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United in What Diversity?

(Un)Communaautaire Reasoning in Applying Competition Law to the Public–Private Divide on Two Sides of the Atlantic

HANS H. B. VEDDER

I Introduction

The internal market and the free movement of goods in particular have always been a fascination of Laurence. Whether as a Commission official or as an academic, he has been at the forefront of critically analysing and furthering the Court's¹ jurisprudence in this field from the perspective of what has been dubbed the 'community method of integration'. This chapter analyses the Court's jurisprudence that applies the competition rules to this public–private divide through the lens of this community method. To that end this introduction first provides a preliminary description of the community method and the corresponding French adjective *communaautaire*. Following that, the public–private divide is summarily described and used to define the scope of this chapter. Combining these two elements allows the further analysis of both concepts as well as the identification of two hypotheses that can be tested through a functional comparative legal method also set out in this introduction.

The community method entails clear federal elements in its reliance on an autonomous supranational entity to further decision-making and the supervision of such supranational decision-making as well as national decision-making by an independent judiciary.² This, to anyone acquainted with the workings of the internal market, is exactly what the Court does mostly when it is asked to interpret the EU rules as to their applicability to Member State regulation. Moreover, it is exactly this

¹ This term will be used a shorthand for the Court of Justice of the European Union.

² For a description of the community method, see G. Majone, *Dilemmas of European Integration* (Oxford University Press 2005). For an analysis of this phenomenon, see F. W. Scharpf, 'The Joint-Decision Trap Revisited' (2006) 44 JCMS 845, 851–3.

relation between 'the supreme law of the land' and its effect on integration and federal structures that it also at the forefront of the state action defence in US antitrust law.

The public-private divide is central in many respects, both to the law on the free movement of goods and the antitrust or, to use the European terminology, competition rules.³ The public-private divide is an open term that can be understood in many ways, but it boils down to the clarity with which public and private tasks and entities are assigned and divided.⁴ In the area of competition law, this is explicit where the self-regulation of an industry or government-sponsored private regulation is involved. In relation to the free movement of goods, the public-private divide is more insidious, hiding in captured regulation⁵ that will only expose this capture definitively during scrutiny in some form of supranational judicial review. Such judicial review is possible and even incentivised by the community method. In a nutshell, the community method with its reliance on the combination of direct effect, supremacy and broadly defined bans on restrictions of competition and the fundamental freedoms was intended to attract private actions against the myriad national rules and public-private regulatory arrangements that possibly violated these prohibitions.

The community method, like any method, requires consistency and coherence in its application. As a result, failure to be coherent and legally consistent exposes the Court to accusations of being *uncommunautaire*.⁶ At the other side of the Atlantic, a similar debate has resulted in concepts such as judicial policymaking and judicial legislation, triggering debate both about and inside the Supreme Court on what is the correct role of the judiciary in settling disputes at the knife edge of the public-private divide.⁷ The political and constitutional sensitivity of the issues at stake in the public-private divide is reflected in the legal reasoning of both the

³ It is for good reason that many cases in this field raise the question of whether they should be judged as a free movement or a competition case (W. Sauter and H. Schepel, *State and Market in European Union Law* (Cambridge University Press 2009), 124–7).

⁴ On the breadth and difficulty of a definition, see G. Jurgens and F. van Ommeren, 'The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-dependant Divide' (2012) 71 CLJ 172, 172–3.

⁵ On regulatory capture, see G. J. Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Science* 3.

⁶ L. W. Gormley, 'Assent and Respect for Judgments: *Uncommunautaire* Reasoning in the European Court of Justice', in L. Krämer et al. (eds.), *Law and Diffuse Interests in the European Legal Order: Liber Amicorum N. Reich* (Nomos 1997).

⁷ For an overview of this debate, see ABA Section of Antitrust Law, *State Action Practice Manual*, 2nd edn (ABA 2010), 41–5.

Supreme Court and the Court of Justice. This means that such jurisprudence is a result of a substantive competition law appraisal as much as a political/constitutional appraisal.

Given the Supreme Court's relatively clearer federal constitutional setting,⁸ we hypothesise that the political sensitivity of the matter results in less clearly articulated rules on the European side of the Atlantic. This gnomic nature expresses itself most clearly when the political/constitutional and competition-related aspects of the state action defence are separated and identified and when the application of the doctrine is tested for the effects and consistency in relation to both aspects. This contribution uses a functional comparative legal method, where the functionality is defined in relation to the fundamental problem inherent in all public-private divide cases.⁹

To this end, we will first elaborate the preliminary understanding of the public-private divide identified above. This will be done in relation to competition law and will help identify the fundamental problem inherent in all public-private divide cases. After that the EU case law on the *effet utile* doctrine will be described and analysed and then compared to the US Supreme Court's approach to the related state action defence doctrine. The aficionado of competition law will notice that these are two, and thus different, sides of the same coin, but the understanding of the public-private divide makes them functionally identical and thus a basis for a valid comparison.

II The Public-Private Divide in Competition Law

The public-private divide can be understood in many ways and it may have different meanings and provide separate frameworks of reference for the various sciences that have addressed it.¹⁰ It can be understood in a

⁸ Admittedly not a comparative appraisal, but a more abstract characterisation of EU constitutional law and constitutional reasoning can be found in G. Itzcovich, 'The European Court of Justice', in A. Jakab et al. (eds.), *Comparative Constitutional Reasoning* (Cambridge University Press 2017). See further M. Shapiro, 'The US Supreme Court and European Court of Justice Compared', in A. Menon and M. Schain (eds.), *Comparative Federalism: The European Union and the United States in Comparative Perspective* (Oxford University Press 2006), 203ff., who reiterates the 'more complicated implementation phase' and the follow-on complexities.

