Towards the Effects-based Approach in EU Competition Law:

the Assessment of Single Branding Agreements

Master thesis for master program IEL

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1. Introduction: methodological choices

One of the initial impetuses for the EU to adopt the 'more economic approach' was in the field of vertical restraints,[1] where the influence of Chicago school is argued to be relatively significant on the policy of the European Commission.[2] However, even recently influential legal scholars reckoned that the legal practice in the EU is still in need of efforts to develop clearer and more consistent analysis of effects of vertical agreements.[3] In particular, there has been advice, aligned with the structure and application of Art. 101 TFEU, to refine the **object** category and develop a clearer framework for **effect** analysis.[4] Motivated as such, this thesis is planned to make a contribution, through comparative legal study, with the main research question:

- What are the similarities and differences between the rule of reason analysis in U.S. antitrust case law and the assessment of effects restrictions under Art. 101 TFEU done by the EU courts with respect to single branding/exclusive dealing?
- In light of the comparison, what suggestions can be made in order to boost the More Economic Approach in competition law/ antitrust?

To answer this research question, the author will ask the following sub-questions that will form the backbone of this thesis' chapters:

- What is the essence of the more 'economic approach' as applied to single branding?
- How does EU case law approach the issue of single branding and exclusive supply?
- How does US case law approach the issue of exclusive dealing?
- What are the similarities and differences between the approaches on the two sides of the ocean?
- What can those approaches learn from each other/change in order to be

[1] David J Gerber, 'Two Forms of Modernization in European Competition Law' (2008) 31 Fordham Intl LJ 1235, 1249-51.
[2] See Dzmitry Bartalevich, 'The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy' (2016) 54 Journal of Common Market Studies 267.
[3] See Miguel de la Mano and Alison Jones, 'Vertical Agreements under EU Competition Law: Proposals for Pushing Article 101 Analysis, and the Modernization Process, to a Logical Conclusion' [2017] TLI Think! Paper 59; Roger Van den Bergh, 'The More Economic Approach in European Competition Law : Is More Too Much or Not Enough?' in Kovač Mitja and AS Vandenberghe (eds.), *Economic Evidence in EU Competition Law* (Intersentia 2016) 21-24.
[4] de la Mano and Jones (n 3) 25-33.

better aligned with a 'more economic' approach to competition law/antitrust?

As far as terminology is concerned, this thesis will use 'single branding' in the context of European competition law, and 'exclusive dealing' for U.S. antitrust law. For 'single branding' is used in European competition law to stand for agreements to oblige or induce a buyer to concentrate its orders for a particular type of product with one supplier (exclusive purchasing).[5] In contrast, 'exclusive dealing' is the term used by U.S., which covers the meaning of 'single branding', and what the Commission termed 'exclusive supply', or arrangements that require a supplier to sell all of its requirements or a large extent thereof to one buyer.[6]

In the remainder of this chapter, two methodological choices will be explained before revealing the organization of the following chapters: (1) the focus on single branding/exclusive dealing and (2) judicial practice, as the object of the comparative study.

1.1 Single branding/exclusive dealing

In economic literature, vertical restraints are taken as the contractual tools used by firms to facilitate vertical coordination of the process of production and distribution vertically through the market transactions between each other. The lower transaction costs of coordination, which could be achieved through market transactions or vertical integration, determine the approach taken by the undertakings.[7] In the same vein, the most important economic rationale for vertical restraints is to seek efficient delivery of inputs or goods, or to minimize inefficiency incurred therein.[8] Therefore, economic approaches to competition law identify the efficiencies achieved by vertical restraints, proposing treatment consistent with that of vertical integration without distorting the behavior of undertakings.[9]

Against the efficiencies, economic approaches to competition law balance the anti-competitive effects that typically accompany different types of vertical

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[5] In the 2010 *Guidelines on Vertical Restraints* issued by European Commission, 'single branding' refers to 'those agreements which have as their main element the fact that the buyer is obliged or induced to concentrate its orders for a particular type of product with one supplier.' (para. 129)

[6] See Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] *OJ C 45/7,* para 32; International Competition Network, 'Report on Single Branding/Exclusive Dealing' (2008), <http://www.internationalcompetitionnetwork.org/uploads/library/doc355.pdf > accessed 2 April 2018.

[7] See Dennis W Carlton and Jeffrey M Perloff, *Modern Industrial Organization* (4th edn, Pearson/Addison Wesley 2005) 400.

[8] ibid 414-28.

[9] Ernest Gellhorn, William Kovacic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell* (5th edn,Thomson/West 2004) 339; Van den Bergh (n 3) 22.

restraints, among which this thesis will focus on single branding/exclusive dealing for two reasons. Firstly, the main criterion for choosing the central object of analysis in this thesis is whether the comparison may be methodologically fruitful in the sense that insights are gained towards the economic assessments conducted by courts. As summarized by Hughes,[10] the vertical restraints that serve as responses to supply and distribution problems include resale price restrictions, exclusive distribution, and exclusive dealing, which are thus of practical and comparative significance.

However, the economic assessments conducted by EU judicial practice concerning resale price restrictions and exclusive distribution are based on EU-specific factors as contrasted to the U.S. In particular, the EU case law began to deem resale price restrictions to cause restrictions by object under as a consequence of Art. 101(1)(a) TFEU enumerating price fixing to be an example of anti-competitive agreements,[11] and subsequently kept the stance and evolved with mainly form-based arguments.[12] And the EU case law on exclusive distribution has been preoccupied with the market integration objective.[13] Therefore, the fundamental characteristics of the EU legal structure have shaped the reasoning in the judicial practice in a substantial way, to the point that economic analysis and insights have a very negligible role to play in the EU case law on resale price maintenance. To be sure, resale price restrictions and exclusive distribution are definitely topics worth comparative studies,[14] but through a perspective other than the one adopted by this thesis, which is on economic assessments conducted by courts. Therefore, it seems that single branding/exclusive dealing is the object that serves better the purpose of this thesis.[15]

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[10] Mat Hughes, 'The Economic Assessment of Vertical Restraints under UK and EC Competition Law' (2001) 22(10) Eur Comp LR 424, 428.

[11] Richard Whish and David Bailey, *Competition Law* (8th edn, OUP 2015) 129.

[12] See e.g., Case 26-76, Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities [1977] ECR *1875;* Case 243/83, SA Binon & Cie v SA Agence et messageries de la presse [1985] ECR 2015; Case C-74/04 P, Commission of the European Communities v Volkswagen AG [2006] ECR I-6585.

[13] See Alison Jones and Brenda Sufrin, *EU Competition Law : Text, Cases, and Materials* (4th edn, OUP 2010) 790-93; Sandra Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Hart 2010) 66-68. However, exclusive distribution is often combined with single branding, in which context it does not afflict concerns of market integration and the relevant evaluation depends on the effects caused by the integrated vertical clauses. See Commission, 'Guidelines on Vertical Restraints' [2010] OJ C 130/1, para 161.

[14] There have been more studies dealing with these topics, see, e.g., Jedličková Barbora, *Resale Price Maintenance and Vertical Territorial Restrictions : Theory and Practice in EU Competition Law and US Antitrust Law* (Edward Elgar 2016).

[15] Some other types of restraints, such as tying and franchising, are arguably able to produce equivalent economic effects as exclusive dealing or single branding in different circumstances, while only applicable in its own contexts. See, e.g., Herbert Hovenkamp, *Antitrust Enterprise : Principle and Execution* (Harvard UP 2008) 181-205. In particular, tying is not focused by this thesis only because related EU cases tend to be scant or context-specific so as not to form ideal materials for comparative study. See David W Hull, *Tying : A Transatlantic Perspective*, in Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (Edward Elgar 2006) 287 . For now,

Another justification as to why this thesis looks at single branding/exclusive dealing lies in the distinction between inter-brand and intra-brand competition. Bishop and Walker[16] summarized the direct effects of the restraints, where it is clear that the restraints affiliate with single branding/exclusive dealing are those prone to reduce inter-brand competition. In contrast, exclusive distribution and exclusive territories only reduce intra-brand competition as the preliminary impacts. As inter-brand competition can harm competition to a greater extent and is generally agreed to be essential for market efficiency, it follows that single branding/exclusive dealing deserves attention insofar as the effects analysis under Art. 101 TFEU is concerned.

1.2 Judicial practice

The introduction of economics to analysis of U.S. antitrust and EU competition law, although to different extents, has allowed courts an additional channel to exert influence to law. That happens through adoption of economic scholarship, which includes theories in literature and evidentiary statements from experts in trial. What the courts do to incorporate it into doctrines and judgments is to articulate persuasive reasoning in terms of law to justify their choices of models and decision making.[17] While the institutional contexts in litigation may vary among the EU and U.S., as argued in the following, comparison made between judicial reasoning on economic assessments has significance in terms of the development of the more economic approach. The gap between the extents to which economic scholarship is introduced into judicial argumentation in U.S. and EU is to be inspected and analyzed so that potential improvements that would align this argumentation with economics could be proposed.

Generally, less adherence of EU competition law to a full-fledged effects-based approach may be due to inherent dependency of modern economic analysis on quantitative reasoning, which raises the cost of proof and analysis to burden the legal system.[18] This burden is exacerbated by the limited analytical resources and economic proficiency deployed in courts, while competition authorities, like other administrative agencies, typically enjoy more manpower and organizational flexibility than the judiciary. In the EU context, since the

the idea is to exclude tying from the scope of the thesis to have a better focus, for the evaluation of tying agreements typically involve more complicated relation between two products and respective markets.

[16] Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd rev. edn, Sweet & Maxwell 2010) 210.

[17] J E Lopatka and W H Page, Economic Authority and the Limits of Expertise in Antitrust Cases (2005) 90 Cornell LR 617, 694-99.

[18] Van den Bergh (n 3) 34-38.

Commission created positions for economists,[19] their cooperation with lawyers can be expected. In contrast, the regard to economic expertise of the Commission is one of the reasons why EU courts have confined the scope of review concerning its assessment of complex economic matters.[20] In the U.S., despite that more favorable environment than Europe has nourished economic analysis of law,[21] similar limitation in interdisciplinary capabilities for judges are still present in the antitrust field.[22] Therefore, there is an institutional common background against which the comparison would be made.[23]

Related to the limitation of resources are the decisional norms concerning how the courts deal with expertise and serve as the interface between law and facts, and between law and economics. In the U.S., judicial procedure is mainly of adversarial character, where the courts determine the applicability and scope where the expert testimony has evidential power under the *Daubert* doctrine.[24] And in EU competition law most case law has been produced during review of decisions by competition authorities, to which the courts shall recognize margin of appreciation and establish whether evidence contains all the information which must be taken into account and whether it is capable of substantiating the conclusions drawn from it.[25] As such, the review of evidence and the accompanying economic assessments in respective judicial system is worth the research since it is the ultimate examiner and interpreter ('gatekeeper' in the phrase of Lopatka and Page) of the highly technical economic evidence,[26] based on which the relevant case-specific facts are determined and economic evaluations are made. In the context of EU competition law, based on economic evidence, relevant factual factors to the case are determined and the assessment of the facts underlying alleged economic analysis are reviewed to tell whether 'manifest error of assessment' is present in 'complex economic appraisals' conducted by the competition authority.[27] Such review is crucial for ascertaining assessments of the anticompetitive effects and accompanying efficiency improvements, which also involve choices between competing economic theories

[19] Roger Van den Bergh and Peter D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2nd edn, Sweet & Maxwell 2006) 1.
[20] David Bailey, 'Scope of Judicial Review under Article 81 EC' (2004) 41 CMLR 1327, 1335-36.
[21] K G Dau-Schmidt and C L Brun, 'Lost in Translation: The Economic Analysis of Law in the United States and Europe'(2006) 44 Colum J Transnat'l L 602, 605-10.
[22] Jonathan Klick, 'The Value of Training in Quantitative Methods for Judges' in Mitja and Vandenberghe (eds.), *Economic Evidence in EU Competition Law* (Intersentia 2016) 43-45,.
[23] Throughout the comparison in this thesis, account will be taken on the argumentation and analysis made by the court, with that done by the parties considered only if it is presented in the judgments.
[24] Daubert v. Merrell Dow Pharmaceuticals, Inc. ,509 U.S. 579 (1993).
[25] Case C-12/03 P, Commission v Tetra Laval [2005] ECR I-987.
[26] Lopatka and Page (n 17) 621; Andriani Kalintiri, 'What's in a Name? The Marginal Standard of Review of "complex Economic Assessments" in EU Competition Enforcement' (2016) 53 CMLR 1283, 1309-11.
[27] Kalintiri, ibid 1299-1302.

or models to characterize the disputed agreements. Although whether and how the procedural differences between the U.S. and EU courts influence their economic assessments deserves more research than the theme of this thesis can cover, what matters for the present research is that courts of both countries ultimately adopt and apply certain version of economic theory to make the substantive decision. Thus, comparison of review across the Atlantic Ocean should be able to shed light on how the more economic approach has impacted the judiciary, which ultimately decides on the correctness of economic analysis and hence the application of competition law.

