RESOLVING CONFLICTS BETWEEN COMPETITION AND OTHER VALUES: THE ROLES OF COURTS AND OTHER INSTITUTIONS IN THE U.S. AND THE E.U.

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Resolving Conflicts between Competition and Other Values: The roles of courts and other institutions in the U.S. and the E.U.

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Introduction

The laws of competition often lead to results that conflict – or at least appear to conflict – with the requirements of other laws, regulations, or policies in the same jurisdiction. For example, a law may specifically permit behavior proscribed by the antitrust laws, such as allowing competitors to set rates collectively, as did a 1948 law for the benefit of the railroad industry in the United States.[1] Even if another law does not directly contradict the laws of competition in that way, the blunt instrument of competition enforcement may interfere with a more finely-honed regulatory scheme tailored to, for example, complicated securities practices.[2] "Conflict" therefore can be an expansive concept; so conceived, it comes into play whenever a court's imposition of liability for a violation of competition law would directly frustrate some other law or public policy. Indeed, even though antitrust law and a particular regulatory regime may in general yield similar results because both were designed to further a similar end, the overlap of multiple legal regimes with differing standards for liability may create costly legal

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[1] The Reed-Bulwinkle Act of 1948, Ch. 491, 62 Stat. 472 (1948) (codified as amended at 49 U.S.C. § 10706 (2006)). This legislation expressly empowered the now-abolished Interstate Commerce Commission (ICC) to grant approval to agreements establishing rate bureaus for the purpose of setting rates collectively.

[2] *See, e.g.,* Credit Suisse Securities (USA) v. Billing, 551 U.S. 264 (2007).

uncertainty in borderline cases such as *Credit Suisse*. In recent years courts in the United States have become more attuned to this second type of conflict.

The appropriate way in which to resolve any particular conflict depends upon the answer to two related questions:

- First: Is the conflict one of means alone, or do the laws truly serve different and hence irreconcilable ends?

When two conflicting laws further the same value, such as economic efficiency (whether understood as consumer welfare or as total welfare), the conflict is one of means alone. In such a case, it is possible one institution with sufficient access to the relevant facts and expertise in economics could determine the appropriate balance between them. When, on the other hand, the values underlying two laws diverge, there is little reason to think any institution could determine the optimal balance between them; the best that may be done is to decide which of the two must give way.

If there were an agreed-upon single metric of social welfare, then the task of reconciling the laws would be easier. Most competition experts probably believe it is more desirable to maximize economic efficiency than to favor the economic interest of some subset of producers or consumers in the economy. In a democratic society, however, we must expect, though perhaps not happily, that more narrow values may and do find their way into legislation. In fact, the values a society holds are far from stable over time. For example, the economic downturns and depressions in the late 19th and early 20th Centuries led to widespread public discontent with market capitalism and its associated value of competition, and that discontent entered the legal regime of the United States through many statutes enacted in the New Deal era and beyond.

Later in the 20th Century, the turn in the academy toward economic analysis of law and the deregulatory movement to which it gave rise led to a general convergence upon economic efficiency as the proper goal of economic regulatory legislation; as a result, the way courts and agencies reconciled competition laws with more recently enacted statutes had to change.

As we discuss below, the locus of much decision-making in the United States has shifted over this period from the legislature to the courts; at the same time, the European Commission Directorate-General for Competition (DG Comp) and the European Courts developed their own distinct tools for reconciling competition laws with anti-competitive regulatory schemes. There can be no guarantee on either side that the current emphasis upon economic efficiency will last: With the recent financial crisis, and the popular skepticism about free markets it has engendered, we may be entering another period of disagreement about the fundamental values that should underlie legislation.[3] If that happens, the legislature may become more active, again resolving conflicts in favor of values other than competition.

- Second: Which institutions are best placed to resolve a conflict between competition and other laws, regulations, or priorities?

We consider three possible answers to this question: (1) the legislature; (2) a competition agency;[4] and (3) a court. The institution best situated to solve a particular conflict depends upon

[3] *See* James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1564-65 (2010) (noting the "aftermath of the financial crisis has not only directly affected government involvement in the economy, but in general has fed impulses to rely less on competition, and more on government dictate, to organize the economy").

[4] A competition agency is typically a unit of the executive branch of government, as are the Antitrust Division of the U.S. Department of Justice (DoJ) and the Directorate-General for Competition in the European Commission. We do not consider the resolution of purely intra-executive branch conflicts between competition and other values because such conflicts are straightforwardly resolved within the hierarchy of the executive branch. For example, if the Antitrust Division were to raise concerns about the antitrust implications of a merger between two defense contractors, which merger the Department of Defense favors, any disagreement not resolved by the heads of the DoJ and the DoD would be resolved by the President or his delegate. *Cf.* Competitive Impact Statement, United States v. Raytheon Co., No. 1:97-CV-02397 (D.D.C. Oct. 22, 1997) (noting cooperation between DoJ and DoD in approving purchaser of divested assets or a trustee of assets). For an extended discussion of the interplay between the DoD and the antitrust enforcement agencies in defense industry mergers in the U.S., see Mark Schwartz, *The Not-So-New*

the nature of that conflict.[5] A competition enforcement agency will likely have the experience and the technical know-how, as well as the appropriate set of institutional norms, with which to reconcile competition law with another legal regime likewise intended to serve economic efficiency, such as, perhaps, a patent or a securities law. A competition agency would be ill-suited, however, to reconcile competition law with some law meant to serve a wholly different goal, such as the protection of labor unions; a union, which may unite workers at competing firms in order to raise producers' cost of labor, is structurally equivalent to a cartel fixing the price of an input. A competition agency could hardly be expected to resolve resulting conflict in a principled or unbiased fashion. Moreover, furthering two irreconcilable values, like serving two masters, could only bring confusion to the mission of the agency and lower its morale.

The balancing of irreconcilable goals is best left to the legislature. This is not to say the legislature always, or even usually, does the "right" thing – however measured. Indeed, it is a fact of life that legislatures pass laws with goals other than, and frequently inimical to, economic efficiency. During the New Deal era, for example, the United States Congress passed many laws that broadly[6] or narrowly[7] but quite intentionally facilitated the reduction of output and,

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Antitrust Environment for Consolidation in the Defense Industry: The Martin Marietta-Lockheed Merger, 1996 COLUM. BUS. L. REV. 329 (1996). For the remainder of this paper, we focus our analysis upon the competition agency as the most relevant actor within the executive branch, although we recognize other executive branch departments and officials may also play important roles in resolving conflicts between antitrust and other laws or policies.

