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THE IMPORTATION OF THE RULE OF REASON IN EUROPEAN COMPETITION LAW: THE IMPLICATIONS OF ECONOMIC AND BEHAVIORAL THEORIES AND THE CASE OF PORT SERVICES

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I. Introduction to the Debate Between Law and Economics Theory and Behavioral Law and Economics Theory

International markets regulation is presently faced with a new challenge emerging from a debate that started long ago at the University of Chicago Law School (or the “Chicago School”), passed through behavioral theories, and arrived in the European Union model.

In fact, the European Court of Justice’s interpretation is a perfect example of the difficulties that can be found in controlling a market comprised of different States and Countries, but with the common aim of carrying out uniform, or at least harmonized, regulation. I refer to

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2 The “Chicago School” identifies a group of American scholars that, through the development of the theories of Ronald H. Coase and Richard Posner, elaborated on the economic antitrust law approach.
two main groups of European rules: the internal market rules (that have an effect similar to the Commerce Clause of the United States Constitution) and the competition rules (that have the same meaning of the Sherman Act). It is, anyway, necessary to highlight that European Union law applicable to restraint of trade and antitrust is an importation of U.S. doctrine. The American antitrust experience, therefore, provides the necessary background for European scholars and regulators.

Within this conceptual framework, two main theories set against each other concerning the market and antitrust regulation. The first one, law and economics theory, is based on the economic analysis of the costs and benefits of restraint of trade, and justifies a restraint only for economic reasons. The second, behavioral law and economics theory, is based on the empirical

3 For a complete analysis of the comparison between European and American antitrust law, see ELEANOR FOX & DANIEL CRANE, GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW (2010).


5 The “behavioral law and economics theory” can be best understood through the recent study, Christine Jolls, Cass R. Sunstein, & Richer Thaler, A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471 (1998), while a traditional explanation of the doctrine can be
analysis of the regulation through instruments taken from social sciences. While on their face these two very different approaches to the general theory of law behind public interventions into the economy on the grounds seem diametrically opposed, I will attempt to demonstrate that they pursue the same ultimate objective.

The Chicago School started with the idea that market regulation, specifically in the antitrust sector, should have the aim of optimizing competition between companies, which derived from on the idea that greater competition and a more open trade environment would provide an increased advantage to consumers. In this outlook, the consumer’s position coincides with the general welfare. The task of law and economics is to determine the implications of the


rational maximizing of behavior in and out of markets, including the legal implications for markets and other institutions.\(^7\)

Taking into consideration the great success of this doctrine, a number of Supreme Court decisions analyzing antitrust practices have held such practices to be prohibited by the Sherman Act\(^8\) (agreement, conspiracy and monopolization) on economic grounds. Yet such reasoning seems to rest on the assumption that the consumer is a normal person who is always rational: in this context, consumers always choose the best product (or service) at the lowest price. This model is called “perfect competition”\(^9\) and presupposes a utopian world where free competition, jointly with the consumer’s complete set of information, always leads to an auto-regulation of

\(^7\) A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1989); RICHARD H. POSNER, ECONOMIC ANALYSIS OF LAW (1989).


\(^9\) The definition of “perfect competition” can be read in KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 2, 9 (2003) (distinguishing “perfect competition,” which is when “in long run competitive equilibrium, firms earn zero economic profits . . . because of entry and exit,” from “market equilibrium,” which is when “the quantity demanded by consumers equals the quantity supplied by producers”). See also Ronald H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960). Perfect competition, according to Hylton, exists when there is balance among: atomism (that is, the level of concentration of a market), perfect information (complete consumer information), mobility (absence of restraints of trade), and no third-party effect.
the market: the efficient companies will be rewarded by the rational choices of users, while wasteful producers and providers will be obliged to exit the market.

Law and economics theory can be contrasted by behavioral law and economics theory. According to the latter, the Chicago School offers a simplistic view of the economic world. The reality is much different, as in fact, consumers and users are not always rational. Rather, they are never rational. Thus, it would be misguided to make choices for the regulation of the market, and the public intervention into the economy, before having carefully analyzed all the different concrete variables that consumers and users must take into consideration, including personal motivations and the consequences of different economic contexts. The simplistic analysis of antitrust practices and restraint of trade on grounds of market structure and the hypothetical rational choices of consumers would seem to imply a hypothetical interest of people that, in reality, do not exist. The task of behavioral law and economics is to explore the implications of actual (rather than hypothesized) human behavior for the law.  


According to Posner,\textsuperscript{12} the irrationality of human behavior does not impose a limit on the application of law and economics theory because

[T]he fact that people are not always rational, even that some are irrational most or all of the time, is not in itself a challenge to rational-choice economics. Many people have an irrational fear of flying. It is an irrational fear, I concede, rather than just an aversion that we may not share, because the people who harbor it believe it is irrational.

In fact, the uncertainty of the behavioral law and economics approach leads to the concrete

application of the law and economics theory because

[T]he rational-choice economist asks what “rational man” would do in a given situation, and usually the answer is pretty clear and it can be compared with actual behavior to see whether the prediction is confirmed. Sometimes it is not confirmed - and so we have behavioral economics. But it is profoundly unclear what “behavioral man” would do in any given situation.