Another trade-off to be made on the adoption of economics into law is concerning the cost in terms of legal certainty demanded by the case-by-case nature of the economic methodology. In the field of vertical restraints, economic analysis is justified by the need to assess the inherent efficiency possibly achieved by vertical coordination in production and/or distribution, where a right balance needs to be stricken against potential anti-competitive effects. The doctrinal evolution of U.S. case law on vertical restraints –from per-se illegal to rule of reason– may be able to provide a comparative lesson for the EU as U.S. has taken the journey earlier and farther.[28] Ideally, the comparative analysis should head for improvement of legal argumentation to justify the economics within the decisions, through which loss of ex-ante predictability may be compensated by ex-post social acceptability and scientific reliability.[29]

Among the categories of vertical agreements, single branding, also known as exclusive dealing in the U.S. context, is chosen as the object of comparison. Chapter 2 will provide a descriptive analysis on the EU and U.S. case law concerning single branding and exclusive dealing, respectively, including the structure of the legal framework, development of the case law, and important cases and doctrines.

The comparative study can then unfold to demonstrate the similarities and differences between the relevant analysis in the case law of EU and U.S in Chapter 3. Account will be taken of tests and doctrines used in assessing effects of vertical restraints on competition and efficiency, and whether the courts have molded different economic perspectives into them. More specific and important to the objectives of this thesis is the inquiry how the doctrines and tests serving similar functions differ and how differently the courts approach the determining economic factors, such as entry barrier and foreclosure of the market. Once it is demonstrated that the U.S. approach is more aligned to economic reasoning, this

[28] Similar concern was expressed in Colino (n 13) 11-12.
[29] See Lopatka and Page (n 17) 621.

thesis would take it as an opportunity to seek improvements to the EU practice provided that it suits the EU legal context. As conclusion, suggestions shall be made for the EU on both the analysis of effects restrictions and development of a more economic approach.

2. EU and U.S. case law on assessment of single branding/exclusive dealing

2.1 Comparison of the structures of applicable rules

To begin description of case law in EU and U.S. respectively, a brief comparison of the structure of the rules applicable for single branding/exclusive dealing may demonstrate the background against which the courts deal with the alleged infringements. In the context of U.S., the term 'exclusive dealing' is much more used than single branding, and is hence used with the U.S. context in mind hereinafter.

As far as exclusive dealing is concerned, U.S. has a more complicated system of provisions and vaguer wording in the applicable statutes than the EU does in the Treaties. Section 1 of The Sherman Antitrust Act[30] of 1890 addresses bilateral anti-competitive agreements such as those related to exclusive dealing.[31] Section 2 of the same Act may also apply to exclusive dealing conducts, unilateral or bilateral, where a situation of 'monopolization' happens.[32]

If the agreements concern lease or sale of goods, Section 3 of the Clayton Act[33] could also be invoked where an exclusive dealing conduct may 'substantially lessen competition or tend to create a monopoly.' The use of discounts or rebates is explicitly mentioned as an example in the text.[34]

In addition, Section 5 of the Federal Trade Commission Act[35] proscribes 'unfair methods of competition in or affecting commerce', which, in the practice of the Fair Trade Commission, include Sherman Act offenses and are applied to exclusive dealing arrangements on the same principles as those applied in Sherman Act and Clayton Act cases.[36] In the case law, the content of requirements to prove anti-competitiveness is also the same whether it is Section 3 of the

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[30] 15 U.S.C. §§ 1-7.

[31] The related part of the text reads: 'Every contract, combination in the form of trust or otherwise, or conspiracy, **in restraint of trade or commerce** among the several States, or with foreign nations, is declared to be illegal.' (emphasis added)

[32] The related part of the text reads: 'Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize ...shall be deemed guilty of a felony'.

[33] 15 U.S.C. § 12-27.

[34] The related part of the text reads: 'It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale … or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods...of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' (emphasis added)

[35] 15 U.S.C. §§ 41-58.

[36] Ernest Gellhorn, William Kovacic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell* (5th edn,Thomson/West 2004) 37; Herbert Hovenkamp and Phillip E Areeda, *Fundamentals of Antitrust Law* (3rd edn, Aspen 2004) §18-20.

Clayton Act or Section 5 of the Federal Trade Commission Act to be applied[37]

Paralleling the debate in the EU on the purpose of competition law, there has been scholarly disputes on Congressional intent in the Sherman Act.[38] A major difference across the ocean is that the Sherman Act imposes imprisonments on infringements in addition to fines. After the Clayton Act was passed as a response of Congressional perception that the Sherman Act had been interpreted too narrowly, the Supreme Court began to interpret the Sherman Act more aggressively.[39] The case law is divided as to whether the Clayton Act introduced more relaxed criteria for infringements than the Sherman Act, although there seems not much rationale for such difference.[40]This thesis will not pursue in more depth on this issue as it is more relevant in the domestic context of U.S. antitrust law.

After all, statutes mentioned above all contain open-textured general operative terms, such as 'restraint of trade or commerce' in Section 1 of the Sherman Act, which recognize the existing common law and entrust the federal courts with their central role to interpret the rules so as to elaborate the evolution of the doctrines over changing industrial circumstances,[41] such as the rule of reason analysis gradually developed by Supreme Court.

In contrast, the EU counterpart of Section 1 of the Sherman Act, Art. 101 TFEU, introduced analysis of (vertical) agreements through the 'bifurcated structure' of Art. 101(1) and (3).[42] In particular, EU case law has elaborated the dichotomy of object and effect analysis in Art. 101(1), which characterizes features distinct from the U.S. rule of reason analysis and substantiate the approaches to be described in the following part of this chapter and compared in the next one.

The EU counterpart of Section 2 of the Sherman Act, Art. 102 TFEU, deals with abusive conduct of a dominant undertaking. Like the ban on monopolization prescribed in Section 2 of the Sherman Act, the concept of 'abuse' as of Art. 102 TFEU does not preclude a unilateral conduct or an agreement. However, a subtle difference is that the application of Art. 102 TFEU requires dominance, while Section 2 of the Sherman Act can reach any undertaking whose conduct has the effect of 'monopolization.'

The structures of the Sherman Act and TFEU are largely similar and simple as to their application to single branding/exclusive dealing conducts. Nevertheless, it

[37] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (2nd edn, Hart 2011) 513.
[38] Gellhorn et al. (n 36) 37.
[39] Hovenkamp and Areeda (n 36) §18-19.
[40] More often than not, the federal courts are affirmative toward this question. See Hovenkamp and Areeda (n 36) §18-18&19.
[41] Gellhorn et al. (n 36) 39-40.
[42] Alison Jones, 'Analysis of Agreements Under U.S. and EC Antitrust Law—convergence or Divergence?' (2016) 51 The Antitrust Bulletin 691, 740.

is notable that Section 2 of the Sherman Act and Section 5 of the Clayton Act cover, respectively, conducts that are attempted to monopolize and that threaten to create a monopoly, while such conducts if not taken by a dominant undertaking would be tackled by Article 101 TFEU in EU competition law. This fact has to be considered together with the U.S. case law that in the early times began the application of the Sherman Act to exclusive dealing conducts with monopolization cases.[43] Subsequently, as can be seen later in this chapter, the threshold of market share covered by exclusive dealing arrangements was raised so that the majority of U.S. cases researched in this thesis involve dominant undertakings. In contrast, single branding arrangements, if conducted by dominant undertakings in the EU, would come under concurrent application of Article 101 and 102 TFEU,[44] and those by non-dominant undertakings merely under Article 101 TFEU. In view of such difference, the objects of comparison would not be directed by structures of the rules but by economic substance. For example, economic assessments concerning conducts by dominant undertakings could be compared with similar U.S. cases regardless of the legal provision in the TFEU under which they are performed. Due regard, then, should be paid to the legal framework after some insights are gained and attempts are made to improve reasoning in the EU context.

[43] Hovenkamp and Areeda (n 36) §18-14.

[44] See Case T-65/98, *Van den Bergh Foods Ltd v Commission of the European Communities* [1998] ECR II-04653, which will be analyzed in depth in later chapters.

2.2 EU case law on assessment of single branding

2.2.1 Overview and development of the effects analysis in the case law

This subsection demonstrates and analyzes the case law forming and governing the ways to assess agreements containing single branding clauses under Art. 101 TFEU. As to application of Art. 102 TFEU, the case law on single branding has been formalistic until recently, which will be fully analyzed in subsection 2.2.2.2.

In the early case law of the ECJ, contrast has been made between *Consten and Grundig*[45] and *STM*[46] on the need to take account of the effects of an agreement, depending on whether an exclusive distribution agreement had granted absolute territorial protection.[47] The Court articulated a list of factors to be considered in *STM*, including the nature and quantity of the products covered by the agreement, the position and importance of parties in their respective markets, and the opportunities allowed for other competitors.[48]

The analysis in *STM* has been followed by a series of cases, including the *Delimitis*[49] judgment which is leading in the area of single branding agreement and will be analyzed in detail in the next section. As emphasized in *O2*, which also cited *Delimitis*, the assessments of the contested agreements on their impact on existing and potential competition have to be done in a 'counterfactual' perspective.[50]

It should also be noted that the above-mentioned analysis is meant to examine 'restriction or distortion of competition' under Art. 101(1) TFEU, but not so-called pro-competitive (or redeeming) ones. In other words, the structure of the provision leaves consideration of the latter under the application of Art. 101(3) TFEU so that balancing of pro- and anti-competitive factors is conducted separately from the application of Art. 101(1) TFEU.[51] This constitutes a significant difference between the effects analysis and the rule of reason adopted by the U.S. courts. In general, relevant interpretation can be highlighted by the judgment of the Court of First Instance (CFI, now the General Court):

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[45] Case 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 299.

[46] Case 56/65, *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235.

[47] Jones (n 42) 749.

[48] Case 56/65, *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, 250.

[49] Case C-234/89, *Delimitis v Henninger Bräu AG* [1991] ECR *I-00935.*

[50] Case T-328/03, *O2 (Germany) GmbH & Co. OHG v Commission of the European Communities* [2006] ECR II-01231, para 71.

[51] Althouth there are scholarly debate and inconsistency where ancillary restraints to a main non-restrictive agreement are involved. See Jones (n 42) 774-89.

> It is only in the precise framework of [Article 101(3) of the Treaty] that the pro and anti-competitive aspects of a restriction may be weighed. Article [101(3)] of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article [101(1)] of the Treaty.[52]

Once the application of Art. 101(1) is established and the agreement cannot be exempted by a Block Exemption Regulation, the alleged undertaking may provoke Art. 101(3) for individual exemption. There has not been much case law in the context of single branding, but a relevant judgment is *Van den Bergh foods*[53], which will be addressed in the next subsection.

As the U.S. case law analyzed by this thesis does not engage much in the balancing of pro- and anti-competitive factors, no comparative study could be conducted on this field. However, concerning the first condition of Art. 101(3) TFEU, 'an improvement in the production or distribution of goods or in technical or economic progress', there has been scholarly debates and inconsistency in Commission decisions on whether it should refer to non-competition factors, namely those related to general public or social policies[54]. The EU case law, however, has taken a broader view to consider, for example, employment as improvement of general conditions of production under this provision[55]. More fundamentally, the CFI once held that the Commission is entitled to take public interest into consideration of granting exemption under Art. 101(3) TFEU.[56] Such doctrine of individual justification is contrary to the position adopted by the Commission in its *Guidelines*[57]. When it comes to U.S. case law, it can be noted here that in the *Tampa* case, as analyzed later, public interest was also been taken as a factor that may justify a conduct restricting competition.

