commitments from undertakings that have or may have infringed EU competition la

Merger Control in the Greek Banking Sector: The Example of the Incomplete Merger between the National Bank of Greece and Eurobank

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Over the past two years, while Greece witnessed the devastating impact of the financial crisis, various banking mergers, acquisitions and other alliances took place. The main aim of such restructuring was to create stronger and more flexible financial institutions and to satisfy their pressing recapitalisation needs. In this context, this article examines the role of merger control in the Greek banking sector and the arising issues by considering the example of the incomplete merger between the National Bank of Greece and Eurobank.

I. Introduction

During 2008 the world economy faced an unprecedented financial and economic crisis, as the result of various misplaced financial investments, important fiscal problems and the rapidly increasing unemployment. The biggest financial and insurance companies in Europe and in the USA considered themselves as 'too big to fail'[1] and proceeded to several risky lending transactions and other doubtful investments. Such actions actually led to huge deficits and forced the local governments to spend important amounts of public money for their rescue.[2] Despite the recent corrective

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[1] George Provopoulos and Panayiotis Kapopoulos, *The Dynamics of the Financial System* (Kritiki Publications, Athens 2010) 213.

[2] Various EU governments challenged the legitimacy of the EU financial aid to its distressed Member – States. Such actions were strictly prohibited by the Maastricht Treaty (Articles 123 and 124). However, the necessary liquidity has been provided, under the fear of the Eurozone's collapse. See Constantine Botopoulos, 'Different in the Difficulties: EU

actions that took place in the European Union (hereinafter "EU"),[3] the latter is still beset by the recent crisis. The main reason is that unlike corporate collapses, State insolvency does not occur within a set legal framework, and hence every State bailout tests new legal ground. The problem was particularly acute for EU Member States. Although the latter maintain a common currency, so far they have been reluctant to adopt a common policy against public debts, or create institutional mechanisms to deal with macroeconomic shocks, occurring especially when markets stop financing their deficits.[4]

Inevitably the ongoing financial crisis affected significantly the existing financial institutions. As a response to the crisis, the ailing banking sector in Greece was restructured through targeted mergers and acquisitions, with a view to create stronger financial institutions. However, banking mergers create a number of concerns from a competition law perspective, which this article aims to address. To this end, Part II describes the key features of the Greek financial crisis, illustrates the structure of the domestic banking industry and presents the main characteristics of the applicable recapitalisation schemes. Part III considers the special role for merger control in the banking sector. Then, Part IV sets out the key elements of the National Bank of Greece (NBoG) – Eurobank scheme, by underlining the exogenous factors which ultimately led to the failure of the specific merger. Finally, Part V concludes by synopsising the discussed issues and attempts to provide a brief insight into the broader role for merger control in the Greek banking sector.

II. The Effects of the Financial Crisis in Greece and the Domestic Banking Industry

The repercussions of the financial crisis affected the majority of the global economic sectors in various ways. Likewise, despite its continued high growth rates, the Greek banking system did not take long to be affected, too. The main reason was that the Greek governments forced local banks to acquire an important portfolio containing Greek bonds, in order to cover

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and USA in Crisis' in Sotirios Dalis (eds), *From Bush to Obama: The International Policy in a Changing World* (Papazisis Publications, Athens 2010) 299 – 308.

[3] The creation of the European Financial Stability Facility (EFSF) as a permanent rescue mechanism and the purchase of government bonds by the European Central Bank (ECB). See Constantine Stephanou, 'European Responses to the Sovereign Crisis: European and Greek Responses' (ECEFIL Working Papers 4/2012) 17 – 20.

[4] IOBE, 'The Greek Economy' (2011) Quarterly Report 4/2011, 7–10.

their increasing financial needs and curb the growing public debt. Such financial needs usually included the payment of huge wages in the public sector despite the latter's proven inefficiency, while the chosen investments in bonds were of doubtful profitability. Furthermore, another cause of the Greek financial crisis was the widespread tax evasion of the private sector, which the current tax system failed to prevent. The cumulative effect of those factors made markets react adversely and Greece started to face financial difficulties, since its regular borrowing through markets suddenly stopped. As a result and due to those fiscal imbalances, Greece lost part of its credibility. Although the scenario of bankruptcy became a real threat, the reaction and choices of the political parties of the country made the situation worse. The local connoisseurs proved unable to foresee the events to come. The facilitation of their governmental aspirations was more important than supporting the government bonds and looking out for a viable way to exit the crisis.[5]

The prolonged recession of the Greek economy led to its dramatic downgrade to a 'selective default' status. The lack of liquidity and the coverage of the growing debt became increasingly pressing issues for Greece. At the European level, the adoption of the so-called Eurobonds was proposed as a common solution to the financial problem. Such bonds could alleviate the current sovereign debt crisis, improve the effectiveness of the adopted monetary policy and make the European financial system more resilient to future adverse shocks. Accompanied by stricter fiscal surveillance and budgetary discipline, these actions could limit the banks' exposure to toxic bonds, stimulate their liquidity and suspend any merger from taking place for those reasons. Nevertheless, although it was acknowledged that the proposed solution was appropriate to reassure the global capital markets and strengthen solidarity within the EU, its implementation became a thorny issue[6] causing strong debate among the European governments.[7]

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[5] Prodromos Daghtoglou, 'The Greek Crisis' (2011) 1 European State Legal Journal 5.

[6] An EU Treaty amendment may be required in case of issuing Eurobond, which is incompatible with the current 'no bailout' provision. See Opinion of the European Economic and Social Committee on the 'Green Paper on the Feasibility of Introducing Stability Bonds' COM (2011) 818 final.

[7] Ricardo Cabral, 'E – Bonds: Europe's Own Subprime Teaser Rates' (2010) <http://www.voxeu.org/article/e-bonds-europe-s-own-subprime-teaser-rates> accessed 9 December 2013.