Some competition agencies, such as the Federal Trade Commission (FTC) in the U.S., are not subject to executive branch oversight. When the source of a conflict between the antitrust laws and another law or policy is a difference of opinion between an executive agency and an independent agency, the conflict cannot be resolved within the executive branch of government and therefore may be resolved by a court, *see, e.g.*, FTC v. Alliant Techsystems *Inc.*, 808 F. Supp. 9, 12, 24 (D.D.C. 1992) (preliminarily enjoining merger between two suppliers of ammunition where testimony of Army witnesses "indicated a professional and individual preference for the merger" and the Army itself had "'no objection to the merger'"), or by the legislature, *see, e.g.*, 49 U.S.C. § 10706(a)(2)(A) (exempting from the antitrust laws any agreement between rail carriers if approved by the Surface Transportation Board).

[5] Although the primary focus of this paper is upon the role of courts in resolving such a conflict, we consider other institutions that may be involved in this process in order to illuminate more fully the role of courts and to evaluate whether a court is always the best-placed institution to resolve the conflict.

[6] *See, e.g.*, Fair Labor Standards Act of 1938, Pub. L. 75-718, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 210, *et seq.*), (establishing a federal minimum wage, requirement of overtime pay, etc.); National

consequently, increased the prices of goods, which slowed the nation's recovery from the depths of the Great Depression.[8] If there is a large enough constituency for such a law, not only is the legislature the more legitimate institution to strike that political balance; a competition agency would be unsuited to the task, which is not matched to its strengths and its culture. A court, similarly, lacks the tools, as well as the democratic legitimacy, with which to balance fundamentally opposing values. Therefore, if the legislature is to pass a law that reduces economic efficiency, then it would be best for it to state that goal expressly, or at least to say expressly that the competition laws do not apply where the new law does apply lest the courts try to balance irreconcilable values and end up attributing their own preferences to the unexpressed will of the legislature.

Where, then, do courts enter the picture? Courts occupy a unique position: According to the dominant jurisprudential philosophies in America and, we believe, in Europe, a court must give effect to the general will of the legislature as applied to the specific case before it. The court is therefore never the first mover: Because its role is not to initiate law-making but rather to interpret the law, even if that requires it to fill a gap, the court must always look to the prior decision (explicit or implicit) of another institution for guidance about how to reconcile antitrust with an overlapping regulatory scheme. The court's job is straightforward when the legislature

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Industrial Recovery Act [NIRA] of 1933, ch. 90, 48 Stat. 195 (previously codified at 15 U.S.C. §§ 701–712), *invalidated as unconstitutional in* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), Title I of which empowered trade associations to pass codes of "fair competition" and exempted such agreements from the antitrust laws.

[7] *See, e.g.*, Motor Carriers Act of 1935, 49 Stat. 543, ch. 498 (codified at 49 U.S.C. 31502) (limiting entry into trucking industry); Agricultural Adjustment Act of 1933, Pub. L. 73-10, 48 Stat. 31 (subsidizing farmers for removing land from production), *invalidated as unconstitutional in* United States v. Butler, 297 U.S. 1 (1936).

[8] *See, e.g.*, See Letter from John Maynard Keynes to President Franklin D. Roosevelt (Dec. 30, 1933), in From Keynes to Roosevelt: Our Recovery Plan Assayed, N.Y. Times, Dec. 31, 1933, at XX2 , *available at* http://newdeal.feri.org/misc/keynes2.htm ("N.I.R.A. ... probably impedes Recovery"; "stimulation of output by increasing aggregate purchasing power is the right way to get prices up; and not the other way round"); MILTON FRIEDMAN & ANNA SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867—1960 494—95 (1963) (NIRA raised prices of goods and lowered profits, leading to a decrease in private investment and a slowing of the economic recovery).

has said the competition laws will not apply to a particular activity or a particular class of organizations, but the legislature does not always do so; nor can a legislature be expected to foresee, and thus to deal expressly with, every conflict between a new law and the corpus juris.

When two laws would yield conflicting results but neither expressly repeals or overrides the other, a court must use some method of statutory interpretation in order to discern what the will of the legislature requires in the circumstances before it. A court may also determine that the application of competition law to a particular practice would interfere with the work of a regulatory agency even if simultaneous compliance with both competition law and sectoral regulation would not necessarily entail contradictory obligations; the court will then interpret the legislature as having intended to give the regulators space in which to operate unobstructed by antitrust enforcement. The more courts are willing to treat such a tension as a conflict, and therefore to find an undertaking or a practice exempt from competition law,[9] the more active the role courts play in defining the limits of competition law and the proper balance between it and other bodies of law and regulation.

In addition to applying the express or implied will of the legislature, a court must apply its fundamental law – whether the Constitution of the United States or the Treaty on the Functioning of the European Union (TFEU). When application of competition law conflicts with fundamental law, of course, the latter law must prevail. As illustrated by the Supreme Court's decision in *Superior Court Trial Lawyers Ass'n v. FTC,*[10] however, determining the proper reach of the Constitution, and therefore whether it precludes application of the antitrust laws in a particular situation, is no easy task. In that case, the court of appeals had determined the First Amendment guarantee of free speech protected from antitrust liability a strike by government-

[9] *See, e.g., infra*, note 26 and accompanying text.
[10] 856 F.2d 226 (D.C. Cir. 1988), *rev'd*, 493 U.S. 411 (1990).

funded lawyers who represented indigent defendants in criminal cases; although the strike was intended most immediately to increase the lawyers' wages, the court held that because the striking lawyers intended thereby to improve the quality of representation provided to the indigent defendants, they were exempt from the antitrust laws if they did not have market power, which question had not been resolved by the FTC.[11] The Supreme Court reversed that judgment and concluded the "expressive component" of a strike or an economic boycott is not substantial enough to warrant special consideration under the antitrust laws.[12]

In Europe, competition law is part of the fundamental law and hence more likely to prevail in the event of a conflict with another law. It is therefore in general unnecessary for a European court to ask, as had the court of appeals in *Superior Court Trial Lawyers*, whether the fundamental law precludes the application of competition law. The fundamental competition law necessarily trumps an ordinary law or a regulatory regime, as shown in the case of *Deutsche Telekom AG v. Commission*; the European Court of Justice held Deutsche Telekom liable for the exclusionary effect of its wholesale prices even though those prices had been specifically approved under the German telecommunications regulatory commission.[13]

I. Reconciling Conflicts in the United States

The methods by which the United States and Europe reconcile a conflict between competition and other laws differ due more to history than to any difference of philosophy. Because in the United States the principal antitrust law – the Sherman Antitrust Act – was passed in 1890, most potentially conflicting regulatory legislation came in a later era. Applying the principle that a later legislative enactment prevails over an earlier one, a U.S. court faced with a

[11] *Id.* at 250.
[12] 493 U.S. at 431—32.
[13] *See infra*, note 44 and accompanying text.

potential conflict will generally ask whether the later statute expressly or implicitly repealed the earlier statute.[14] If the later statute does not repeal the earlier one, then the courts must turn to other methods by which to resolve the conflict.