2.2.2 Analysis of major cases and doctrines on single branding

As single branding is a vertical restraint which induces the downstream undertaking, or the retailer, to buy (almost) exclusively from the upstream one, or the wholesaler, its nature does not limit the conduct to be undertaken by a dominant firm or an oligopolist. The anti-competitiveness of the conduct is the harm of foreclosure to the market, which can only be done in certain types of market structure, more often than not by undertakings with some degree of

[52] Case T-112/99, *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission of the European Communities* [2001] ECR II-02459, para 74.
[53] Case T-65/98, *Van den Bergh Foods Ltd v Commission of the European Communities* [1998] ECR II-04653.
[54] See generally Richard Whish and David Bailey, *Competition Law* (8th edn, OUP 2015) 165-69.
[55] Case T-528, 542, 543, 546/93, *Métropole Télévision v Commission* [1996]ECR II-00649, para 43.
[56] ibid para 118.
[57] European Commission, 'Guidelines on the application of Article 101(3) TFEU' OJ [2004] C 101, para 42.

market power operating in a market characterized by barriers to entry. Thus, the cases studied in this section may invoke Art. 101 or 102 TFEU, or both, like in *Van den Bergh foods.* The principal aim is to find out how the Courts assess the contested behaviors and whether a consistent theory of harm has been formulated.

2.2.2.1 Art. 101 TFEU: The *Delimitis* Test

The EU case law on single branding has been built on the test proposed by the *Delimitis* judgment, and this subsection will introduce this line of cases. In *Delimitis*, a brewer let a public house to a natural person, Delimitis, in an agreement, by which Delimitis was obliged to obtain a set minimum of beer and soft drinks from the brewer or its subsidiaries. In a preliminary reference case, the Court of Justice was asked to assess the compatibility of the agreement with Art. 101 TFEU.

The Court, after recognizing the mutual interest inherent in the clauses of the agreement which facilitate cooperation between the supplier and reseller to organize production and distribution effectively, deemed it necessary to ascertain whether the agreement has anti-competitive effects. To do so, the effects of the agreement need to be assessed in combination with those of similar agreements existing on the same market. The aim is to ascertain the existence of possible cumulative foreclosure effects.[58]

As the relevant market was defined to consist of public houses and restaurants at national level in particular, the effects of the network of similar contracts that tie points of sale to national producers were examined in terms of factors pertaining to the economic and legal context, in particular those relating to opportunities for access to the market.[59]

The Court made a nuanced analysis on the access to the relevant market for a new competitor. When the network of the contracts constitute cumulative effects that denies access to the relevant market, the individual contracts making a appreciable contribution to the status quo should be responsible and fall under prohibition under Art. [101(1)] TFEU.[60] Such analysis required consideration of various elements including: (1) the market position of contracting parties and the proportion of outlets tied to the producer(s);[61] (2) the duration of the contract, which, when longer compared to the average in the relevant market, would cause significant foreclosure even if the market share held by the contracting party is

[58] Case C-234/89, *Delimitis v Henninger Bräu AG* [1991] ECR I-00935, paras 10-14.
[59] Ibid, paras 15-20.
[60] Ibid para 27.
[61] Ibid para 25.

small;[62] (3) other factors related to entry barriers: the possibilities of a new competitor penetrating the existing contracts (by, e.g., acquiring a brewery, opening new public houses, or making new contracts with present wholesalers), legal rules and agreements on acquisition of companies and establishment of outlets, the minimum number of outlets for the economic operation of a distribution system, the degree of saturation of the market and customer fidelity to existing brands.[63]

Delimitis was followed by several cases filed in the CFI, now the General Court. In *Roberts v. Commission*[64], at issue was the definition of the relevant market and accordingly the market share, which would be the determinant of contribution of the network of contracts concerning exclusive purchasing obligation concluded by Greene King, a brewer, to foreclosure of the market. The CFI affirmed the Commission's submission that the market share of Greene King was less than 2% in terms of the number of establishments, and therefore negligible.[65] In turn, the CFI inspected the normal duration of the agreements concluded by Greene King, 9 years, which were not manifestly excessive compared to the practice in the market, where the majority may extend to 20 years.[66] It continued to hold that establishments which were owned and in a sense 'locked-in' by Greene King accounted for only 0.7% of the market, which is too small to be considered as contributing to foreclosure of the market.[67] It could be noted that the CFI further clarified the relation between market position and duration of the contract: the market share of less than 1% was so small that there would be no occasion to consider whether the undertaking contributed significantly to foreclosure of the market.[68] A related argument made by the CFI is to infer a less significant contribution of the contract to foreclosure from the fact that the average amount of the loan provided by Greene King as an incentive for the contract was not so large as to be difficult to obtain in the market of commercial loan and induce more adherence of the public houses.[69]

Neste[70], a preliminary ruling case on the applicability of then Art. 85(1) of the EC Treaty to a contract between a reseller (service station) and supplier of motor fuels (Neste), applied the *Delimitis* test. The referred question was concerning an

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[62] Ibid para 26.
[63] Ibid paras 21-22.
[64] Case T-25/99, *Colin Arthur Roberts and Valérie Ann Roberts v Commission of the European Communities* [2001] ECR II-01881.
[65] Ibid para 69.
[66] Ibid paras 76-80.
[67] Ibid paras 82-85.
[68] Ibid para 85.
[69] Ibid para 69.
[70] Case C-214/99, *Neste Markkinointi Oy v Yötuuli Ky and Others* [2000] ECR I-11121.

the legality of an exclusive agreement which could be terminated by the retailer at any time on one year's notice and represented only a very small proportion of those providing for such obligation concluded by the supplier. Meanwhile, the majority of exclusive agreements in the relevant market have fixed duration and the agreements as a whole had a significant influence on the partitioning of the market.[71] It may be noted that a large number of exclusive purchasing agreements concluded by *Neste* were exempted under Regulation No. 1984/83 on the condition that the supplier allows the reseller to lease or through other ways operate the service station and imposes the exclusive obligation for the period of operation. The Court recognized the fact that only one brand of motor fuels is sold in a particular service station and that such fact induces the duration of the underlying obligation to be a more decisive factor in market-sealing effect than the exclusivity clause, which is one respect where the assessment of the agreements is significantly different from those relating to beer or ice cream.[72] Besides, the Court upheld an assessment distinguishing various categories of contracts concluded by a particular supplier in order to limit the number of cases where the contracts are declared void.[73]

Another field where the doctrine of *Delimitis* has been applied more sophisticatedly is the impulse ice-cream market. In *Langnese*[74], a producer of ice cream (Langnese) commanding a market share of 45%, concluded with retailers in Germany agreements which included exclusive purchasing obligation and prohibition of competition. The Commission adopted a decision which deemed the agreements as infringing the then Art. 85(1) of the EEC treaty and refused exemption under Art. 85(3). Applying the *Delimitis* test, the CFI upheld the decision of the Commission, by firstly finding that Langnese held a strong position in the relevant market with more than 15% sales outlet tied to it.[75] In determination of the cumulative effects of the network of similar agreements, the CFI considered the percentage of outlets tied to the other main ice-cream producer in Germany, which was more than 10%.[76] Account was also taken, as the other aspects of the economic and legal contexts in which the agreements operate, on the fragmentation of demand of the retailers, the popularity of the product brands of Langnese, the use of other measures such as the lending of freezer cabinets in which the retailers were obliged to store products of Langnese and rebates for observing the exclusivity arrangement, and the effective duration of

[71] Ibid para 19.
[72] Ibid paras 30-32.
[73] Ibid paras 37-38.
[74] Case T-7/93 *Langnese Iglo GmbH v Commission of the European Communities*, [1995] ECR II-01533.
[75] Ibid paras 96-97.
[76] Ibid para 104.

the contested agreements being around two-and-a-half years.[77]

Van den Bergh Foods continued the doctrine in a case where the accused undertaking (HB) infringed both the Art. 85 and 86 of the EEC treaty. The contested exclusivity measure, a noted difference of the case from the agreements in other cases, is the provision of freezer cabinets, free of charge or at a nominal rent, on the condition that they are only used for its own products (HB ice-creams). Such measure had been generally adopted by manufacturers and distributors of ice creams, and does not preclude retailers from selling products of other brands.[78] However, the limited space in the retailer shops, among other practical constraints, in effect tied the outlets to the manufacturers. In particular, the CFI derived from statistical data contained in a couple of surveys that HB enjoyed an 89% share of the relevant market (both in volume and in value) and created a de facto tie of 40% of sales outlet to it,[79] and that 83% of the retail shops in Ireland had freezers provided through clauses similar to the contested one, with HB supplying 61% or 64% of the cabinets (according to two surveys respectively).[80]

The CFI specifically noted that the tie of 40% of all sales outlets alone cannot infer with certainty the capability of hindering competition appreciably, the determination of which has also to take into consideration the networks of similar agreements concluded by other suppliers on the relevant market.[81] Other relevant factors include the practical difficulties encountered by retailers to change to or include new brands, the strong recognition of HB brands in the market, and the expense involved in acquiring a stock of freezer cabinets which creates difficulties for small companies occupying specific niches,[82] all of which constituted barriers to entry of the relevant market.

The durations of exclusivity were taken into consideration by the CFI both in *Langnese* and *Van den Bergh Foods.* In *Langnese*, it was only mentioned without reasoning. In *Van den Bergh Foods*, HB offered retailers possibilities of termination on short notice or immediately. The CFI held that such possibility 'in no way precludes the effective enforcement of the exclusivity clause' and 'does not in fact operate to reduce the degree of foreclosure of the relevant market.'[83] It seems that assessment of duration in the ice cream cases plays only a role of 'supplement' in that the flexibility in termination does not save the exclusivity clause from

[77] Ibid paras 107-111.
[78] Case T-65/98, *Van den Bergh Foods Ltd v Commission of the European Communities* [1998] ECR II-04653, para 79.
[79] Ibid paras 90 & 99.
[80] Ibid para 86. To be clear, 44% of sales outlets sell two brands of ice creams, and the average number of cabinets in the outlets is 1.5, according to the surveys presented. Ibid paras 17 & 94.
[81] Ibid paras 108-11.
[82] Ibid paras 111-13.
[83] Ibid para 105.

infringement of the treaty rules. A contrast in such role with other cases can be drawn further in section 3.2.

After establishing the application of Art. 85(1), the CFI refused the exemption under Art. 85(3) in both *Langnese* and *Van den Bergh Foods* with similar arguments, both of which are only about the first condition of the rule, in particular whether the efficiency created in relation to distribution can outweigh the weakening of competition induced by the contested agreements. In the view of the author, this reasoning is not convincing enough. Stating the standard of review for complex evaluations on economic matters, the CFI questioned on the factual evidence presented by the accused undertaking to prove manifest error committed by the Commission. Due to the burden of proof, the CFI upheld the opinion of the Commission that the strong position of the undertaking served as the deciding factor for the exclusivity clause to be unable to enhance competition but constituting a major barrier to entry.[84] However, such arguments did not answer the question itself how the effect of restricting competition outweighs the improvement in distribution, especially in *Van den Bergh Foods* where similar clauses were generally used by the competitors of the dominant undertaking. Resort to dominance of the undertaking is tantamount to applying a per-se rule where a dominant undertaking adopts an exclusivity clause, beside which the CFI merely made restatements of the barriers to entry induced by the clauses, a relevant factor for application of Art. 101(1) TFEU but not explaining why those are not justified by the efficiency created.

Although the burden of proof that is shifted to the defendant has also decreased the chance of the U.S. courts to weigh the pro-competitive effects, in the EU context the formalistic approach as to Art. 101(3) TFEU seems apparent from the above analysis.

2.2.2.2 Art. 102 TFEU

Another issue raised in *Van den Bergh Foods* was about the infringement of Art. 86 EEC Treaty, now Art. 102 TFEU. The CFI affirmed the dominant position of HB in view of the large market share. On the concept of abuse, the CFI cited the case law that prohibits eliminating a competitor by recourse to ‘means other than those based on competition on the merits’[85], and held that the exclusivity clause constituted abuse by preventing retailers from selling products of other brands (or reducing the opportunity to do so) and by preventing competing producers from

[84] Case T-7/93 *Langnese Iglo GmbH v Commission of the European Communities*, [1995] ECR II-01533, para 182; Ibid para 140.
[85] Ibid para 157.

gaining access to the relevant market.[86]

What is more intriguing, despite recognizing that the contested practice constituted a standard practice on the relevant market, the CFI argued that the same conduct which 'contributes to an improvement in production or distribution of goods and which has a beneficial effect in a balanced market' may restrict competition if engaged by a dominant undertaking.[87] Though such proposition is not against intuition, more analysis is necessary to ensure that a balance stricken between the pros and cons articulated. The lack in argumentation on balancing gives the prohibition a rather 'per se' tint.