In this climate of European scepticism, the Greek government and its foreign lenders desired more imminent solutions with immediate impact on market expectations and lower marginal funding costs. Therefore, they proposed the Private Sector Involvement (PSI) debt exchange as an alternative feasible solution. However, the implementation of the PSI would bring about significant losses for the banks which already faced unprecedented difficulties due to the shrinkage of their liquidity.[8] Thus, both parties started to realise that new recapitalisation plans should be put in place.[9] One option would be to satisfy the needs in capital through the issuance of common shares with no voting rights or with restrictions on the voting right. Alternatively, any loss derived from the PSI was proposed to be covered through the issuance of Contingent Convertible Bonds (CoCos).[10] In any case, the implementation of recapitalisation plans was deemed as vital prerequisite for the gradual restoration of local banks, the continuous supporting of the real economy and the enhancement of the business environment.[11] As a result, most banks started looking for alliances in order to ensure their sustainability. To that end, banking mergers were used as a mechanism to implement the scheduled recapitalisation procedures.

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[8] BoG, *Report on the Recapitalisation and Restructuring of the Greek Banking Sector* (2012) 13 <http://www.bankofgreece.gr/BogEkdoseis/Report_on_the_recapitalisation_and_restructuring.pdf> accessed 9 December 2013 (Eurosystem).

[9] Greek banks' capital adequacy ratios should be gradually increased (Core Tier 1), according to Basel Pillar 1 standpoint. Therefore, Bank of Greece (BoG) announced that an amount of approximately 50 billion Euros constitutes the appropriate backstop facility for the coverage of the respective needs and its related restructuring costs. See BoG (n 9) 10.

[10] Through this mechanism the government secures its legal rights as shareholder, preserves the current control arrangements in the respective banking institutions and values efficiently its ownership stake. This matter is quite important since always remains the risk for local banks to become nationalised and hence lose their competitiveness, if another recapitalisation procedure is adopted. Troika and the Greek government mutually agreed to demand a 10% private share subscription floor from the banks' shareholders over the new common equity capital. This was considered as the minimum threshold for the local banks to keep themselves privately run and their ownership structure intact. The remaining amount would be covered though by the Hellenic Financial Stability Fund (HFSF). See Stilpon Nestor and Daria Khalilulina, 'Governance Issues in Greek Bank Recapitalisations: A Comparative Overview' (2012) 3 Greek Financial Law Journal 342 – 346.

[11] Gikas A. Hardouvelis, 'The International Financial Crisis and Greece' (The Global Financial Crisis and Greece conference, Athens, 23 October 2008) <http://www.hardouvelis.gr/FILES/SPEECHES/IOBE_HARDOUVELIS_Oct_23.pdf> accessed 9 December 2013.

However, banking mergers are not a new phenomenon in Greece. The establishment of a major Greek bank, the so-called 'national champion', has always been the dream of every successful banker making business in the country. The first strategic alliances emerged in the early 1990s after the decision of the Greek government to privatise part of its banking sector. In this way, the domestic institutions overcame their local and international competitors and coped with the institutional changes that arose after the Maastricht Treaty and the implementation of the common market.[12] Following those developments, the Greek banking industry comprised only a few major banks playing a vital role in the local economy.

In the subsequent years the picture of the banking sector remained largely unchanged, although new banks were established in the territory. The already merged banks turned their focus on their internal restructuring, the adoption of common internal procedures, the reduction of overstaffing and the rationalisation of their operating costs. However, a number of important developments caused a change of scenery as marked by the establishment of the Eurozone, the enactment of a more flexible EU legal framework and the deregulation of the Greek financial market. In this new context, foreign financial institutions showed interest in collaborating with local banks and in taking over part of the latter's control.[13]

The most recent wave of banking mergers took place as a reaction to the current financial crisis, and drastically changed the structure of the domestic banking sector. 'Piraeus Bank' played a starring role in the recent developments. In the last couple of years, it absorbed the 'Agricultural Bank of Greece', which was the largest publicly-owned bank, and it acquired the entire stake of 'Société Générale' in 'Geniki Bank'. Moreover, in the aftermath of the Cypriot banking crash, 'Piraeus Bank' further strengthened its position in the market by acquiring the Greek branches of the leading Cypriot banks, including their loans and deposits. Finally, 'Piraeus Bank' agreed with 'Millennium BCP' to acquire the entire share capital of 'Millennium Bank Greece'.[14] Besides 'Piraeus Bank', another Greek bank

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[12] John Tolios, *Capital Accumulation, Banking and Insurance Groups within the Greek Society* (Sakkoulas Publications, Athens – Komotini 1998) 78 – 99.

[13] George Pagoulatos and Lucia Quaglia, 'Turning the Crisis on its Head: Sovereign Debt Crisis as Banking Crisis in Italy and Greece' in Iain Hardie and David Howarth (eds), *Market – Based Banking & The International Financial Crisis* (Oxford University Press, 2013) 182.

[14] Piraeus Bank official website <http://www.piraeusbank.co.uk> 9 December 2013.

with a prominent presence in the last wave of banking mergers was Eurobank. Eurobank absorbed the so-called 'healthy side' of the 'Hellenic Post Bank' which was resolved in 2012, while its 'bad side'[15] had been cleared out by the Bank of Greece (BoG). Moreover, after the completion of its restructuring in May 2013, Eurobank also acquired the 'New Proton Bank'.[16]

The historical evolution of mergers in the Greek banking sector transformed its picture. The various banks that have been established in Greece during the last decades offer a variety of similar products, are subject to the local regulatory framework and are strictly supervised by the BoG. However, the recent concentrations which took place as a consequence of the financial crisis and the need to realise the recapitalisation of Greek banks led to a banking sector which comprises only a small number of active core financial institutions. Therefore, the danger of oligopoly within the domestic financial services market is significant. For that reason, it is crucial to also consider banking mergers from a competition law perspective. To that end, the following section will examine the role of merger control in the banking industry.