Courts in the U.S. reconcile potentially conflicting application of antitrust and other laws in one of four ways, depending upon the precise wording of the other law. They may (1) interpret an express statutory exemption to preclude application of the antitrust laws; (2) interpret a statute to require a case by case balancing of competition and other values; (3) interpret a conflict between antitrust and a later law to preclude application of the antitrust law; or (4) interpret the vaguely worded antitrust laws narrowly so as to avoid their conflicting with a later-enacted law.

A. Express Legislative Repeal of the Antitrust Laws

Many laws passed in the early to mid-20th Century expressly provided for repeal of the antitrust laws. For example, § 6 of the Clayton Act of 1914 exempts labor unions and agricultural cooperatives by declaring, "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help."[15] Unsurprisingly, such enactments coincided with the widespread rise of values

[14] *See* Posadas v. National City Bank of New York, 296 U.S. 497, 503 (1936) ("Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one"). Some cases describe the effect of repeal, whether express or implied, as conferring an "exemption" or an "immunity." *See, e.g.,* Connell Constr. Co. v. Plumbers, 421 U.S. 616, 621–622 (1975) ("basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act"); *cf.* Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 56 (1993) ("Those who petition government for redress are generally immune from antitrust liability").

[15] 15. U.S.C. § 17. Similarly, the Webb–Pomerene Act of 1918 states "[n]othing contained in the Sherman Act shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade [etc.]" so long as the agreement does not harm domestic exporters or harm competition within the United States. 15 U.S.C. § 62. Title I, § 5 of the NIRA (1933) provided "any code [of fair competition] ... [or] any action complying with the provisions thereof ... shall be exempt front the provisions of the antitrust laws." Likewise, the Reed-Bulwinkle Act of 1948 exempted "[p]arties to any agreement approved by

inimical to the notion of free competition that undergirds market capitalism. Both because such exemptions are less common in more recent legislation and because a court's job in applying such an exemption is fairly straightforward, we do not dwell further upon this situation.

B. Judicial Balancing of Competition and Other Values

Some laws have required courts themselves to balance the value of competition against a broader conception of the public interest, even though courts are not well-equipped to perform that task. Under the Bank Merger Act of 1966, for example, after a court finds the effect of a proposed merger "may be substantially to lessen competition," the banks may defend their merger on the ground that "the anti-competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[16] Similarly, when the Federal Trade Commission, pursuant to § 13(b) of the FTC Act,[17] asks a court temporarily to enjoin a merger in order to preserve the status quo pending a trial on the merits, the court must determine whether granting the injunction will serve the public interest – a capacious concept that may incorporate

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the [Interstate Commerce] Commission ... from the operation of the antitrust laws." 62 Stat. 473 (codified as amended at 49 U.S.C. § 10706(b)(2)).

[16] 12 U.S.C § 1828(c)(5)(B), (c)(7)(B); *see also* United States v. First City Nat. Bank of Houston, 386 U.S. 361, (1967) (holding trial court must decide de novo, even after regulatory approval, whether anti-competitive merger serves the public interest). The Bank Holding Company Act, 12 U.S.C. § 1843(j)(2)(A), contains a similar provision: "[Federal Reserve] Board shall consider whether performance of the [acquired nonbanking] activity by a bank holding company or a subsidiary of such company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, unsound banking practices, or risk to the stability of the United States banking or financial system."

[17] 15 U.S.C. 53(b) (granting district courts jurisdiction to issue preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest"). Section 4 of the Sherman Act, 15 U.S.C. § 4, and § 15 of the Clayton Act, 15 U.S.C. § 25, grant district courts similar authority in a suit brought by the U.S. Department of Justice.

values other than competition, such as full employment[18] or national security[19] – in addition to whether the government is likely to succeed at trial. As noted above, courts are not well-equipped to perform such a balance. Due perhaps to the rise of economic analysis of law in the 1970s and the associated movement toward deregulation, however, the Congress since then has been more likely to pass economic legislation consistent with efficiency and less likely to provide for express exemption from**,** or balancing against, the antitrust laws.

C. Implied Repeal of Antitrust Law

Without express guidance from the legislature, federal courts have developed a doctrine of implied repeal to deal with situations where application of the competition laws would conflict, or at least be in tension, with a more recently enacted law. This doctrine, especially as the Supreme Court has extended it in the last few years, is itself in some tension with the Supreme Court's oft-repeated teaching generally that "repeals by implication are not favored,"[20] and specifically that "[r]epeal [of the antitrust laws] is to be regarded as implied only if necessary to make [a law such as] the Securities Exchange Act work, and even then only to the minimum extent necessary."[21]

Pursuant to that "cardinal principle,[22] U.S. courts historically would find a conflict between two laws only when application of one would lead to an outcome incompatible with what application of the other would have required. For example, in *Silver v. New York Stock Exchange*, the Supreme Court asked whether the Securities Exchange Act of 1934 had implicitly

[18] *See* FTC v. Weyerhauser, 665 F.2d 1072, 1083 (D.C. Cir. 1981) ("improvement in the area employment rate" weighed against enjoining likely anticompetitive merger even though it "would not qualify as [a] defense[] to the charged violation of Section 7 of the Clayton Act").
[19] *See* FTC v. PPG Industries, Inc., 798 F.2d 1500, 1508 (D.C. Cir. 1986) ("avoiding foreign ownership of military suppliers" might weigh against enjoining likely anticompetitive merger).
[20] Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963).
[21] *Id.*
[22] *Id.*

repealed the antitrust laws insofar as § 1 of the Sherman Act would have prohibited (as a group boycott) the members of a securities exchange from adopting a rule barring direct telephone lines to nonmember brokers.[23] The Court held the antitrust laws did apply in that situation because the exchange had not given the plaintiff nonmember notice and an opportunity to be heard, but that did not finally resolve the substantive relation of the antitrust laws to the Securities Exchange Act.[24] In another case, the Court applied the same doctrine and held the Securities Exchange Act did, however, repeal the antitrust laws to the limited extent that SEC regulations implementing that Act prior to 1975 allowed a stock exchange to fix the commissions charged by member brokerage firms, a horizontal agreement that otherwise would have been proscribed by § 1 of the Sherman Act.[25]

In more recent cases, courts have lowered somewhat the bar for concluding the antitrust laws have been implicitly repealed, doing so where application of the antitrust laws would simply interfere in some way with the functioning of a regulatory scheme. Accordingly, the Supreme Court has recently distinguished *Silver*, holding in *Credit Suisse* that the Securities Exchange Act repealed the antitrust laws insofar as they would have applied to the way syndicates of securities underwriters in initial public offerings agreed upon commission rates and upon the joint marketing of securities. The Court based this determination upon

