

Paper Trail: Working Papers and Recent Scholarship

This issue's Paper Trail summarizes a working paper, a forthcoming article, and (for the first time) a recently published book. The working paper, by Ahlborn, Evans, and Padilla, surveys the law and economics of tying in the United States and the EU, and argues that the time has finally come to abandon what is left of per se illegality in favor of a structured rule of reason analysis. The article, by John Lopatka and me, analyzes an often-overlooked dimension of the relationship between the antitrust laws and state regulation: the distinction between "hybrid" and "unilateral" anticompetitive state action. Finally, the book, by Bruno Zanettin, examines various current forms of cooperation between national antitrust agencies in the investigation of international antitrust offenses, and discusses the possibility of a more effective multilateral framework for cooperation.

As always, suggestions for coverage in the Paper Trail are welcome. Please email John Woodbury (jrw@crai.com) or Bill Page (page@law.ufl.edu).

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Papers and Summaries

Christian Ahlborn, David S. Evans, & A. Jorge Padilla, *The Antitrust Economics of Tying:*

***A Farewell to Per Se Illegality*, <http://www.aei.brookings.org/publications/abstract.php?pid=311>**

This paper (1) surveys and compares the current legal status of tying arrangements in the United States and the European Union, (2) reviews the Chicago School and post-Chicago economic analyses of tying, and (3) proposes a structured rule of reason inquiry for identifying anticompetitive tying. The comparative analysis of tying doctrine is lucid, particularly in its critique of some of the more retrograde formalisms of EU law. The authors show that, although the verbal formulation of EU law is similar to *Jefferson Parish*, the applications are closer to the earlier, strict per se approach in the United States. The review of economic theory usefully shows that there is really not much theoretical dispute between Chicagoans and post-Chicagoans. Chicagoans showed tying is ubiquitous, typically beneficial, and rarely anticompetitive. Post-Chicagoans like Whinston (1990) and Carlton & Waldman (2002) use game theory to demonstrate that tying can be used to deter entry in either the tying or tied product markets in limited circumstances. Because the post-Chicago theories rest on such restrictive assumptions, they also support abandonment of per se illegality.

The authors offer a series of "screens" derived from economic theory for a new rule of reason. As a first screen, they identify seven conditions for any anticompetitive effect to be present, including a near-monopoly of the tying product; imperfect competition and entry barriers in the tied product market; and the absence of power buyers. As a second screen, they would require articulation and support of a particular theory of anticompetitive harm. For example, for the Carlton & Waldman theory, they would require, among other things, proof that the a potential entrant has a higher quality product than the defendant and "would enter the primary market if it previously had entered the complementary market." Finally, they would allow proof of offsetting efficiency benefits.

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John E. Lopatka & William H. Page, State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints, YALE J. ON REGULATION (forthcoming 2003)

For a .pdf version, contact: page@law.ufl.edu

Antitrust observers are familiar with the two-part *Midcal Aluminum* test for the immunity of state regulation from federal antitrust laws: the state must clearly articulate its policy to displace competition and must “actively supervise” any private conduct pursuant to the policy. But state action need not meet these requirements if it is “unilateral” and therefore does not conflict with Section 1. Only if a state-authorized restraint is “hybrid,” combining state and private action in a way that resembles a prohibited agreement, need the restraint satisfy *Midcal*.

In this paper, John Lopatka and I examine the history and present importance of this distinction between unilateral and hybrid restraints. Although the Supreme Court’s precedents are not entirely consistent, we argue that a unilateral restraint is one in which governmental actors define the extent of consumer harm, while a hybrid restraint is one in which the government “empowers private actors to exercise discretion as to the nature or level of consumer injury in a way that closely resembles an antitrust violation.” We examine the emergence of this principle in the context of state restraints that are analogous to resale price maintenance. We then examine recent appellate decisions characterizing horizontal restraints as hybrid. In this part, we argue that antitrust law reaches “not only state authorized express collusion but state practices that significantly facilitate *tacit* collusion and serve no competitively benign purpose.”

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BOOK NOTE

Bruno Zanettin, Cooperation Between Antitrust Agencies at the International Level (Hart Publishing Co., Oxford and Portland, Oregon 2002)

Zanettin identifies actual and potential conflicts that may arise between antitrust regimes because of enforcement actions against international practices (mergers, cartels, and exclusionary practices), and then explores various levels of cooperation between agencies both to avoid conflicts and to facilitate investigations. He distinguishes “soft cooperation,” the use of bilateral agreements to coordinate investigations, from two types of “hard cooperation.” The first of these is sharing of confidential information both through judicial mechanisms and by “mutual legal assistance agreements” under the International Antitrust Enforcement Assistance Act. The second form of hard cooperation is “positive comity,” or instituting investigations at the request other countries. In the final chapter, Zanettin points out the shortcomings of bilateral cooperation and considers the possibilities for a multilateral cooperation framework, for example through the framework of the WTO.

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