III. Merger Control in the Banking Sector

Due to their nature, banking mergers are subject to both sector-specific and competition review, prior to their implementation. Indeed, merger control aims to ensure that the intended transaction will not significantly impede effective competition in the market concerned, thereby resulting in excessive concentration and a reduction in consumer welfare. Therefore, besides the need to obtain regulatory approval, banking mergers are additionally subject to the competition rules, particularly where the banking industry presents oligopolistic features, as for example currently in Greece. The outcome of the merger analysis will determine whether the merging parties are allowed to proceed with their transaction or not.

For the purposes of merger control it is important to consider the market power of the various financial institutions. To that end, defining the relevant

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[15] It refers to consisting from bad loans portfolio.

[16] Eurobank Economic Research, 'Greece Macro Monitor - Focus Notes: Greece' (2013), Weekly Report 1/2013, 6 <http://www.eurobank.gr/Uploads/Reports/GREECE%20Macro%20Monitor%20-%20October%2031%202013.pdf> 9 December 2013.

market is a crucial step of the analysis.[17] Typically, banking services are categorised into retail banking, corporate banking and other financial market services, which may be further sub-divided. For instance, retail banking services usually include (saving) deposits, mortgages and consumer loans. For the purposes of market definition, the traditional criterion of product interchangeability applies to banking mergers as well. On that basis, the various products will be deemed to comprise a single market or several markets depending on the circumstances of the particular concentration. Generally, the Greek financial institutions operate across the whole territory, while the market is not characterised by product differentiation. Indeed, Greek banks offer similar products and services with the same characteristics. Obviously the actual market definition exercise is case-specific. However, it remains an important step for the determination of the competitive relations among the various banks in the market.

Having determined the banking services which constitute the relevant market, the second step is to examine the market power of the merging entities as well as of their competitors. Typically large market shares constitute a useful first indicator regarding the market power of the merging institutions, as they reveal the way the particular banking services market is allocated and allow us to draw useful inferences as to the competitive dynamics among the existing players. Nonetheless, the existence of large market shares is not conclusive. Barriers to entry are also to be taken into consideration.

Indeed, examination of the barriers to entry with a view to determine the real market power of the merging entities constitutes a significant aspect of merger analysis with respect to concentrations in the banking sector. First, the so-called cost of money may be proved a significant hurdle for new entrants, but also for the existing financial institutions. The said cost in the deposit accounts is controlled by Euribor, the demand for further deposits from the banks' side, and the offer of respective banking products. Lately, this cost has increased for Greek deposits in real terms. Additional direct or

[17] The 'relevant market' includes all products or services which are considered as consumable or substitutable by the customers, according to their characteristics, price and usage. The 'relevant geographic market' includes the area where the subject entities sell their products or provide their services, under sufficiently homogeneous conditions. See 'Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law' [1997] O.J. C372/5, [1998] 4 Common Market Law Review 177.

indirect costs and risks, such as the commitment period, the interest rest, the potential for early withdrawals, any cost deriving from covering the current liquidity conditions and the clients' rating, should not be disregarded.

Moreover, the switching costs for consumers are another consideration to take into account. Nowadays consumers take advantage of the introduction of internet and phone banking services and of the banks' seasonal promotions. Normally they do not maintain long-term relationships with only one bank. Instead, they benefit from the periodical information that they receive from their banks,[18] by weighing all the involved fees and charges. A slight diversity in the interest rates of loans, credit cards and deposits or the offer of more attractive funding procedures can make them switch to a different institution with a better offer for maximization of their expected value. Thus, switching costs remain relatively low, although they may depend on the type of offered products.[19]

Furthermore, the existence in place of regulatory laws is a crucial parameter to consider when examining the effect of barriers to entry with respect to banking mergers. Such regulatory laws may significantly affect the possibility for new competitors, and particularly foreign institutions, to enter the market. For this reason, national competition authorities examine carefully related arguments relied upon to oppose potential mergers on the ground that they might limit competition.[20] On the other hand, market deregulation reduces the regulatory burdens for potential entrants. Over the last decades there has been a tendency to alleviate regulatory barriers with a view to promote competition among undertakings. Although the BoG keeps closely supervising foreign banks, which desire to expand their network in the local market, Greece has generally stayed aligned with this trend.

In the case of merging entities with significant market power, the fear is that competition on the market will be significantly impeded post-merger. The number of competitors will be inevitably reduced, while the most powerful entities may no longer feel any competitive pressure. A banking merger may

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[18] According to the ECIB Common Principles of Bank Account Switching, which have been adopted by the Hellenic Bank Association.

[19] Hans Dergyse and Steven Ongena, 'Competition and Regulation in Retail Banking' (2007) OECD (Background Note) 15–58 <www.oecd.org/dataoecd/44/18/39753683.pdf> accessed 1 November 2012.

[20] Alistair Lindsay, Emanuela Lecchi and Goeffrey Williams, 'Econometrics Study into European Merger Decisions since 2000' (2003) 24 European Competition Law Review 673–682.

significantly impede effective competition if the merged entities may unilaterally increase their prices, or reduce their productivity. Moreover, the risk of coordinated effects cannot be ruled out either. Since consumers may turn to their products or services, even the non-merged entities may coordinate to increase their prices if the other features of the market allow so.[21] Generally, the risk of anti-competitive effects is greater in the case of limited competition between the merging entities and limited consumer choice for alternative products. In any case though, if the banking merger generates efficiencies which outweigh any anticompetitive effects, then the specific transaction will be allowed. As usual, such efficiencies may be allocative, productive or dynamic.