> (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; ...(3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of

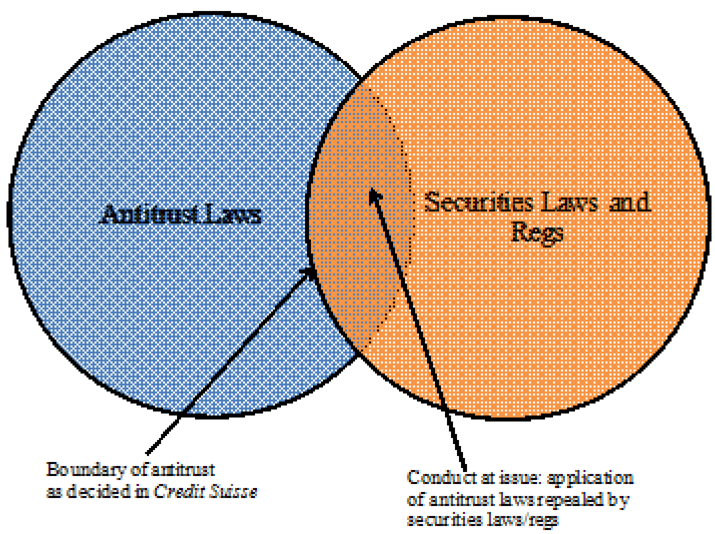
[23] *Id.*
[24] *Id.* at 369—70.
[25] Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 685—86 (1975).

> conduct ... [and because] (4) ... the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.[26]

Even though prior cases such as *Silver* suggested the Court would find an implied repeal only in situations of clear "repugnancy" or "incompatib[ility]" between antitrust and another body of law,[27] the Court dramatically extended the notion of incompatibility in *Credit Suisse* to reach a situation in which two laws imposed liability for similar conduct and therefore application of the antitrust law – in the Court's view – provided little incremental benefit.[28]

This option of holding a later law implicitly repeals the antitrust laws in a specific context gives U.S. courts significant power to define, and thus to shrink, the scope of application for the antitrust laws, as shown in Figure 1 below.

Figure 1. *Credit Suisse*: Securities Laws and Regulations Repeal the Antitrust Laws



As compared with express repeal by the Congress, which often shields blatantly anticompetitive behavior from application of antitrust laws, the implied repeal doctrine, as developed by the

[26] Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264, 275 (2007).
[27] *Id.*
[28] *Id.* at 284 ("In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct").

courts, limits the scope of the antitrust laws only to the degree necessary to avoid interfering with a regulation that similarly targets anticompetitive behavior in a more specific manner and is tailored to particular business practices.[29] Express statutory repeals are typically applied to a broad class of actors or activities, such as labor unions, whereas implied repeals are typically limited by the court to a narrow class of commercial behavior, such as, in *Credit Suisse*, the setting of commission rates by a syndicate of underwriters that markets securities in an initial public offering.[30]

D. Narrow Interpretation of the Antitrust Laws

Fourth, and finally, a court may determine that the vaguely worded antitrust laws were not intended to apply to certain activities regulated by other institutions. For example, the Supreme Court held over a century ago that the framers of the Sherman Act "never contemplated" that it would apply to "reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor."[31] In *United States v. Line Material Co.*, the Supreme Court likewise stated "the possession of a valid patent ... does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly,"[32] which is a roundabout way of saying the patent laws do displace the antitrust laws to the extent of the rights granted by a patent.[33]

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[29] In *Credit Suisse*, for example, the Supreme Court emphasized, in holding the actions of the underwriters were impliedly exempt from the antitrust laws, that the SEC had already forbidden many of the challenged practices at issue, albeit in a more detailed and nuanced fashion than the antitrust laws would have done. 551 U.S. at 279.
[30] *See Credit Suisse*, 551 U.S. at 268.
[31] E. Bement & Sons v. National Harrow Co., 186 U.S. 70, 92 (1902).
[32] 333 U.S. 287, 308 (1948).
[33] Where "the limits of the patent monopoly" lie, however, is a vexed question. For years, the federal courts of appeals had tightly restricted the application of the antitrust laws as applied to so-called "reverse payments," *i.e.*, payments made pursuant to an agreement to settle patent litigation in which the party claiming infringement

In its most recent case involving this fourth method of reconciling conflicts, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, the Supreme Court decided the antitrust laws do not impose upon an incumbent telephone company a duty to lease to a competing carrier access to parts of its network where the Federal Communications Commission has already imposed such a requirement pursuant to the Telecommunications Act of 1996.[34] Rather than holding the telecommunications laws and regulations had *pro tanto* repealed the antitrust laws,[35] as the securities laws and regulations were held to do in *Credit Suisse*, the Supreme Court in *Trinko* couched its decision as merely interpreting the scope of the earlier-adopted Sherman Act. The Court noted that, except in very limited circumstances, a company has no duty under the antitrust laws to deal with its competitors;[36] therefore, it characterized the question before it as whether to broaden the reach of the antitrust laws, not whether to narrow that reach, which would have been the question raised by the doctrine of implied repeal. The Court explained that imposing a new duty under the antitrust laws when a telecommunications regulation already

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(typically a branded pharmaceutical manufacturer) agrees to pay the allegedly infringing party (typically the manufacturer of a generic version of the branded drug). As the Court of Appeals for the Eleventh Circuit reiterated in 2012, "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." FTC v. Watson Pharmaceuticals, Inc., 677 F.3d 1298 (11th Cir. 2012), *cert. granted* --- S.Ct. ---, 2012 WL 4758105 (December 07, 2012); *see also* In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 213 (2d Cir. 2006) (similar); In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed Cir. 2008). Just recently, however, the Third Circuit disturbed this relatively pro-patent consensus of the courts of appeals when it allowed plaintiffs to proceed to trial on a claim under § 1 of the Sherman Act against the parties to a reverse payment agreement. In re K-Dur Antitrust Litigation, 686 F.3d 197 (3d Cir. 2012). The D.C. and Sixth Circuits had previously allowed antitrust suits to proceed against parties to reverse payment agreements, *see* Andrx Pharms., Inc. v. Biovail Corp. Int'l, 256 F.3d 799 (D.C. Cir. 2001); In re Cardizem CD Antitrust Litig., 332 F.3d 896 (6th Cir. 2003), but in those cases the branded drug manufacturer had paid the manufacturer of the generic simply to delay the start of the generic's 180-day exclusivity period under the Hatch-Waxman Act without resolving the patent and antitrust litigation between the two firms. Accordingly, there was no clear circuit split before the recent decision of the Third Circuit in *K-Dur.* The court pointed to the "almost unrebuttable presumption of patent validity" that flowed from the other circuits' "scope of the patent" standard, which presumption it deemed unjustified in light of various empirical analyses showing generic drug manufacturers often prevailed against branded drug manufacturers in suits for infringement. *Id.* at 214. The Supreme Court will resolve this conflict among the circuit courts in the near future. FTC v. Watson Pharmaceuticals, Inc.,--- S.Ct. ---, 2012 WL 4758105 (December 07, 2012) (granting petition for writ of certiorari).

