***Per se* Rules in U.S. and EU Antitrust/Competition Law**

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***Per se* rules in the U.S.**

The *per se* rules found in U.S. antitrust jurisprudence grew out of a perceived need for efficient enforcement of Section 1 of the Sherman Act, which prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.”[[1]](#endnote-1) Early judicial interpretations of the Sherman Act noted that a strict, literal reading would result in the illegality of *every* agreement between two or more entities because an agreement necessarily prevents one party’s competitors from gaining the business of the other party to the deal.[[2]](#endnote-2) Thus, the Court found it necessary, based on earlier common law antitrust jurisprudence and the simple need to promote the spirit of the Sherman Act, to use a “rule of reason” when conducting a Sherman Act Section 1 analysis in order to assess whether an agreement would actually promote or suppress competition under the Act.[[3]](#endnote-3) The rule of reason analysis seeks to balance the pro- and anticompetitive effects of an agreement against each other (the absence or presence of either is not dispositive of the outcome). Under the Court’s rule, agreements unreasonably suppressing competition are violations of Section 1, while those not found to have a negative effect on competition are not.

A full-scale analysis of all the relevant market conditions and factors surrounding an agreement is both time-consuming and costly. Notably therefore, in its 1940 *Socony-Vacuum* decision, the Supreme Court held that certain types of conduct, such as price fixing, inherently restrain competition in an unreasonable manner and are therefore prohibited *per se*.[[4]](#endnote-4) Under such *per* se rules, the Court’s evidential inquiry ends once it determines that a contract or agreement falls within a previously determined category of *per se* illegality. Any such contract or agreement is presumed anticompetitive and therefore prohibited under Section 1. While *per se* rules are an extremely useful tool which help conserve time and resources, the Supreme Court has set a fairly high standard for establishing such rules, requiring “considerable experience with the type of restraint at issue” and “demonstrable economic effect rather than . . . formalistic line drawing.”[[5]](#endnote-5)

The evolution of antitrust jurisprudence in the U.S. has seen the creation and abrogation of such presumptions based on judicial experience and changing market conditions. In 1967 the court declared vertical territorial and customer restrictions *per se* illegal in *United States v. Arnold, Schwinn & Co*., but overruled that holding only ten years later in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, substituting a rule of reason analysis.[[6]](#endnote-6) *GTE* *Sylvania* was truly a watershed event, which began a trend of the Court’s revisiting many of its *per se* rules in search of concrete empirical justifications. Indeed, thirty years after *GTE Sylvania*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* held that minimum resale price maintenance would be subject to the rule of reason, rather than the *per se* treatment that had applied to that practice for nearly a century.[[7]](#endnote-7) While *per se* prohibitions remain present in U.S. antitrust jurisprudence (*e.g.*, horizontal price fixing, geographic market division, customer allocation, output reduction, group boycotts), the Court has been explicit in favoring a nuanced approach in applying them. To be sure, *per se* treatment is alive and well but the Supreme Court is on guard against excessive formalism and therefore avoids use of presumptions where possible—and is willing to overrule them and their corresponding *per* se rules when no longer justifiable (e.g., in light of economic theory and data).[[8]](#endnote-8)

***Per se* Rules in the EU?**

[Art. 101(1) of the Treaty on the Functioning of the European U](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:NOT)nion (“TFEU”) includes a different approach than the Sherman Act in its proscriptions against anticompetitive behavior. The first portion of Art. 101 is arguably similar to Sherman Act § 1 in that it prohibits “agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition.” Subsections (a-e) provide examples of five types of behavior that explicitly fall within Art. 101(1): (a) price fixing; (b) output controls; (c) market allocation; (d) applying dissimilar conditions to similar transactions; and (e) tying.

While this non-exhaustive list of examples may imply that *per se* rules explicitly exist within the 101(1), Art. 101(3) exempts agreements, decisions and concerted practices that, in brief, prevent, restrict or distort competition but also contribute to production or distribution while benefitting consumers so long as they do not impose indispensible restrictions on competition or allow the involved undertakings to later eliminate competition.[[9]](#endnote-9) Therefore, taking subsections (1) and (3) together, there is no room for the CJEU to read *per se* rules into Art. 101 because it contains both a prohibition and an explicit basis for exemption.