II. From Economic and Behavioral Theories to the Rule of Reason: Evolution Under the Sherman Act

The application of both economic and behavioral theories to the antitrust sector requires a careful analysis of the effects of restraints of trade in order to arrive at a correct interpretation of the Sherman Act.\textsuperscript{13} This analysis is presently guided by the Supreme Court’s reasonableness


\textsuperscript{13} A deeper analysis of the evolution of economic theory from the antitrust perspective can be found in: DONALD DEWEY, \textit{MONOPOLY IN ECONOMICS AND LAW} 112 (1959); WILLIAM LETWIN, \textit{LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ACT} (1965); and HANS B. THORELLI, \textit{THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION} (1955).
standard,\textsuperscript{14} which is the product of an evolution over two hundred years of judgments by the Supreme Court judgment according to the rule of reason.\textsuperscript{15} This doctrine, developed within the Chicago School,\textsuperscript{16} is based on the idea that a restraint of trade could be justified by showing an advantage for consumers by way of a reasonableness test. The rule of reason had its earliest and most renowned elaborations by the Supreme Court in \textit{Mitchel v. Reynolds}\textsuperscript{17} and \textit{Chicago Board of Trade},\textsuperscript{18} where the Court held that the judicial application of antitrust laws must be flexible and to reject every claim and regulatory act simply based on the existence of an agreement. According to the rule of reason theory, courts and administrative powers always have the obligation to let companies explain and prove the reasonableness of the effects of the agreement.

\textsuperscript{14} For a catalogue of Supreme Court cases concerning price fixing practices, see J.C. Peppin, \textit{Price Fixing Agreements Under the Sherman Antitrust Law}, 28 CALIF. L. REV 297 (1940) and SIDNEY RATNER, \textit{THE TARIFF IN AMERICAN HISTORY} (1972).

\textsuperscript{15} Indeed, according to SANDRA M. COLINO, \textit{VERTICAL AGREEMENTS AND COMPETITION LAW: A COMPARATIVE STUDY OF THE EU AND US REGIMES} (2010):

[I]n the US the Supreme Court has gradually taken vertical restraints out of the per se illegality rule. What Sylvania achieved in placing non-price vertical restraints under the rule of reason in the late 1970s, the Khan judgment did for maximum resale price maintenance in 1997, whilst most recently and most significantly in 2007 the Leegin case followed suit for minimum resale price maintenance.

\textsuperscript{16} For an additional useful resource on the rule of reason, see KEITH N. HYLTON, \textit{ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION} 113 (2003).

\textsuperscript{17} Mitchel v. Reynolds, (1711) 24 Eng. Rep. 347 (K.B.).

\textsuperscript{18} Chi. Bd. of Trade v. United States, 46 U.S. 231 (1918).
conspiracy, or monopolization. As a result, American case law shifted from a position of high-level deregulation to low-level re-regulation.

In fact, in *Mitchel v. Reynolds*, the Queen’s Bench Court adopted a rule of reason standard that allowed companies to justify a restraint of trade on grounds of a reasonableness test having both pro-competitive economic parameters and efficiency parameters. In particular, the Court focused on the specific advantage brought by the behavior or agreement to the wealth of consumers or to the general welfare. The result was a free market that provided State intervention, through judicial or administrative authorities, only when a particular behavior was unreasonable. In *Chicago Board of Trade*, the Supreme Court changed its position to a more intensive intervention by the courts and the regulatory authorities: the Court, in fact, held that the justifications that can be taken into consideration, for the evaluation of the lawfulness of restraint

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19 An important scholar of the rule of reason, Mark F. Grady, thinks that restraints of trade often cause social advantages; this conclusion would be the basis for the general application of the rule of reason. See Mark F. Grady, *Toward a Positive Economic Theory of Antitrust*, 30 Econ. Inquiry 225 (1992).


21 In *Mitchel v. Reynolds*, the Court held that “covenants not to compete may be justified if reasonable and ancillary to some principal (legitimate) transaction and if limited in time and space.” According to Keith N. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* 103 (2003), “*Mitchel v. Reynolds* was the first case to make a serious effort to state the doctrine in this area, and the formulation established has remained intact for more than two hundred years.”
of trade agreements and behaviors, can only be based on economic motivations.\textsuperscript{22} It is useful to follow the reasoning of the Supreme Court, that, first of all, rejected the application of the per-se rule because:

\[T]\text{he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied.}\]

Then, after basing the reasonableness test only on pro-competitive arguments, the Court added: “to evaluate the reasonableness it should have regard to: the nature of the rule, the scope of the rule and the effects on the rule; and in this case there was no effect on market prices but the rule improved market competition.” In fact, it is necessary that defendants bring concrete proof of the reasonableness of their conduct in the form of information on the structure of the specific market and the concrete effects on the supply/demand curve.

The protection of competition has never been, neither in the United States nor in the European Union, an absolute value that needs to be preserved through public intervention measures.\textsuperscript{23} As anticipated, however, in the United States, the Chicago School’s reasoning has become the doctrine most applied by the Supreme Court, while the behavioral law and economics theory has yet to obtain judicial recognition. Consequently, the Supreme Court admits

\textsuperscript{22} In the same sense, see \textit{United Stae}s \textit{v. Socony-Vacu}um \textit{Oil Co.}, 310 U.S. 150 (1940).

While after \textit{Chicago Board of Trade}, an important case involving reasonableness based on extra-competitive standards was \textit{Appalachian Coals \textit{v. United States}}, 288 U.S. 344 (1933).

the validity of vertical and horizontal agreements only when they are justified by economic pro-
competitive reasons, proven through specifics analysis of the market structure and through the 
examination of the concrete effects of the agreement on supply and demand conditions.