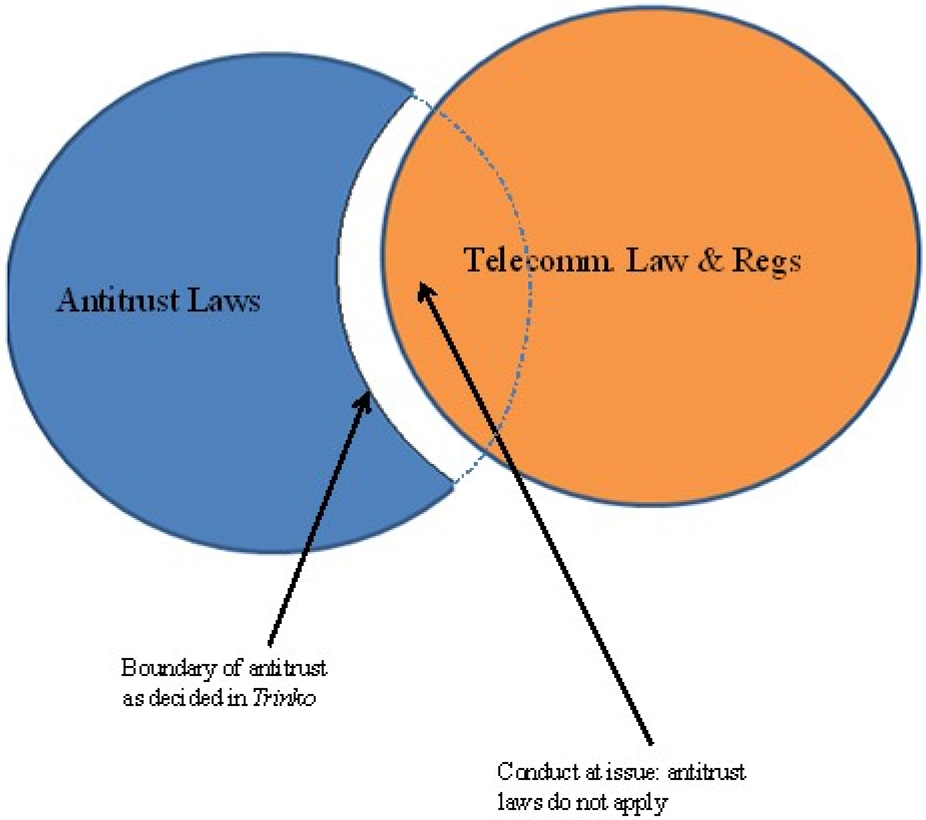
[34] 540 U.S. 398 (2004).

[35] Indeed, the Telecommunications Act of 1996 foreclosed the doctrine of implied repeal by expressly providing that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 110 Stat. 143, 47 U.S.C. § 152, note.

[36] 540 U.S. at 408.

performed much the same function could not be expected to yield more social benefit than it would social cost.[37] In that way, the Court in *Trinko* reached much the same end as it had in *Credit Suisse* – the giving way of the antitrust laws in favor of a later-enacted regulatory law – but by a different route. For a graphic representation of the Court's analysis in *Trinko*, see Figure 2.

Figure 2. Trinko: A Narrowing Interpretation of the Antitrust Laws



Trinko is like *Credit Suisse* in another way: It significantly expanded one of the four judicial methods of resolving a conflict with the antitrust laws. Prior to *Trinko*, the Supreme Court had used the fourth method in a rather modest fashion. As we have seen, for example, the

[37] *Id.* at 412 ("Against the slight benefits of antitrust intervention here, we must weight a realistic assessment of its costs").

Court held the Sherman Act of 1890 was not intended to qualify the previously enacted patent laws. In *Trinko*, by contrast, the Supreme Court held that the Sherman Act was not intended to reach practices that were first regulated by the Telecommunications Act of 1996, passed more than a century later.

State action immunity, which first arose in the case of *Parker v. Brown*, 317 U.S. 341 (1943), is another doctrine by which courts narrow the reach of the antitrust laws: If a “clearly articulated” state statute permits conduct by a private actor that would otherwise violate the antitrust laws, and that conduct is “actively supervised” by the state, then it does not come within the condemnation of the antitrust laws. For example, in *California Retail Liquor Dealers*,[38] the Supreme Court held wholesalers who set resale prices for wine pursuant to a state authorizing statute were not immune from liability under the Sherman Act (as it was then interpreted to prohibit all resale price maintenance (RPM)[39]) because the state did not actively supervise those prices. Although states have no authority to override a federal law, which the Constitution declares the supreme law of the land, the Supreme Court reached much the same result through this “state action” doctrine by interpreting narrowly the intended scope of the federal antitrust laws so as not to reach conduct authorized by state law and supervised by the state. That is, they concluded the Congresses that passed the Sherman and Clayton Acts in 1890 and 1914 did not intend that the antitrust laws be applied to the states acting in their capacity as sovereigns or, by

[38] Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

[39] *See* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (holding minimum RPM a per se violation of § 1 of Sherman Act); Albrecht v. Herald Co., 390 U.S. 145 (1968) (holding maximum RPM per se unlawful under § 1). *But see* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (abandoning the per se rule in favor of the rule of reason for claims that a particular instance of minimum RPM violates the Sherman Act); State Oil Co. v. Khan, 522 U.S. 3 (1997) (same regarding claims for maximum RPM).

extension, to private parties whose anticompetitive behavior is explicitly permitted and actively overseen by a state.[40]

Two commentators have argued the logic of state-action immunity should extend beyond instances of active supervision by the states and, accordingly, that federal courts should not construe the antitrust laws to reach conduct that can be adequately redressed under state law. They argue the antitrust laws should not deal with cases of so-called "patent holdup," in which a patentee uses its leverage to demand a higher royalty after an industry has adopted a standard for which its patent is essential, because state tort and contract remedies, as well as federal patent law remedies, are adequate for such cases.[41] At least to date, the courts have not taken up that invitation. In *Rambus Inc. v. FTC*,[42] the court did narrow the range of viable antitrust claims involving patent holdups to situations where, absent fraud against the standard setting organization, a patent would not have been made essential; the court did so, however, without reference to the adequacy of state law contract remedies to handle situations of holdup short of fraud. Indeed, we know of no case thus far in which a court has limited the scope of the federal antitrust laws because there is an adequate state (or patent) law alternative, although that is a jurisprudential possibility opened up by the *Parker* and the *Trinko* decisions.