⁹ For an explanation of this method, see K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford University Press 1998), ch. 3.

¹⁰ See, e.g. A. E. Davis, *The Evolution of the Property Relation* (Palgrave 2015), 95ff.; and A. M. B. Colombi Ciacchi et al. (eds.), *Law and Governance – Beyond the Public-Private Law Divide?* (Eleven 2013).

European competition law context to apply to the classic dichotomy between the Member States and undertakings. In the framework of the European Treaties, we find competition rules addressed to the Member States (e.g. Articles 106 and 107 TFEU) and those addressed to undertakings (Articles 101 and 102 TFEU). More generally and thus not confined to the EU competition rules, it can be understood from the perspective that it is the state that seeks to control the restrictions of competition that result from private actions, such as the conclusion of restrictive agreements or the use of market power. It does so in the public interest of protection of undistorted competition, which in turn is considered to lead to optimal consumer welfare.¹¹ Given that consumer welfare is an economic concept and in view of the fact that current competition policy is greatly influenced by economic insights,¹² our understanding of the public–private divide must be based on a legal as well as economic understanding.

In economics the public–private divide can be seen where market failures are discussed. In essence, social or total welfare is maximised by competitive markets where myriad private parties all take decisions on what to produce and what to consume. Adam Smith's invisible hand then ensures that everyone will be better off in a situation that economists now refer to as efficient.¹³ However, when there are market failures, optimal efficiency is not attained. Market failures thus denote a situation in which the private actions on a market do not yield optimal results and thus attention turns to public authorities. It is no coincidence that one of the most prominent examples of a market failure concerns public goods.

Central to this overly short exposé is that the public–private divide is as much about actors and their characteristics as it is about activities and their objectives. In its simplest form, the public–private divide assigns all public tasks to public actors in the public interest and private actors are only assumed to take on whatever activity is in their personal interest. Applied to a competition law context, this means that competition law intervention is only called for when the private actions are no longer in

¹¹ An excellent discussion is provided by M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004), 39ff.

¹² Myriad books that contain an economic analysis of competition law as well as the explicit use of economic models and insights in the application of the competition rules bear testimony to this. See e.g. A. C. Witt, *The More Economic Approach to EU Antitrust Law* (Hart 2016).

¹³ Welfare economics has established that the equilibrium in competitive markets, to which Smith's metaphor would apply, yields Pareto optimal outcomes.

the public interest of ensuring optimal consumer welfare. The *locus classicus* of such actions being the cartel: a purely private action by private actors that most often entails price increases in the interest of the cartelists to the detriment of total and consumer welfare. In such cases, public entities intervene by creating public law statutes that prohibit such actions and public entities assigned with and equipped for the task of uncovering and prosecuting such cartels. At the other side of the spectrum we find pure public goods, provided by the state in manners that are largely immune to competition law scrutiny.¹⁴

Competition law will often be applied where the clear division in the public–private divide gets muddled. This will often occur when the state acknowledges that its regulation of an activity is likely to be inefficient. In such instances we will find a mixture of private and public forms and actions. This could take the form of state-sponsored self-regulation by members of the industry. In the case of the liberal professions this will often happen to overcome the information asymmetry between the professionals involved and their clients. However, there is a similar information asymmetry between the regulated professionals and their regulators, exposing the latter to a risk of capture and being subjected to rent-seeking by the industry.¹⁵ Why indeed would a profit-maximising entrepreneur confine his rent-seeking to the prices that can be forced upon consumers and not also try to extract rents from the state that tries to regulate it?

A Questions of Competition Law

In terms of competition law, such instances of a muddled public–private divide present a fairly simple problem that can be addressed in a two-step method. First, the exact nature of the market failure must be established. This could be an externality, public good of some sort or an information asymmetry. This step also involves an appraisal of the inefficiencies that would arise in the absence of the intervention. The second step involves

¹⁴ Many instances in which EU competition law is applied to such state interventions include goods that have some degree of public good character, but not enough to qualify them as ‘non-economic’ to borrow the terminology of Art. 2 Protocol 26 on Services of General Interest [2008] OJ C115/308 attached to the Treaty of Lisbon.

¹⁵ Research into regulatory capture was triggered by Stigler’s seminal work (‘Theory of Economic Regulation’). For an account of the ensuing literature, see C. Carrigan and C. Coglianese, ‘George J. Stigler, “The Theory of Economic Regulation”’, in M. Lodge et al. (eds.), *The Oxford Handbook of Classics in Public Policy and Administration* (Oxford University Press 2015).

an appraisal of the proportionality of the regulatory intervention in the light of the market failure. This would involve at least a test of the suitability and the objective necessity of the intervention. In other words: it would need to be shown that the intervention is suitable to address the market failure and that it does not go beyond what is necessary to remedy the inefficiency arising from the market failure. This, in essence, is the test that can be discovered in any justification or exception within competition law, whether it is the rule of reason pursuant to US antitrust law, Article 101(3) TFEU or the objective justification available within the framework of Article 102 TFEU.¹⁶

