

## Referee-granskad artikel

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## Property and European Integration: Dimensions of Article 345 TFEU

### 1. Introduction

Property is a key concept in determining how society is organised. Its relevance for the European integration process is recognised in a treaty provision whose origin can be traced back to the Schuman Declaration of 1950 and to Article 83 of the Treaty establishing the European Coal and Steel Community (TECSC) of 1951. The present wording of the provision is found in Article 345 of the Treaty on the Functioning of the European Union (TFEU):

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

An almost identical provision had already been included in Article 222 of the Treaty establishing the European Economic Community (TEEC) of 1957 which later became Article 295 of the Treaty establishing the European Community (TEC). While the aims behind Article 83 TECSC are fairly well known,<sup>1</sup> this is not the case with Article 222 TEEC and its subsequent incarnations. Article 222 TEEC introduced the provision of Article 83 TECSC for the first time in the context of general economic integration, and broadened its wording. However, it is unknown what exactly the original purposes of Article 222 TEEC were, that is, how it was supposed to define the role of property with respect to general economic integration, as opposed to the sectoral approach of the TECSC. It is also unknown whether and how its purposes have changed in subsequent stages of the integration process.

Still today, Article 345 TFEU leaves fundamental questions unanswered. For example, does it establish a division of competences between the European Union (EU) and the Member States? If so, what competences does it concern and how are they divided? Is it to be interpreted differently in different contexts?

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<sup>1</sup> See section 2.1 below.

Does it affect the prospects for developing a European property law or other property-related law at EU level?

Different viewpoints, such as those of integration history and the various property-related fields of law reveal different dimensions of Article 345 TFEU, for example the functions the provision is perceived to serve. In what follows, Article 345 TFEU is examined from four viewpoints.<sup>2</sup> Section 2 explores Article 345 TFEU in the light of the early stages of European integration and the multilingual setting of European law (Losada). Section 3 reviews interpretations of the provision with respect to unification and harmonisation efforts in the field of property law (Juutilainen). Section 4 explains the relation of the provision to competition law (Havu). Finally, section 5 examines the provision at the intersection of competition law and the law of intellectual property (Vesala).

A central reference point for this discussion is a recent study by *Bram Akkermans* and *Eveline Ramaekers*, which seeks to clarify the provision of Article 345 TFEU by analysing its drafting as well as its use by EU institutions and by Member States.<sup>3</sup> Akkermans and Ramaekers arrive at a rather narrow interpretation of the article. According to them, the provision limits, but does not prevent, application of the TFEU as a whole to the way in which Member State rules deal with ownership of *undertakings*. In their view, the provision only concerns whether undertakings are held in public or private ownership, leaving this to be regulated by the Member States. The content and objects of the right of ownership are, so the argument goes, outside the scope of the provision. Accordingly, they conclude that the provision does not prevent development of a European property law.

## 2. Taking History and Multilingualism into Account when Interpreting Article 345 TFEU

### 2.1. *The Origin of the Provision*

Akkermans and Ramaekers address the issue of how Article 345 TFEU should be interpreted. Despite their great attention to detail, some crucial questions remain unanswered. These concern the reasons why a similar provision was included in the Treaties from the very beginning of the European integration

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<sup>2</sup> The discussion is based on the authors' contributions at the seminar «What Role for Property in European Integration? An Exchange of Ideas between Maastricht and Helsinki» organised by the Centre of Excellence *Foundations of European Law and Polity* in Helsinki on 7 June 2011. The authors are members of the Centre.

<sup>3</sup> *Bram Akkermans – Eveline Ramaekers*, «Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations», *European Law Journal* 2010, 292–314. Akkermans and Ramaekers delivered a keynote presentation based on their study at the seminar mentioned in n. 2 above.

process, as well as the meaning of the article in Europe's multilingual context. The former issue is discussed in the present section, the latter in section 2.2.

The first step in attempting to understand this provision is to explain why a provision on property was included in the Treaties in the first place. Following Advocate General *Ruiz-Jarabo Colomer's* opinion in what perhaps should be considered the core cases of the *Golden Shares* saga,<sup>4</sup> Akkermans and Ramaekers trace the basic content of Article 345 TFEU back to the Schuman Declaration.<sup>5</sup> For reasons which are not evident, they mainly focus on Article 222 TEEC and its different language versions in their inquiry into the content that the drafters intended to give to the provision. However, the question of the intended content cannot be answered without first exploring the reasons behind its inclusion in the Schuman Declaration and in Article 83 TECSC.