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[40] For a critique of state action immunity as unnecessarily shielding anticompetitive conduct from federal antitrust scrutiny, see Cooper & Kovacic, *supra* note 3, at 1585 ("As currently construed by the courts, the state action ... doctrine[] sweep[s] too far, protecting anticompetitive conduct that harms consumers and [does not] advance[] ... the value[] of federalism"). *But see id.* at 1589 (concluding, due to the entrenched aversion of federal courts to intruding upon state policy-making, the best way to overcome the pernicious effects of the doctrine would be for the Congress to "to amend the antitrust laws to note explicitly that it intended to supplant anticompetitive state regulation" rather than for the Supreme Court to overrule *Parker v. Brown*). Cooper and Kovacic would "distinguish state programs that serve the 'public interest' from those that are merely designed to enrich favored producers," and narrow the application of state action immunity to practices of the former type. *Id.* at 1590.

[41] Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMP. L. & ECON. 469, 479 (2009).

[42] 522 F.3d 456 (D.C. Cir. 2008).

Each of the four approaches we have surveyed may have its virtues, but some do seem preferable to others. A legislature can save a court a lot of effort, and avoid the risk the court will err, by providing an express exemption from the antitrust laws when it passes a law inimical to economic efficiency. The legislature puts a court in a much more awkward and uncertain position when, as in the Bank Merger Act, it directs the court to balance the harm to competition against other aspects of the "public interest." Even if an adept economist could fit diverse public interest concerns within the single metric of economic efficiency, a court is not equipped to perform the detailed cost-benefit analysis such a balancing requires. Conversely, a court may be better suited to determine, by following the four-part analysis of *Credit Suisse*, whether a later law implicitly repealed the antitrust laws within the commercial setting it governs, than it is to discern the intended scope of the Sherman Act of 1890 when that law overlaps with a contemporary regulation, as the Court had to do in the *Trinko* case.

II. Reconciling Conflicts in Europe

Like the United States, Europe has dealt with conflicts in a way shaped by its history, and the picture therefore looks very different. Competition law in the European Union is a product of the EU Treaty. Before the original Treaty came into effect in 1958, several European countries had nationalized major industries. Whereas competition law developed in the United States from the late 19th Century, competition law in Europe developed at a time when skepticism about economic regulation, along with the paramount need to create a single market, could influence European courts to give competition laws a broad construction.

Most important, EU courts are guided by "the principle of the primacy of Community law," according to which EU laws are supreme over those of an individual member state.[43] Because most sectoral regulation occurs at the member state level, EU competition law overrides that regulation whenever there is a conflict. In contrast to the situation in the United States, the courts in Europe have interpreted the competition laws of the EU quite broadly: "[I]t is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that [articles 101 & 102 of the TFEU] do not apply."[44] In the quoted case, the ECJ held a price squeeze violates Article 82 (now 102) of the Treaty despite the approval of the telecommunications company's wholesale and retail rates by the German national regulatory authority. This is in marked contrast to the U.S. Supreme Court's decision in *Pacific Bell Telephone Co. v. LinkLine*, which held a price squeeze did not violate § 2 of the Sherman Act when both the wholesale and the retail prices at issue were subject to the supervision of the Federal Communications Commission.[45] The ECJ's decision illustrates how little European

[43] T-Mobile Deutschland/02 Germany, 2004 O.J. (L 75) 32, ¶ 157; *see also* Giorgio Monti, *Managing the Intersection of Utilities Regulation and EC Competition Law*, 4 COMP. L. REV. 123 (2008).
[44] Deutsche Telekom AG v. Commission, Case C-280/08 (E.C.J. Oct. 10, 2010). This doctrine provides an even narrower exemption from the competition laws than does the analogous immunity for state action in the United States, because a private firm is exempted in Europe only if the law of a Member State leaves it no choice but to engage in anticompetitive conduct, whereas in the United States a practice is exempt so long as it is "clearly articulated and affirmatively expressed as state policy" and "actively supervised by the State itself," Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (internal quotation marks and citation omitted). For a favorable comparison of the European doctrine as contrasted with state action immunity in the United States, *see* Mel Marquis, *Abuse of Administrative Power to Restrict Competition in China: Four Reflections, Two Ideas and a Thought*, 8—12, (unpublished draft, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2090138) *to be published in* REGULATION AND COMPETITION POLICY IN CHINA: NEW DEVELOPMENTS AND EMPIRICAL EVIDENCE (Michael Faure & Xinzhu Zhang eds., forthcoming in 2013).
[45] 555 U.S. 438 (2009).

courts will defer to a sectoral regulator's actions if seen by the court to conflict with the competition articles of the Treaty.[46]

Although the competition laws generally prevail over non-fundamental laws in the event of a conflict, there is an equally fundamental exception: Article 101(3) of the TFEU itself provides that the prohibitions of Article 101(1) may "be declared inapplicable" to an agreement with an anticompetitive effect if it (1) "contributes to improving the production or distribution of goods or to promoting technical or economic progress," (2) "allow[s] consumers a fair share of the resulting benefit," (3) does not "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives," and (4) does not "afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." A determination under Article 101(3) that an agreement is exempt from Article 101(1) may be made either ex ante – by the European Council, by the European Commission, or by a national competition authority – or ex post – by a national court.[47] Formally, at least, Article 101(3) exempts an agreement from Article 101(1) only if application of the latter article would create what we have defined above as a "conflict of means," not in the event of a "conflict of ends," *i.e.*, when a competing goal would frustrate economic efficiency. Viewed in that light, Article 101(3) looks like a codification of the rule of reason familiar to U.S. antitrust jurisprudence.[48] Nevertheless, the European Commission has in some Article 101(3) cases given weight to values other than competition and thus determined the overall social utility

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[46] As with conflicts between EU competition law and national regulation, European courts similarly construe competition law broadly even when that law is in tension with a community-wide sectoral regulation; they have refused to exempt the practices of regulated industries in the absence of a block exemption issued by the Commission. *See* Verband der Sachversicherer e.V. v. Commission, Case No. 45/85 (E.C.J. 1987) (confirming Articles 101 & 102, formerly Articles 81 and 82 of the EC Treaty, apply to insurance companies).

[47] *See* Council Regulation 1/2003, Arts. 4-6, 2003 O.J. (L 1) 1, 2 (EC). Unlike the European Commission or a national competition authority, which may proceed either ex post or ex ante, a court would typically make such a determination on an ex post basis only.

