Exploring if Differences in US and EU Antitrust Law Are Substantive or Superficial by Re-Trying US Cases in the EU

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Abuse of dominant position; Anti-competitive practices; Comparative law; EU law; Predatory pricing; Price fixing; Sport; Tying clauses; United States

Abstract

This article canvases several types of antitrust violations. It discusses the legal standards in both the US and EU, explains an illustrative case from each jurisdiction, discusses the differences in the law by comparing and contrasting the cases, and then hypothetically retries the US case under EU law to see how those differences shape the outcome, if at all. The paper then discusses how those analyses ought to result in meaningful policy change.

I. Introduction

Antitrust law enforcement is now a global endeavor with the explosion of the number of countries enacting antitrust laws and increased cooperation among enforcement agencies.[1] The biggest violators of antitrust laws are often large business organisations that operate multinationally.[2] It is therefore vital to understand the laws of the major players in competition law. Specifically, the two largest and most influential systems of competition regulation are the US antitrust laws and the EU's competition laws.[3] Although they are surely not the only major players in global antitrust enforcement, they are the ones this article will focus on because they remain the most influential. Agencies from both the US and EU often co-operate to accomplish the shared goal of enforcing competition laws. However, while the goals are commonly shared, the statutes used are not identical.[4]

This paper will compare the US and EU antitrust laws by looking to see how the EU statutes would have handled some of the most influential antitrust cases in US history. Specifically, each section will look at how both systems handle a certain type of antitrust violation, overview a major case in each system, compare and contrast the antitrust laws that prohibit that type of violation, look to predict how the EU would handle the US case if those same facts appeared before them today, and what conclusions that prediction allows us to draw about the substantive differences between US and EU law on that particular violation, if any exist at all. Part II will include Section A analysing price-fixing, Section B analysing predatory pricing, Section C analysing tying arrangements, and Section D analysing leagues. Part III will look to the future and outline specific policy suggestions when one system has a superior framework to the other.

II. Discussion

A. Price-fixing

1. Law

Horizontal price-fixing agreements are prohibited by both s.1 of the Sherman Antitrust Act in the US[5] and by art.101 of the Treaty on the Functioning of the European Union (TFEU) in the EU.[6] Generally, these are agreements where competitors in the same market agree to sell their products or services at the same price or agree to some rule(s) governing the setting of prices. Section 1 of the Sherman Act states that

> "[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal".[7]

Article 101 TFEU states that

> "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"

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[1] Assistant Attorney General Charles A. James, "International Antitrust in the 21st Century: Cooperation and Convergence", OECD Global Forum on Competition (17 October 2001), available at *https://www.justice.gov/atr/speech/international-antitrust-21st-century-cooperation-and-convergence* [Accessed 29 April 2018].

[2] Antitrust Division, "Sherman Act Violations Yielding A Corporate Fine of $10 Million or More", 2016, available at*https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more* [Accessed 1 May 2018].

[3] Choong Kwai Fatt, Edward Wong Sek Khin and Priscilla Yap, "Doctrine of Corporate Governance and Competition Laws: The Malaysian Perspectives" (2010) 4 Afr. J. Bus. Med. 1175, 1176.

[4] See fn.1, above.

[5] Sherman Antitrust Act 15 U.S.C.S. §1 (1890).

[6] TFEU, 5 September 2008, 2008 O.J. C 115/47, art.101.

[7] See fn.5, above.

are prohibited, and specifically includes price-fixing in s.(1)(a).[8]

In the US, agreements to fix prices are illegal per se, meaning that s.1 requires only proof of the combination and that its purpose was to fix prices.[9] For example, in *Socony-Vacuum Oil*, major oil companies collaborated to set each major seller of oil up with an independent seller "dancing partner" to buy "hot oil" from.[10] This was in response to people pumping excess oil out of wells that reached into neighboring properties so that they would be able to profit from it, rather than their neighbors.[11] This practice led to excess "hot oil," resulted in an increase in supply, and thus a decrease in the "spot price" of oil.[12] The agreement matched major oil companies up with the independent sellers flooding the market so there would not be a rush to sell.[13] The major oil companies would buy the "hot oil," store it away, and the prices would not drop too low.[14] Although the defense claimed that the prices were reasonable and the purpose was to avoid ruinous competition, the Supreme Court held that these defenses were immaterial because

> "under the Sherman Act, a combination for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se"*.[15]

Article 101 TFEU has been understood through EU case law to require each economic operator to act independently.[16] It strictly precludes direct or indirect contact among those operators, the effect or object of which is to influence the conduct of other operators on the market or to disclose to competitors their own planned conduct.[17] For example, in Commission Decision on Peroxygen Products, the Commission became aware of what was known in the hydrogen peroxide and sodium bicarbonate manufacturing industries as the "home market rule".[18] The rule was that each major manufacturer of these products was to sell only to buyers in the country where their manufacturing operation was located.[19] The result was limited competition in all the effected countries and occasionally helped create a monopoly for a manufacturer in their "home market".[20] The Commission determined that there was enough evidence to prove the existence of anticompetitive "agreements between undertakings or concerted practices" and that all defenses regarding the effect of this agreement were irrelevant.[21]

2. Analysis

Socony-Vacuum Oil and *Peroxygen Products* are similar in a number of ways. Both involve several competitors conspiring to designate buyers to the major sellers in the industry, which resulted in a reduction of competition.[22] Additionally, the courts that decided these cases both stated that the argument that there were potential pro-competitive effects of the agreements was irrelevant because the conspiracy itself satisfied the applicable antitrust law.[23] However, there were also some factual differences between the cases. First, there was considerably more discussion over the actual existence of an agreement in *Peroxygen Products* than *Socony-Vacuum Oil*. This was because the defendants denied such an agreement, leaving the court to embark on a determination of whether the conduct constituted a violation of EU antitrust law.[24] Also, it was clear in *Socony-Vacuum Oil* that the purpose of the conspiracy was to raise the "spot price" of oil.[25] However, the purpose in *Peroxygen Products* was not as clear because the agreement had been in place for many years.