In discussing the CJEU’s application of Art. 101, it is worth noting that the Court functions within a different institutional framework in the EU than the Supreme Court does within the U.S. Indeed, as identified in the “[Origins and Interpretation of ‘Concerted Practice’](http://www.eucomplaw.com/the-case/concerted-practice/)” section of this site, the three countries contributing prominently to the drafting of the Treaty of Rome (the first version of what is now the TFEU) were France, Germany, and the Netherlands—all civil law countries. This civil law heritage may suggest that there is little room for judicial development of *per se* rules that fall outside the text of the Treaty in CJEU competition jurisprudence. As a natural consequence, the CJEU’s interpretation of Art. 101 tends to be static, as the court operates under the fixed objectives embodied by the TFEU’s provisions. Although CJEU opinions do cite to earlier cases as rule of law, the Court typically relies on long-standing interpretations of the Treaty evermore (as exemplified through modern day cases that use, often without citation, the same (or nearly so) language from cases of the early 1960s). The Supreme Court’s interpretation of the Sherman Act, on the other hand, is more cyclical as it does not operate under such a fixed objective. The Supreme Court’s broader range of interpretive authority allows it to respond and adapt to market trends and economic theories and resulting in rules of law that change over time (as discussed above).

Nonetheless, necessity remains for the CJEU to interpret Art. 101’s prohibition of agreements “which have as their *object*… the prevention of competition.” As mentioned above, the CJEU holds the authority to lay down general principles of law in response to a referral of a member state. The Court often relies on its prior experience in infringement by object cases in order to remain consistent in its interpretation of this vague aspect of Art. 101, including a frequently recurring quote from the *Beef Industry* decision that “certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.”[[10]](#endnote-10) In *T-Mobile*, however, Advocate General (“AG”) Kokott went further than this commonly recurring theme and actually used the term “*per se* prohibition,” justifying the standard in part by noting the benefits of legal certainty for undertakings and conservation of enforcement and judicial resources.[[11]](#endnote-11) Granted, even absent Kokott’s recognition of a *per se* rule, the unilateral information exchange in *T-Mobile* may very well have been deemed to have an anticompetitive object under the *Beef Industry* standard. The ECJ’s inquiry into the actual effects of such an agreement would nevertheless end in a similar manner as would that of a Supreme Court *per se* analysis, but the use of the term “*per se*” in an EU competition decision is a marked development.

In a more recent CJEU decision, regarding the [Autorité de la concurrence](http://www.autoritedelaconcurrence.fr/user/index.php)’s (the French competition authority) regulation of a joint venture between online ticketing agent, Expedia, and rail operator, SNCF, to sell train tickets online, the AG reverted back to the previously quoted *Beef Industry* language regarding the justification to prohibit “certain forms of collusion.”[[12]](#endnote-12) In this case, the CJEU was answering the question of whether a member state was bound to follow the 10% market share *de minimis* standard set forth in Council Regulation (EC) No.1/2003. The CJEU found once again here that “there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.”[[13]](#endnote-13) While the term “*per se*” did not make another appearance in this opinion, it seems the Court favored *per se* type thinking rather than undertaking or requiring an in depth analysis, rendering both the *de minimis* standard and Art. 101(3) unaddressed.

**Comparison/Trends**

The CJEU’s willingness to impose *per se* rules in competition law (whether explicitly or implicitly) might suggest a trend in a direction opposite that of recent U.S. Supreme Court jurisprudence. While the Supreme Court has been reassessing its prior assumptions and rulings regarding the harm that necessarily or in all likelihood results from certain market behaviors, the CJEU appears to be leaning toward favoring presumptions and experience in order to conserve its resources and those of other authorities within the EU. As mentioned above, the Court specifically referenced this interest in the *T-Mobile* decision. The Supreme Court has, however, recently focused on efficiency within the marketplace—which it sees as a correlate of consumer welfare—and takes an unfavorable view of [false positives](http://www.eucomplaw.com/use-of-burden-shifting-in-decisions/), rather than emphasizing *judicial* efficiency or the need not to impair the possibility of regulatory intervention in the market.