The Schuman Declaration mentioned that establishing the High Authority, a supranational administrative body, would not prejudice the regime of ownership of undertakings.<sup>6</sup> In order to understand this statement it is important to recall the political context of the time. After the Second World War, the French authorities were concerned about the possible rearmament of Germany, while on the other side of the border the German people were trying to recover their dignity having accepted responsibility for past events. Showing them no mercy could have jeopardized their repentance and created a breeding ground for a renewed and potentially dangerous nationalism. As a result, the first steps in the European integration process were based on a delicate balance between the French wish to somehow monitor German industrial potential and Germany's need to regain its own dignity.<sup>7</sup>

One of the elements in restoring Germany's dignity was its ability, as a state, to recover control over its industries. As a matter of fact, in occupied Germany, Law 75 of the British and American forces had already reorganised the coal and steel companies and established, against the opinion of the French,<sup>8</sup> a »commit-

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<sup>4</sup> Joined opinion to the Court of the Advocate General in Cases C-367/98 *Commission of the European Communities v Portuguese Republic* [2002] ECR I-04731, C-483/99 *Commission of the European Communities v French Republic* [2002] ECR I-04781, and C-503/99 *Commission of the European Communities v Kingdom of Belgium* [2002] ECR I-04809.

<sup>5</sup> Akkermans – Ramaekers 2010, 296.

<sup>6</sup> The language of the Declaration was French: »L'institution de la Haute Autorité ne préjuge en rien du régime de propriété des entreprises.»

<sup>7</sup> See the recurrent mentions of this idea in *Jean Monnet, Mémoires* (Paris: Librairie Générale Française 2007), particularly in chapters XI to XV.

<sup>8</sup> *Charles de Gaulle* reportedly considered this as »the gravest decision made so far during the 20th century», since it was not clear what the stance of the German state towards Russia and communism was. See »Gen. de Gaulle fears Germany to back reds», *Kentucky New Era*, 17 November 1948 (digitalized version available at: <http://news.google.com/newspapers?nid=0N-VGjzr574C&dat=19481117&printsec=frontpage&hl=en>, last visited on 17 February 2011).

ment to re-privatize Ruhr industry»,<sup>9</sup> thus devolving competence over the rules concerning the property of the factories to the German government.<sup>10</sup> It is true that the main aim of this measure was to clarify which assets were German property and thus available to be used for paying war damages,<sup>11</sup> but once the ownership of companies had been devolved to the German state, all measures proposing any control by French authorities over German industry were pushed off the agenda.

The French remained suspicious and uneasy about the potential of German industry, particularly due to the decisive influence of certain industrial groups considered as accomplices to Nazism and its policy of aggression. Only a general and abstract rule applicable to all countries without exception would be accepted in order to keep the neighbour's rearmament under control. This was realised via an antitrust policy of universal character imported from the United States,<sup>12</sup> which would be supervised and implemented by the High Authority.

The statement in the Schuman Declaration, according to which the establishment of the High Authority would not prejudice the regime of ownership of undertakings,<sup>13</sup> was the first formulation of what later became Article 345 TFEU. This statement served several purposes. First and foremost, it sought to separate the proposed Community from the unsolved and highly sensitive political issue of property rights over the Saarland collieries and the Ruhr mines.<sup>14</sup> The aim of the TECSC was not to resolve this conflict, but to pool the coal and steel industries *despite* its existence. In addition, the statement demarcated the powers of the projected Community. That is, even though resources were to be pooled and the High Authority would plan the development of the sector, the Treaty would not affect national regulations on property. Thus, different conceptions of market economy would fit in the proposed system.<sup>15</sup>

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<sup>9</sup> Helge Berger – Albrecht Ritschl, »Germany and the political economy of the Marshall Plan, 1947–52: a re-revisionist view«, in Barry Eichengreen (ed.), *Europe's Post-War Recovery* (New York: Cambridge University Press 1995), 219.

<sup>10</sup> Reorganization of German Coal and Iron and Steel Industries, Military Government – Germany, U.S. Zone of Control Law No. 75 of November 10, 1948, *Department of State Bulletin*, Vol. 19 (1948), 704.