While these considerations are valid, they can only be accepted by presupposing the rational choice of users and consumers – an assumption that, according to the behavioral law and economics theory, is not always true. The market structure in the port industry is a good field to consider the contrasts between the Chicago School and behavioral law and economics theory, because of the easier analysis of the supply/demand curve that results from its oligopolistic (and sometimes monopolistic) nature.\(^\text{24}\) This means the full application of the rule of reason as a justification of restraints of trade and the rejection of the \textit{per se} rule.

The most important example of the application of the rule of reason in an oligopolistic market can be found in Boycott agreements. Boycott doctrine can be divided into three development stages: pre-Socony, post-Socony, and post-BMI/Sylvania.\(^\text{25}\) The first is pre-Socony, in which the Court applied the rule of reason. The second is post-Socony, in which the Court turned toward a \textit{per se} rule. The third is post BMI/Sylvania, in which the Court adopted a more rigorous rule of reason test.


The most important case of the pre-Socony stage is *Eastern States Retail Lumber Dealers’ Assn. v. United States.* In that case, a group of retail lumber dealers refused to deal with wholesalers who sold directly to consumers. The Court upheld the lower court’s finding of a conspiracy in violation of the Section One of the Sherman Act. According to the reasoning of the Court, the government must prove conspiracy when charging defendants with boycotting. The defendants argued that direct selling by the wholesalers infringed on their exclusive right to trade. The Court concluded that every retailer has the right to stop trading with any wholesaler for any reason; but when they combine to do this, they conspire in a manner that harms the public.

In two other cases, *Paramount* and *First National Pictures,* the Court seemed to adopt the same rule of reason. In both cases, film distributors agreed on specified terms by which to contract with exhibitors. In *Paramount,* distributors were obliged to contract only with those exhibitors who accepted an arbitration clause, while in *First National,* exhibitors were required to post cash deposits. The Court held these agreements were unlawful because they restricted the freedom of distributors to compete. These pre-Socony stage decisions are consistent with the rule of reason analysis because the Supreme Court required evidence of (1) an agreement to boycott, and (2) an anticompetitive purpose. A rigorous *per se* analysis would require only the evidence of the first issue.

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26 E. States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600 (1914).


After the Socony case,29 the Supreme Court turned towards the application of a clear *per se* standard. The first leading case is *Fashion Originator’s Guild of America v. Federal Trade Commission*,30 where the Court signaled a shift toward the *per se* analysis. In that case, manufacturers of original dress designs wanted to fight “style piracy” by refusing to sell to distributors who also sold clothes copied from Guild members’ dresses. The Court held that the boycott violated both the Sherman Act and the Federal Trade Commission Act. The defendants admitted that they had agreed to suppress competition from styles pirates (so the evidence of conspiracy was strong), but tried to prove the reasonableness of their behavior on the grounds that they lacked monopoly power. The Court stated that it was sufficient that the defendants’ activities tended to monopolize the market. According to the Court’s opinion, the Guild had formed an extra-governmental trade regulation agency, thus making the boycotts *per se* unlawful as a form of private justice.

The economic analysis of *Fashion Originator’s* teaches that there is a conflict between the consumer welfare standard and the goal of maximizing competition through the application of the *per se* standard. In fact, according to Wright,31 there is a contrast in the intellectual soul of American consumer law thanks to which “a battle emerges between its two pillars: conventional consumer protection law and antitrust law.” Traditional consumer policy aims to ameliorate the deleterious effects of market failures associated with consumers’ imperfect or incomplete information. Antitrust policy “provides the institutional framework for protecting consumers


from losses associated with the creation and acquisition of monopoly power.” Therefore, both groups of laws have the common objective of protecting consumer welfare. In fact, the two policies have well known potential complementarities. This is why the application of the rule of reason is the best standard to be applied in the regulation of competition: antitrust policy focuses on market failures associated with the creation of market power in so far as it is useful to pursue consumer protection. The argument that a court should hold a boycott reasonable because of some inherent conflict between competition and consumer welfare is simply one of several reasonableness defenses available to defendants.

The passage from the rule of reason to the *per se* rule can be highlighted through the *Klor’s* case. There, Klor’s operated a retail store in San Francisco. Broadway Hale, a chain of department stores, opened next to Klor’s, competing in the sale of household appliances. Suppliers refused to sell to Klor’s in favor of Broadway Hale. The defendant admitted the refusal and the Court held that they violated the Sherman Act, noting that such a boycott should be examined under the *per se* standard and that there is no need to prove public harm. This is obviously a *per se* holding. In fact, Klor’s can also be reconciled with the rule of reason as it is applied today, because the defendants offered no pro-competitive justification. Under the rule of

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32 According to Wright, “it is unsurprising that legal scholars, economists, and regulators envision a fully integrated ‘consumer law’—a term I use hereafter to refer jointly to antitrust and consumer protection.”

reason, as interpreted in *Chicago Board of Trade*, courts cannot uphold a restraint of trade that has no pro-competitive justification.\(^{34}\)