Rebates are also commonly used to achieve single branding by dominant undertakings, which in economic theory have similar effects on customers and the competitive analysis of which is argued to be effectively the same.[88] However, the approach of the EU Courts concerning loyalty rebates before the recent *Intel*[89] case has been commented as per se prohibition[90] . For the purpose of this thesis, it suffices to consider the cases of *Intel* and *Tomra*[91], the latter being the most recent confirmation of its previous case law before change was made in *Intel.* The following discussion will thus focus on, firstly, the contrast between the approaches adopted by the two cases and those analyzed above and, secondly, what is implied by the *Intel* judgment.

Tomra is a dominant supplier of reverse vending machines in the national markets where its market shares had exceeded 70% before 1997 and exceeded 95% after 1997. Tomra concluded agreements with supermarkets that were accused of exclusivity by the Commission. In the review of the ECJ on whether the agreements constituted abuse under Art. 82 EC, on dispute was whether it is required for application of the provision to establish a threshold of foreclosure. The Court, citing *Hoffman-La Roche*[92] and *Michelin I*[93], held:

> ...an undertaking in a dominant position...abuses that position where, without tying the purchasers by a formal obligation, it applies...a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining—**whether the**

[86] Ibid para 160.
[87] Ibid para 159.
[88] Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (3rd rev. edn, Sweet & Maxwell 2010) 249-50
[89] Case C-413/14 P, Intel Corp. v European Commission (ECJ, 6 September 2017).
[90] Alison Jones and Brenda Sufrin, *EU Competition Law : Text, Cases, and Materials* (4th edn, OUP 2010) 450.
[91] Case C-549/10 P, *Tomra Systems ASA and Others v European Commission* EU:C:2012:221.
[92] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* [1979] ECR-00461.
[93] Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR-03461.

> **quantity of its purchases is large or small**—all or most of its requirements from the undertaking in a dominant position...[94] (emphasis added)

In other words, unlike the *Delimitis* test, in determining abuse of dominance by exclusivity agreements, the magnitude of the effects in terms of market share foreclosed is not relevant. Instead, the Court, again citing *Michelin I*, reiterated the case law that prescribed the necessary consideration:

> In that regard, it is necessary to consider all the circumstances, particularly **the criteria and rules governing the grant of the rebate**, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition.[95] (emphasis added)

Accordingly, it is only necessary to determine the effects the rebate tends to have by considering, for example, the criteria and rules governing the grant of the rebate. This clarifies the Court's assertion that 'it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect.'[96]

The foregoing arguments also explained why the Court ruled that the finding of abuse does not require a comparison between costs and effective prices but only considerations such as the incentive, individuality, and retroactivity induced and involved by the rebate system.[97]

Similar issues appear in *Intel*, where the dominant producer of CPUs provided rebates to OEM manufacturers of computers conditional on purchasing of over 80% of their requirements from it. The review of the GC followed the approach of *Tomra*, subjecting the grant of loyalty rebates to the presumption of unlawfulness, where Intel can justify it by showing that it is objectively necessary or that it has counterbalancing efficiency that also benefits consumers.[98] As a corollary, it was deemed unnecessary to conduct the as-efficient-competitor (AEC) test that assesses whether the effective price under the rebate system would foreclose a competitor as efficient as Intel.[99]

The ECJ, however, took a different stance on what and how to assess and

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[94] Case C-549/10 P, *Tomra Systems ASA and Others v European Commission* EU:C:2012:221, para 70.
[95] Ibid para 71.
[96] Ibid para 68.
[97] Ibid paras 73-75.
[98] Case T‑286/09, *Intel Corp. v European Commission* (GC, 12 June 2014) para 94.
[99] Ibid para 151.

remanded the case. While the Court affirmed that exclusive dealing practiced by a dominant undertaking violates Art. 102 TFEU whether it is conducted through exclusive purchasing obligation or rebates,[100] it further clarified that the analysis of the foreclosing capacity of the conduct done by the Commission and the arguments based on evidence submitted by the undertaking must be examined by the GC.[101] In the present case, the AEC test 'played an important role' in such analysis and thus must be reviewed by the GC.

However, to capture what *Intel* implies generally on the law of loyalty rebates needs a closer look. The Court merely required the need to review the AEC test since it 'played an important role' in the analysis of the Commission, despite the emphasis the Commission had placed that the test was not necessary or required for the decision to be made.[102] In contrast, all the analysis the Court required, as it reiterated in paragraph 138 through 141 of the judgment, is to demonstrate the foreclosure capability. In order to do this, the Court specified that:

> In that case, the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, **the share of the market covered by the challenged practice**, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market...[103] (emphasis added)

The last item to inspect, which is on exclusion of 'as efficient competitors', is special to the law of loyalty rebates. It is also the new development in the case law, based on which the Court revoked the judgment of the GC. It is related to the debates in literature whether loyalty rebates should be treated analogically as predatory pricing or exclusive dealing[104], which is beyond the subject of this thesis. In contrast, the first two requirements may be generalized to all types of conducts inducing exclusive dealing, and can be compared to the previous case law and the *Delimitis* test.

It is intriguing that the Court ordered the analysis of 'the share of the market covered by the challenged practice' since it is potentially contradictory to its statement in another paragraph, which cited *Hoffman-La Roche* and coincided

[100] Case C-413/14 P, *Intel Corp. v European Commission* (ECJ, 6 September 2017) paras 137-38.
[101] Ibid paras 138 & 141.
[102] Ibid para 142.
[103] Ibid para 139.
[104] See Damien Geradin, 'Loyalty Rebates After Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche' (2015) 11(3) J of Comp L & Eco 579, 581.

with argument of *Tomra* quoted above, that discounts from a dominant undertaking conditional on the customer's obtaining all or most of its requirements trigger Art. 102 TFEU 'whether the quantity of its purchases be large or small.'[105]

As the line of case law led by *Hoffman-La Roche* is clear and still cited, the rationale for inspecting 'the share of the market covered by the challenged practice' should best be observed in light of what the Court added as rationale for such inspection: to facilitate assessment of whether the system of rebates may be objectively justified in terms of efficiency.[106] In other words, it can be argued that application of Art. 102 TFEU requires analyzing the share of the market covered by a system of rebates because of its relevance for the 'balancing of the favourable and unfavourable effects of the practice in question on competition', which was expressly proposed by the Court.[107] . Such interpretation of the judgment is different from that of some commentators, who argued that 'a substantial share' has to be covered to constitute an infringement,[108] but seems to be a more coherent and consistent understanding of the judgment, especially the remaining citation of *Hoffman-La Roche.*

It follows that the approach adopted by the case law towards application of Art. 102 TFEU to loyalty rebates differs from the *Delimitis* test: the latter requires determination of significant foreclosure to actual or potential competitors, while the former finds infringement of Art. 102 TFEU if a dominant undertaking applies a system of loyalty rebates—whether the quantity of related purchases is large or small.

Even if *Intel* demanded that several factors be inspected in order to determine the application of Art. 102 TFEU, the requirements are still more formalistic than when similar conducts are assessed under Art. 101 TFEU. Whether such approaches are form-based or how to evaluate them could be discussed after comparative analysis with the U.S. is done in the next chapter. It may be noted here that the difference might be explained in part by the stance taken by the EU Courts:

> ...a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market...That is why

[105] Case C-413/14 P, *Intel Corp. v European Commission* (ECJ, 6 September 2017) para 137.
[106] Ibid para 140.
[107] Ibid.
[108] Geradin (n 104) 582.

Article 102 TFEU prohibits a dominant undertaking from...by using methods other than those that are part of competition on the merits.[109]

Such ‘special responsibility’ is one of the reasons why the GC rejected the approach of *Delimitis* being adopted in *Intel.* However, the approach adopted by the ECJ can only be analogized to that of restriction by object analysis under Art. 101 TFEU.[110] The difference in stances of the ECJ taken in single branding cases under Art. 101 and 102 TFEU is thus perceivable.

Lastly, as to objective justification, in *Tomra* and *Intel* the undertakings failed to submit arguments to be considered in detail by the courts.[111]

2.2.3 Framework and elements of the effects analysis

The assessments of the EU courts on single branding agreements focus on three elements: **market shares of the concluding undertakings, the duration of the agreements, and barriers to entry which depends on different factors in different contexts of the relevant markets.** What deserves more discussion is the relations between and the significance of the three elements in the framework of assessments, which differs to some extent concerning conducts made by a dominant undertaking and a non-dominant one.

As far as Art. 101 TFEU is concerned, it is clear that there is a threshold for the market share of the wholesaler to be met before the compatibility of a single branding agreement with EU competition law comes into issue. It is, however, not so about how many outlets the agreement has to tie and how long it has to last to constitute an infringement. As *Delimitis* held that cumulative coverage is critical in the determination of foreclosure, there has still been no particular threshold or standard for size of coverage. Rather, *Delimitis* seemed to note a potential trade-off between the tolerance of coverage and that of duration in excess of the average in the relevant market. Subsequent cases continued to consider the significance of duration, with some like *Neste* regarding it critical and some like *Van den Bergh Foods* holding illegal the readily terminable agreements. It follows that whether duration affects foreclosure of the markets depends on different contexts of the relevant markets. In particular, when the level of entry barrier is high, the significance of duration diminishes (see *Van den Bergh Foods*).

In a nutshell, when the market share of certain undertaking exceeds the

[109] Case C-413/14 P, *Intel Corp. v European Commission* (ECJ, 6 September 2017) paras 135-36.
[110] Pablo Ibáñez Colomo, ‘The future of Article 102 TFEU after Intel’ (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125468> accessed 14 May 2018.
[111] Case C-549/10 P, *Tomra Systems ASA and Others v European Commission* EU:C:2012:221, para 75; Case T-286/09, *Intel Corp. v European Commission* (GC, 12 June 2014) para 94.

threshold, implying it being a significant participant in the network, the cumulated effect of the exclusivity clauses turns out to be the critical factor to be considered. And the economic and legal contexts of relevant markets, from which entry barriers should be teased out, are crucial in the assessments, where it is to be seen whether the clauses, including those about duration, would cause foreclosure of the market.

In contrast, the assessment of the EU courts seems to adopt a 'simpler' and more formalistic framework when the conducts are made by a dominant undertaking. The size of (individual or cumulative) coverage is not considered to be a critical factor. Neither is barrier to entry, which is sometimes embedded in the determination of dominance, for example, where there is part of the market subject to 'must stock item' offered by the dominant undertaking.

Generally, the approach is close to a per se standard where the dominant undertaking which engages in exclusionary conducts is 'using methods other than those that are part of competition on the merits' and thus breaching its 'special responsibility.'[112] It follows that necessary examination is limited to the contents rather than effects of the contested arrangements. However, elements like relative market positions and coverage of exclusivity measures will begin to play a role in balancing the anti- and pro-competitive effects, as the ECJ ruling in *Intel* requires.

[112] Case C-413/14 P, *Intel Corp. v European Commission* (ECJ, 6 September 2017) paras 135-36.

2.3 U.S. case law on assessment of exclusive dealing

2.3.1 Development of the case law

The English common law had treated exclusive dealing as an ordinary form of competition, and most of the courts in U.S. between 1890 and 1914 found it lawful except for a few cases where a monopoly was actually created.[113] After the enactment of the Clayton Act in response to a Supreme Court decision approving a tying arrangement, the judicial practice took a firmer stance against exclusive dealing whenever it applied the Clayton or the Sherman Act.[114] However, as tying conducts could be viewed and were treated as exclusive dealing as in *Jefferson Parish*[115] (but the converse is not always true), the U.S. case law had adopted a more tolerant attitude toward exclusive dealing than tying conducts.[116]

Standard Stations –a seminal case that will be explained below– is a typical example of the case law in the early times, and after *Tampa* –another foundational decision– the judicial practice, mostly the federal appellate courts, has been forming the content of the rule of reason analysis, leading to non-hostile treatment in general.