In addition to the traditional elements of merger analysis, merger control in the banking sector needs also to take account of some further parameters. As we explained, the economic crisis shrank the local banking sector and reduced the liquidity of its institutions. Because of this, the stability of the banking market should be preserved at all costs in order for Greece to avoid bankruptcy.[22] For that reason, the competent regulatory authorities may often facilitate the takeover or merger of a failing bank, instead of going through a potentially costly public liquidation.[23] In this light, a banking merger involving the acquisition of an institution with insurmountable financial problems is unlikely to be prohibited as anticompetitive, if the failing bank would in any case exit the market in the near future.[24] In other words, the major priority for a vulnerable banking sector is the avoidance of systemic risks rather than the prohibition of mergers which may lead to the creation of a dominant position or to substantial lessening of competition.[25] Regarding Greece, such mergers should be welcomed by the local governments and national authorities. Following this approach is crucial, since Greece has a significant number of operating financial institutions whose balance sheet value often exceeds the domestic GDP.

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[21] John Kokkoris and Kyriacos Papadakis, 'Competition Implications of Merger in the Greek Banking Sector' (2013) 7 Greek Business and Company Law Journal 659.

[22] OECD, *Competition and the Financial Crisis* (2009) 32 <ww.oecd.org/dataoecd/52/24/42538399.pdf> accessed 1 November 2012.

[23] In case general social or economic objectives must be considered.

[24] Elena Carletti, Philipp Hartmann and Steven Ongena, 'The Economic Impact of Merger Control: What is Special about Banking' (2007) ECB Working Paper Series 786/2007.

[25] Xavier Vives, 'Competition and Stability in Banking' (2010) IESE Business School Working Paper 852/2010.

Generally, the banking sector has been characterised by competition among its economic actors, despite the business failures that may have at times arisen from the adoption of profit–maximizing strategies. However, competition policies have recently become less suspicious towards the financial sector by mitigating the applicable tight regulation, and hence sponsoring national ownership. In fact, concentrations of financial institutions are mainly decided upon other variables, such as the merging parties' balance sheets and the actual value of their assets, parameters which are not at the core of competition law analysis. Moreover, the fact that a bank failure entails the risk of spillover effects is not to be taken lightly.[26] In this light, the competent regulatory authorities should interpret the EU competition law principles with greater flexibility in order to also alleviate the parties' onerous burdens.[27] To that effect, they should be concerned with the functioning of the banking markets, the incentives of the banks and the impact of the banking mergers. Such a flexible and comprehensive analysis is necessary to ensure that the national authorities will facilitate potential mergers which are primarily associated with encouraging the systemic stability of the local banking industry.

However, this is not to say that merger control in the banking sector should be overly simplified in times of uncertainty for the European economy. Competition policy always remains a supporting tool to ensure the good functioning of the markets. Therefore, it cannot be sacrificed on the altar of short-term gains. Besides, anticompetitive effects usually stem from individual cases rather than from generalised practices. At first glance, relaxing competition law enforcement may relieve the ailing industries and may produce short–term benefits. Nevertheless once the crisis is done, the outcome may be more costly for consumers and various inequalities may remain.[28]

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[26] John Fingleton, 'Competition Policy in troubled Times' (presented to OFT, London 2009) <http://www.oft.gov.uk/shared_oft/spe...09/spe0109.pdf> accessed 1 November 2012.

[27] Michael Reynolds, Sarah Macrory and Michelle Chowdhury, 'EU Competition Policy in the Financial Crisis: Extraordinary Measures' (2011) 33 Fordham International Law Journal 1670.

[28] Alexis Walckiers, 'Competition Law in Times of Economic Crisis: In Need for Adjustment?' (GCLC 8th Annual conference, Brussels, November 2012) <https://www.coleurope.eu/sites/default/files/uploads/event/alexis_walckiers.pdf> accessed 9 December 2013.

Such considerations are crucial with respect to problematic mergers. In practice, these transactions are carried out at the expense of consumers and their business partners. Therefore, the competition conditions in the relevant market should be examined carefully.[29] In this way, the national authorities will be able to prevent any unfair competition among banks and to guarantee that, recapitalisation plans will prevent aggressive commercial behaviours from the beneficiaries' side. In this way, competition law contributes to the crisis management, while unnecessary distortions of competition are generally avoided.[30]

IV. The Failure of the NBoG – Eurobank Scheme

An illustrative example of the particularities of merger control in the Greek banking industry is the recent scheduled NBoG–Eurobank merging scheme, whose completion has unexpectedly failed.

The parties to this deal were the NBoG and Eurobank. More specifically, the NBoG has been a well-known institution with substantial history and pivotal contribution to the national financial life over the past 170 years. Established in 1841, it is the oldest bank currently operating in Greece. Quite soon, the NBoG has become the largest and strongest financial institution of the country, while it also maintained a strong presence in Southeast Europe and Eastern Mediterranean.[31] In 1880 it became a listed entity and proceeded to various mergers and acquisitions of its subsidiaries.[32] On the other hand, Eurobank is a newly formed financial institution, established in December 1990 under the trade name 'Euromerchant Bank SA'. Initially, Eurobank focused on investment and private banking services. However, its strategic objectives were redefined in the mid-90s in view of the new perspectives that had arisen. In addition to the autonomous development of its network, Eurobank has also pursued to

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[29] Joaquin Almunia, 'The Role of Competition Policy in Times of Crisis' (28th Annual AmCham EU Competition Policy Conference, Brussels, December 2012) <http://europa.eu/rapid/press-release_SPEECH-12-917_en.htm> accessed 9 December 2013.

[30] Damien Gerard, 'Managing the Financial Crisis in Europe: Why Competition Law is Part of the Solution, Not the Problem', (2008) 1 The Online Magazine for Global Competition Policy Release, 2-14.

[31] NBoG controls the ¼ of retail banking, maintains the largest deposit base in Greece, includes 1,184 units and serves a market of 125 million residents (data as of 31.12.2012).