The laws prohibiting price-fixing in each jurisdiction are distinct as well. One major difference between s.1 of the Sherman Act and art.101 TFEU is that the latter uses the phrase "object or effect" in referring to the conspiracy's effect on competition, whereas the Sherman Act simply says, "in restraint of trade".[26] Justice Douglas later clarifies "in restraint of trade" to mean "with the purpose *and* effect" of affecting prices in price-fixing cases.[27] However, Justice Douglas later says in a hypothetical that even if the agreement were not honored, it would still be a violation.[28] This means that affecting prices is not a requirement in price-fixing cases in the US. Furthermore, the case law in both the US and EU focuses on the existence of a conspiracy or agreement, and this alone satisfies both antitrust laws.

[8] TFEU art.101.
[9] *Black's Law Dictionary 887* (1891) (defining per se as "in itself; taken alone; inherently").
[10] *United States v Socony-Vacuum Oil Co* 310 U.S. 150, 178–80 (1940).
[11] *United States v Socony-Vacuum Oil Co* 310 U.S. 150, 178–80 (1940).
[12] *United States v Socony-Vacuum Oil Co* 310 U.S. 150, 178–80 (1940).
[13] *United States v Socony-Vacuum Oil Co* 310 U.S. 150, 178–80 (1940).
[14] *United States v Socony-Vacuum Oil Co* 310 U.S. 150, 178–80 (1940).
[15] *United States v Socony-Vacuum Oil Co* 310 U.S. 150, 223 (1940).
[16] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics*, 2nd edn (Hart Publishing, 2011), p.110.
[17] Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.110.
[18] Commission Decision of 23 November 1984 Relating to a Proceeding Under Article 85 of the EEC Treaty, No.85/74/EEC, Peroxygen Products, pp.9–14.
[19] Commission Decision of 23 November 1984 Relating to a Proceeding Under Article 85 of the EEC Treaty, No.85/74/EEC, Peroxygen Products, pp.9–14
[20] Commission Decision of 23 November 1984 Relating to a Proceeding Under Article 85 of the EEC Treaty, No.85/74/EEC, Peroxygen Products, pp.44–46.
[21] Commission Decision of 23 November 1984 Relating to a Proceeding Under Article 85 of the EEC Treaty, No.85/74/EEC, Peroxygen Products, p.52.
[22] See *Socony Vacuum Oil*, 310 U.S. 178–80; see also *Peroxygen*, No.85/74/EEC at 50–52.
[23] *Peroxygen*, No.85/74/EEC at 50–52.
[24] See *Peroxygen*, No.85/74/EEC at 50–52.
[25] See *Socony-Vacuum Oil*, 310 U.S. 190.
[26] Sherman Act §1; TFEU art.101.
[27] *Socony-Vacuum Oil*, 310 U.S. 223.
[28] *Socony-Vacuum Oil*, 310 U.S. 223 at 253.

Another difference between the two laws is that art.101 TFEU refers to "all agreements … and concerted practices" when discussing what is illegal, whereas the Sherman Act does not mention that mere concerted practices will satisfy it.[29] The phrasing may appear to mean that companies merely behaving in identical ways in terms of pricing or other relevant market behaviour could be in violation of EU antitrust laws. However, the Commission stated that the establishment of a concerted practice requires coordination because the concept that economic operators must act independently is inherent in the Treaty.[30] The Court of Justice has defined "concerted practice" as a form of coordination between undertakings by which, without concluding a proper agreement, practical cooperation between them is knowingly substituted for the risks of competition.[31] It has also said that a concerted practice pursues an anticompetitive object for the purposes of art.101.[32] This demonstrates that although the words of art.101 may appear to allow violations on the basis of companies behaving in the same way alone, this is not the case.

In conclusion, if presented with the facts of *Socony-Vacuum Oil*, the EU Commission would likely come to the same result as the Supreme Court did because they would have found a clear conspiracy that was anticompetitive. Additionally, although art.101 is worded differently than s.1 of the Sherman act, the crux of the analyses of cases brought under either is whether or not there was a constructive conspiracy. This is because the phrase "concerted action" refers to coordination with the purpose or effect of anti-competitiveness. As a result, the coordination among major oil suppliers to find "dancing partners" to drive down the "spot price" and increase profits would have clearly been unlawful under EU antitrust law.

B. Predatory Pricing

1. Law

In the EU, art.102 prohibits "any abuse by one or more undertakings of a dominant position … Such abuse may, in particular, consist in directly or indirectly imposing unfair purchase or selling prices".[33] This prohibition illustrates a two-step analysis of (i) dominance in the relevant market; and (ii) abuse of that dominance by looking to see if the prices were unfair.