<sup>11</sup> The issue of what was not German property was equally important, especially in the cases of German companies established in foreign countries or foreign companies established in Germany. Even more problematic were the instances of German shareholders in foreign companies or foreign shareholders in German companies. On these technical but central issues, see *Martin Domke*, »The Control of Corporations. Application of the Enemy Test in the United States of America«, *The International Law Quarterly* 1950, 52–59.

<sup>12</sup> *Wyatt Wells*, *Antitrust and the Formation of the Postwar World* (New York: Columbia University Press 2002).

<sup>13</sup> For the exact wording, see n. 6 above.

<sup>14</sup> *Paul Reuter*, *La Communauté Européenne du Charbon et de l'Acier* (Paris: LGDJ 1953), 146.

<sup>15</sup> This was explicitly recognised by *Paul Reuter*, legal adviser to Schuman and Monnet during the negotiations for the TECSC: »une des conséquences importantes de la variété des types de propriété va être, dans la Communauté, le fonctionnement d'un marché concurrentiel qui

This statement had an implicit and additional content, since it also signified that the new Community would under no circumstance have the power to nationalise companies. It must be recalled that such power is a major expression of the monopoly of legitimate force which defines a state.<sup>16</sup> Therefore, when ratifying the TECSC, Member States were not conferring this key attribute of their sovereignty on the High Authority. All these reasons lay behind the codification of this statement as one of the general and final provisions of the Treaty (Article 83).<sup>17</sup>

A subsequent question is why this provision was maintained, albeit with a different formulation, when economic integration in more general terms was negotiated some years later. Were the original reasons behind it, related to the particular conditions of the coal and steel industries and to certain politically sensitive issues, also valid with respect to broader economic integration? It should be noted that Article 83 TECSC explicitly mentioned as the object of the provision *the undertakings subject to the provisions of this Treaty*, whereas the new Article 222 TEEC referred to *the system of property ownership in Member States*.<sup>18</sup> This suggests that a more general provision was needed for the new step in European integration. Perhaps this was a broader claim against conferral of any power to nationalise.<sup>19</sup> Be that as it may, no convincing answer as to why the provision was maintained can be given due to the simplistic account of the drafting process in the *travaux préparatoires* and the lack of literature.<sup>20</sup>

It is still possible to answer related questions, such as what were the content and scope of the provision. However, the explanation provided by Akkermans and Ramaekers is not fully satisfactory in this regard. In short, they argue that despite the change of wording in Article 222 TEEC, the content of the provision remained the same as in Article 83 TECSC, particularly regarding its object.<sup>21</sup> According to their interpretation, removing the reference to undertakings from

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opposera des entreprises purement capitalistes, des sociétés d'économie mixte, des entreprises nationalisées, et des affaires, sous toutes les formes juridiques imaginables, sans omettre la co-gestion allemande. Le fonctionnement correct du marché commun opérera dans ces conditions la démonstration d'une affirmation théorique aussi évidente que méconnue dans les milieux politiques, à savoir que l'économie de marché n'est pas liée directement à l'organisation du droit de propriété». Reuter 1953, 146–147. Cf. *Helen Papaconstantinou*, *Free Trade and Competition in the EEC*. Law Policy and Practice (London: Routledge 1998), 4.

<sup>16</sup> According to *Max Weber*, a state can be defined as »the human community that, within a defined territory ... (successfully) claims the *monopoly of legitimate force* for itself». *Max Weber*, *Max Weber's Complete Writings on Academic and Political Vocations* (New York: Algora Publishing 2008), 156 (emphasis in the original).

<sup>17</sup> The wording of its single original version (French) was: »L'institution de la Communauté ne préjuge en rien le régime de propriété des entreprises soumises aux dispositions du présent traité.»

<sup>18</sup> The French wording of the provision was: »Le présent traité ne préjuge en rien le régime de la propriété dans les États membres.»

<sup>19</sup> On the issue, see section 3.2 below.

<sup>20</sup> See Akkermans – Ramaekers 2010, 300.

<sup>21</sup> *Ibid.*, 302.

the formulation of the provision did not change its content. This counter-intuitive interpretation, which restricts the scope of the article despite its wording, ought to be supported by stronger arguments than those which have come to the fore so far.