As the case law and legislation that govern exclusive dealing conducts have been distinct from other types of vertical restraints, the *Tampa* judgment required rule of reason analysis before the same was done by *Sylvania*[117], a case on territorial restriction applied by a manufacturer to its retailers, for all types of vertical restraints other than resale price maintenance. As *Sylvania* expressly endorsed the use of modern economics in antitrust law, it did not offer further instructive contents of the analysis, leaving the lower courts with chances to diverge and explore on a more comprehensive framework of assessment.[118] For resale price maintenance measures, the Supreme Court finally also required rule of reason analysis in *Leegin*.[119]

2.3.2 Analysis of major cases and doctrines on exclusive dealing

2.3.2.1 Early cases

In *Standard Stations*[120], Standard Oil was the largest seller of gasoline in

[113] Hovenkamp and Areeda (n 36) §18-14.
[114] Hovenkamp and Areeda (n 36) §18-15 & §18-19.
[115] Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).
[116] Andrew I Gavil, William E Kovacic, and Jonathan B Baker, *Antitrust law in perspective : cases, concepts, and problems in competition policy* (2nd edn, Thomson/West 2008) 823-25.
[117] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
[118] Gellhorn et al. (n 36) 334-37.
[119] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
[120] Stand. Oil Co. of California v. U.S., 337 U.S. 293 (1949).

Western U.S., which had a market share of 23% in terms of total taxable quantity of fuel sold in 1946: 6.8% conducted by its own service stations, 6.7% through exclusive dealing contracts with independent service stations, and the remainder to industrial users. As to the number of stations, 16% (5,937) of retail gasoline outlets had written contracts with Standard Oil, and 2% (742) had oral ones. Other competitors, among which six leading ones gained 42.5% of market share, employed similar contracts, with 1.6% of retail outlets selling gasoline from more than one supplier.

The issue in the case is the interpretation of sec. 3 of the Clayton Act in how to prove that exclusive dealing contracts may 'substantially lessen competition.' The district court took an approach under which exclusivity by itself lessens competition and the only requirement is to prove that a substantial portion of commerce is affected by the contracts (quantitative substantiality). The underlying reasoning was that the contracts denied opportunity for outside retailers and competing suppliers to make deals.[121] The alternative is to demonstrate that competition has diminished or will probably diminish. Such approach was considered but not adopted by the Supreme Court, which affirmed the general advantage of requirement contracts. The Court, taking as given the market structure and Standard's competitive position that remained during the use of the requirement contracts, held that the effect of the contracts 'has been to enable the established suppliers individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market' and that such result would render unimportant the efficiency created by the contracts.[122]

The Court recognized that the evidence is inconclusive concerning whether competitive activities had actually declined but that 'Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of [sec. 3 of the Clayton Act] to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity.'

As a judgment in the early times, *Standard Stations* used an idea close to cumulative foreclosure as the key factor in determining that the contested contracts 'substantially lessen competition', where potential effect on a 6.7% share of the retail market sufficed to trigger sec. 3 of the Clayton Act. Cumulative foreclosure played a clearer role in *Motion Picture Advertising*, where the Court determined foreclosure by summing market shares of the major four undertakings.[123] In addition, there seemed no clear argumentation about rule of

[121] *Id.* at 299.
[122] *Id.* at 310.
[123] Fed. Trade Commn. v. Mot. Picture Advert. Serv. Co., 344 U.S. 392 (1953), 396.

reason, whereas consideration in the judgment placed more weight on removal of restraints upon competition than on the efficiency and reduction of costs induced by the contested contracts.

2.3.2.2 Toward rule of reason analysis

While it is not clear from the *Tampa*[124] judgment itself, the case has been read as adoption of a general rule of reason for exclusive dealing agreements,[125] with a paragraph frequently cited:

> To determine substantiality in a given case, it is necessary to weigh **the probable effect of the contract** on the relevant area of effective competition, taking into account the **relative strength of the parties**, **the proportionate volume of commerce involved** in relation to the total volume of commerce in the relevant market area, and **the probable immediate and future effects** which pre-emption of that share of the market might have on effective competition therein.[126] (emphasis added)

Tampa involved an issue on legality under sec. 3 of the Clayton Act of a requirement contract, according to which Tampa Electric, a public utility producing and selling electricity was obliged to purchase all the coal requirement for its new units at the Gannon Station. The purchase order contract was deemed by the Court to involve a maximum of 0.77% of the relevant market for the coal product, for a period of 20 years.[127] As the Court determined, the relevant market where the coal producers effectively competed had some 700 producers.[128]

In evaluation of the effect of the contract on competition, the Court first held that protracted requirement contracts are 'suspect' in the context of antitrust legislation but not 'illegal per se.'[129] Without mentioning again the market share of the market covered by the contested contract, the Court noted the difference of the present case from others, where the exclusive contract was not concluded by a dominant undertaking or adopted by industrial-wide practice.[130] Then it proceeded to examine the economic advantage induced by the contract to buyers and sellers. Quoting the text of *Standard Stations*, the Court affirmed that

[124] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).
[125] Elhauge and Geradin (n 37) 541-42.
[126] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961), 330.
[127] *Id.* at 323 & 334.
[128] *Id.* at 325.
[129] *Id.* at 334.
[130] *Id.* at 335.

> In the case of the buyer it 'may assure supply,' while on the part of the seller it 'may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and * * * offer the possibility of a predictable market.'[131]

Another concern of the Court was the length of the contract, which was outweighed by the securing of public interest in terms of steady and ample supply of fuel and less burdensome rate for consumers. As the Court said, such 'particularized considerations of the parties' operations are not irrelevant.'[132]

To some extents a rule of reason was conducted by the Court in *Tampa*, even if the affected share of the market was as small as 0.77%. The Court did not rule in particular on whether a foreclosure to 0.77% of the market is 'substantial', but instead examined various relevant factors, like how strong existing competition in the markets was and whether use of exclusive dealing was common practice in the relevant market, to assess 'probable effect of contract on relevant area of effective competition.'[133]

Although subsequent development of case law did not carry a crystal clear message, *Tampa* has been leading a series of judgments which conducts rule of reason analysis where legality of exclusive dealing agreements comes at issue. Five years after *Tampa*, *FTC v. Brown Shoe Co.*[134], a non-leading case, upheld an FTC decision based on no significant evidence to condemn an exclusive dealing agreement which was argued to foreclose less than 1 percent of the relevant market. In *Jefferson Parish*, the rule of reason analysis was explicitly required by the Court as far as exclusive dealing arrangements are concerned. Specifically:

> In determining whether an exclusive-dealing contract is unreasonable, the proper focus is on **the structure of the market for the products or services in question**—the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others. Exclusive dealing is an unreasonable restraint on trade **only when** a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.[135](emphasis added)

Therefore, it could be argued that the size of the market covered by the exclusive deal is not the only relevant factor for the analysis, and that 'the

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131 *Id.*
132 *Id.* at 335-36.
133 *Id.* at 335.
134 FTC v Brown Shoe Co., Inc., 384 U.S. 316 (1966).
135 Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), 46.

structure of the market for the products or services in question' should be considered in order to determine whether a 'significant' fraction of buyers or sellers are denied access to the market. In other words, analysis of market structure and hence the foreclosure effects of the agreements are crucial, to which attention should be paid in the following observation of more recent case law.

2.3.2.3 The present approach

As commentators have noted, a particular 'threshold' of market share cannot be sorted out from the case law of lower courts following *Tampa* and *Sylvania*.[136] However, tolerance has been afforded by the rule of reason approach towards higher market shares covered by exclusive dealing agreements.[137] As such, it is the goal of this subsection to tease out the rationale underlying recent case law.

Omega Environmental[138] exemplified again how market shares are not decisive in assessment of exclusive dealing agreements. The case involved Gilbarco Inc., one of five manufacturers of petroleum dispensing equipment in the U.S., which sold products both directly to customers and through authorized distributors. Exclusive dealing arrangements were adopted between manufacturers and the approximately 500 distributors. Gilbarco captured roughly 55% of the market as a whole, where some 120 (24% of all) authorized distributors operated to make 70% of its sales, that is, about 38% in terms of the total market share. The standard agreements Gilbarco concluded with distributors had an initial term of one year, which either party could terminate on 60 days notice without cause or penalty.[139]

The majority opinion dismissed the arguments that high proportion of distributors and market share covered by the deals had constituted significant foreclosure, for two main reasons. The first is essentially that capability of existing or potential alternative channels of distribution to reach the ultimate consumers relieves the worry that exclusive dealing arrangements may foreclose the relevant market from competition.[140] It was thus noted that all the manufacturers achieved a certain proportion of sales through direct sales, and that there were potential and actual entrants to compete with existing authorized distributors.[141] Furthermore, it was held that antitrust law is protective of the freedom to compete, i.e. 'to sell directly, to develop alternative distributors, or to compete for

[136] Elhauge and Geradin (n 37) 548-49.
[137] Gavil, Kovacic, and Baker (n 116) 828.
[138] Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997).
[139] *Id.* at 1161-62.
[140] *Id.* at 1164.
[141] *Id.* at 1163-64.

the services of the existing distributors'[142]; but not against legitimate competitive advantage enjoyed by the incumbents, such as finances, abilities, and customer relationships of the existing distributors.[143]

The second point put forward by the court was based on the short duration and easy termination of the agreements, which relieved related anticompetitive concern as it would last for no more than 60 days.[144]

There have been new elements added into foregoing reasoning concerning whether and how 'existing or potential alternative channels of distribution' can relieve exclusive dealing arrangements from infringement of antitrust law. In *Microsoft*[145], at issue were the agreements between Microsoft and all leading Internet Access Providers (IAPs) that required exclusive promotion for the IE browser and limited shipment of internet access software using Navigator browser to be under a specific percentage. The D.C. circuit held that the agreements violated Sec. 2 of the Sherman Act, arguing:

> ...a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.[146]

The court determined that the majority of all IAP subscribers was covered by the contested agreements and hence a significant effect in preserving Microsoft's monopoly. On the other hand, it dismissed Microsoft's justification of keeping more developers for the Windows platform as 'to preserve its power in the operation system market.'[147]

It is worth noting that the D.C. circuit affirmed the ruling of the district court on Sec. 2 of the Sherman Act, which was based on the determination that the contested agreements severely restricted Netscape's access to the distribution channels leading 'most efficiently' to access of the browsers market.[148]

In *Microsoft*, alternative methods of distribution, e.g. through free download, were available to Netscape, which appears to be a relief of infringement as held in *Omega Environmental*. Although the D.C. circuit did not expressly comment on or distinguish from *Omega Environmental*, the argument of the district court effectively explained why the treatment in Microsoft was different: the existence of less efficient distribution channels alone cannot save the exclusive dealing

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[142] *Id.* at 1164.
[143] *Id*.
[144] *Id.* at 1165.
[145] U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
[146] *Id.* at 71.
[147] *Id.* at 72.
[148] *Id.* at 71.

arrangement from condemnation.

Another scenario where the efficacy and cost of using alternative channels of distribution became a critical factor of foreclosure effects is the *Dentsply*[149] case. Dentsply is a dominant manufacturer of prefabricated artificial teeth with a market share of 75%—80% on a revenue basis and 67% on a unit basis, and all of its competitors in the market enjoyed market shares of less than 5%. Dentsply concluded supply contracts with its dealers, which exclude their carrying of teeth from competitors and were terminable at will.[150] After examining the anti-competitive effects caused by the contracts, the court held that Sec. 2 of the Sherman Act was violated.

In contrast to the district court decision that resorted to direct sales as alternative channels of distribution, the appellate court based its ruling on the benefits dealers provided to both the manufacturers and the consumers. In addition, direct sales was held as not posing 'a real threat' to the monopoly of Dentsply in view of the 'long-entrenched Dentsply dealer network' and 'minuscule 5% and 3% market shares eked out by direct-selling manufacturers.'[151]

To further determine the secured foreclosure, the appellate court proceeded to refute terminability of the contract to be a counter argument against the efficacy of the contracts. Such refutation, along with distinguishing *Omega Environmental* where decreasing prices and fluctuating market shares were noted, was done by contrasting the sales made by Dentsply with those by its competitors through wooing the dealers, and re-affirming the significant role played by the dealers in distribution.[152]

Two interlinked arguments are worth mentioning in the foregoing determination made by the appellate court. Firstly, the court noted that 'the stagnant, no growth context of the artificial tooth field', as contrasted to 'a dynamic, volatile market like that in *Microsoft*', imposed 'heavy economic pressure' on the dealers and amplified the economic impact of the contested arrangements.[153]

Then the court argued that the dealers had facilitated 'substantially reduced distribution costs' and 'cheap, high volume supply lines'[154] and that such channel of distribution would be tied to the dominant undertaking with the 'all-or-nothing' clause only under when entry barriers exist. Just like metaphor in the treatise of Professor Hovenkamp, which was cited by the court: No new department stores

[149] U.S. v. Dentsply Intern., Inc., 399 F.3d 181 (3d Cir. 2005).
[150] *Id.* at 185-86.
[151] *Id.* at 194.
[152] *Id.* at 195-97.
[153] *Id.* at 197.
[154] *Id.*

would be efficiently set up by entrants to sell bowties so that exclusive dealing arrangements made by the dominant would prevail.[155]

As such, the court established how the grip of a dominant undertaking on the more effective or lower-cost distribution network constituted anticompetitive foreclosure.