In the US, predatory pricing can be a violation of s.2 of the Sherman Act.[34] Section 2 makes monopolising and attempts to monopolise unlawful.[35] The Robinson-Patman Act also addresses predatory pricing in the US.[36] The Act (also known as s.2 of the Clayton Act) specifically addresses price discrimination and makes the practice unlawful if it satisfies numerous conditions about the pricing and commodity, and the injury is considered an antitrust injury.[37] The Supreme Court has held that competitive harm under the Robinson Patman Act "is of the same general character" as injury under s.2 of the Sherman Act.[38] Specifically, the Robinson Patman Act provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality … where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."[39]

Predatory pricing is considered an attempt to monopolise under s.2 of the Sherman Act when the plaintiff establishes competitive injury resulting from (i) a rival's low prices that are below an appropriate measure of that rival's costs; and (ii) a dangerous probability of recoupment.[40] The Robinson Patman Act claims also require a showing that the prices were discriminatory. Also, the Sherman Act prohibits predatory pricing when there is a "dangerous probability" of actual monopolisation, whereas the Robinson Patman Act prohibits it when there is a "reasonable possibility" of substantial injury to competition.[41] Despite acknowledging this difference, the court has said that the essence of a claim under either statute is of the same general character.[42]

The ECJ in *AKZO* elaborated on predatory pricing as described in art.102 by establishing that prices below average variable costs should be regarded as abusive, and that prices above average variable costs but below average total costs could be regarded as abusive if it were also determined that they were part of a plan to eliminate a

[29] Sherman Act §1; TFEU art.101
[30] Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p. 110.
[31] EU L. Blog, "Concerted Practices, Oligopoly, Restriction by Object: Case C-8/08", 3 October 2009, available at *http://eulaw.typepad.com/eulawblog/2009/10/concerted-practices-oligopoly-restriction-by-object-case-c-808.html* [Accessed 1 May 2018].
[32] EU L. Blog, "Concerted Practices, Oligopoly, Restriction by Object: Case C-8/08", 3 October 2009.
[33] TFEU art.102
[34] See *Brooke Group v Brown & Williamson Tobacco Corp* 509 U.S. 209, 224–25 (1993).
[35] Sherman Act §2.
[36] Robinson-Patman Act 15 U.S.C. §13 (1936),
[37] Robinson-Patman Act 15 U.S.C. §13 (1936),
[38] *Brooke* 509 U.S. 221.
[39] Robinson-Patman Act 15 U.S.C. §13
[40] *Brooke* 509 U.S. 222–23.
[41] Sherman Act §2; Robinson-Patman Act 15 U.S.C. §13.
[42] *Brooke*, 509 U.S. 221.

competitor.[43] In *AKZO*, both AKZO and ECS supplied benzol peroxide, but ECS supplied it mainly as a flour additive, and AKZO supplied it mainly for plastics.[44] ECS alleged that after it began selling in the plastics market, AKZO threatened to drive ECS out of the flour additive market if it did not stop selling in the plastics market.[45] ECS sold in the flour additive market at lower prices than AKZO. The Commission found that AKZO sold above average variable costs and below average total costs.[46] The ECJ found that because it was demonstrated that these prices were part of a plan for eliminating ECS, AKZO violated art.102.[47]

The Supreme Court in *Brooke Group* stated that under s.2 of the Sherman Act a plaintiff must establish that the rival's prices were below an appropriate measure of its costs and that the rival had a dangerous probability under the Sherman Act of recouping.[48] In *Brooke*, Liggett (a competitor in the generic cigarette market) alleged that Brown & Williamson sought to preserve supra-competitive profits being earned in the oligopolistic branded cigarette market by pressuring Liggett to raise its generic cigarette prices.[49] The pressure came from Brown & Williamson entering the generic cigarette market and through the use of huge rebates, operated below costs.[50] The court held that Brown & Williamson was entitled to judgment as a matter of law because the evidence could not support a finding that there was a dangerous probability the alleged scheme would result in recoupment.[51]

2. Analysis

There are some key differences in the standards for predatory pricing as an antitrust violation in the US and EU. First, the EU requires as its first step in its analysis a determination that the undertaking is dominant in the relevant market.[52] The US laws that address predatory pricing have no such requirement.[53] Additionally, the EU laws do not require any standard for the possibility of recoupment while the US laws do.[54]

Further analysis shows that these differences may be more superficial than substantive. First, while the EU laws do not require recoupment, the Court of Justice of the European Communities (ECJ) has said that art.102 prohibits dominant undertakings from eliminating a competitor and strengthening its place in the market.[55] The goal of art.102 is clearly to prevent recoupment, and it could be that instead of requiring some degree of potential for recoupment like the US laws, the EU instead required dominance in the relevant market at the outset. This could be viewed as a determination that only dominant undertakings have the potential for the recoupment that art.102 is meant to address. Therefore, this reading would mean that the EU does have a recoupment requirement, and it simply makes this determination as its first step via dominance, rather than its second.

However, while the EU's dominance requirement may attempt to serve the same purpose as the US's recoupment requirement, it is not the same test. *Brooke* offers insight as to an example where a recoupment requirement may catch certain conduct by looking more directly at the issue and the dominance requirement would fail to do so. For example, Brown & Williamson clearly lacked dominance in the relevant market of generic cigarettes, but what if they were seeking to preserve supra-competitive prices through a legal monopoly or near-monopoly of the branded market, rather than an oligopoly in which they lacked a substantial share of the total market? In that situation, the EU law would say that they lacked dominance in the relevant market (generic cigarettes), and therefore could not have violated antitrust law through their predatory pricing.