[32] NBoG official website, <http://www.nbg.gr/wps/portal/el/Home> accessed 9 December 2013.

participate into several mergers and acquisitions, in order to obtain a systemic presence in Greece and internationally.[33]

Amidst the financial crisis, the ongoing recapitalisation plans and the dire need for liquidity speeded up the merging process between the two banks. By the end of 2012, the NBoG had completed a public offer to Eurobank shareholders regarding the acquisition of the majority of shares in their possession. In essence, the NBoG intended to absorb Eurobank after the completion of the necessary legal proceedings. Therefore, the NBoG had committed to pay for every 100 common, registered and bearing voting rights shares of Eurobank, 58 new, common, registered and bearing voting rights shares issued by itself. The main shareholders of Eurobank had committed to accept the NBoG proposal.

Following the NBoG proposal, the Eurobank Board of Director provided a reasoned opinion on this issue.[34] Indeed, Eurobank concluded that the offer was quite fair from a financial point of view, fell within the range of the exchange ratios and satisfied the local law and the requirements of the Hellenic Capital Market Commission (HCMC). Moreover, it was understood that Eurobank shareholders shall have a unique opportunity to become part of an enlarged scheme with systemic international presence. Additionally, they shall receive all benefits[35] that may derive from the intended merger. The newly established group would be expected to utilize the comparative advantages of the two banks, capitalise the experience and the abilities of their personnel and make every possible effort to minimize the possible social impact of the scheduled changes. A most recent announcement from the Eurobank side confirmed the initiation of the merger process in accordance with the Greek law requirements.

To that effect, the NBoG filed a relevant submission to the BoG on 5 October, 2012, requesting the approval of its qualifying holding in the Eurobank Group. At the same time, the NBoG also informed the Hellenic Financial Stability Fund (HFSF) requesting approval for this issue, referring to the terms and conditions of the Subscription Agreement, as was in force.

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[33] Eurobank official website <http://www.eurobank.gr/online/home/> accessed 9 December 2013.

[34] Eurobank, *Reasoned Opinion* (2013) <http://www.eurobank.gr/online/home/viewNews2.aspx?id=1781&code=PRESS&lang=en> accessed 9 December 2013.

[35] Such as the resulting synergies, the funding costs' rationalisation, the consolidation of infrastructures and systems.

Furthermore, the approval of the Hellenic Competition Commission (HCC) was also sought after. The HCC approved, subject to commitments, the scheduled voluntary public offer of NBoG to the Eurobank shareholders, by issuing a decision in February 2013.[36] More specifically, the HCC approved the commitments that were proposed by the involved parties to address competition concerns with regard to the markets for card merchant acquiring, mortgage loans and the provision of non-life insurance. According to the above, the parties agreed to divest Eurobank's participation in the Cardlink joint venture. In the meantime, both parties decided to proceed with the necessary security measures, in order to prevent the dissemination of any confidential business information from and/or through Cardlink to third parties and its parent entities. Moreover, both parties committed to respect their customers' right to freely choose any non-life insurance products, by blocking any discrimination practices. In case of non-compliance with the above terms and conditions, HCC could impose various fines.

Last but not least, the NBoG requested the European Commission's approval from a state-aid perspective. On 26 October 2012 the Commission informed the NBoG that, according to the European legislation, Eurobank and NBoG should file a joint restructuring plan for the newly established entity, due to the fact that both of these institutions had benefited from state–aid measures in the past. In addition and after the prior commitment of the Greek government, the Commission informed the NBoG that the latter may exceptionally acquire stakes in various companies, and not only in those of minor importance, as long as the approval period lasts.

In stark contrast with the promising climate that had been generated following the obtained approvals, the investors were suddenly informed about the suspension of the intended merger. Although various explanations have been proffered so far,[37] it seems that the outcome of the recapitalisation procedure of the new to-be entity was actually dictated by political and economic factors and choices. Indeed, such transaction

[36] Resolution No. 562/VII/2013. Until September 2013, the full content of the specific decision was not publicly available, and hence not published in the Government Gazette. Some initial HCC thoughts have been included into the pertinent press release.

[37] Troika raised several concerns regarding the time required for the completion of the specific transaction and the technical obstacles that may arise in the process.

required a significant amount of money to proceed.[38] However, concentrating this money proved a thorny challenge, particularly following the sharp deterioration of the economic climate in Greece. In addition, it appears that the result reflects Troika's desire that Eurobank remains independent and free to carry out its systemic role, by potentially absorbing the remaining banks whose presence was not as systemic. The idea was that in this way both the NBoG and Eurobank would become more attractive to foreign investors and their privatisation procedure would be accomplished more easily, without the risks of having a huge merged financial institution with assets exceeding the whole Greek GDP.

V. Conclusion

The recent financial crisis confirmed once again that market failure and market correction are nothing new. Indeed, these phenomena are integral parts of the capitalist system. With this in mind, the various participants in the formation and enforcement of competition policy, such as governments, regulators and market operators, are entrusted with balancing long-term competition and micro-economic goals, while keeping the system clear of individualistic political aspirations and other exogenous considerations that may distort the process. The newly launched banking policy framework, based primarily on the Single Supervisory Mechanism[39] and the Single Resolution Mechanism[40] are moving in the right direction, to the extent that they seek to establish a well-regulated banking sector with stable and strong institutions. However, competition law concerns should not be disregarded. Merger control in the banking sector complements banking regulations and ensures that post-merger competition among financial institutions remains vivid. The relatively distinct steps of traditional merger analysis minimises

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[38] Initially, it was expected to require a share capital increase of 10.9 billion Euros. After the cancellation of the specific merger, NBoG approved a recapitalisation plan worth of 9.76 billion Euros, intending to raise some money from private investors. However, most of the required cash came from the bailout – supported bank rescue facility and the HFSF. On the other hand, Eurobank failed to raise the minimum 10% of the money needed in order to remain privately run. When the respective share capital increase was concluded, the full value of Eurobank recapitalisation was borne by the HFSF only. See BoG, Monetary Policy 2012 – 2013 (2013) 92 – 97.