B Questions of a Political/Constitutional Nature

Precisely because of the public intervention to address the market failure that we often find in public–private divide cases, the application of competition law adds a second public element to the case, leading to questions of a constitutional nature. These constitutional issues boil down to questions of competence and deference in reviewing the exercise of that competence on the basis of competition law. What we have is a regulation of an economic activity in some form of co-regulation between the private actors involved and a lower level of government. Competition law oversight invariably means some form of oversight of this lower-level government action, mostly by a judicial or an administrative body at a higher level of governance.¹⁷ Such oversight invariably raises questions of (democratic) legitimacy and – to use the EU terminology – subsidiarity.¹⁸ These questions can be treated as legal–technical issues or matters of constitutional law and philosophy,¹⁹ but competition law as a lens enables the identification of an implicit narrative. With its focus on consumer welfare, competition law turns these questions into an inquiry into the breadth of the consumers whose welfare is to be maximised. Are these the consumers of one state or Member State or should

¹⁶ See W. Sauter, *Coherence in EU Competition Law* (Oxford University Press 2016), 101–4 discusses both Art. 101(3) and the objective justification pursuant to Art. 102 under the heading of exceptions.

¹⁷ It is possible that there will be oversight by means of the legislature.

¹⁸ F. Amtenbrink, 'Continuation or Reorientation: What Future for European Integration?' (Inaugural lecture delivered on 25 November 2008), 15–17, 33–5.

¹⁹ As can be seen in the debate between Cahill and Davies. M. Cahill, 'Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach' (2017) 15 *I-CON* 201; G. Davies, 'Theorizing Subsidiarity: A Reply to Maria Cahill' (2017) 15 *I-CON* 225; M. Cahill, 'Theorizing Subsidiarity: A Rejoinder to Gareth Davies' (2017) 15 *I-CON* 231.

the consumers of the Union of states provide the benchmark? Given the predominant involvement of companies in its administration,²⁰ competition law will provide a voice to companies established outside the jurisdiction. The extra information and broader scope of the research involved complicates an already complex question. Answering these questions will be complex and the answer will probably depend on the political preferences of the person. Providing an answer therefore doesn't make overly much sense from a legal perspective²¹ and, moreover, is not required to research the hypothesis central to this contribution.

What is important, however, is the method by which or framework within which such oversight takes place. In federal systems, like that of the United States of America, questions of competence, oversight and accountability are explicitly addressed. In the EU, this is less explicit as can already be gleaned from the fact that the supremacy of EU law over the laws of its Member States is nowhere explicitly provided for in the Treaties, whereas the US constitution is clear on federal law being the supreme law of the land.²²

C The Competition Law of the Public–Private Divide

For the purpose of this contribution, the public–private divide is understood as a tool to disentangle situations of muddled governance where the public and private entities, activities and objectives are mixed. Such disentangling then allows the exposure of rent-seeking or regulatory capture and thus those situations where the public interest is not truly served by the actions produced by such situations despite the involvement of the public authorities. This understanding means that we should identify those rules in competition law that address such muddled governance situations or state–private hybrids. As a result, the prohibitions of restrictive agreements laid down Article 101 TFEU and its US corollary Section 1 of the Sherman Act as such are not relevant as these concern only purely private restrictions of competition by means of cooperation, i.e. those created by undertakings or companies. Insofar as such cooperation is relevant to the public–private

²⁰ The overwhelming majority of cases, to use but one indicator, are started as a result of complaints from companies, rather than consumers (F. Cengiz, 'Legitimacy and Multi-Level Governance in European Union Competition Law: A Deliberative Discursive Approach' (2016) 54 JCMS 826, 835).

²¹ G. Davies, 'Internal Market Adjudication and the Quality of Life in Europe' (2015) 21 CJEL 289, notably 325–7.

²² Article VI, Clause 2 US Constitution.

divide, this will manifest itself in the form an exception to the scope whereby the private entities accused of colluding will point to state action that reduces or negates their responsibility for the collusion. Such an exception to the prohibition of restrictive agreements exists in EU²³ and US competition law.²⁴ This is commonly referred to as the state action defence.

Logically, a similar exception would exist for unilateral restrictions of competition, commonly covered by Section 2 Sherman Act and its European counterpart Article 102 TFEU. However, no such cases could be found in the US whereas in the European context this case will most likely be dealt with under the heading of Article 106(2) TFEU.

A similar absence of a trans-Atlantic corollary exists with regard to the state's liability for restrictions of competition resulting from a muddled public-private divide. Whereas there is simply no US statute covering the public authority's involvement in the restriction of competition,²⁵ EU competition law does in fact contain a rule addressed to the Member States. This is the 'new norm'²⁶ or, as we shall refer to it, *effet utile* or effectiveness doctrine, which consists of Article 4(3) TEU, the duty of loyalty, read in conjunction with the prohibitions on restrictions of competition by private parties (Articles 101 and 102 TFEU).

The absence of competition rules addressed to the states also manifests itself when we look at financial distortions of competition by public bodies. This is where the European Union has an extensive legal framework that covers so-called state aid and no explicit US rules at the federal level.²⁷

To allow for a valid and interesting comparison, this chapter will thus narrow down the competition law rules that are relevant to those that are comparable. This comparability certainly exists for the state action defences at both sides of the Atlantic. It also exists for the *effet utile* doctrine developed in the EU, given that it is connected to the state action

²³ See e.g. C-359/95P and C-379/95P *Ladbroke Racing*, EU:C:1997:531, paras. 30–5 and T-370/09 *GDF Suez*, EU:T:2012:333, paras. 312–20.