However, under the US law, a court could find that there was a dangerous probability of recoupment because Brown & Williamson could recoup in the branded market after eliminating the competitors in the generic market and shifting more people to buy their branded cigarettes at supra-competitive prices. The knowledge that they would not be found to violate competition laws by predatory pricing may discourage new entrants that might normally compete during the time of supra-competitive prices because they would know that upon their entry, Brown & Williamson would simply drop their prices below costs. The recoupment test of the US is more flexible in that a court could look at this scenario in its entirety rather than having to dismiss it immediately because of a low market share in the relevant market. Therefore, while the two sets of laws may be more similar than they initially appear, the US predatory pricing framework is superior in that it more accurately reflects (and is therefore more likely to address) the purpose of preventing predatory pricing, which both the US and EU agree is to prevent undertakings from eliminating competitors to gain an advantage in a market.

[43] *AKZO Chemie BV v Commission of the European Communities* (C-62/86) EU:C:1991:286; [1991] 1993] 5 C.M.L.R. 215; [1994] F.S.R. 25 at 7.
[44] *AKZO* (C-62/86) EU:C:1991:286; [1993] 5 C.M.L.R. 215; [1994] F.S.R. 25 at 35.
[45] *AKZO* (C-62/86) EU:C:1991:286; [1993] 5 C.M.L.R. 215; [1994] F.S.R. 25 at 35.
[46] *AKZO* (C-62/86) EU:C:1991:286; [1993] 5 C.M.L.R. 215; [1994] F.S.R. 25 at 79.
[47] *AKZO* (C-62/86) EU:C:1991:286; [1993] 5 C.M.L.R. 215; [1994] F.S.R. 25 at 80–81.
[48] *Brooke*, 509 U.S. 222.
[49] *Brooke*, 509 U.S. 222 at 212.
[50] *Brooke*, 509 U.S. 222 at 212.
[51] *Brooke*, 509 U.S. 222 at 242–43.
[52] *AKZO* (C-62/86) EU:C:1991:286; [1993] 5 C.M.L.R. 215; [1994] F.S.R. 25 at 71–74; Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011); see also TFEU art.102.
[53] Sherman Act §2; 15 U.S.C. §13.
[54] TFEU art.102; Sherman Act 2; 15 U.S.C. §13.
[55] *AKZO* (C-62/86) EU:C:1991:286; [1993] 5 C.M.L.R. 215; [1994] F.S.R. 25 at 71–74.

Therefore, if presented the actual facts of *Brooke*, rather than this hypothetical, the ECJ would have likely found that Brown & Williamson was not dominant in the generic cigarette market, and therefore could not have violated art.102 for predatory pricing. It is likely that the *Brooke* case would have been thrown out in the EU on this basis, which would not have allowed the ECJ the opportunity to inquire into the possibility that despite lacking dominance in the relevant market, Brown & Williamson could have nonetheless potentially recouped. Although the case likely would have come out the same way in the EU as the US, this lack of inquiry into the potential for recoupment along with the previously discussed hypothetical demonstrates an important distinction.

C. Tying arrangements

1. Law

Tying is the practice of conditioning the sale of one product on the purchase of another.[56] The product that will not be sold without the other is known as the tying product, and generally is the product in which the provider has the greatest market power.[57] The tied product is the one that the buyers must also purchase in order to get the tying product.[58]

In the EU, tying arrangements can either be a violation of art.101 or 102.[59] Under art.101(1)(e) tying arrangements are unlawful because agreements that

> "make the conclusion of the contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."[60]

Article 102 uses the same definition in its list of prohibited abuses by undertakings with a dominant position within the internal market.[61]

In the US, tying arrangements can be challenged under s.1 of the Sherman Act, s.2 of the Sherman Act, s.3 of the Clayton Act, and s.5 of the FTC Act.[62] Although there were initially distinctions drawn between the Sherman Act and Clayton Act on the standard for unlawful tying arrangements, such distinctions have since become largely irrelevant.[63] The standard in the US today has been called a "quasi-per se" rule.[64] This is because a tying arrangement will only be considered per se unlawful if it meets certain criteria.[65] Otherwise, the conduct will be looked at using a rule of reason analysis.[66]

The first criterion that must be met for a tying arrangement to be considered per se unlawful is that the tying product and the tied product must in fact be two separate products.[67] Specifically the tying product and the tied product cannot be components of the same product, such as pens and pen caps.[68] However, although courts consider if the two products have distinct markets, it is not sufficient to merely prove that there is no demand for one of the products separate from the other.[69] Additionally, it must be proven that the two products are truly tied.[70] The seller must have sold the tying product only under the condition that the buyers also take the tied product.[71]

Next, the defendant must have market power in the tying product market.[72] The market power requirement for tying arrangements has been explained as the power "to force a purchaser to do something that he would not do in a competitive market",[73] "the ability of a single seller to raise price and restrict output",[74] and the seller's possession of a predominant share of the market.[75] Additionally, the Supreme Court has held that neither a market share of 30 per cent alone, nor the mere existence of a patent is enough to demonstrate market power.[76]

Lastly, there must be a "non-trivial dollar amount" of sales in the tied product.[77] The court has held this can be established by a showing of sales of $60,000.[78] Courts have also held that this burden was not met when the amount affected was $12,000 in a multibillion-dollar industry.[79] An additional reason tying is considered quasi-per se is that a defendant can still escape being