[48] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (rule of reason requires "plaintiffs [to] show that [the defendant's] conduct was, *on balance*, anticompetitive") (emphasis supplied).

of an agreement by balancing harms to competition against ill-defined benefits unrelated to competition; as a result, competition laws gave way in conflicts over ends and not just means.[49] These cases are problematic for reasons described earlier: Neither competition agencies nor courts are well-equipped to balance a harm to competition against a benefit to, for example, the environment, even if an economist might be able to express such diverse values according to the single metric of economic efficiency.

In the last decade or so, however, the European Commission has seemed less inclined to use Article 101(3) to import non-competition values into its analyses.[50] Instead, the Commission has generally put Article 101(3) to good use, issuing ex ante block exemptions for certain pro-competitive business practices. In doing so, the Commission has generally followed the conclusion of DG Comp that a particular type of agreement does not on balance harm competition. Some of these block exemptions are sector-specific:

- Insurance companies had argued, starting at least as early as the 1980s,[51] that what are now Articles 101 and 102 could not be applied to them directly, that is, without implementing legislation, because of specific circumstances in their industry. Eventually, in 2003, the Commission adopted a block exemption allowing (1) agreements among

[49] In Commission Decision 84/380, 1984 O.J. (L 207) 17 ("Synthetic Fibres"), the European Commission found an agreement to reduce total capacity for the manufacture of synthetic textile fibers fell under the exemption now in Article 101(3) because the agreement "raise[d] the profitability and restore[d] the competitiveness of each party." Of course, cartel agreements also increase the member firms' profitability, and it is difficult to see why "overcapacity" should present an exception to the general rule against cartel agreements. *See also* Commission Decision 2001/837/EC, 2001 O.J. (L 319) 1 ("DSD") (balancing benefits to the environment from a reduction in packaging waste against the anticompetitive effects of an agreement among manufacturers and distributors of packaging).
[50] *See* Commission Decision 2003/600/EC, 2003 O.J. (L 209) 12 ("French Beef") (holding French beef farmers' agreement setting a minimum price was not justified as a reaction to "exceptional circumstances" brought about by a reduction in beef consumption due to fear of mad cow disease).
[51] *See* Commission Decision 84/191/EEC, 1984 O.J. (L 099) 24 (EEC) ("Nuovo CEGAM").

insurance companies for the purposes of sharing data on costs and risks, (2) the creation of re-insurance pools, and (3) several other competitively benign practices.[52]

- Transportation was exempted wholly from the competition laws under Council Regulation 141/62, but that was largely withdrawn in 2002. Now a handful of narrower block exemptions apply to specific practices in the transportation sector, such as agreements on various technical matters[53] and certain agreements among small and medium sized firms.[54]

Many block exemptions, however, are not directed at specific sectors of the economy, but rather go to a particular practice or type of practice regardless of the industry in which it may occur.[55]

In theory, block exemptions allow the Commission substantially to reduce legal uncertainty by exempting ex ante various beneficial business practices from potential liability under the competition laws. Courts in the EU, however, interpret block exemptions “narrowly” or “strictly,”[56] which tends to limit the gains in legal certainty that the exemption might otherwise provide. Moreover, the party arguing for application of the exemption bears the burden of persuasion.[57] Taken together, European courts’ practice of giving a narrow construction to block exemptions and a broad construction to the competition laws even when they are in tension with another law, we see that competition law may have a substantially broader application in Europe than it does in the United States.

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[52] Commission Regulation 358/2003, 2003 O.J. (L 53), 8 (EC).
[53] Reg. 1017/68, Art. 3, 1968 O.J. (L 175), 1 (EC).
[54] *Id.*, Art. 4 (permitting agreements by small and medium sized transportation firms, as defined by carrying capacity, regarding various joint activities including financing and the purchase of equipment).
[55] For example, see the European Commission Regulation on the Application of Article [101](3) of the Treaty to Categories of Technology Transfer Agreements (Commission Regulation 772/2004, 2004 O.J. (L 123) (EC)), which exempts certain classes of patent-related agreements from strict application of the competition laws.
[56] *See* BMW v. ALD Auto-Leasing, Case C-70/93 (E.C.R. 1995).
[57] Council Regulation 1/2003, Art. 2, 2003 O.J. (L 1) 1 (EC).

III. Comparative Evaluation

Finally, we compare and evaluate the different conflicts regimes of the United States and the European Union in general, and along three specific dimensions: uncertainty, expertise, and flexibility.

A. Comparative Institutional Framework

As we have seen, the reach of the competition laws in the United States and in Europe is subject to rather different institutional constraints. In the United States, antitrust law is ordinary law that has no inherent primacy over other federal statutes, such as those that create and empower sectoral regulators, whereas in Europe competition law is fundamental and hence may not be repealed by the European Parliament. Consequently, the U.S. Congress, because it can repeal or otherwise narrow the antitrust laws at will, plays a much larger role in defining the scope of antitrust law than does the European Parliament. Similarly, due to the judicially developed state action doctrine, the legislatures of individual states in the United States play a more active role in this respect than do the legislatures of member states in the European Union.

Notwithstanding the contrary impression one might get from looking solely at *Credit Suisse* and *Trinko*, therefore, it may be in the United States rather than in Europe where the judiciary plays the more modest role in reconciling competition and other values. When a U.S. court decides a case involving the scope of the antitrust laws, it does so as a matter of legislative interpretation; its decision can be overturned by the Congress.[58] By contrast, because the

[58] This process works in both directions. The Congress may overturn a broad judicial interpretation of the antitrust laws, as it did in enacting the labor exemption in §§ 6 and 20 of the Clayton Act; that statute overturned decisions such as Loewe v. Lawler, 208 U.S. 274 (1908), in which the Supreme Court had held a labor union that had organized a boycott a of non-union employer's products was subject to antitrust liability as a combination in restraint of trade. Conversely, the Congress may also overturn a judicially created exemption from the antitrust laws, as it did in the Curt Flood Act of 1998, 15 U.S.C. § 26b, which limited the antitrust exemption for major league

competition laws in Europe are constitutional in nature, a court decision interpreting those laws is not realistically subject to revision by the European Parliament. If the European courts were to interpret the competition laws in such a way as to stifle competition or innovation – which an untoward decision can surely do, as we saw in the United States for many decades – the European Union may be stuck with that interpretation for the indefinite future.[59] The best solution in Europe, however, may be not for the European courts to emulate the U.S. courts by taking upon themselves, as they might do pursuant to Article 101(3), the task of reconciling competition and other values; the legitimacy of judicial policy-making is more questionable with respect to matters that are not subject to legislative correction. Rather, it may be best to look to DG Comp and the competition authorities of member states to reconcile conflicts with the competition laws as they arise. By issuing block exemptions, the Commission can develop sensible interpretations of the competition laws that give clear guidance to private parties and due consideration to other regulatory schemes that also seek to advance consumer welfare.