A more recent confirmation of the case law, which also revealed the inconsistency of doctrines adopted between circuits of the federal courts is the *McWane*[156] case. The issue tackled by the appellate court is whether the exclusivity conduct of McWane, a supplier of ductile iron pipe fittings, constituted unlawful maintenance of a monopoly. The relevant market in the case was that for fittings produced domestically, where the court deemed McWane to be the monopolist. McWane captured 100% market share from 2006 until 2009, when Star entered the market and became the major competitor. The market share of McWane declined to approximately 95% in 2010 and 90% in 2011.[157]

In the fittings market, products are sold through middleman distributors. In response to the threat of entry by Star, McWane implemented its 'Full Support Program', under which distributors buying products from other suppliers would lose rebates from McWane and be cut off from McWane's supply for up to three months.[158]

McWane contended that its program was nonbinding and short-term and hence should be presumed to be legal.[159] The court noted that caselaw from other circuits supported McWane's view, such as *Omega Environmental* and *Roland*[160]. Nonetheless, it followed *Denstply* and held that the contested arrangements created 'practical effect' to make switching economically unfeasible for distributors. A relevant factor which had also existed in *Denstply* was that direct sale was not viable as an alternative channel for distribution.[161]

The court then applied the doctrine of *Tampa* to analyze the harm to competition done by the contested program. It held that

> …foreclosure is one of several factors…We will also look for **direct evidence** that the challenged conduct has affected price or output, along with other **indirect evidence**, such as the degree of rivals' exclusion, the duration of the exclusive

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155 *Id.* at 196.
156 McWane, Inc. v. F.T.C., 783 F.3d 814 (11th Cir. 2015).
157 *Id.* at 831.
158 *Id.* at 821-22.
159 *Id.* at 834.
160 Roland Mach. Co. v. Dresser Industries, Inc., 749 F.2d 380 (7th Cir. 1984).
161 McWane, Inc. v. F.T.C., 783 F.3d 814 (11th Cir. 2015), 834-36.

deals, and the existence of alternative channels of distribution.[162] (emphasis added)

The condition of substantial foreclosure was easily met since the two largest distributors, which together controlled 50-60% of distribution, and other ones, were deterred from dealing with Star after the announcement of the Program. One complication was that the market share of Star was growing during the same period, but the court held that substantial evidence supported the determination that the growth was slowed.[163]

As to the other evidence that competition had been harmed, the court built basically two arguments. Firstly, the court found McWane raised prices during implementing the program, which reasonably appeared to be a significant contribution to its monopoly power. Secondly, through depriving competitors of efficient ways of distribution, McWane increased the rivals' costs and made Star unable to achieve sales volume necessary to afford a foundry of its own. In other words, McWane's program slowed the growth of its rivals and prevented their development into ones that could constrain the monopoly power.[164]

As to the procompetitive justifications forwarded by McWane, the court dismissed them as unpersuasive. The court cited *Microsoft* to rule that to retain enough sales to afford its foundry does not qualify as a procompetitive justification.[165]

2.3.3 Framework and elements of rule of reason analysis

It is apparent that the case law follows the approach framed by *Tampa* and *Jefferson Parish* in a flexible and adaptable fashion. The whole case law exemplifies how to assess the probable effects of the exclusivity deals, and to this end, the ease with which the targeted parties of the deals can switch to the competitors or entrants in the relevant market.

Throughout the development of the case law, stricter conditions have been added into the necessary consideration for infringements to be determined. As noted in *Eastern Food*, **existing concentration** in the relevant market and **substantial foreclosure** caused by the contested measure are the core elements.[166] Other factors, such as duration and generality of the exclusivity arrangements, have to be analyzed against various market contexts and specific market structure, including barriers to entry.

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[162] *Id.* at 836.
[163] *Id.* at 838-39.
[164] *Id.* at 841.
[165] *Id.* at 842.
[166] E. Food Services, Inc. v. Pontifical Catholic U. Services Ass'n, Inc., 357 F.3d 1 (1st Cir. 2004), 9.

It can be seen that most cases dealt with by the courts, such as *Omega Environmental*, *Microsoft*, *Dentsply*, and *McWane*, involve the dominant undertaking in the market. **Alternative channels of distribution** play a vital role against foreclosure of the market where exclusive dealing arrangements are generally adopted (*Omega Environmental*). Furthermore, the very concept of 'alternatives' must be understood in terms of cost (*Microsoft* and *McWane*) and practical feasibility (*Dentsply* and *McWane*).

Analysis of market structure and related contexts is fundamental for determination of the actual, potential, or future effects of the measures, which is linked to barriers to entry and potential for dealers to switch. It is exemplified by consideration of growth potential of the market and the economic pressure faced by the dealers (*Dentsply*), the strength and dominance of the distributors (*Microsoft*, *Dentsply*, and *McWane*), capital requirements and necessary operation scale (*McWane*).

A recent trend is the reference to whether direct evidence such as change in price or quantity.of the underlying products has supported the determination of harm to competition (*Dentsply* and *McWane*). In contrast, duration of the arrangements is a factor to be considered but often against or within the framework of a complete analysis of practical market dynamics (*Dentsply* and *McWane*).

3. Comparative analysis of U.S. and EU practice

3.1 As a benchmark: The economics of single branding/exclusive dealing

Single branding/exclusive dealing arrangements may cause pro- and anti-competitive effects, which economics helps characterize, analyze and evaluate. This subsection discusses perspectives from economics towards single branding/exclusive dealing as a benchmark to evaluate and compare the case law of EU and U.S.

The major anticompetitive concern here is the exclusion or impairment of the access of competitors to most cost-effective distribution channels (retailers) or most cost-effective input sources (upstream suppliers). And the ultimate results would be higher prices and reduced consumer choices.[167] Besides, search costs of consumers are raised since it is harder to find alternative products that are only accessible from distributors that are not subject to the exclusivity arrangements. Competition and substitution of the products thus becomes more difficult. The extent to which search costs matter depends on, *inter alia*, the relative value of the product, whether the consumers are one-time or repeat buyers, and whether the consumption is final or intermediary.[168]

There are various types of economic benefits created by single branding/exclusive dealing arrangements, which serve as justifications against the anti-competitive effects.[169] While the benefits differ with the economic contexts, the fundamental function is the reduction of transaction costs in relation to vertical coordination and cooperation. In particular, exclusive purchasing can protect the marketing efforts of the manufacturer from exploitation of his rivals acting as free riders.[170] Viewed from relationship between the manufacturer and the dealer, single branding/exclusive dealing encourages and facilitates relationship-specific investments of the manufacturer as to engage in deeper cooperation with the dealer, which may include choices of location, method or technology of production, and advertising.[171] As empirical study demonstrates that exclusive dealing relationships are consistent in making the parties better off and consumers as well,[172] the determination of infringement needs to be

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[167] Gavil, Kovacic, and Baker (n 116) 844.

[168] Mat Hughes, 'The Economic Assessment of Vertical Restraints under UK and EC Competition Law' (2001) 22(10) Eur Comp LR 424, 429; Roger Van den Bergh and Peter D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2nd edn, Sweet & Maxwell 2006) 215.

[169] Gavil, Kovacic, and Baker (n 116) 844.

[170] Van den Bergh (n 168) 217-18.

[171] Elhauge and Geradin (n 37) 519-20.

[172] James C Cooper and others, 'A Comparative Study of United States and European Union Approaches to Vertical Policy' (2005) 13 Geo Mason LR 289, 294.

conducted cautiously.

The existence of considerable transaction costs in the vertical relationships can explain why exclusivity clauses are necessary and better solutions than simply specifying the desired performance to achieve vertical cooperation: the performance is neither easy to specify nor verifiable. Similarly, exclusivity clauses are used instead of sales quotas because specifying a definite quantity to be bought might impose excessive risk on the dealer, as sales volume is prone to economic fluctuation and cannot be precisely forecasted.[173]

In addition to the pros and cons of single branding/exclusive dealing recognized by typical legal practice, different perspectives have been developed in economics. The Chicago School contends that monopoly power cannot be enhanced by exclusionary conducts since the monopoly profit, if any, can be fully obtained through monopolist pricing of the particular product (the single monopoly profit theory).[174] It follows that exclusive dealing measures would not be anticompetitive and could only be motivated by efficiency-enhancing reasons. As the Chicago school tends to propose per se legal rules that relieve exclusive dealing conducts without effective assessments, the Post-Chicago School has been more inspective of specific and complex market conditions to see their competitive implication.[175] As opposed to the more abstract assertion of the Chicago School, the Post-Chicago School is more attentive and realistic as to how exclusivity clauses specifically influence competition in the relevant market. The restrictive assumptions based on which the single monopoly profit theory is built, such as perfect competition in the other market, are relaxed by the Post-Chicagoans.[176] And they argued that exclusivity conducts may be anti-competitive because they tend to raise rivals' costs (RRC), which in turn may facilitate maintenance of prices at a higher level.[177] As a new theory of harm that requires proof by specific market facts and evidence, RRC lessens the reliance of competition law on arguments based on market concentration and on doctrinal reasoning based on legal categories.[178] How the concept of RRC was involved in analysis made by the U.S. and EU courts is to be demonstrated in this chapter.

Thus, it is to be seen in the following comparison how differently the EU and U.S. courts have been inspired by the foregoing economic thoughts.

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[173] Elhauge and Geradin (n 37) 520-21.

[174] Gavil, Kovacic, and Baker (n 116) 846.

[175] See Patrice Bougette, Marc Deschamps, and Frédéric Marty, 'When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law' (2015) 16(2) Enterprise & Society 313, 337-38; Alison Jones and Brenda Sufrin, *EU Competition Law : Text, Cases, and Materials* (4th edn, OUP 2010) 28-29.

[176] Doris Hildebrand, *The Role of Economic Analysis in the EC Competition Rules* (3th edn, Wolters Kluwer 2009) 152.

[177] Gavil, Kovacic, and Baker (n 116) 847; Cooper and others (n 172) 293-94.

[178] Hilderand (n 176) 153.

3.2 Comparison of tests and doctrines serving similar functions

Due to lack in literature on recent comparison between EU and U.S. case law,[179] this section initiates the comparative work with a rough and structural contrast of the reasoning in the leading cases across the Atlantic Ocean.

As a preliminary remark, the term 'foreclosure' has different contextual meaning in EU and U.S. case law. In U.S. case law, foreclosure happens whenever a undertaking engages in exclusive dealing arrangements, which, by definition, serve to 'foreclose' the opportunity of competitors to engage in the underlying business with the committed dealer. 'Foreclosure' itself would not be illegal per se according to the present case law even if caused by a monopolist; it is a starting point of legal analysis. Whether infringement can be established depends on whether such foreclosure lessens competition or induces monopolization. In contrast, the EU case law led by *Delimitis* takes foreclosure as denial of access to the relevant market, an anti-competitive effect that would conclude the application of the Art. 101(1) TFEU.

In short, by foreclosure, the U.S. terminology describes the situation where some part of the market comes under the coverage of certain exclusive dealing arrangements, while the EU practice means the consequential anti-competitive effects induced by similar conducts. The difference in usage of terms is aligned with the mindset behind different approaches adopted that are analyzed as follows.