While *Fashion Originator’s* and *Klor’s* can be read under the rule of reason from *Chicago Board of Trade*, in *Associated Press*,\(^{35}\) the Supreme Court applied the real *per se* rule that finalized the shift to the post-Socony stage. Associated Press was a cooperative that distributed news among its members. Associated’s self-regulation allowed member newspapers to veto the membership application of a local rival. The Court held this practice to be a violation of the Sherman Act according to the power, purpose, and effect of the bylaws. The Court said that the right to veto went beyond the exercise of each individual member’s right to trade with whomever it wishes. Moreover, the Court noted that evidence that Associated Press had not achieved a complete monopoly was irrelevant. Associated Press’s alternate defense was that there were many competitors outside their network. However, the Court rejected this argument as well on the ground that complete absence of competition is not a prerequisite under Section One of the Sherman Act. According to the Court’s opinion, Associated’s self-regulation inhibited competition by allowing members to gain a competitive advantage with the sole aim of driving out their local rivals.\(^{36}\) In fact, in *Socony*, the Court held that complete absence of competition is


not a necessary requirement. The Court described the network as an artificial creation designed to force nonmembers out of business by giving a decisive advantage to network members.\(^{37}\)

The third stage started after the *Sylvania* case,\(^{38}\) where Sylvania terminated a contract with its retailer Continental. The distributor, in fact, had begun an unauthorized territorial expansion into the markets of other retailers. Continental claimed that Sylvania had violated Section One of the Sherman Act through the enforcement of franchise agreements that banned the sale of Sylvania products outside specific geographical borders. The trial court, applying *United States v. Arnold, Schwinn & Co.*,\(^{39}\) agreed that it was a violation of Section One of the Sherman Act. The Ninth Circuit reversed after making technical distinctions between the facts in *Schwinn* and those in *Sylvania*. The Court applied the rule of reason:

> Under the Sherman act it is not unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it . . . [and] the rule of reason governs when the manufacturer retains title, dominion and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer.

Moreover, according to Wright, “beginning in 1977 with *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Supreme Court began integrating the economic discipline fostered by Chicago School literature into judicial decision-making directly; the Court also began revisiting earlier

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\(^{37}\) The Court analogized to *United States v. Terminal R.R.*, 224 U.S. 383 (1912), where the Court required the defendants to provide fair access to competitors.


\(^{39}\) 388 U.S. 365 (1967).
precedents imposing broad, per se prohibitions against large classes of conduct.” The developments of the rule of reason in boycott cases passed from a hybrid application in *Northwest* to a clear reasonableness in *Indiana Federation of Dentists*.

The Court in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.* shifted to a hybrid rule of reason/per se test. Northwest Wholesaler Stationery was a cooperative of office supply retailers that could purchase goods in large quantities, lowering the cost to retailers. Pacific Stationary was expelled after violating the bylaws of the cooperative. The Ninth Circuit held it was a per se violation because Northwest did not provide adequate procedural safeguards. However, the Supreme Court upheld the lower court decision, stating that the agreement did not fall under the automatic per se rule category. The Court distinguished *Northwest* from the *Silver* case, cited by the district court, arguing that in *Silver* there was a national policy favoring self regulation of the securities that was not present in *Northwest*. The Court then elaborated a new rule of reason, according to which, unless a cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion merits application of the per se standard is not correct. This implies that the rule of reason is the default standard courts should apply in boycott cases.

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42 The argument was drawn from the judgment of the Supreme Court in *Silver v. N.Y. Stock Exchange*, 373 U.S. 341 (1963), where the NYSE violated the Sherman Act by excluding a broker from access to its facilitates without first providing hearing. This was a per se ruling because the Court did not need evidence of restraints of competition.
The definitive shifting to the rule of reason in boycotts occurred in *Indiana Federation of Dentists.*\(^{43}\) The Federation of Dentists agreed to refuse insurers’ request for x-rays. The reason was that insurers had attempted to control the costs of dental treatment by requesting that dentists submit x-rays and other information with any request for payment. The Court applied the rule of reason because (1) the facts did not fall in the category of cases described in *Northwest* that would merit application of the *per se* rule (where market power is used to discourage a customer or supplier from doing business with a competitor), and (2) there was a professional group that had a greater claim to rule of reason treatment. The rest of the opinion applied *Chicago Board of Trade* arguments that the defendants had the burden of proving a pro-competitive justification for the trade restraints. The defendants’ argument centered on *Professional Engineers,\(^{44}\) according to which, they contended, their behavior was reasonable because it aimed to protect the quality of dental services. Yet *Professional Engineers* rejected the claim that intention to enhance product quality could serve as a justification for restraints on competition. Therefore, the Court held there was a violation of Section Five of the FTC Act.

This rule of reason analysis respects the boundaries established by *Chicago Board of Trade*. Arguments suggesting an inherent conflict between competition and consumer welfare are generally impermissible. This is why it is necessary to identify the exact parameters and boundaries of the application of the rule of reason.\(^{45}\) Courts went from standards related to the


\(^{45}\) A deep analysis of the boundaries for the intervention of public authorities can be studied in: W. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652
social welfare in *Mitchell v. Reynolds* to hard regulation based on the sole pro-competitive efficiency of the prohibited agreements in *Chicago Board of Trade*.