²⁴ See e.g. *Parker v. Brown*, 317 US 341 (1943).

²⁵ In fact, the *Parker* case, established immunity not so much for private parties, but rather for the state.

²⁶ K. Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition' (2001) 38 *CMLRev.* 613, 619.

²⁷ The application of the (dormant) interstate commerce clause to direct taxation could, however, result in some form of state subsidy control, provided that the state direct taxation at hand discriminates against interstate commerce (J. E. Milne, 'Energy Tax Incentives in the United States: A Comparative Perspective on State Aid' (2017) 16 *European State Aid Law Quarterly* 34).

defence. This means that it can function as a mirror to the state action defence and can thus be compared to the US law on the state action defence.

III EU Competition Law and the Public–Private Divide

The state action defence and *effet utile* doctrine can be two sides of the same coin, in that the state's involvement in a restrictive practice can constitute a state action defence for the market participants and thus create immunity from the competition rules while it is exactly that state involvement that could fall foul of the *effet utile* doctrine. For this to be the case, there would need to be a link between these two legal frameworks and the factual situations they cover in the form of the concertation contrary to Article 101 and the state's actions with regard to this concertation. In this understanding, the muddled governance can only exist when there is concertation in the meaning of Article 101. Muddled governance resulting in distortions or restrictions of competition in the absence of concertation subject to Article 101 would escape competition law scrutiny, both under Article 101 and the effectiveness doctrine.

For the state action defence, the issue at hand here can be viewed from two mutually exclusive perspectives. The supremacy view on the matter would simply hold that national laws that legalise concertation contrary to Article 101 could never provide immunity under that provision. Any other solution would jeopardise the uniform application of Article 101 and thus jeopardise the supremacy of EU law.²⁸ The substance-based view would not delve into the relation between the national and European legal order, but rather inquire as to whether the national legal framework still allows for autonomy between the parties to the collusion. It is this latter view that the courts have adopted where we read in cases like *Ladbroke*²⁹ and *CIF*³⁰ that what matters is whether the national legislation allows for autonomous conduct on the part of the companies. In the absence of sufficient autonomy for the undertakings, no restriction of competition contrary to Article 101 exists.

²⁸ G. Marengo, 'Le Traité CEE Interdit-il aux Etats Membres de Restreindre la Concurrence?' (1986) 22 *Cahiers de droit Européen* 285. Note that 123/83 *Bureau National Interprofessionnel du Cognac*, EU:C:1985:33, para. 17 is reminiscent of this type of reasoning.

²⁹ C-359/95P and C-379/95P *Ladbroke Racing*, paras. 33–4.

³⁰ C-198/01 *Consortio Industrie Fiammiferi (CIF)*, EU:C:2003:430, para. 52, and notably the first step of the two-step approach suggested there by the Court.

This of course begs the question what room there is for the Member States to regulate the actions of undertakings in such a way that these no longer have competitive freedom and thus benefit from a state action defence. In this regard, essentially the same two views can be identified in the Court's earlier case law.

A *The Requirement of a Link between the Collusion and State Involvement*

This line of cases commences with *GB-INNO* where the Court held that the duty of loyalty read in conjunction with Article 102 TFEU precluded the Member States from adopting or maintaining in force 'any measure which could deprive [Article 102 TFEU] of its effectiveness'.³¹ This very first mentioning of the *effet utile* doctrine relies as much on the substance of the competition provisions³² as on the supremacy and effectiveness of EU law.³³ Later cases develop both views, with *Aubert*,³⁴ *Asjes*³⁵ and *Vlaamse Reisbureaus*³⁶ relying on the link with a substantive competition provision that would otherwise be infringed. The supremacy-based view, which does not require a nexus to a private initiative that would, in the absence of the state intervention fall foul of Articles 101 or 102, can be seen in *Leclerc*. There the Court started out holding that

legislation of the type at issue does not require agreements to be concluded between publishers and retailers or other behaviour of the sort contemplated by Article [101 TFEU]; it imposes on publishers and importers a statutory obligation to fix retail prices unilaterally. Accordingly, the question arises as to whether national legislation which renders corporate behaviour of the type prohibited by Article [101] (1) superfluous, by making the book publisher or importer responsible for freely fixing binding retail prices, detracts from the effectiveness of Article [101] and is therefore contrary to the [Article 4(3) TEU].³⁷

Here we see that no link between the state intervention and a specific infringement of Articles 101 or 102 is required and that all that matters

³¹ 13/77 *GB-INNO-BM*, EU:C:1977:185, para. 31.

³² 13/77 *GB-INNO-BM*, para. 34, where the Court refers to the encouraging by the Member State of abuse.

³³ 13/77 *GB-INNO-BM*, para. 33, where the Court refers to the circumvention of the constraints imposed by the EU competition rules by means of Member State legislation.

³⁴ 136/86 *Aubert*, EU:C:1987:524, paras. 22–4.

³⁵ 209–213/84 *Asjes*, EU:C:1986:188, paras. 72 and 76.

³⁶ 311/85 *Vlaamse Reisbureaus*, EU:C:1987:418, paras. 22–3.