[56] Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.562.
[57] Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.562.
[58] Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.562.
[59] TFEU art.101; TFEU art.102; Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p. 574–75.
[60] TFEU art.101(1); Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.574.
[61] TFEU art.102; Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.574.
[62] Department of Justice, "Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act: Chapter 5" 2015. Available at *https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-5* [Accessed 1 May 2018].
[63] See above.
[64] Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.571.
[65] See Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.572.
[66] See Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.572.
[67] *Eastman Kodak Co v Image Tech Servs*, 504 U.S. 451, 461 (1992).
[68] Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.572.
[69] *Kodak* 504 U.S. 463.
[70] Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.573.
[71] Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.573.
[72] See *Kodak* 504 U.S. at 462.
[73] *Jefferson Parish Hospital Dist. No 2 v Hyde* 466 U.S. 2, 14 (1984).
[74] *Fronter Enterprises Inc v United States Steel Corp*, 394 U.S. 495, 503 (1969).
[75] *Kodak*, 504 U.S. at 464.
[76] Elhauge and Geradin, Global Competition Law and Economics, 2nd edn (2011), p.575
[77] *Jefferson Parish* 466 U.S. at 2.
[78] *United States v Loew's Inc* 371 U.S. 38, 49 (1962).
[79] *M. Leff Radio Parts Inc v Mattel Inc* 706 F. Supp. 387, 399 (W.D. Pa. 1988).

judged as a per se violator if they can prove strong offsetting efficiencies, demonstrating that the tie was the least restrictive means of producing efficiencies that were passed on to consumers and were large enough to outweigh the harm.[80] If a plaintiff fails to prove these criteria to demonstrate per se liability, the court will engage in a traditional rule of reason analysis.[81]

In the EU, tying arrangements are often litigated under art.102 as abuse of dominance.[82] For example, in *Microsoft* the Commission alleged that Microsoft unlawfully tied its media player to its Windows operating system in violation of art.102.[83] Microsoft tried to argue that these were in fact part of one product because there is no market for one without the other, but the General Court rejected this argument by distinguishing them as complementary, but nonetheless separate products.[84] Additionally, the General Court allowed a finding of separate products because there was separate consumer demand for streaming media players.[85] The General Court also found that Microsoft's conduct met the requirement of foreclosing competition, stating that the media player was pre-installed on more than 90 per cent of the PCs shipped worldwide, the pre-installation would make buyers less likely to use a third party's media player, and that this provided Microsoft with a competitive advantage that may have a harmful effect on the structure of competition in that market.[86]

As mentioned above, tying arrangements can violate s.1 of the Sherman Act, which prohibits certain agreements in restraint of trade, or s.2, which prohibits monopolisation and attempts to monopolise.[87] For example, in *Kodak* the plaintiff alleged that Kodak unlawfully tied its servicing to the sale of its replacement parts.[88] When independent services organisations (ISOs) began selling services for Kodak machines and buying their own replacement parts, Kodak struck a deal with the parts manufacturer to exclusively sell replacement parts to Kodak.[89] Owners of Kodak machines had to go to Kodak for replacement parts, and because of the tie they were forced to use Kodak's services instead of the cheaper ISOs.[90]

Kodak argued that while it had a large market share in the parts market, it could not have market power because if they were to raise prices above a competitive level, consumers would stop buying their equipment entirely because of the high replacement parts costs.[91] Kodak also argued that services and parts were not two separate products because there was no market for services without parts. The court rejected both arguments, distinguishing products that were linked from those that were actually part of the same single product.[92] Kodak also raised the business justifications of protecting the reputation of the quality of its products by making sure it would not be blamed for ISO errors, reducing inventory costs, and preventing ISOs from free-riding Kodak's investment in equipment, parts, and services.[93] The court found these arguments unconvincing, and ruled against Kodak in its motion for summary judgment.[94]

2. Analysis

These two cases were similar in several respects. First, the two products that were tied were not clearly separate. In both cases the defendant argued that the products were really singular in that they were components of one larger product, and in both cases the respective courts rejected this argument. Aside from the products themselves, these cases differed in the way each defendant designed their tying arrangement. Microsoft simply had the media player come as part of the operating system while leaving open the possibility that consumers would still choose to download media players from third parties.[95] Kodak, however, required buyers of replacement parts to have their servicing done through Kodak, which excludes the possibility of those consumers getting their servicing done through third parties if they also needed parts.[96]

The EU law is similar to the US law on tying in that both s.2 of the Sherman Act and art.102 require the defendant to have market power in the tying product market in order for the tying arrangement to amount to antitrust violation.[97] Additionally, both require that the tie include two separate products, rather than mere components of the same product.[98]

[80] *Kodak*, 504 U.S. at 486; Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.575..
[81] *Jefferson Parish*, 466 U.S. at 28–29.
[82] Elhauge and Geradin, *Global Competition Law and Economics*, 2nd edn (2011), p.575.
[83] *Microsoft Corp v Commission of the European Communities* (T-201/04) EU:T:2004:372; [2005] 4 C.M.L.R. 5; [2005] E.C.D.R. 19 at 21.
[84] See above at 920–32.
[85] See above at 925.
[86] See above at 977–83.
[87] Sherman Act §1–2.
[88] *Kodak* 504 U.S. at 457–58.
[89] *Kodak* 504 U.S. at 458.
[90] *Kodak* 504 U.S. at 455–58.
[91] *Kodak* 504 U.S. at 466–67.
[92] *Kodak* 504 U.S. at 463.
[93] *Kodak* 504 U.S. at 483.
[94] *Kodak* 504 U.S. at 485–86.
[95] *Microsoft* (T-201/04) EU:T:2004:372; [2005] 4 C.M.L.R. 5; [2005] E.C.D.R. 19 at 21.
[96] See *Kodak* 504 U.S. 457.
[97] See TFEU art.102; Sherman Act §2.
[98] See TFEU art.102; Sherman Act §2.