Some recent judgments have taken into consideration different parameters of extra-competitive environments in order to justify agreements and prohibited behaviors in light of social objectives and special public policies.\(^{46}\) The clearest decision on this point is *Brown*, where MIT and several Ivy League Schools had been agreeing on financial aid packages offered to admitted students. The Justice Department brought suit under Section One of the Sherman Act. The Third Circuit (reversing the district court) found that the agreement was not a violation of the Sherman Act and that the district court failed to give adequate weight to MIT’s “pro-competitive and social welfare justifications.” While courts should obviously consider social welfare justifications under a full-blown reasonableness inquiry, they are generally outside of the boundaries set by *Chicago Board of Trade*. Actually this trend is not yet a habit of the Supreme Court, which still applies an economics-oriented rule of reason on the assumption, typical of the law and economics theory, that fair competition necessary implies advantages for consumers.\(^{47}\)

### III. First Level of Importation: The Incidence of the U.S. Rule of Reason in European Competition Law


\(^{46}\) See United States v. Brown Univ., 5 F.2d 658 (3d Cir. 1993) (holding valid an anti-competitive agreement among universities in order to guarantee financial aid to admitted students on grounds of welfare protection).

The problem that needs to be analyzed, through a comparison of the United States legal system and European competition law, is whether European parameters of the rule of reason can be the same as those held by the Supreme Court in *Chicago Board of Trade*. Nevertheless, the European scholar has the duty to avoid the risk of giving too much importance to American judgments. Even if European competition law is an importation of the Sherman Act, the standards for application of the specific norms must be different. The major differences concerning public policies and market structure between the United States and the European Union oblige public authorities and European judges to take into consideration a society that has as its main objective the integration of different national markets and the realization of other important goals, such as the environmental protection, the mobility right, the promotion of research, and the work safeguard.

From this point of view, the evolution of the judgments of the European Court of Justice has allowed scholars and public regulators to fix a kind of regulation with goals different from


50 *Nigel Foster, Foster on EU Law* (2011) (identifying a complete range of public interests pursued through European Union policies).

the Supreme Court experience. The European Court of Justice introduced a model of regulation that allows public intervention in the market and punishes anti-competitive agreements and behaviors, whereas the economic disadvantage brought by the restraint of trade is necessary to pursue a different imperative public objective according to the proportionality principle.

The clearest examples of this trend can be found in the European Court of Justice judgments concerning the regulation of vertical agreements under the article 101 of the Treaty on the Functioning of the European Union. The Court has never turned its orientation away from the protection of the common market and the development of the integration of the different national markets. The pursuit of these goals has, nevertheless, been accompanied by the need of a balance with other important goals of a non-economic nature.

The first concrete application of this approach, concerning a vertical agreement restraining competition, was the case *Consten and Grundig*, where the producers of technological apparels imposed territorial exclusivity on their distributors. The effect of the agreement was a partitioning of the market, and the resulting European Commission sanction was confirmed by the judgment of the European Court of Justice. The decision of the Court merits specific attention for the clear elaboration of the rule of reason doctrine announced by the

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52 A complete inquiry into the most recent tendencies of the European Court of Justice can be found in P. CRAIG & G. DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS (2011).


General Advocate Karl Roemer, who took clear inspiration from the American law and economics theory:

I have already indicated in another case that American law (the 'White Motor Case') requires for situations of the type before us a comprehensive examination of their economic repercussions. Clearly I do not mean to say that we should imitate in all respects the principles of American procedure in the field of cartels. This would not in fact be justified by reason of the essential differences between the systems (prohibition per se in American law; possibility of exemption under Article 85 (3) of the EEC Treaty). But such a reference is useful nevertheless in so far as it shows that in respect of Article 85 (1) also it is not possible to dispense with observing the market in concreto.

Roemer, in fact, criticized the European Commission decision, stressing that the restraints of trade brought by the agreement within the distributive chain of Grundig products could not be bound by the prescriptions of article 101 of the TFEU, because the relevant market, for the evaluation of the existence of the restriction, must include the inter-brand competition. Roemer carried out a brilliant economic analysis of the market following the Chicago School doctrine, emphasizing that

... it is undeniable that in a given market situation competition between several sellers of a single product can also take on great importance, that it may be indispensable for the normal play of competition on the market. But the Commission if wrong in taking account of this last mentioned internal competition exclusively and in neglecting completely in its considerations competition with similar products. In fact, it is perfectly possible that there exists between different products or rather between different producers

55 *Id.* (opinion of the General Advocate Roemer).

56 It is interesting to note the harsh critique General Advocate Roemel made of the European Commission’s reasoning:

Let me say first that in this the Commission itself is clearly not being wholly consistent in its actions, since in other cases it has at least given the impression of renouncing the pure theory of objective purpose which attached importance only to the aim of the agreement, since it required that there should be 'perceptibly ' adverse effects upon competition. In my opinion, this concept implies, if regarded objectively, an examination of the effects on the market, and I do not understand how the Commission can at the same time maintain that it should not make quantitative inquiries (for example, on shares of the market), and that it is not required to look at the market in concreto.
such sharp competition that there remains no appreciable margin for what is called internal competition in a product (for example, in relation to price and servicing). The Commission considers that it does not have to take into consideration this competition between different manufacturers except for simple mass-produced articles. That does not seem to be correct, if it is desired to judge economic phenomena realistically. Even for very specialized instruments, like radio receivers, which are sold under a special mark and which are distinguished from one another by external and technical characteristics, genuine and perceptible competition is perfectly possible.

In other words, according to Roemer, an agreement or a behavior with an adverse effect on competition among distributors of the same product can have the effect of increasing the competitiveness conditions of the market of producers: the inter-brand competition promotes innovation among producers and delivers a definite advantage to consumers.\(^{57}\) Indeed:

\[T\]his concrete examination may show that it is not possible for a manufacturer to find an outlet in a particular part of the market unless he concentrates supply in the hands of a sole concessionaire. That would signify that in a given situation an exclusive distributorship agreement has effects which are likely only to promote competition. Such a situation can in particular appear when what is at issue is gaining access to an penetrating a market.