³⁷ 229/83 *Leclerc*, EU:C:1985:1, para. 15.

for intervention on the basis of the effectiveness doctrine would be whether the legislation results in the same effects as collusion under Article 101 would produce. This approach is reminiscent of the development of the concept of a measure of equivalent effect pursuant to the free movement of goods, which is further substantiated by the Court's condition that there is no '[Union] competition policy with which the Member States would be required to comply', thus introducing a requirement of EU-level harmonisation in the absence of which the Member States remain sovereign. To rephrase this in classic supremacy terms: as long as the EU has not exercised its lawmaking prerogatives, Member States are not estopped. This is a legal turn of phrase that the ECJ has used more often in connection with the application of the free movement of goods to politically sensitive areas.³⁸

This legal turn of phrase has resulted in the *de facto* neutering of the effectiveness doctrine in what is now called the *Van Eycke* restatement³⁹ in which the Court held that there would need to be a specific concertation contrary to Article 101 to which the state measure is linked, for that state measure to fall foul of that doctrine.⁴⁰ In the absence of this link, the full effectiveness is not jeopardised.⁴¹ While the Court is extremely brief in its judgment in *Meng*, the report of the hearing⁴² shows that this issue was not resolved lightly while the considerations in AG Tesauero's opinion are equally enlightening and fundamental. Indeed, in his opinion, the Advocate General touches upon the heart of the matter when he concludes that there would need to be a link to the concertation for the *effet utile* doctrine to apply and accepts that this would mean the introduction of a formal criterion.⁴³ He then holds that this situation would only arise in cases where the state regulation affects competition in a 'manner substantially in line with the wishes expressed by the economic agents concerned'. This is essentially a description of regulatory capture, that the Advocate General considers acceptable for two reasons. First, the

³⁸ e.g. C-379/98 *PreussenElektra*, EU:C:2001:160, paras. 77–81 and notably para. 81 where we, following a short analysis of EU electricity market harmonisation, read that the measures were compatible with EU law 'in the current state of [EU] law' and C-573/12 *Ålands vindkraft*, EU:C:2014:2037, paras. 94–104.

³⁹ Sauter and Schepel, *State and Market in EU Law*, 106.

⁴⁰ 267/86 *Van Eycke*, EU:C:1988:427, para. 16.

⁴¹ C-2/91 *Meng*, EU:C:1993:885, para. 22.

⁴² Published in the [1993] ECR notably I-5758ff.

⁴³ Opinion of AG Tesauero in C-2/91 *Meng*, EU:C:1993:308, para. 28 where he mentions that 'in certain cases an agreement between undertakings may prove to be of *only formal significance*' (emphasis added).

influence of individuals is an established fact in modern legal systems and, second, it would not be easy to determine the extent to which the regulation coincides with the wishes expressed by the economic agents. To my mind, the first reason is fallacious in that it would mean that all 'established facts' would just need to be accepted, something that is both undesirable and not in line with reality. The second reason is more interesting and connects to arguments concerning docket control and the practicalities of the supervision that would result from a broader understanding of the *effet utile* doctrine that relinquishes the requirement of a link with concertation.⁴⁴ The docket control argument has obvious significance and even though it is not mentioned in *Meng*,⁴⁵ the Court used it one week later in *Keck and Mithouard* to restrict the scope of what is now Article 34 TFEU by means of the exclusion of selling arrangements.⁴⁶ Whatever may be of the effectiveness of attempts at docket control, that fact remains that judicial review requires some form of it unless we accept an overburdened judiciary. As to the practicalities, the Advocate General suggests a substantive test whereby the applicability of the *effet utile* doctrine would depend on whether and to what extent the state measure reflects courses of action advocated by private individuals.⁴⁷ This appears to have inspired the fifth question asked by the Court on the possibilities of justifying such state regulation.⁴⁸ Unfortunately, we can never know which of these reasons resulted in the remarkably short – if not terse – reasoning by the Court in *Meng*.⁴⁹

The fact is that all judgments since have employed the *Van Eycke* formula and thus relied on a link between the concertation and the state measure.⁵⁰ This has resulted in judgments like that in *Doulamis* where the Court succinctly reasoned that a ban on advertising dental

⁴⁴ Ibid., the AG mentions these concerns in para. 27 of his conclusion.

⁴⁵ The third question asked by the Court appears to inquire into this element, see the report of the hearing (n. 42).

⁴⁶ C-267/01 and C-268/91 *Keck and Mithouard*, EU:C:1993:905. It may be noted that this judgment also received Laurence's attention (L. W. Gormley, 'Reasoning Renounced? The Remarkable Judgment in *Keck & Mithouard*' (1994) 5 *EBLR* 63).

⁴⁷ Opinion of AG Tesaro in C-2/91 *Meng*, para. 28.

⁴⁸ Report of the hearing [1993] ECR I-5768.

⁴⁹ Ole Due, president of the Court that handed down *Meng*, is open about the choice for formalism over functionalism (O. Due, 'Pourquoi Cette Solution?', in O. Due et al. (eds.), *Festschrift für Ulrich Everling* (Nomos 1995)).