EU law governing tying differs from the US law in that art.101 does not require the provider to have market power in order to violate the statute.[99] Even under s.1 of the Sherman Act, the court has held that market power in the tying product market is required.[100] Specifically, in *Illinois Tool Works* the court said, "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product".[101]

Therefore it would seem in the EU, an agreement to purchase tied products between an undertaking without market power and a consumer could be unlawful. However, Regulation 330/2010 on vertical restraints states that tying is presumed compatible with 101 so long as the market share of the provider is below 30 per cent.[102] Specifically, the regulation created a block exemption for vertical agreements because

> "it can be presumed that, where the market share held by each of the undertakings party to the agreement on the relevant market does not exceed 30%, vertical agreements which do not contain certain types of severe restrictions of competition generally lead to an improvement in production or distribution and allow consumers a fair share of the resulting benefits".[103]

This clarifying regulation makes the EU law essentially the same as the US law in that both require market power in the tying market. The difference is that the US has made this clear through case law, while the EU created a bright line rule that requires the undertaking to have at least a 30 per cent market share in the tying product market. The US rule of requiring market power allows a bit more flexibility in that a certain market share is not dispositive of the issue if there are other considerations, but the EU rule allows more certainty because businesses can be sure whether a tying arrangement would be lawful if they have accurate data regarding their market share. Additionally, art.102 requires market dominance in order for there to be a violation,[104] similar to s.2 of the Sherman Act and this is how tying is generally addressed in the EU.[105]

Also, the US and EU differ on how they have chosen to analyse whether a tied product is "separate". The US courts have generally inferred a single product from competitive market practices,[106] when the bundle combines two components of a product that operates better when bundled together,[107] or when they are in fact the same product.[108] In the EU, this inquiry rests on customer demand.[109] This includes analysing whether a substantial number of customers would have purchased the tied product without buying the tying product, as well as evidence that consumers would have preferred to buy the tying product and the tied product separately from different sources.[110] Although these appear to be different inquiries, they both address the question of whether the tied product is "separate" by analysing if it has its own market.

Therefore, if *Kodak* were tried in the EU, the defendant would be found to have violated art.102 through their tying arrangement. The relevant market for the tying product in *Kodak* was Kodak replacement parts.[111] As a result of Kodak's deal with the parts manufacturer, Kodak clearly had dominance in this market for purposes of art.102 because they controlled nearly 100 per cent of the parts market.[112] The requirement that customers buy Kodak's services along with its replacement parts would also have clearly met art.102's definition of a tying arrangement.[113] Thus, *Kodak* would have been decided the same way in the EU.

D. Sports leagues

1. Law

Professional sports leagues play a vital role in the economy and culture of both the US and EU. For sports leagues to exist, co-operation between member teams is often necessary.[114] For example, agreement over the rules of the sport, acceptable dimensions of the field, and a policy on performance-enhancing drugs are all vital to the successful operation of a sports league because they help maintain competitive balance.[115] However, profitable teams agreeing on their practices sounds like it could be in violation of some of the various antitrust laws discussed thus far. Both the US and EU have found that sports leagues must comply with antitrust laws, and have enforced them in similar, although not identical ways.

Article 101 TFEU states that

[99] See TFEU art.102.
[100] See *Illinois Tool Works Inc v Independent Ink Inc*, 547 U.S. 28, 46.
[101] *Tool Works Inc v Independent Ink Inc* 547 U.S. 28, 46.
[102] See Commission Regulation 330/2010, 2010 OJ L 102.
[103] Commission Regulation 330/2010, 2010 OJ L 102.
[104] TFEU art.102.
[105] See fn.81, above, at 575.
[106] See Areeda, Elhauge and Hovenkamp, *X Antitrust Law* (Little, Brown,1996), pp.1744–45.
[107] Areeda, Elhauge and Hovenkamp, *X Antitrust Law* (1996), p.1746.
[108] Areeda, Elhauge and Hovenkamp, *X Antitrust Law* (1996), p.1747.
[109] *Microsoft* (T-201/04) EU:T:2004:372; [2005] 4 C.M.L.R. 5; [2005] E.C.D.R. 19 at 917–22.
[110] See fn.104, above, at 627.
[111] *Kodak* 504 U.S. at 481.
[112] See above.
[113] See TFEU art.102.
[114] See L. Farzin, "On the Antitrust Exemption for Professional Sports in the United States and Europe" 22 Jeffrey S. Moorad Sports L.J. 75, 107.
[115] Farzin, "On the Antitrust Exemption for Professional Sports in the United States and Europe" 22 Jeffrey S. Moorad Sports L.J. 75, 107.

> "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"

are prohibited.[116] Although a sports team colluding with other teams in a way that restricts competition appears as if it would fall under art.101, the ECJ once found that this was not the case.[117]

In *Walrave*, a cyclist challenged a rule that required the pacemaker for a competing cyclist to be of the same nationality as that cyclist.[118] The EJC decided that the rules governing a national team are purely of sporting nature, and thus are not subject to EU law.[119] This would include the antitrust prohibitions found in art.101 and 102. However, the EJC did state that when an agreement is not of a sporting nature, but constitutes an economic activity, it would be subject to EU law.[120] Despite the potential for EU law to apply in situations constituting economic activity, *Walrave* had been regarded as the case that established the exemption for sports rules under EU law.[121]