\(^{57}\) In the United States, the Supreme Court once had the same orientation concerning inter-brand competition. In the case of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), a producer was prohibited from imposing territorial exclusivity contracts on its distributors. Ten years later, the Supreme Court overturned its decision in *Schwinn* in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), conducting a complete evaluation of the reasonableness of vertical anti-competitive agreements. Thirty years later, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the Court held that the goal of antitrust law in the United States is the protection of inter-brand competition, while intra-brand competition is completely unimportant.
According to Roemer, the Commission had a mistaken interpretation of the restraint of competition, because “it is clear that the Commission did not take considerations of this type into account as regards the relationship between Grundig and Consten.”

However, Roemer’s opinion did not convince the European Court of Justice to adopt the American standards of application of the rule of reason. In fact, the Court confirmed the sanctions inflicted on Grundig by the European Commission. The European Court of Justice highlighted that restraints on free competition cannot have the effect of artificially splitting the geographical market through private contracts. Rather, the objective of the European Union is the opposite: that is, the unification of many different national markets and the realization of a single European common market. Therefore, if it is abstractly possible to justify an anti-competitive vertical agreement in light of a general increase in market innovation,

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\ldots \text{the improvement in the production and distribution of goods, which is required for the grant of exemption cannot be identified with all the advantages which the parties to the agreement obtain from it in their production or distribution activities, since the content of the concept of improvement is not required to depend upon the special features of the contractual relationships in question. This improvement must in particular show}
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58 See S.M. Colino, Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes (2010) (analyzing the differences between the European system and the United States’s system’s focus on restraints of trade imposed by manufacturers on distributors). The same comparison standards are valid in the context of commercial relations between shipping companies and terminal operators.

appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition.

In this way, the Court gave a clear idea of the lawful behaviors both to all public regulators of member States and to the European Commission, providing important standards for the evaluation of the structure of the market and need to balance with other public goals.

Importantly, the Court explained:

[I]n its evaluation of the relative importance of the various factors submitted for its consideration, the commission must judge their effectiveness by reference to an objectively ascertainable improvement in the production and distribution of the goods and decide whether the resulting benefit suffices to support the conclusion that the consequent restrictions upon competition are indispensable.\(^{60}\)

The position of the European Court of Justice has undergone an important evolution over the years with respect to the parameters of the reasonableness test. It began with the famous cases of *Pioneer*\(^ {61}\) and *Volkswagen*,\(^ {62}\) where the Court sanctioned price-fixing agreements that created territorial partitions of the European market. Now, the recent case of *GlaxoSmithKline*\(^ {63}\)

\(^{60}\) Concerning this point I agree with Fox that, through a comparison of European law and United States law, it seems the value of the European market and competition policy is that it is more flexible and less bound to economic analysis. G.A. Berman, R.J. Goebel, W.J. Davey & E.M. Fox, *Cases and Materials on European Union Law* 829 (2011).


represents an important arrival point: the European Court of Justice justified the self-regulation of prices of pharmaceutical products for all Spanish distributors by reason of the necessity of obtaining as much profits as possible in order to make investments in innovation and research.

This interpretation of the European Court of Justice concerning vertical restraints of competition was repeated in the context of horizontal agreements and abuses of dominant positions, although with some variations related to the different market structures. Horizontal agreements, with adverse effects on the competition, are contracts between companies at the same level of the supply chain. The European Court of Justice, in fact, prohibited a great number of anti-competitive behaviors, including data dissemination and tighter agreements. The standard of evaluation of their effects was always the reasonableness test, which balanced anti-competitive effects against the pursuit of other important public policies according to the proportionality principle.

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The reasoning of the European Court of Justice is actually the development of a specific rule contained in paragraph 3 of article 101 of the TFEU, according to which the prohibition of anti-competitive agreements can be declared inapplicable to agreements that contribute to the improvement of production and distribution processes or to the promotion of technical and economic progress, as long as the majority of the advantage is reserved to consumers. These agreements are allowed only if the restraints comply with the proportionality principle, they are indispensable to reaching those public objectives, and they do have not the effect of eliminating competition in a substantial part of the relevant market.

The evaluations of the European Commission and the European Court of Justice have always been structured in two phases. The first, compulsory in order to get to the second one, consists in the evaluation of anti-competitive effects brought by the agreement, while the second phase is the balance between those effects and the technical and economic benefits according to the proportionality test. In fact, the agreement must be necessary to the fulfillment of the public benefit and there should not be any other possible measure to pursue the same consumer advantage. This rule is a clear choice of the European competition policy directed towards the application of the rule of reason and to the rejection of the *per se* rule. In fact, the European Court of Justice gradually enlarged the number of possible public goals that can legitimate a restraint of trade, arriving to justify five kinds of public objectives: the protection of work and retirement conditions,\(^\text{66}\) environmental protection,\(^\text{67}\) the independence of professions,\(^\text{68}\) and


research and innovation. These public objectives must be pursued according to the proportionality principle.

**IV. Second Level of Importation: The Relevance of the Level of Concentration of a National Oligopolistic Market: The Case of Port Services**

American standards of antitrust law were imported into the European legal approach to market regulation with strong consequences for national legal systems where European Union law is applicable.  