⁵⁰ The myriad cases in which it has been applied cannot possibly all be mentioned here. Suffice a reference to the most recent case C-221/15 *Colruyt*, EU:C:2016:704, para. 44.

services did not fall within the scope of the *effet utile* doctrine simply because there was no evidence of any concertation.⁵¹

B The Link between the State and Bodies Exercising Delegated Powers of Economic Intervention

Apart from those cases where the state measure is linked to concertation within the meaning of Article 101, the *effet utile* rule also applies to instances where the state deprives its own legislation of its official character by delegating to private traders' responsibility for taking decisions affecting the economic sphere. This delegation test has suffered a similar neutering in the Court's jurisprudence. This started with *Reiff* and reached a climax in the cases concerning the Consiglio Nazionale Forense and similar Italian professional bodies. To start with *Reiff*, this case dealt with German legislation on the fixing of road haulage tariffs by a tariff board consisting of 'tariff experts' from the road haulage industry. In the Court's view their appointment by the Federal Minister for Transport meant that these experts, often the owners or high-level executives of the road transport companies, did not act as representatives of the latter and thus their meetings did not qualify as a cartel meeting.⁵² On a similar note, no delegation contrary to the *effet utile* doctrine was found because the minister was involved in the appointment of the tariff experts, could attend their meetings and overturn tariff decisions in the public interest. These are at best feeble guarantees to ensure that the tariffs are indeed in the public interest.⁵³ In that regard the mandatory consultation of an advisory committee of representatives of the users of road haulage services comes closest to a guarantee against an obvious case of regulatory capture.⁵⁴

Anecdotal evidence shows that Italy is overrepresented in effectiveness doctrine cases and the combination of legal professionals and the Consiglio Nazionale Forense as a professional body has indeed resulted

⁵¹ C-446/05 *Doulamis*, EU:C:2008:157, para. 22.

⁵² C-185/91 *Reiff*, EU:C:1993:886, para. 17. Note that this effectively overturns the ruling in 123/83 *Clair*, where the Court held that 'the legal framework within which such agreements are made and such decisions are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the community rules on competition and in particular Art. 85 of the treaty are concerned' (para. 17).

⁵³ Cf. A. Bach, 'Annotation of Case C-185/91, *Reiff*; Case C-2/91, *Meng*; Case C-245/91, *OHRA Schadeverzekeringen*' (1994) 31 *CMLRev.* 1357, 1367.

⁵⁴ C-185/91 *Reiff*, EU:C:1993:886, para. 18.

in several cases.⁵⁵ In all of these cases, the Court accepts the minimal involvement of the state as sufficient to remove the regulation in question from the scope of the *effet utile* doctrine.⁵⁶ Evidence of this minimal involvement can be gleaned from the judgments in *Spediporto* and *Librandi*, where the Court initially relied inter alia on the fact that the majority of the members of a tariff body represented public authorities and later conceded that even when the economic operators form a majority, this does not fall foul of the *effet utile* doctrine provided that the tariffs are fixed with due regard for the public-interest criteria and the public authorities do not delegate their rights and powers to private economic operators.⁵⁷

More recent jurisprudence, however, shows that the climax in the Court's deference is behind us. In *API*, for example, the Court focused on the composition of a tariff board and the '[possibility] to rebalance power between the public authorities and the private sector'.⁵⁸ The Court then referred to its older case law according to which such a board may escape the *effet utile* doctrine where there is a legal requirement to set these 'taking into account not only the interests of the undertakings or associations of undertakings in the sector which has appointed them but also the public interest and the interests of undertakings in other sectors or users of the services in question'.⁵⁹ Despite the reference to the older case law, the test that followed showed considerably less deference to such national measures. The court first observed that there were no legal guarantees to prevent the industry representatives from acting in the exclusive interest of the profession. Following that the Court characterised the national legislation as merely containing a vague reference to the public interest involved and leaving a very large margin of discretion and independence to the members of the board.⁶⁰ The interim conclusion reached by the Court is that the national regulation 'does not contain either procedural arrangements or substantive requirements capable of ensuring, that, when establishing minimum operating costs, the [board] conducts itself like an arm of the State working in the public interest'.⁶¹

⁵⁵ C-35/99 *Arduino*, EU:C:2002:97; C-94/04; C-202/04 *Cipolla*, EU:C:2006:758; C-250/03 *Mauri*, EU:C:2005:96.

⁵⁶ A fuller discussion can be found in Sauter and Schepel, *State and Market in EU Law*, 115.

⁵⁷ C-96/94 *Spediporto*, EU:C:1995:308, para. 23; C-38/97 *Librandi*, EU:C:1998:454, paras. 33–4.

⁵⁸ C-184–187/13, C-194/13, C-195/13; C-208/13 *API*, EU:C:2014:2147, para. 33.

⁵⁹ C-184–187/13, C-194/13, C-195/13; C-208/13 *API*, para. 34.

⁶⁰ C-184–187/13, C-194/13, C-195/13; C-208/13 *API*, paras. 35–7.

⁶¹ C-184–187/13, C-194/13, C-195/13; C-208/13 *API*, para. 38 (emphasis added).

This is complemented with a finding that there is no review by the public authorities or consultation of other bodies or public associations.⁶² This leads to the final conclusion that:

in the light of the composition and the method of operation of the [board], on the one hand, and of the absence both of any public-interest criteria laid down by law in a manner sufficiently precise to ensure that carriers' and customers' representatives *in fact operate in compliance with the general public interest* that the law seeks to achieve and of actual review and of the power to adopt decisions in the last resort by the State, on the other, the [board] must be regarded as an association of undertakings within the meaning of Article 101 TFEU when it adopts decisions fixing minimum operating costs for road transport such as those at issue in the main proceedings.⁶³

API shows that national regulations concerning the public–private divide may only escape competition law scrutiny when there are adequate substantive or procedural guarantees to guarantee that the governance structure effectively operates in the public interest. As a result, the bar for a state action defence⁶⁴ as well as the escape clauses from the *effet utile* doctrine significantly is higher than under the older case law. This increases the guarantees that the muddled governance that we find in public–private divide cases actually avoids regulatory capture. This can only be in the public as well as *communautaire* interest, if only because the Union's objectives do not contain a single reference to the private interests of industry and rather refer extensively to the public interest and consumer interests in particular.⁶⁵ In addition, if the stated objective of the EU's competition rules is indeed the maximisation of consumer welfare,⁶⁶ it becomes increasingly difficult to understand why rent-seeking by companies should be immune from competition scrutiny.