However, the ECJ retreated from this exemption in 2006 when it applied EU competition laws to a sporting rule.[122] In *Meca-Medina*, two professional swimmers were found to have violated FINA's (Federation Internationale de Natation) anti-doping rules.[123] After appealing their four-year suspensions, the suspensions were reduced to two years. The swimmers then challenged the anti-doping rules under EU antitrust law as a concerted practice between the IOC (International Olympic Committee), FINA, and the 27 laboratories that accredited the specific limit of the banned substance that would be a violation if found in a competitor's system.[124] The Commission and Court of First Instance found no violation of arts 101 or 102.[125] However, the ECJ retreated from the sports exemption established in *Walrave* by stating, "the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty".[126] Sporting rules were now subject to arts 101 and 102. Yet, the ECJ did specify that as a result of the special characteristics of professional sports, a sporting rule would not violate art.101 or 102 if "the consequential effects restrictive of competition are inherent in the pursuit of [the objectives of the rule] and are proportional to them".[127] The ECJ held that the anti-doping rules at issue did not violate art.101 because they were justified by a legitimate objective inherent in the organisation and proper conduct of competitive sport, and its purpose was to ensure healthy rivalry.[128]

In the US, sports leagues are categorically analysed under a rule of reason analysis because of an understanding that professional sports are "an industry in which horizontal restraints on competition are essential if the product is to be available at all".[129] With reference to the NFL, the court has said:

> "[T]eams share an interest in making the entire league successful and profitable, and that they must cooperate to produce games, provides a perfectly sensible justification for making a host of collective decisions. Because some of these restraints on competition are necessary to produce the NFL's product, the Rule of Reason generally should apply, and teams' cooperation is likely to be permissible."[130]

In *American Needle*, an independent manufacturer claimed that the NFL's decision to exclusively license its intellectual property to Reebok was unlawful under §1 of the Sherman Act.[131] The NFL argued that the National Football League Properties (NFLP) was a single entity which was organised to market all the teams' individually owned intellectual property.[132] The court rejected this argument, but declined to hold that the exclusive license was per se unlawful.[133] Instead, the court applied a rule of reason analysis, and held that the conduct was unlawful.[134] The court explained that because the marketing of intellectual property is not an area in which cooperation is necessary in order for the league to exist, it was concerted activity covered by §1.[135]

All US professional sports leagues are subject to the rule of reason analysis used in *American Needle*, with the exception of the MLB.[136] The court explained in *National*

[116] TFEU art.101.
[117] Farzin, "On the Antitrust Exemption for Professional Sports in the United States and Europe" 22 Jeffrey S. Moorad Sports L.J. 75, 97.
[118] See *Walrave v Association Union Cycliste Internationale* (36/74) EU:C:1974:140; [1975] 1 C.M.L.R. 320 at 2.
[119] See *Walrave* (36/74) EU:C:1974:140; [1975] 1 C.M.L.R. 320 at 8.
[120] *Walrave* (36/74) EU:C:1974:140; [1975] 1 C.M.L.R. 320 at 4, 36.
[121] Farzin, "On the Antitrust Exemption for Professional Sports in the United States and Europe" 22 Jeffrey S. Moorad Sports L.J. 75, 97.
[122] See *Meca-Medina v Commission of the European Communities* (C-519/04) EU:C:2006:492; [2006] 5 C.M.L.R. 18; [2006] All E.R. (EC) 1057 at 27.
[123] *Meca-Medina* (C-519/04) EU:C:2006:492; [2006] 5 C.M.L.R. 18; [2006] All E.R. (EC) 1057 at 2–3.
[124] *Meca-Medina* (C-519/04) EU:C:2006:492; [2006] 5 C.M.L.R. 18; [2006] All E.R. (EC) 1057 at 3.
[125] *Meca-Medina* (C-519/04) EU:C:2006:492; [2006] 5 C.M.L.R. 18; [2006] All E.R. (EC) 1057 at 3–4.
[126] *Meca-Medina* (C-519/04) EU:C:2006:492; [2006] 5 C.M.L.R. 18; [2006] All E.R. (EC) 1057 at 27.
[127] *Meca-Medina* (C-519/04) EU:C:2006:492; [2006] 5 C.M.L.R. 18; [2006] All E.R. (EC) 1057 at 42.
[128] See *Meca-Medina* (C-519/04) EU:C:2006:492; [2006] 5 C.M.L.R. 18; [2006] All E.R. (EC) 1057 at 45.
[129] See *NCAA v Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984).
[130] *Am Needle Inc v NFL*, 560 U.S. 183, 202 (2010).
[131] *Am Needle Inc v NFL*, 560 U.S. 183 at 187–88.
[132] *Am Needle Inc v NFL*, 560 U.S. 183 at 197.
[133] *Am Needle Inc v NFL*, 560 U.S. 183 at 201–03.
[134] *Am Needle Inc v NFL*, 560 U.S. 183 at 203.
[135] *Am Needle Inc v NFL*, 560 U.S. 183 at 200–03.
[136] *See*Farzin, "On the Antitrust Exemption for Professional Sports in the United States and Europe" 22 Jeffrey S. Moorad Sports L.J. 75.

League that the Sherman Act only applies when conduct directly affects interstate commerce.[137] The analysis that followed determined that baseball was not commerce, and thus baseball gained a blanket exemption from the Sherman Act.[138] While this precedent is largely considered a legal anomaly, it has nevertheless been continuously upheld.[139]

2. Analysis

The sports league cases discussed, although over 50 years apart, shared a similar view of sports leagues. Both jurisdictions, in some way, held that a professional sport was not subject to antitrust laws. In the EU, this was explained as being because those rules were "purely of a sporting nature".[140] In the US, this was because "baseball is not commerce".[141] However, with the exception of the long standing baseball exemption in the US, both the US and the EU have moved away from this view towards one that looks to see if the rule or conduct being challenged is essential to the unique structure of a sports league and necessary for it to continue to successfully exist.