United States is still consolidated in the Chicago School and thus admits only economic reasons. In fact, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the Supreme Court declared unlawful the self-regulation of fees established by the Society of Engineers for the construction of high safety buildings, because the establishment of safety standards is a public competence that cannot justify anti-competitive agreements.


70 The obligation to implement European Union law causes the risk of civil liability for those member States that don’t comply with European requirements. M. FUCHS, FROM
It is very important to highlight the complexity of the work of European national courts and scholars charged with evaluating the lawfulness of antitrust practices, such as agreements, conspiracies, and monopolizations, through the application of a legal doctrine formed in the United States and twice imported to Europe: first from the United States to the European Union, and then from the European Union to each national legal system.\textsuperscript{71} Moreover, scholars from civil law countries are used to interpreting legal rights through the roman legal model, whereas antitrust regulation is an evolution of many common law principles,\textsuperscript{72} according to which the interpretation of Sherman Act should be held.

The risk, hidden behind the wrong research of the legal base and model of antitrust regulation, is either an extension or restriction of the real field of application with the following consequence: in the first case there will be a de-regulation of practices and agreements that would need the public intervention while, in the second case, the antitrust law will be applied also to situations that don’t need the public intervention. In both cases the national judge won’t reach the optimization of the social welfare that, according to the general theory of law, is the objective of the public regulation of the market.

\textsuperscript{71} \textit{International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion} (Dinah Shelton ed., 2011) (pointing out the bilateral nature of the relationship between international law and domestic legal systems).

\textsuperscript{72} See United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), \textit{aff’d} 175 U.S. 211 (1899); Nash v. United States, 229 U.S. 373 (1913).
This risk becomes more and more concrete in those oligopolistic industries, such as the port services sector, where the narrowness of resources (or areas) and the market natural structure are a prolific environment for restraints of trade through vertical and horizontal agreements, conspiracies, and monopolizations. Considering, for example, the service of loading and unloading of freights in European ports, the main feature that has to be noted, by the analysis of the market structure, is the dearth of terminal areas and the need to access.\(^{73}\) Consequently, all terminal operators and all shipping companies have the right to use those infrastructures through the contested scheme of self-consumption that was affirmed by the European Court of Justice. In fact, many European countries have a local economy based primarily in the field of infrastructures: the ports sector is one industry where local actors can easily carry out the artificial partition of the market\(^ {74}\) through the negotiation of port areas.\(^ {75}\) Without adequate


\(^{75}\) A description of the Italian port services market can be read in S.M. Carbone & F. Munari, *La Disciplina Dei Porti Tra Diritto Comunitario e Diritto Interno* (2006) and *Lo Spazio Mediterraneo Della Mobilità, Assetti Organizzativi, Concorrenza e Regolazione Delle Infrastrutture Strategiche* (M. Maresca ed., 2010).
market regulation, foreign terminal operators and foreign shipping companies are excluded from the market. An important example of inefficient regulation in the port sector is the Italian system, where there has been a frequent need for the intervention of the European Court of Justice.

After the main European judgments, many member States adopted law packages to liberalize the port services. The most critical act, precipitated by a great number of judgments of the European Court of Justice, was adopted in Italy, through law n. 84/1994, which created a new independent regulator in charge of each port: the Port Authority. This new public body had the ability to coordinate and control the economic activities carried out within the port areas and the authority to award concessions for the management of the terminals.

The most important rules of the European reforms, including the Italian one, tried to bring about the liberalization of port areas and port services through the implementation of the

That power can be carried out from an independent public authority through administrative measures, but with the possibility of claiming specific rights upon the judicial authorities.

The most important case decided by the European Court of Justice in this sector was Case C-179/90, Siderurgica Gabrielli v. Merci Convenzionali del Porto di Genova, [1991] E.C.R. I-05889 (E.C.J.).

European internal market rules, which are an importation of the Commerce Clause of the United States Constitution. But the most interesting rule introduced by the Italian State was a sort of *per se* rule similar to the Clayton Act. In fact, according to the article 18 paragraph 7 of law n. 84/1994, a concessionary of port area (i.e., a leaseholder) is prohibited from asking for another concession in the same port for the same activity. The second paragraph of that rule prescribes the prohibition on all terminal operators from using structures and services of other concessionaries unless there is an explicit prior authorization from the Port Authority.

The above described disposition, apparently included in the category of *per se* rules, is a category of norms that is nearer to law and economics theory, but has never been accepted by the majority of scholars. According to the *per se* interpretation of the antitrust rule, there is no possibility of integrating terminal operators activities because the protection of the plurality (or atomism) of producers and providers implies the pursuit of fair competition. However, if atomism could be an important goal at the beginning of a liberalizing process, it becomes a restraint of trade in a liberalized market.