⁶² C-184–187/13, C-194/13, C-195/13; C-208/13 *API*, paras. 39–40.

⁶³ C-184–187/13, C-194/13, C-195/13; C-208/13 *API*, para. 41 (emphasis added).

⁶⁴ This can be seen in C-136/12 *Consiglio nazionale dei geologi*, EU:C:2013:489, dealing with the applicability of Art. 101 TFEU to a professional body.

⁶⁵ These objectives are set out in Art. 3 TEU. It may also be noted that the provisions on industrial policy are set in a system of open and competitive markets as per Art. 173(1) TFEU. Furthermore, Protocol 26 on Services of General Interest explicitly mentions user rights.

⁶⁶ e.g. J. Almunia, 'Competition and Consumers: The Future of EU Competition Policy', speech at the European Competition Day, SPEECH/10/233 (Madrid, 12 May 2010); J. Almunia, 'Competition – What's in It for Consumers?', speech at the European Competition and Consumer Day, SPEECH/11/803 (Poznań, 24 November 2011).

IV US Antitrust Law and the Public–Private Divide

US antitrust law knows no rules directed at the (federal) state(s), but it knows an extensive case law on the state action defence. This series of cases started with *Parker* and has – for the moment – reached its pinnacle in *North Carolina State Board of Dental Examiners*. In a functional comparative approach, this case law can be validly compared to the European Court of Justice's case law on the state action defence and, more prominently, the *effet utile* doctrine, given that both sets of jurisprudence deal with untangling the governance we find at the public–private divide and exposing situations of industry rent-seeking or regulatory capture.

The law on state action defences has been shaped by the judiciary, with myriad judgments from the US Supreme Court defining and redefining what it takes for a private action within the meaning of Section 1 Sherman Act to escape antitrust scrutiny.⁶⁷ These start from a clear federalist perspective as *Parker* immunity attaches to states acting as sovereigns.⁶⁸ When states entrust similar activities to private parties these federalist considerations translate into the double requirement of clear articulation and active supervision.⁶⁹ These essentially prescribe deference to the state legislature, government and judiciary whenever it acts as sovereign in compelling private actions. This deference for the state legislature also explains the *Noerr–Pennington* doctrine according to which lobbying as part of the adoption of (anticompetitive) state legislation is outside the scope of the Sherman Act.⁷⁰ It also explains why private boards are subject to Midcal's double requirement whereas lower forms of state governance, such as municipalities, need to comply only with the clear articulation requirement. Municipalities, the *Hallie* Supreme Court held, are electorally accountable, have general regulatory powers and do not have a private price-fixing agenda and therefore do not need active supervision to acquire antitrust immunity.⁷¹ At worst, they

⁶⁷ For a quick overview, see S. Safvati, 'Public–Private Divide in *Parker* State-Action Immunity' (2016) 63 UCLA LR 1110.

⁶⁸ *Parker v. Brown*, 317 US 341 (1943).

⁶⁹ *California Retail Liquor Dealers Association*, 445 US 97, 105 (1980).

⁷⁰ This doctrine consists of the two Supreme Court cases: *Noerr Motor Freight, Inc.*, 365 US 127 (1961) and *Pennington*, 381 US 657 (1965). It may be added that this entails a more substantial response to the fact of life noted by Opinion of AG Tesaura in C-2/91 *Meng*, Section III.A above.

⁷¹ *Hallie*, 471 US 34, 46–47 (1985).

could succumb to purely parochial public interests, but this is said to be minimised by the clear articulation requirement that is set at the state level. This effectively – albeit to the aggregation level of the state – addresses the question identified above concerning the breadth of consumers whose interests are taken into account.⁷²

What it boils down to is deference to state sovereignty, even when it acts through private parties, provided that the sovereign is sufficiently involved in the private parties' activities. That this is an appraisal of a clearly federalist, or to use the terminology introduced earlier in this chapter, political/constitutional nature, can be seen where the Third Circuit Court of Appeals held that '[w]hile individual anticompetitive acts of state governments may be considered unwise or counterproductive, the decision to make such choices lies within the sovereign power of the states'.⁷³

These fundamentals have been refined considerably in the course of several decades primarily for professional boards similar to those that found themselves scrutinised in the European *effet utile* cases.⁷⁴ We find several cases dealing with the question under what circumstances such boards made up of industry representatives qualify for *Parker* immunity. Interestingly, much of this case law and the doctrine surrounding it centres on theories of regulatory capture.⁷⁵ We see this for example where the article by Edlin and Haw is cited by the Supreme Court in *North Carolina State Board of Dental Examiners*.⁷⁶

The Supreme Court, in its own words, thus restricts the scope of the Sherman Act along lines of sovereignty and federalism⁷⁷ rather than 'whether the challenged conduct is efficient, well-functioning, or wise'.⁷⁸

⁷² Section II.B above, p. 355.

⁷³ *Philip Morris Incorporated*, 263 F.3d 239 (3d Cir. 2001).

⁷⁴ An overview of these cases and the general background can be found in A. Volokh, 'The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges' (2014) 37 *Harvard Journal of Law and Public Policy* 931.