In the United States, therefore, the courts are often the best placed institution to reconcile the conflicting demands of antitrust and other laws, whereas in Europe it is DG Comp (or a national competition authority) that is so placed. Because the United States and the European Union, accordingly, turn to rather different institutions with different virtues to reconcile conflicts (of means or of ends), there are different advantages to the methods adopted by each jurisdiction. We shall compare those institutions along three dimensions – certainty, expertise, and flexibility.

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baseball recognized by the Court in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922) and reaffirmed in Flood v. Kuhn, 407 U.S. 258 (1972).

[59] *See* Douglas H. Ginsburg & Eric M. Fraser, *The Role of Economic Analysis in Competition Law*, at page 35 in INTELLECTUAL PROPERTY, COMPETITION LAW AND ECONOMICS IN ASIA (Ian McEwin, ed., 2011) ("From 1890 into the 1970s competition law in the United States was not economically coherent"); Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust Law*, 65 COLUM. L. REV. 363, 364 (1965) ("Anti-free-market forces now have the upper hand [in antitrust jurisprudence] and are steadily broadening and consolidating their victory").

B. Reduction of uncertainty

The European practice of using block exemptions to resolve conflicts seems at first glance to provide more certainty for private actors than does American practice, which relies upon case-by-case resolution.[60] By announcing in advance that certain practices shall be exempt from the competition laws, the European Commission provides more guidance on the applicability of those laws. By contrast, in the United States the question whether a practice is exempt will not be resolved until the issue is pressed in litigation, and even then the court's decision may and probably will resolve the uncertainty across a more narrow range than would a block exemption. Because European courts construe block exemptions narrowly and the competition laws broadly, however, the scope for enforcement of competition law may be wider in Europe than it is in the U.S, as illustrated by the *Deutsche Telekom* case. Therefore, insofar as there is uncertainty inherent in Articles 101 and 102 themselves, the future judicial development of the competition laws is concomitantly uncertain and the method by which Europe resolves conflicts therefore may provide less certainty than might at first appear.

C. The role for expertise

In Europe, DG Comp plays a leading role in drafting block exemptions for promulgation by the Commission. Courts, by contrast, have a smaller role in defining the boundaries between competition policy and other bodies of law. If a competition agency can have enough information and foresight to draft block exemptions that are neither too broad nor too narrow,

[60] Of course, Article 101(3) of the TFEU also allows for granting exemptions ex post on a case-by-case basis, whilst the U.S. antitrust enforcement agencies issue ex ante "guidelines" to facilitate business planning. For our present purpose, however, the relevant comparison is between the EU's use of ex ante block exemptions and the U.S. system of resolving actual conflicts ex post.

then the European approach would seem to be more sensible than looking to the courts, as is done in the U.S., to decide whether a practice is implicitly exempt from the antitrust laws.

Perhaps owing to the influence that the economic analysis of law has had upon the U.S. judiciary, the Supreme Court seems confident of its ability to engage in an implied repeal analysis, as in *Credit Suisse*, and in the creative tailoring of the antitrust laws, as in *Trinko*. Such analyses require complex judgments regarding, among other things, (1) the incremental benefit of applying competition law to conduct already subject to sectoral regulation, and (2) the risks of false positives inherent in enforcing competition law. Without doubt, there are some American judges with the knowledge and training needed to perform that type of analysis, but we think it unclear whether the judiciary as a whole has the appropriate expertise to justify giving it this expansive role. For that reason, the U.S. system runs the risk of generating lower court decisions of varying analytic quality, which may give only uncertain guidance to undertakings potentially subject to antitrust liability.[61] Because, however, any first instance decision that the antitrust laws have been repealed by a subsequent statute (or otherwise narrowed by conflicting regulation) is likely to be reviewed by a court of appeals and perhaps by the Supreme Court, the relevant question may be only whether appellate judges are equipped for this task.

D. Flexibility

On the other hand, by relying more heavily upon the courts, the United States requires that conflicts be resolved ex post, on a case by case basis, which means courts base their decisions upon a factual record of real business conduct and its known effects upon

[61] *See* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J. LAW & ECON. 1 (2011) (adducing empirical evidence that having basic economics training improves quality of a judge's opinions in ordinary antitrust cases but not in complex antitrust cases).

competition.[62] This approach minimizes the risk of the court or agency striking the wrong balance by acting before it has accumulated sufficient information to make an informed determination, and perhaps thereby reaching an inefficient decision. Of course, the European Counsel and the European Commission can also take advantage of hindsight by modifying block exemptions in the light of their accumulated experiences, and they have done so on occasion.[63]

IV. Conclusion

Because the United States and Europe have developed different methods of resolving conflicts between competition and other values, reflecting their different constitutional structures, it is difficult to draw firm comparative conclusions from their experiences. Each approach has its virtues as well as its flaws. By relying heavily upon the courts, the United States runs the risk that lower court judges, unskilled in economic analysis, will provide only uncertain guidance to businesses or will err when deciding the antitrust laws should give way to another regulatory regime in a particular circumstance. Appellate review and Congressional oversight, however, may ensure the costs of any such error are not necessarily substantial. Moreover, the United States has the added advantage of flexibility inherent in case by case adjudication to resolve conflicts.

In Europe, by contrast, the cost of a judicial error may be much greater because the "constitutionalization" of competition law in the Treaty precludes legislative oversight of the courts' competition decisions, thereby increasing the likelihood that any judicial error will be

[62] *See, e.g.*, United States v. Microsoft, 253 F.3d 34, 93 (D.C. Cir. 2001) (declining to apply per se rule against tying "because of the pervasively innovative character of platform software markets, tying in such markets may produce efficiencies that courts have not previously encountered and thus the Supreme Court had not factored into the per se rule as originally conceived").
[63] *See* Council Regulation 1/2003, Art. 36, 2003 O.J. (L 1) 1, 7 (EC), repealing the exemption from competition law previously given to the transportation industry.

long-lived. The Commission has mitigated that risk somewhat by using its authority under Article 101(3) to resolve conflicts ex ante. That practice has the added advantage of giving greater certainty to the business community than does case by case judicial decision-making.

Finally, both the United States and Europe have managed to incorporate expertise into their systems in different ways. By delegating to DG Comp the decision whether to exempt a practice or entity from competition law, the European Commission can rely directly upon the agency's economics expertise and experience. The United States has given expert competition agencies little authority to resolve such conflicts, but it has nonetheless managed for several decades to make antitrust jurisprudence increasingly coherent by relying upon appellate judges to deploy at least a basic understanding of economics.