3.2.1 Non-dominance: The 'cumulative foreclosure' approach vs the 'individual weighing' approach

3.2.1.1 Economic determinants: to check or to weigh

The EU case law of single branding concerning the application of Art. 101 TFEU, as analyzed in the previous chapter, mainly consists of the *Delimitis* case and others based on the framework it built. The counterpart in U.S. case law is *Tampa*, which has been cited as the origin of the rule of reason analysis towards exclusive dealing arrangements. However, *Tampa* had different significance from *Delimitis* in that *Tampa* does not provide a framework of analysis (in the form of a sequential checklist) like *Delimitis*, but the principal goal of it is to weigh the probable effect. Cases following the two judgments have demonstrated stark contrast.

In effect, the entire analytical framework prescribed by *Delimitis* centers on

[179] Many publications including those cited by this thesis involve comparison of a larger scope such as vertical restraints or other type of vertical restraints like RPM. One of recent research on *Delimitis* judgment that included U.S. law is Valentine C Korah, 'The Judgement in *Delimitis* - A Milestone towards a Realistic Assessment of the Effects of an Agreement - or a Damp Squib' (1993) 8 Tulane European & Civil Law Forum 17.

the finding of whether there is foreclosure of the market caused cumulatively by single branding arrangements (cumulative foreclosure), and of whether the said foreclosure is appreciably contributed by certain particular conduct(s). Market position of contracting parties, proportion of tied outlets, duration of the contracts, and other factors influencing barriers to entry serve as parameters for determining the contribution to foreclosure of the relevant market. Although the elements involved in the analysis are similar to U.S. cases following *Tampa*, the line of argument is different.

While the idea to gauge the (cumulative) effect of all single branding agreements existing in the market seems intuitive, the conception of harm to competition in totality should be derived through interaction of **all influencing factors**, or 'the economic and legal contexts' in the phrase of EU case law, instead of through 'cumulative effects' of **all the contracts** and then singling out individual contribution of the effects. The idea of 'cumulative effects' in *Delimitis* is linked to denied access, or 'foreclosure', to the relevant market, which is deemed by ECJ to fall under prohibition of the treaties. Such conception, however, embodies a perspective on competition that focuses on 'destruction of rivals', which had also been assumed by U.S. antitrust policy of the 1970s and earlier but challenged by new economic theories such as Raising Rivals' Cost (RRC) proposed by the post-Chicago school.[180]

The elements proposed by *Delimitis*, as a result, revealed its conception of foreclosure as cumulative effects in a rather confusing way. The major trouble it caused is the way to 'cumulate' the effects is in fact too vague to conceive if not confusing. Specifically, the arguments concerning market position of contracting parties and proportion of tied outlets have been puzzling, as well as those concerning duration of the contracts. Firstly, the question of how to determine the cumulative effects would have to be answered in terms of two markets, wholesale and retail, both of which has its own market shares, degree of concentration, and the proportion which has been involved in similar contracts. As analyzed below, this conundrum had been further complicated by subsequent cases. Secondly, as to the duration of the exclusivity contracts, the ECJ resorted to the average in the relevant market, which seemed logical as instinctively the contract with longer duration would contribute more to the cumulative effects on foreclosure of the market. But the reasoning has no support in economic theory and would confront more practical clauses such as ready terminability and/or automatic consecution. As can be seen in analysis of cases that follow *Delimitis*, the terms of duration have

[180] Herbert Hovenkamp, 'The reckoning of post-Chicago antitrust' in Antonio Cucinotta, Roberto Pardolesi, and Roger J Van den Bergh (eds), *Post-Chicago Developments in Antitrust Law* (Edward Elgar 2002) 16.

been examined as required, but the criterion proposed by *Delimitis* did not facilitate assessments of the agreements in their entirety.

In contrast, the U.S. *Tampa* case dealt with the relevant economic determinants in a different way. Like in *Delimitis*, the Supreme Court took into account all relevant factors such as the market positions of the parties, the long duration of the contested contract, and the fact that the use of such contract was not common practice. The difference is that all the factors were included into a test to weigh the effect on competition, where no single factor has general importance so as to be included in a 'checklist'. As to the 20-year duration of the contract, the Court deemed it to be outweighed by the public interest secured. The direction for analysis provided by *Tampa* is simply to consider relative strength of the parties, proportion of relevant market covered by the exclusivity contracts, and the probable effect on competition caused therein.[181] And subsequent cases take into account various factors not mentioned, following *Tampa*, just in order to weigh the effect of contested conducts on competition.

To be sure, the weighing approach adopted in the U.S. does not exclude certain threshold of market share of the undertaking which concludes the exclusivity agreements for a violation of antitrust law to be established. As a matter of fact, the federal courts have generally required higher market shares while determining harm to competition since *Tampa.* However, there is no particular threshold prevailing among the federal courts, which seems a natural result of the weighing approach applied to diverse economic and legal contexts.

3.2.1.2 Effect on competition: cumulative vs individual

The incapability of the approach taken by *Delimitis* to facilitate objectively operative standards for determining infringement is more apparently demonstrated by *Langnese.* The market share of the producer concluding the single branding agreements (45%), the proportion of sales outlets tied to it (15%), and that of the ones tied to the other main producer (10%), are not self-evident as to determine a significant contribution to foreclosure. Neither is the effective duration of the contested agreements, two-and-a-half year, which was only mentioned in the judgment without any substantial reasoning. As two of the three elements in the *Delimitis* framework did not help produce an answer, the CFI resorted to various other aspects of economic and legal contexts. And the framework seemed not relevant to the assessments as only 'the other aspects' serve to clarify the result of the case.

Analysis on relevant aspects of the economic and legal contexts, such as

[181] See quotation of the case at note 126.

barriers to entry is undoubtedly critical whether the cases arise in the EU or the U.S., which would be detailed in section 3.3. The case to be made clear here is that the significance of the 'cumulative' effects was not clearly expressed in the framework of *Delimitis*, which therefore cannot be a useful guidance for economic assessments of single branding agreements.

To be sure, the approach adopted in *Delimitis* is just one way to evaluate the effects caused by a network of exclusivity arrangements, which may be clearer when we compare *Neste* and *Standard Stations*. Both cases dealt with the contracts between service stations and wholesalers of motor fuels, where use of exclusivity contracts was prevailing practice and constituted significant negative effects on competition as a whole. The tricky part in common is to tell whether the conduct of particular undertaking that was not a dominant or even a major one 'had a significant contribution to foreclosure' or 'substantially lessened competition.'

As market position did not deliver a clear message in *Neste,* the CFI turned to emphasize the durations of the agreements as more decisive. As a result, the agreements which could be terminated at any time on one year's notice were deemed without infringement, as the majority had fixed terms were exempted under Regulation No. 1984/83.

In contrast, the Supreme Court in *Standard Stations* held that the tie of 6.7% of the retail market violated the Clayton Act. The Court in particular recognized that the anti-competitive effect created by Standard Oil may be potential, or dependent on concurrent use by other major wholesalers of similar contracts. Nonetheless, it was unlawful as being a substantial part of the collectively induced barrier to entry.

Cases after *Standard Stations* generally raised the threshold in terms of market share for triggering further analysis so that there is virtually no chance to follow its reasoning on collectively induced barrier to entry. Nonetheless, it is meaningful to note that *Standard Stations* based its judgment on determining infringement by telling individual substantiality of anticompetitive effect. It exemplified the approach of weighing the effect on competition caused by the conducts of individual undertaking, as contrasted to that of *Delimitis* and *Neste,* where a comparison of duration across the exclusivity clauses implies evaluation of their 'relative' contribution to the cumulative anti-competitive effects. Where the duration is examined in the U.S. case law, despite the opinions are diverging, the focus has been on the practical effects induced by each contested arrangement (See section 3.3).

The general idea proposed by *Delimitis* is first to examine the cumulative effects of the network of exclusivity arrangements, and then to tease out the contribution of contested agreements in a 'relative' sense. It follows that comparison across the agreements in the network is relevant, as the *Delimitis* judgment explicitly proposed concerning duration of the agreements. Such approach is also revealed in the tendency of the practice to sum up the proportion of the markets covered by the network of agreements, while it is still unclear how to attribute the (relative) contribution of foreclosure due to different extent of market power enjoyed by the undertakings adopting similar clauses. In contrast, in U.S. case law led by *Tampa* does not pay much attention to cumulative effects but to the substantiality of the effect created by the defendant.

As mentioned in the beginning of this subsection, to base determination of anti-competitiveness on cumulative effects of foreclosure, or denial of access to the market, is aligned to a theory of harm that resorts to 'destruction of rivals', or total isolation of a certain share of the market from competition. Such view of harm to competition turned up to form the approach in the EU that attributes responsibility of undertakings in a more formalistic fashion rather than weighs the anticompetitive effect individually.

3.2.1.3 The turn of EU case law: *Van den Bergh Foods*

Perhaps the interpretation of 'cumulative effect' in *Van den Bergh Foods* is distinct from *Delimitis* and more aligned with the weighing approach: 'to have regard to the economic and legal context in which [an exclusive agreement] operates and in which it might combine with others to have a cumulative effect on competition.'[182] In the case the CFI deemed that HB enjoyed an 89% share of the relevant market and created a de facto tie of 40% of retail outlets to it. Without determining the conduct of HB alone to be constituting a foreclosure of the market, the CFI proceeded to note that 83% of the retail outlets are under similar arrangements, as well as other market contexts such as how the capital requirement related to the provision of freezers at issue became barriers to entry, especially for small companies and those occupying specific niches. Thus, the CFI established the harm to competition through inspection of all the relevant factors in the economic and legal context, from which the 'cumulative effect' results.

The conception of 'cumulative effect' in *Van den Bergh Foods* is different from *Delimitis* and *Neste* in that the infringement of HB is derived from the anticompetitive effect that the disputed conduct caused given the market contexts including other exclusivity arrangements, but not from a comparison of (relative)

[182] Case T-65/98, *Van den Bergh Foods Ltd v Commission of the European Communities* [1998] ECR II-04653, para 109.

contribution to foreclosure. As will be analyzed in subsection 3.2.2, it can also be argued that the theory of harm in *Van den Bergh Foods* is 'raising rivals' cost', instead of 'denied access to market.'

To conclude this subsection, it has been demonstrated that the elements of analysis are similar but approached differently in the 'cumulative foreclosure' approach of *Delimitis* and the 'individual weighing' approach of *Tampa*. The former views infringement as a (relatively) significant contribution to the cumulative effects on foreclosure of the relevant market, and thus tends to compare the conditions of similar single branding arrangements. In contrast, it seems more coherent for the latter to weigh the anti-competitive effect individually with all relevant factors taken into account. The two approaches would differ less if the cumulative effect happens and is inspected through the economic and legal context, as in *Van den Bergh Foods,* where the anti-competitive effect is hardly 'cumulated' by all similar arrangements.

3.2.2 Dominance: trend to closer look at effect on costs of competitors

This subsection compares the case law of EU and U.S. to make two points. Firstly, by contrast of the different analytical approaches adopted by the EU Courts and the U.S. case law, it can be demonstrated that the latter has tackled dominant undertakings with more economics-based reasoning. Secondly, a common trend across the ocean is to be teased out that the courts has been requiring a closer look at anti-competitive effect induced by single branding/exclusive dealing on the costs of competitors or entrants in the relevant market.

A structural difference of the case law of single branding/exclusive dealing across the Atlantic Ocean is that the EU case law applies different tests to cases of Art. 101 and 102 TFEU, which is not the case in the U.S. The EU Courts have imposed 'a special responsibility' on dominant undertakings that outlaws 'using methods other than those that are part of competition on the merits'.[183] Such rhetoric established a stricter standard for conducts of dominant undertakings without resort to a theory that can quantify it or provide a more precise account on how 'special' the responsibilities are. As there seems no rationale related to economics that could be discerned in the reasoning of the EU courts, it should be viewed as a formalistic approach for Art. 102 TFEU cases.

In the U.S., the fundamental thought of the judicial practice can be perfectly presented and contrasted to that of the EU Courts:

[183] Case C-413/14 P, *Intel Corp. v European Commission* (ECJ, 6 September 2017) paras 135-36.

...imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm.[184]

The D.C. circuit in the *Microsoft* case condemned monopolization attempted through exclusive dealing contracts foreclosing a share of the market lower than that usually required to establish violation of Section 1 of the Sherman Act, which established quantitatively different standards for application of the two sections of the Sherman Act. It embodies an approach under which exclusive dealing conducts that 'monopolize' (Section 2 of Sherman Act) and that only 'lessen competition' (Section 1 of the Sherman Act) are evaluated in the same way but with quantifiable difference in the threshold of market share foreclosed. Since theessense of the antitrust rule is the control in response tounjust use of market power, which in economic theory is a matter of extent,[185] the U.S. practice represents a more effects-based than form-based approach.