One slight difference between the analysis in the US and EU is that the EU law is not explicitly a rule of reason. The EU law has appeared to be similar to a rule of reason analysis in that it allows the sports league to offer arguments. However, this still differs from the US rule of reason, which specifically requires pro-competitive justifications, rather than considering any justifying arguments. From a practical standpoint, this distinction really boils down to a matter of phrasing. Sports leagues in the US can justify the conduct in the same way they would in the EU.

If *American Needle* were tried in the EU, the case would come out the same. The ECJ would embark on the same inquiry it did in *Meca-Medina*. The court would find that the marketing of intellectual property is neither "inherent in the organisation and proper conduct of competitive sport", nor is its purpose to "ensure healthy rivalry". Additionally, to avoid violating art.101, sports leagues "do not need to demonstrate a lack of economic impact, merely that they were not primarily motivated by economic considerations".[142] The collective licensing of intellectual property to Reebok certainly would be considered an agreement "primarily motivated by economic considerations". The league could argue it was for convenience or by choice, but even an argument that collectively bargaining struck a better deal with Reebok would be a primarily economic consideration. Therefore, the conduct in *American Needle* would have also violated art.101 in the EU.

III. Policy arguments

The main policy change that this paper suggests is a change in the EU antitrust law regarding predatory pricing. As discussed earlier, the current EU statute allows room for a dominant firm to enter a market related to a market they are dominant in, begin predatory pricing to eliminate firms in that market, and then abandon that market to recoup by way of consumers being sent to the market in which they are dominant. This is obviously a rare situation, but one that antitrust laws ought to protect against nonetheless. The EU laws would catch this conduct once enough firms were eliminated that the predator gained significant market share to be dominant, but the framework should be able to find a violation before that point. The goal of predatory pricing laws ought to be a balance between the desire to prevent financial gain through eliminating competition and the desire not to punish businesses for low prices. It seems that the common prong of US and EU predatory pricing laws—that the firm price below average variable cost—covers this issue. After all, why would a business lose money on their products if they did not believe they would eventually get that money back? The answer is simply that the business could be failing, a recession could hit, or some other external economic force is driving down demand of their product. The business could sell very few of its product at the profitable price and suffer huge losses or it could sell its product at a loss and likely cut their overall losses, potentially saving their business. The US recoupment requirement handles this situation well because the recession business will not recoup, it may merely survive long enough to make normal (rather than supra-competitive) profits in the future. This example, as well as the hypothetical twist on *Brooke,* demonstrates that the US law requiring a substantial likelihood of recoupment as the second prong of the test more directly addresses the issue in predatory pricing cases when compared to the dominance in the relevant market standard of the EU.

The EU is one of the most influential systems in competition law because it encompasses so many major European trade markets. One of the biggest is the UK, and many policy analysts and practicing attorneys have analysed the numerous effects Brexit had and will have on a number of legal fields. While there was some speculation as to the UK leaving the European Economic

[137] *National League of Professional Baseball Clubs v Fed. Baseball Club Inc*, 269 F. 681, 686–87 (D.C. Cir. 1920).
[138] See *Nat'l League of Professional Baseball Clubs v Fed. Baseball Club Inc*, 269 F. 681, 686–87 (D.C. Cir. 1920).
[139] Farzin, "On the Antitrust Exemption for Professional Sports in the United States and Europe" 22 Jeffrey S. Moorad Sports L.J. 75, 75–76.
[140] *Walrave* (36/74) EU:C:1974:140; [1975] 1 C.M.L.R. 320 at 8.
[141] *Fed. Baseball Club Inc*, 269 F. 685.
[142] Samuli Miettinen and Richard Parrish, "Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home Grown Player Rule)", 5 Ent. and Sports L.J., 9 (2007).

Area (EEA), and adopting its own antitrust laws, this was not the case.[143] The UK remained part of the EEA, and was therefore required to adopt the competition rules under the EEA Agreement.[144] The rules under the EEA Agreement are identical to the EU rules in substance and are universally enforced within the EEA.[145] Therefore, no policy changes are necessary in light of Brexit, and competition law and enforcement will largely be unaffected by the referendum.

IV. Conclusion

This paper has discussed some of the types of antitrust violations that are common to the US and EU. Retrying the US cases using the EU model has been helpful in demonstrating the true differences that exist between the two sets of antitrust laws, as well as distinguishing those true differences from those that are merely perceived in nearly identical rules. In each of the types of violations there have been some differences in the statutes or case law, but this paper illustrated that many of those are merely superficial, while others are truly substantive. While the US and the EU are the largest players in antitrust enforcement, a more global marketplace has resulted in an enormous increase in both the number of countries with antitrust laws on the books and cooperation among those countries to enforce these laws. International cooperation in enforcement has been successful, at least in part, because competition laws typically do not greatly vary in substance among most countries. Even new competition law systems around the world have been heavily influenced, if not directly copied from, the US and the EU. While small differences in sets of laws might not be particularly relevant when enforcement agencies co-operate to bring down an international cartel, distinguishing the substantive differences from the superficial ones may be important when certain conduct of a multinational corporation falls on different sides of legality in two major countries and enforcement cooperation is necessary.

[143] See Norton Rose Fulbright LLP, "Impact of Brexit on antitrust and competition", July 2016.
[144] See Norton Rose Fulbright LLP, "Impact of Brexit on antitrust and competition", July 2016; Countries in the EU and EEA, *https://www.gov.uk/eu-eea* [Accessed 1 May 2018].
[145] See above.