[39] Operated since 01.01.2011 and managed directly by the ECB. See Christos Gortsos, 'The 'Single Supervisory Mechanism' a Major Building Block towards a European Banking Union' (2013) 1 Greek Financial Law Journal 14 – 17.

[40] Commission, 'Commission proposes Single Resolution Mechanism for the Banking Union (Press Release)' COM (2013) 520 final, <http://europa.eu/rapid/press-release_IP-13-674_en.htm> accessed 9 December 2013.

the discretionary elements of the regulatory process and potentially contributes to enhance the transparency and predictability of the regulatory outcome.

The New Approach of the European Commission to Competition Cases in the Energy Sectors *Case COMP/39.402 – RWE Gas Foreclosure*

BURCAK YALCIN*

I. Introduction

The new competition regime came into force with the modernisation of European competition law in May 2004. Regulation 1/2003[1] replaced Regulation 17/62[2] and fundamentally changed the enforcement system of EU competition law by extending the powers of the European Commission (hereinafter the Commission).[3] The introduction of the new way of resolving cases, namely commitment decisions[4] and the imposition of new and improved remedies through Articles 7 and 9, are two examples of the most important changes. Article 9 of Regulation 1/2003, for the first time, entails a public settlement procedure where the Commission instead of issuing a prohibition decision can conclude its investigations by rendering commitments binding upon undertakings who suggest them when such commitments address the Commission's concerns over competition.[5]

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[1] Council Regulation (EC) No 1/2003 of 6 December 2002 on the implementation of the rules on competition laid down in [Article 101 and 102 TFEU] (Regulation 1/2003).

[2] Regulation No 17 First Regulation implementing Article 85 and 86 of the Treaty OJ L 204/62.

[3] Elena Wind, 'Remedies and Sanctions in Article 82 of the EC Treaty' (2005) 26(12) European Competition Law Review 659.

[4] Before modernisation, the Commission had been using behavioural remedies offered as commitments by undertakings concerned to settle competition proceedings on an informal basis. A number of cases were resolved through informal commitments considered by the Commission as acceptable and only after the Regulation 1/2003 this practice was given an express legal basis. See further L.O. Blanco, *EC Competition Procedure* (Oxford University Press 2nd edition 2006).

[5] Article 9 of Regulation 1/2003 (n1).

Another power given for the first time to the Commission by Regulation 1/2003 is to impose structural remedies on undertakings concerned under Articles 7 and 9 of the Regulation, when they are capable to effectively bring an infringement to an end, and proportionate to the violation committed.[6]

In this respect, this case comment will analyse one of the most significant examples of the commitment decisions[7] given under Article 9 of Regulation 1/2003, i.e. the *RWE* decision of the Commission.[8] One may infer from the *RWE* decision and other decisions alike that the Commission might tend to conclude investigations through commitment decisions, *first*, because of the administrative efficiencies such as cost and time reduction, as well as because they are less likely to be challenged through appeal mechanisms as commitments are offered by the parties subject to the investigations.[9]

> 1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission.
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> 2. The Commission may, upon request or on its own initiative, reopen the proceedings:
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> where there has been a material change in any of the facts on which the decision was based;
>
> where the undertakings concerned act contrary to their commitments; or
>
> where the decision was based on incomplete, incorrect or misleading information provided by the parties.

[6] Article 7(1) of Regulation 1/2003 (n1):

> Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

[7] See other Commission decisions, Case COMP/39.388 and Case COMP/39.389 *E.ON* [2008], Case Comp/39.316 *GDF* [2009]; Case COMP/39.317 *E.ON Gas* [2010]; Case COMP/39.315 *ENI* [2010].

[8] Commission Decision, Case Comp/39.402 *RWE Gas Foreclosure* [2009] 1885.

[9] Temple J. Lang, 'Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Antitrust Law' (Fordham Antitrust Conference, Brussels, September 2005).

Second, in comparison with infringement procedures, commitment procedures are less burdensome for the Commission as the infringement of competition law does not need to be proved. Preliminary assessment indicating possibility of the existence of these infringements would be enough to conclude investigations through public settlements.[10] *Third*, the parties concerned may suggest more extensive commitments than those would be imposed by the Commission under Article 7 in order to cease investigations without any established infringement decision.[11] The Commission therefore could prefer to follow commitment procedure, in particular, where relevant markets under investigations are currently being liberalised and the commitments offered are sufficient to further such a liberalisation, on the one hand and are capable to eliminate the deficiencies of sector-specific regulations on the other.

II. Summary of the Decision

To facilitate the understanding of the analysis of the decision, it is useful to understand some basic concepts and mechanisms pertaining to energy sectors. The gas sector, as well as electricity sector, consists of four vertically integrated segments which are production/importation, transmission, distribution and supply. Transmission and distribution segments, i.e. the infrastructures for energy transmission[12] and distribution,[13] are defined as natural monopolies given economic and technical difficulties to construct new ones as alternatives to the existing ones. Thus, market operators who do not own transmission and/or distribution networks have to use these existing ones in order to be able to participate in commercial activities in the energy markets. Transmission and distribution markets are regulated markets whereas production/importation and supply markets are open to competition.

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[10] *ibid*.

[11] Richard Whish and David Bailey, Competition Law (Oxford University Press 7nd edition 2012).

[12] Gas transmission refers to transportation of natural gas through the network, which mainly contains high-pressure pipelines, and its delivery to customers. This does not include supply. Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC OJ L 211/94, art 2.