Another structural difference in the case law is that the in EU has developed a distinct line of cases toward exclusivity rebates, while the U.S. case law of exclusive dealing has not been distinguishing arrangements according to whether rebates are used as a tool to achieve exclusivity.

As to U.S. case law, it has been analyzed in last chapter that the harm to competition in *Microsoft* and *McWane* was recognized through depriving competitors of more efficient channels of distribution and sufficient operation scale. That is, competition is curtailed since rivals' costs are raised. Raising rivals' costs also happened in single branding cases in EU competition law, as can be seen in *Van den Bergh Foods* and others that involved exclusivity rebates.

In *Van den Bergh Foods*, the application of Art. 86 EEC cited *Hoffman-La Roche* and was close to a per se approach and much simpler than that of Art. 85. However, its reasoning concerning market context and the creation of barriers to entry is remarkable. Essentially, in the opinion of the CFI,

...**the expense involved** in acquiring a stock of freezer cabinets for installation in outlets…renders it **very difficult to enter the relevant market**, particularly for small companies and the suppliers of impulse ice-creams which occupy quite

[184] U.S. v. Microsoft Corp., 253 F.3d 34, 71 (D.C. Cir. 2001).
[185] Market power is defined in modern economics as 'the ability to price short run marginal cost', a matter of extent that could be measured quantitatively by, e.g., the Lerner index proposed by William Landes and Richard Posner. See Jones and Sufrin (n 175) 59-60.

specific niches, because it is **difficult to justify the investment in freezer cabinets** from suppliers who offer a smaller range of products.[186] (emphasis added)

The argument runs that costs of distribution would be raised for those with operation scales smaller than one that can efficiently afford an investment of freezers in retail outlets. Thus, the harm to competition was not due to the exclusivity clause itself, but induced through alternation of the costs of distribution. Although *Delimitis* was still cited, the approach adopted in *Van den Bergh Foods* revealed a different theory of harm in the sense that anti-competitive effect can be analyzed in terms of cost rather than access to market. As characterized in last subsection, the foreclosure approach proposed by *Delimitis* implies that competition is damaged due to denial of access to market induced by exclusivity agreements. Whether the access is actually denied, however, is a separate question from harm to competition. If barriers to entry are strengthened through raising rivals' cost, anti-competitive effect can happen along with a shrinking market share of the dominant undertaking (as in *McWane*) because competition would have been in a better situation had the exclusivity conduct not been taken. But the *Van den Bergh Foods* judgment inferred anti-competitiveness from raised cost for entering the relevant market and hence strengthened barriers to entry. Its reasoning thus involves deeper probing into competitive dynamics (effects-based) than where denial of access is the theory of harm.

The EU case law takes a different attitude to the use of rebates from the U.S. courts.[187] As the U.S. case law adopts the general approach toward exclusive dealing measures that involve use of rebates, it is difficult to compare such line of cases with that in the EU. The turn of *Intel* case judged by the ECJ, however, may be a start of a view of harm to competition in terms of cost structures of the related undertakings. Whether a rival's cost is raised by the rebates used by Intel in an undue way will be examined in the cases to come. Although the foregoing quotation of *Van den Bergh Foods* appeared in the application of Art. 101 TFEU, its shared concern with *Intel* is in whether the contested conducts affect the cost of competitors and hence create anti-competitive effects.

3.2.3 Analysis on entry barriers as a critical step of effects-based analysis

Whether the single branding/exclusive dealing arrangements are made by a dominant or non-dominant undertaking, the practical effect on competition depends on the capability of the arrangements to dampen or make harder entry

[186] Ibid para 113.

[187] Alison Jones and Brenda Sufrin, *EU Competition Law : Text, Cases, and Materials* (4th edn, OUP 2010) 483-84.

and expansion of competitors in the market. A more effects-based analysis would therefore involve such capability. Related is the duration clause, whose practical effectiveness also depends on the said capability. It follows that a focus on duration tends to formalistic. This subsection tries to make a contribution to comparison of reasoning across the Atlantic on this important factor and of the approaches adopted.

There is little reasoning concerning the duration of exclusivity agreements in the U.S. cases analyzed in last chapter. As inspecting the duration is to see whether the foreclosure would tie the retailers to the manufacturer for a long time, related and relevant is the analysis on the potential for retailers to switch to other manufacturers that exist in or will enter the market. The analysis is on the practical aspects of 'durability' of the agreements, which would ensure their long-term effectiveness regardless of a short duration (or vice versa). Such analysis played an important part in the U.S. case law and can be contrasted with the EU case law that has placed more emphasis on the duration of the exclusivity agreements.

In the U.S. case law, analysis on barriers to entry and/or expansion, which may include analysis on viability of distribution channels alternative to retailers situated in exclusive dealing arrangements or the potential for those retailers to switch to existing or new competitors of the manufacturer conducting the arrangements, appeared in recent cases such as *Omega Environmental*, *Microsoft*, *Denstply*, and *McWane*. In *Omega Environmental*, availability of direct sales besides distributors in the exclusive dealing arrangements was one critical reason for the court to rule for the defendant. In *Microsoft*, the concept of alternative distribution channel was 'refined' so that the cost involved in distribution and whether the alternative channel could facilitate a threat to the prevalent practice would be considered. In *Denstply*, account has been taken on the growth perspective of the relevant market and hence the economic pressure which would prevent the dealers from switching and curb competition from those without cost-cutting service of the dealers. In *McWane*, the court analyzed how the accused arrangement increased cost of distribution for competitors and constrained their expansion, thus creating 'practical effect' to make switching economically infeasible for distributors and the short-term nature of the arrangement irrelevant.[188]

As summarized in subsection 2.2.2.1, the inspection of factors related to entry barriers is also required by *Delimitis,* which however did not mention the practical effects they may have on the effectiveness of duration clauses. In *Neste*, therefore, focus was placed on the small coverage and short duration of the

[188] See related analysis of the cases in subsection 2.3.2.

agreements rather than inspection of entry barriers. *Langnese* considered factors relevant for analysis of entry barriers but not whether they might have reinforced the effects that the duration of the agreements had on foreclosure of the market. The lack of *Delimitis* in an integrative approach to the assessments may be a cause to the absence of reasoning of *Langnese* towards duration clauses, which were merely mentioned without further assessment.

The analysis in *Van den Bergh Foods* presented a different perspective. The opinion of the CFI dismissed the relevancy of clauses that provided for termination on short notice or valid immediately but instead consider the 'actual duration' of the agreements.[189] As summarized in subsection 2.2.2.1, examination of factors in relation to entry barriers, such as the small-scale operation of retailers and high capital requirements of the disputed conduct, is critical in reasoning that supports the ruling of the CFI. Whether such transformation of the *Delimitis* test could be sustained in the coming cases remains to be seen.

Through comparison of the case law, it has become clear that the *Delimitis* case led a series of cases that had performed a formalistic approach on inspection of relevant factors in relation to duration and entry barriers in assessments of single branding agreements. There is therefore room for improvement towards the effects-based approach for Art. 101 TFEU. Furthermore, as the scope of application and legal consequences of Art. 101 and 102 TFEU have been converging in the area of vertical agreements,[190] the analysis of entry barriers in the U.S. case law, which does not distinguish exclusive dealing arrangements concluded by dominant and non-dominant undertakings, may also be introduced into economic assessment under Art. 102 TFEU.

[189] Case T-7/93 *Langnese Iglo GmbH v Commission of the European Communities*, [1995] ECR II-01533, para 105.

[190] The only difference might be that Art. 102 requires dominance of conducting undertaking. See Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Oxford: Hart 2010) 433-56.

3.3 A reflection on the development of EU competition law

Every review of the development of EU competition law may include the prominent objective of market integration and the potential or actual conflict it has with the use of economic analysis. Indeed, to prioritize market integration would place critical importance on certain factors, such as market access to undertakings from another Member State, so that economic analysis on competition within particular Member State or even the entire Union would appear irrelevant or not of foremost concern in law. When it comes to vertical restraints, this has occurred in areas like exclusive and selective distribution, where partitioning of markets and thus restriction on free cross-border trade may come under concern. The preservation of competition is taken either as a tool to secure the functioning of the single market, or as an additional objective to be pursued if it can be reconciled with integration.[191]

As far as the goal of market integration is not compromised, protection of competition and promotion of economic efficiency should count as one of the goals pursued by EU competition law. As analyzed in chapter one of this thesis, single branding/exclusive dealing conducts do not directly undermine market integration but probably only by way of restricting competition. The adoption of the more economic approach into legal reasoning for single branding/exclusive dealing would therefore raise less concern about inconsistency with the previous development of EU competition law.

To view the question from a different angle, the more economic approach can not only be reconciled with the goal of market integration but also help to fulfill it by promoting market efficiency. For example, the concept of market access is crucial for the integration goal, and also forms the core idea of the *Delimitis* judgment. However, the problem for *Delimitis*, as argued in section 3.1, is not caused by the idea of market access itself, but whether anti-competitive effect could be weighed in a way more aligned to economic reality. Similarly, the more effects-based approach as proposed by section 3.3 is to gauge barriers to entry caused by the contested conducts, which could be also taken as a detriment to market access. The real challenge of *Delimitis*, therefore, is to analyze market access in a more effects-based manner, which is also consistent with the development of EU competition law.

[191] Sandra Marco Colino, *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* (Oxford: Hart 2010) 64-70.

4. Suggestion for EU competition law

This thesis compares the economic assessments conducted by EU and U.S. courts in single branding/exclusive dealing cases to draw insights on how to improve the application of an effects-based approach. Taking economic theories as a benchmark, the comparison produces suggestion for EU competition law in light of the U.S. practice as far as the latter is more aligned with economic thinking.

Generally speaking, the U.S. judicial practice presented a more integrated approach to examine the practical effects caused by exclusive dealing arrangements than its EU counterpart. It has been shown in section 3.2.1 that the U.S. cases *Tampa* and *Standard Stations* laid down the requirement to weigh the anti-competitive effect with all relevant factors taken into account. The U.S. case law also made a quantifiable difference with regard to exclusive dealing conducts that 'monopolize' (Section 2 of the Sherman Act) and that only 'lessen competition' (Section 1 of the Sherman Act). More recent cases exemplified the incorporation of the theory of Raising Rivals' Cost into assessment of contested conducts, which enriched the analysis of the practical effects on barriers to entry.

In contrast, the EU case law has still been taking a more formalistic approach. Though it is widely acknowledged that analysis of effects on restriction of competition is required as to single branding agreements under Art. 101 TFEU, *Delimitis* as the leading case failed to clarify the economic logic behind and the economic relationship between the factors required to be examined. Specific examples include the requirements to inspect the 'cumulative effect' of all agreements existing in the market and duration of the contested one. Let alone the application of Art. 102 TFEU before *Intel*, which is close to a per se standard. However, the turn of *Van den Bergh* and *Intel* to more consideration of the effect on cost of existing or potential competitors deserves more observation as to future developments.

As an effects-based approach should place emphasis on inspection of the actual and practical effects caused by the contested conducts, the U.S. practice can make suggestion for EU competition law at least in the following ways. Firstly, the test of *Delimitis* needs to be restructured to examine and weigh the effect of the contested agreements rather than cumulated effect of all the agreements. Meanwhile, the development of more nuanced economic characterization for anti-competitive effects, such as Raising Rivals' Costs, can be taken into account and facilitate better detection of harm to competition. Secondly, the fact that U.S. case law revealed no qualitative but only quantitative difference in treatment of exclusive dealing arrangements under Section 1 and 2 of the Sherman Act suggests that a more effects-based approach for Art. 102 TFEU could be developed through adoption of similar tests with those conducted in application of Art. 101 TFEU. For example, it is difficult to see why an effects-based approach for Art. 102 TFEU should not include analysis of barriers to entry. More generally, assessment of barriers to entry is crucial in evaluating the viability of an exclusivity measure, where many related factors, such as alternative distribution channels and switching cost of dealers, have been analyzed in U.S. case law. Those could be quite informative for EU competition law as to improving assessments of practical effects induced by single branding agreements. A related condition in *Delimitis* test is about the duration of such agreements, which needs to be reconsidered and revised to suit a more effects-based approach.

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