Regardless of the choice to follow the Chicago School rather than the behavioral law and economics theory, it is evident that consumers and users (either rational or not) do not necessarily evaluate variety of supply as an absolute value. The concentration level of the port

*Per se* rules are those prescriptions that declare the invalidity of an agreement on the grounds of its simple existence. The most important example of this is the Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730, which punishes: (1) price discrimination (Sec. 2); (2) tying and exclusive dealing contracts (Sec. 3); corporate mergers that tend to result in a monopoly (Sec. 7); and interlocking directorates, that is, common board members among competing companies (Sec. 8).
market is a perfect example of this affirmation.\textsuperscript{80} It is, in fact, possible that a port comprised of many terminal operators (with a low level of concentration and a high level of atomism) provides better services and lower fees than a port where there is a high concentration of terminal operators. In this situation, the rational user of the port (that can be either the shipping company or the final consumer) will choose the less concentrated port, while the irrational consumer will choose the more concentrated port. However, experience shows that the opposite situation is possible too.\textsuperscript{81} There are some cases where a port made of few authorized terminal operators is more efficient than a port made of many operators; in this case, the rational user will choose to send the freights or unload them in the more concentrated market, while the irrational consumer will choose to get the services of the less concentrated port.\textsuperscript{82}

\textsuperscript{80} In American literature, there is a contrast between those scholars who consider the value of small enterprises (see R. Krugman, \textit{Is Free Trade Pass?}, \textit{1 J. Econ. Persp.} 131 (1987)) and those scholars who do not consider atomism as an absolute value (K.N. Hylton, \textit{Antitrust Law: Economic Theory and Common Law Evolution} 150 (2003)). In my opinion, atomism is a value that can change according to the different structures of the market taken into consideration.

\textsuperscript{81} \textit{See Moody’s Investors Service, Competition Among West Coast Ports Pressures Credit Outlook} (1998); E. Schenker, \textit{Port Development in the United States} (1976).

This reasoning suggests that the concentration level of a market is not a value for the consumer and, for the same reason, the protection of atomism cannot be an absolute objective of antitrust policy in the port sector. In fact, the port market analysis has the advantage of reducing the width of possible choices for the consumers, avoiding the risk of carrying out a difficult inquiry into the differences between the conclusions arising from law and economics theory and behavioral law and economics theory. Thanks to the structure of the port market, the two theories lead exactly to the same market regulation model: there is no need to protect the atomism of the market because it does not necessarily result in an increase of consumer benefits or the social welfare. Consequently, a per se rule prohibiting every vertical or horizontal agreement in the port sector is simply wrong.


84 The positive externalities of horizontal cooperation can be understood through the reading of L.G. Telser, A Theory of Efficient Cooperation and Competition (1987); L.G. Telser, Economic Theory and the Core (1978); and W.W. Sharkey, The Theory of Natural Monopoly (1982).

85 An important judgment of the Second Circuit noted that agreements and cooperation in an oligopolistic market cannot be considered unlawful before a careful inquiry of their effects. E.I. du Pont de Nemours & Co. v. Fed. Trade Comm’n, 729 F.2d 128 (2d Cir. 1984) (“[B]efore business conduct in an oligopolistic industry may be labeled ‘unfair’ within the meaning of Sec. 5 a minimum standard demands that, absent a tacit agreement, at least some indication of
V. Conclusions

The above reasoning leads to the same conclusion of an interesting recent Italian judgment,\textsuperscript{86} which produced a modern interpretation of article 18 paragraph 7 of law n. 84/1994. According to the decision, the Regional Court allowed few companies to ask jointly for an extension of the concessions they already had. The Court interpreted article 18 paragraph 7 as an antitrust rule that needs to be evaluated according to the desirability of the atomism of the market within the port. The global development of the port is, however, increased if strengthened terminal operators are in place because the relevant geographic competition to be considered goes beyond the single port. The cited Italian judgment, although it is full of contradictions,\textsuperscript{87} is one of the most modern applications of antitrust law to port services, because it proposes a reasonableness test according to standards and parameters that are very similar to the United


\textsuperscript{87} In fact, the Regional Court in some parts of the opinion seems to apply article 18 paragraph 7 as a \textit{per se} rule, suggesting (1) that the aims of the norm are the protection of competition and the prevention of monopolization, and (2) that the rules doesn’t require an inquiry into the concrete adverse effects on competition. But in the most important part of the opinion, the Court held that the port services market needs a flexible application of the antitrust law, because in order to improve shipping traffic, terminal operators must maximize their efficiency through horizontal and vertical integrations of their activities.
States’s interpretation of the rule of reason as embodied in the Supreme Court’s holding in *Chicago Board of Trade*. In fact, the Italian Court made some interesting considerations through the analysis of the pro-competitive effects that might be brought about by vertical integration of the activities of terminal operators, including social welfare improvement. This judgment was not fully in compliance with the trends of the European Court of Justice because its reasoning was limited to the economic perspective. Yet, the fact that, for the first time, an Italian Court analyzed an anti-competitive agreement between terminal operators under the rule of reason is a good starting point for future applications.

The above description of the European case law provides the framework according to which national judges must apply competition laws, taking into consideration not only the literal meaning of the articles of the TFEU, but with the same importance, their public objectives. In fact, the correct approach to antitrust regulation in the port services industry is the interpretation of prohibition laws as flexible rules, rather than the previous applications of member States’ courts, which treated cartels and monopolization as automatic bans on vertical integration of a terminal operator’s activities. National administrations and regulators do not have to consider antitrust laws as *per se* rules—the correct interpretation of the rules requires a careful analysis of the adverse effects on competition brought by the agreement. Moreover, the desired line of reasoning will attempt to identify the public goals that stand behind the application of antitrust laws in the port services industry, among which is the maximization of shipping traffic in national ports. This is a conclusion coherent with the tendencies of the European Court of Justice’s rulings on vertical and horizontal agreements having adverse effects on competition. The protection of competition, intended to preserve atomism in the market, is not an absolute value of either European public policies or the national laws, and consequently, antitrust
regulation must be flexible. Ultimately, this means that the interpretation of antitrust regulations must take into consideration both economic and social effects of agreements, as well as abuses of dominant positions.