[13] Gas distribution means transportation of natural gas through local or regional pipeline networks and its delivery to customers. This does not include supply. *ibid*.

In *RWE* decision, the Commission came to the conclusion that the problem mainly derived from the vertically bundled ownership of RWE AG (hereinafter RWE) including import, supply and network facilities such as transmission grid. The preliminary assessment of the Commission maintained that RWE may have excluded its potential competitors from the market by creating artificial obstacles to access its gas transport network, i.e. the so-called 'third party access', through the refusal to supply and margin squeeze.

1. Parties to the Investigation

The Commission's investigation concerned RWE and its direct and indirect subsidies, in particular RWE Energy AG, RWE Westfalen Weser Ems AG, RWE Rhein Ruhr AG and RWE Transportnetz Gas GmbH.[14] RWE is a fully integrated German-based energy and utility company, mainly active in production and supply of electricity and gas. With regard to the gas sector, the company is active in production, import, transmission and storage of gas as well as in the downstream gas distribution business.

2. Definition of Relevant Markets and Assessment of Dominant Position of RWE

2.1. Relevant Product and Geographic Market Definitions

When assessing the relevant product market, the Commission distinguished between the markets for *the supply (sale) of gas* and *the markets relating to gas infrastructure*, such as gas transport services. In the gas supply markets, the preliminary assessment divided markets into two groups: *wholesalers* and *end customers*. Within these groups, the Commission defined two different markets for *wholesales*: (i) 'Regionalferngasgesellschhaften' (regional distributers) and (ii) 'Stadtwerke' (smaller distributers), and, two different markets for *the supply of gas to end customers*: (i) large industrial customers, and (ii) smaller customers such as household and small commercial customers.

[14] Commission, 'Antitrust: Commission initiates proceedings against *RWE* Group concerning suspected foreclosure of German gas supply markets' MEMO/07/186.

Within the gas transport market, the preliminary assessment defined gas transmission market for services offered by transmission system operators[15] (hereinafter TSO), on the one hand, and gas distribution[16] market for services offered by distribution system operators[17] (hereinafter DSO), on the other.

As to the relevant geographic market, the Commission found that gas transmission and distribution markets cannot be defined larger than grid-wide as in most cases the construction of competing parallel gas networks is not economically viable, therefore competitive constraints from TSOs outside RWE's network remain negligible. Moreover, given missing competitive constraints from suppliers outside RWE's gas network, the downstream gas supply markets were also defined as grid-wide.[18]

2.2. Assessment of Dominant Position of RWE

In the preliminary assessment, the Commission concluded that RWE may have had a dominant position both in the gas transmission market and in the downstream supply markets within its grid area. As regards gas transmission, it was found that no customers connected to RWE's grid had other possibility for their gas transmission needs other than the transmission infrastructure of RWE. High entry barriers for potentially competing TSOs such as the high construction costs and the high barriers to supply via other market areas guarantee that RWE TSO's position in the transmission business within its network area will not be challenged within the foreseeable future.

As regards the downstream supply markets, the preliminary assessment showed that the chances for third party suppliers to compete with RWE in the supply markets within RWE's grid were limited by the small volumes of

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[15] Transmission system operator refers to a natural or legal person who carries out the function of transmission and is responsible for operating, and ensuring the long-term ability of the system to meet reasonable demands for gas transport. Directive 2009/73/EC (n 9) art 2.

[16] Gas distribution means transportation of natural gas through local or regional pipeline networks and its delivery to customers. This does not include supply. Directive 2009/73/EC (n 9) art 2.

[17] Distribution system operator means a natural or legal person who carries out the function of distribution and is responsible for operating, and ensuring the long-term ability of the system to meet reasonable demands for the distribution of gas. Directive 2009/73/EC (n 9) art 2.

[18] Commission Decisions, Case COMP/M.1383 *Exxon/Mobil* [1999]; Case COMP/M.3052 *ENI/Fortum Gas* [2003]; Case COMP/M.4180 *GDF/Suez GDF/Suez* [2006] 5419.

transport capacities available to them. The low share of gas transported for third suppliers on RWE's TSO pipelines translated into equally low market shares on supply markets served by these pipelines. Absence of a functional third party access system and the fact that almost the entire available capacity was booked on a long term basis for RWE, made the risk for RWE to lose customers in case of a price increase quite negligible.[19]

3. Practices that Raised Competition Concerns

The Commission suspected that RWE might have abused its dominant position in the gas transmission markets and in the downstream supply markets within its grid area through the refusal to supply and the behaviour aiming at decreasing the margin of its downstream competitors.

3.1. Refusal to Supply

According to the preliminary assessment, the first possible unilateral anticompetitive conduct of RWE was the refusal to supply. The gas transmission network was considered as an essential facility, since access to it was objectively necessary to carry out business in the gas supply markets within RWE's grid area.[20] RWE may have pursued a systematic approach according to which it tried to keep the transport capacities in favour of its own affiliate for a long period of time by understating the capacity that was technically available to third parties. In fact, it was observed by the Commission that more capacity was used by RWE than indicated as maximum technical capacity. The chances of competitors to get sufficient capacity from RWE's transmission networks were thus reduced. Furthermore, the Commission's investigations showed that the transmission requests of the competitors were regularly and systematically rejected, since the demand for the transmission was largely greater than the offered capacities.[21] These facts could indicate that there was neither a functional third party access system nor an effective congestion management system, which could actually have avoided many of the refused and delayed capacity requests, harming third party transport customers and ultimately consumers. This claim of the Commission is quite significant, because despite the fact that both 'third party access' and 'congestion management'

[19] *RWE* (n 6) para 19.
[20] Case C-7797 *Oscar Bronner* [1998] ECR I-7791.
[21] *RWE* (n 6) para 26.

are sector-specific regulatory rules,[22] the Commission was nevertheless referencing to these rules revealing their deficiencies.