⁷⁵ e.g. W. H. Page, 'Interest Groups, Antitrust, and State Regulation: *Parker v. Brown* in the Economic Theory of Legislation' [1987] *Duke LJ* 618; J. S. Wiley, Jr., 'A Capture Theory of Antitrust Federalism' (1986) 99 *HLR* 713; A. Edlin and R. Haw, 'Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?' (2014) 162 *UPenn. LR* 1093.

⁷⁶ *North Carolina State Board of Dental Examiners*, 574 US (2015), 16.

⁷⁷ F. H. Easterbrook, 'Antitrust and the Economics of Federalism' (1983) 26 *Journal of Law and Economics* 23.

⁷⁸ *North Carolina State Board of Dental Examiners*, 574 US (2015), 9.

The respect for state sovereignty follows from the dual foundations of financial disinterest and political accountability.⁷⁹ The involvement of actors that satisfy the standards under these two headings results in immunity, putting the decision-making process, and the safeguards for that to truly operate in the public interest, at centre stage.⁸⁰ Only then will there be a public process resulting in a publicly reasoned and publicly accountable decision to sideline competition that can be challenged in the political process as an alternative to the legal process that administers competition law. This process view of the scope of antitrust in public–private divide cases provides for clear and convincing borders and a coherent and consistent view on the application of competition law to the muddled governance we find at the public–private divide. It, in other words, is thoroughly *communautaire* in reasoning decisions from the perspective of a certain status awarded to both federalism and competition in a legal system.⁸¹

V *Communautaire* Reasoning on the Public–Private Divide in the EU

The description and analysis of the case law on both sides of the Atlantic set out above have revealed alignment as well as divergence. A quick glance at both sets of jurisprudence shows similarity in that both focus on a link between the public authority's activities and the private actions on which a decision on the immunity (or not) from competition supervision is based.

However, divergence manifests itself where the haphazard (and terse if not absent) reasoning by the European Court of Justice is compared to that by the Supreme Court. Together with inconsistent case law and the implicit replacement of functionalism or teleology with formalism, many of the ECJ's judgments can only be characterised as *uncommunautaire*. Many have tried to explain the deference that befell the Member States in the so-called November revolution.⁸² Precisely the fact that the Member

⁷⁹ E. Elhauge, 'The Scope of Antitrust Process' (1991) 104 HLR 667, 672 and 696.

⁸⁰ Ibid., 671. This is what Elhauge has called the process view of the state action doctrine.

⁸¹ *North Carolina State Board of Dental Examiners*, 574 US (2015), 5, citing *Topco Associates, Inc.*, 405 US 596, 610 (1972) and *Ticor Title Ins. Co.*, 504 US 621, 632 (1992) to hold that the Sherman Act is a central safeguard likened to the Bill of Rights.

⁸² Gormley, 'Reasoning Renounced?', being one as well as N. Reich, 'The "November Revolution" of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited' (1994) 31 CMLRev. 459, deals with this line of cases.

States were given more leeway under EU law in the frame of both the free movement of goods as well as competition shows that this could not have been the result of a rethinking by the Court in federalism or political/constitutional terms alone. The federal aspect of the free movement laws is at the very heart of the matter in *Keck*, whereas it is hardly discussed in the competition cases.⁸³ In competition or substantive terms, *Keck*, *Meng*, *Reiff* and the Italian cases are equally unsatisfactory. Following on from *Keck*, the free movement of goods, the operationalisation of the market access test has proved cumbersome.⁸⁴ In the context of the competition rules, the Court's faith in legal formalism on the part of the Member States is unwarranted by any standard of common sense.

In this regard, the US position that departs from a well-defined position on the role of competition in the economic system as well as a clear perception on federalism can provide guidance, even in the absence of a similarly clear position on both issues in the EU. There are two essential reasons for this. First, in terms of federalism or political constitutional terms, the ECJ has repeatedly manifested itself as the guardian of the Treaties also when these are applied in areas where the EU lacks competence and the Member States thus are competent. Fiscal sovereignty, for one, has not kept the ECJ from applying state aid supervision to national tax schemes insofar as trade between Member States is affected.⁸⁵ In that regard, EU law contains no clear boundary within which the Member States are sovereign.⁸⁶ Second, whether the debate is set in terms of competition, user emancipation or a combination of both, it is obvious from Article 3 TEU that an open market economy that puts consumers central is at the core of the European project. Third, that financially interested agents should not be trusted to regulate their own business is plain common sense.⁸⁷ Taking the second and third reason together could emancipate European integration from a market integration exercise into the creation of real shared values, not

⁸³ *Keck and Mithouard*, paras. 14 and 17 where the Court analyses national regulation from the perspective of competitive effects and non-free movement related aims.

⁸⁴ J. Snell, 'The Notion of Market Access: A Concept or a Slogan?' (2010) 47 *CMLRev.* 437.

⁸⁵ See the recent flurry of cases in which Art. 107 TFEU is applied to national direct business taxation schemes, e.g. C-20/15P *World Duty Free Group*, EU:C:2016:981.

⁸⁶ As Lenaerts writes: 'There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community' (K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *AJCL* 205, 220).

⁸⁷ Elhauge, 'Scope of Antitrust Process'.

just for economic agents but also for citizens and consumers. In that regard, the Court's stricter stance in *API* could be the first step in a process where the EU, its Member States and market participants become more of a *communauté*. This community requires a clearer constitutional setting for the Court that would allow our hypothesis to be proved false in the future.