A comparison of the underlying goals of each of the respective systems of law may help explain the differing directions of the two jurisprudential trends. The Supreme Court’s primary goal is to uphold the U.S. Constitution as the foundation for any law upon which the court rules. Thus, a U.S. antitrust decision is not governed by the Sherman Act alone, but also by the Court’s predilection to link its decisions to broader policy objectives, such as its Constitutionally mandated responsibility to interpret laws passed by Congress and intervene when those laws overstep the boundaries of Congress’s authority under the Constitution.[[14]](#endnote-14) The EU (originally the “European Community”), on the other hand, was first formed with the primary goal of economic market integration among its members. Thus, the CJEU is tied very tightly to the political and economic objectives of the Treaty itself, and as the highest court of the EU, it carries the role of lead interpreter of the Treaty’s provisions, including Art. 101 (the [European Commission](http://ec.europa.eu/index_en.htm) acts as “[guardian of the treaties](http://europa.eu/legislation_summaries/glossary/european_commission_en.htm)” subject to the CJEU’s authority to interpret them). While the U.S. Supreme Court has never viewed strict enforcement of the Sherman Act as an essential element in realizing the fundamental visions of the founding fathers, the CJEU has developed an institutional mindset focused on strict enforcement of Art. 101, in order to ensure the achievement of the fundamental goals of [Jean Monnet](http://www.cvce.eu/content/publication/1997/10/13/fea7d215-e7e5-4882-ab3c-ee08605621b8/publishable_en.pdf)—the father of the European Community.

1. 15 U.S.C. § 1. [↑](#endnote-ref-1)
2. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 66 (1911) (“If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide.”). [↑](#endnote-ref-2)
3. United States v. Am. Tobacco Co., 221 U.S. 106, 179 (1911) (“[A]s the statute had not defined the words ‘restraint of trade,’ it became necessary to construe those words,-a duty which could only be discharged by a resort to reason.”). [↑](#endnote-ref-3)
4. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (“Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.”). [↑](#endnote-ref-4)
5. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 887 (2007). [↑](#endnote-ref-5)
6. *See* U. S. v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) overruled by Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). [↑](#endnote-ref-6)
7. *Leegin* 551 U.S. at 907 (overruling Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)). [↑](#endnote-ref-7)
8. *See* California Dental Ass'n v. F.T.C., 526 U.S. 756, 779 (1999) (“The truth is that our categories of analysis of competitive effect are less fixed than terms like ‘per se,’ . . . and ‘rule of reason’ tend to make them appear. We have recognized, for example, that ‘there is often no bright line separating per se from Rule of Reason analysis,’ since ‘considerable inquiry into market conditions may be required before the application of any so-called “per se ” condemnation is justified.”) (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 at 104 (1984)). [↑](#endnote-ref-8)
9. Consolidated Version of the Treaty on the Functioning of the European Union Art. 101, 2008 O.J. C 115 at 88-89. [↑](#endnote-ref-9)
10. Case C-209/07 Beef Industry Development Society and Barry Brothers [2008] ECR I-0000 (‘BIDS’), paragraph 16. [↑](#endnote-ref-10)
11. Case C-8/08 T-Mobile Netherlands BV and Others v. Raad van bestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-04529, AG Opinion, paragraph 43. [↑](#endnote-ref-11)
12. Case C-226/11 Expedia, Inc. v. Autorité de la concurrence and Others [2012] ECR 0000, paragraph 36. [↑](#endnote-ref-12)
13. *Id.* at paragraph 35 (citing Joined Cases 56/64 and 58/64 Consten and Grundig v. Commission [1966] ECR 299; Case C-272/09 P KME Germany and Others v. Commission [2011] ECR I-0000, paragraph 65; and Case C-389/10 P KME Germany and Others v. Commission [2011] ECR I-0000, paragraph 75). [↑](#endnote-ref-13)
14. *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). [↑](#endnote-ref-14)