In its conclusions, the Commission stated that RWE's intention might have been rather to protect itself from new competitors than to attract new transport customers. Third party shippers were, as a result of this intention, only granted a fraction of the transports at the RWE's transmission grid and could not compete in an effective manner in the downstream supply markets.[23]

3.2. Margin Squeeze

The second concern of the Commission related to the possible abuse of the RWE's dominant position on the TSO-level by way of a margin squeeze. The preliminary assessment stated that RWE may have intentionally set its transmission tariffs at an artificially high level in order to squeeze its competitors' margins in the downstream gas supply markets.[24] According to the Commission, there was evidence that the network tariffs were creating asymmetric cost effects to the detriment of downstream competitors. This was because the detrimental network tariffs were only applied to third party users elevating the costs of tariffs which were already high. Moreover, rebates used by RWE increased the existing cost disadvantages for the competitors in the downstream supply markets, since they were only granted to RWE due to the long-term transmission contracts, although technically available for all market operators.[25] The preliminary assessment also raised concerns over balancing system[26] which posed an asymmetric negative impact on new entrants through high balancing costs, which was not paid by RWE due to an agreement signed between TSO (which was vertically integrated to RWE) and RWE, and high penalty fees, which prevented competitors from attempts to submit offer to downstream customers.[27]

4. Commitments Proposed by RWE and Principle of Proportionality

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[22] Directive 2009/73/EC (n 9).
[23] *RWE* (n 6) paras 22-25.
[24] Oliver Koch and others, 'The RWE Gas Foreclosure Case: Another Energy Network Divestiture to Address Foreclosure Concerns' (2009) 2 Competition Policy Newsletter <http://ec.europa.eu/competition/publications/cpn/cpn_2009_2.html> accessed 07 December 2013.
[25] *RWE* (n 6) para 34.
[26] Balancing system is a gas transmission system within which differences between exact and forecasted gas consumption must be balanced. Directive 2009/73/EC (n 9) art 2.
[27] *RWE* (n 6) para 35.

RWE agreed to divest its transmission system business including the entire current German high-pressure gas transmission network with a total length of approximately 4000 km. According to the Commission's decision, the commitments suggested by RWE were not only suitable to remove the Commission's concerns over competition but also complied with the principle of proportionality.[28] The disposal of RWE's transmission business would guarantee that the control of RWE over transmission network would be taken as preventing the undertaking from engaging in similar unilateral anticompetitive practices relating to the access to its network in the future. These structural remedies were also necessary, since there was no equally effective behavioural remedy to the divestiture which could be easily monitored and administered without being more burdensome for RWE.[29]

Furthermore, according to the Commission, in the absence of a structural remedy, the incentives to further engage in such behaviour would not be removed effectively, because anticompetitive unilateral behaviour of RWE, on a lasting and repeating basis, stemmed from the inherent conflict of interest within RWE as a vertically integrated gas company, i.e. from the very structure of the undertaking, which used to control both the transmission and the supply of the gas.[30]

III. Conclusion

The outcome of the above case makes it clear that the Commission aims to eliminate the shortcomings of regulation in newly liberalised energy markets by accepting structural commitments offered by the parties under investigations. As it is seen from the decision, the structural remedies were used to eliminate weaknesses of the energy regulation as well as to create *ex ante* regulatory effects on the markets. This trend of the competition law application might launch a new form of the Commission's activity, ie the 'regulatory antitrust'.[31] Regulatory antitrust therefore can be assumed as a

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[28] According to the principle of proportionality, the measures adopted by the EU institutions must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued. If there is a choice between several appropriate measures, the least onerous one must be imposed. Although the wording of Article 9 of Regulation 1/2003 does not mention the principle the Commission is obliged to comply with it when the decisions is given on the basis of Article 9 of the Regulation; Case C-441/07P *European Commission v Alrosa Company Ltd* [2010] ECR II-5949.

[29] *RWE* (n 6) para 50.

[30] ibid.

[31] See Giorgio Monti 'Managing the Intersection of Utilities Regulation and EC Competition Law' (2008) 4(2) Competition Law Review 123; Javier Tapia and Despoina

methodology to eliminate regulatory failure. It can be clearly seen that with regulatory antitrust the Commission aims at promoting further regulations. However, it should not be forgotten that competition law and sector-specific regulation have different objectives. Even though they can have a complementary relationship they cannot substitute each other. Furthermore, the approach of the Commission should not undermine *ex ante* sector-specific regulation by replacing its duty with regulatory antitrust which would impede legal certainty in the markets.

Mantzari 'The Regulation/Competition Interaction' (2012) Centre for Competition and Regulation <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044722> accessed 07 December 2013.

Aim

The *ICC Global Antitrust Review* aims at encouraging and promoting outstanding scholarship among young competition law scholars by providing a unique platform for students to engage in research within the field of competition law and policy with a view to publishing the output in the form of scholarly articles, case commentary and book reviews. The Review is dedicated to achieving excellence in research and writing among the competition law students' community around the world.

Scope

The *ICC Global Antitrust Review* is intended to become a leading international electronic forum within which students engage in debate and analysis of the most important issues and phenomena in the global competition law scene. The *Review* welcomes contributions dealing with competition law and policy in all jurisdictions as well as those addressing competition policy issues at regional and international levels. In particular, it welcomes works of interdisciplinary nature discussing and evaluating topics at the interface between competition law and related areas such as economics, arbitration, information technology, intellectual property, political science and social geography. Only scholarship produced by students – whether at undergraduate or postgraduate level (taught and research) – will be considered for publication in the *Review*.

Form and Output

The *Review* will be published annually in electronic format. Each yearly volume will consist of a maximum of five long articles, two short essays, a case note section and a book review section. Further information on submission guidelines can be found in the *Review's Guidelines for authors*.

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