## 2.2. *The Meaning of the Article in a Multilingual Context*

In order to elucidate the meaning of the provision of Article 345 TFEU, Akkermans and Ramaekers also carry out a comparison between its different language versions. Article 83 TECSC was written in French, which was its sole official language, whereas the Treaty of Rome (EEC and the European Atomic Energy Community) was written in four language versions, all considered authentic. Therefore, interpreting the provisions of Article 222 TEEC and its subsequent incarnations depends on the content of all the versions, as the authors correctly explain. Furthermore, since they wrote the results of their research in English, it is understandable that the authors compare all the original versions with the English one. Yet, in terms of rigour of research it would have been more appropriate to study the four original versions first and only then proceed to compare them with the English one. This would have made it more evident that what used to be a uniform interpretation according to the first versions became a more dubious one after the United Kingdom and Ireland joined the EEC in 1973. The reason for this was that the French term *préjuge* was translated into English as *prejudice*, while its meaning is *prejudge*. Even though Akkermans and Ramaekers doubt this translation, they consider to what extent it is possible to adapt the wording of the English version to the meaning of the other language versions.<sup>22</sup>

Nevertheless, some additional research is needed. Once such a difference between versions has been detected, and bearing in mind that all language versions are of the same value when interpreting the Treaties, the next step should be to examine whether and to what extent the English version embodied a voluntary change in the Treaty contents. If the answer was affirmative, later versions of the Treaties, corresponding to further accessions, would also include this nuance in the meaning of the present Article 345 TFEU. However, neither the Spanish and Portuguese versions (from the 1986 enlargement), nor the Finnish and Polish ones (from the 1995 and 2004 enlargements, respectively) differ from the original drafting.<sup>23</sup> This suggests that it was not the intention of the Member States, in accepting the English *prejudice* instead of *prejudge*, to modify the content of the Treaties.

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<sup>22</sup> *Ibid.*, 298.

<sup>23</sup> Not all the language versions have been checked, but the four mentioned in the text seem representative and adequate enough for the purpose of what is to be proved.

Therefore, resulting from interpretation of the provision according to all authentic language versions as well as from the fact that *prejudice* is not a correct translation of *préjuger*, it may be concluded that despite the literal wording of the English version the article should be interpreted as meaning *prejudge*.<sup>24</sup> Akkermans and Ramaekers arrive at a similar but not fully equivalent conclusion: »when compared to the original four language versions, it can be understood that the expression ‘shall in no way prejudice’ refers to the *neutral stance* that is taken by the EU with regard to the way in which Member States regulate their system of property ownership». <sup>25</sup> It seems that in their view, mere neutrality of European institutions towards national systems of property is enough to respect fully the mandate of the article.<sup>26</sup> However, this interpretation can be questioned for two reasons. First, when making such a statement, they seem to establish a link between *not prejudicing* and neutrality, a step in their reasoning which is difficult to justify according to any language version of the Treaties. As a matter of fact, if the provision is interpreted as meaning *prejudge*, the gap between its actual wording and the way they interpret it is even wider. Second, neutral supranational rules may treat equally what in substance are unequal forms of property. Thus, applying the same rationale to both public and private undertakings could lead to ignoring the fundamental differences between them.<sup>27</sup>

### 3. Article 345 TFEU and the Europeanisation of Property Law

#### 3.1. *The Need for a Clear Interpretation*

The vague wording of Article 345 TFEU and its predecessors has caused considerable confusion with respect to property law, and continues to do so. Some scholars maintain that this provision is meant wholly or partially to exclude property law from EU competence,<sup>28</sup> whereas others argue that it merely safe-

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<sup>24</sup> This interpretation is in accordance with the *CILFIT* doctrine (Case 283/81, *CILFIT* [1982] ECR 3415), mentioned in Akkermans – Ramaekers 2010, 294.

<sup>25</sup> Akkermans – Ramaekers 2010, 298 (emphasis added).

<sup>26</sup> As a matter of fact, they state that »Article 345 TFEU excludes application of the Treaty to the question whether these undertakings are held in private ownership – by shareholders – or in public ownership – by a Member State government». Akkermans – Ramaekers 2010, 303.

<sup>27</sup> *Danny Nicol* argues that this has already happened in the European integration process: »the Commission, when examining a particular operation under the rules on state aid, must neither prejudice nor favour public undertakings. Aid granted to public undertakings must therefore be subject to the same rules applying to all forms of aid granted by the Member States. Yet the effect of non-discriminatory treatment is to deprive public ownership of its potential for distinctiveness and of its useful purpose.» See *Danny Nicol*, *The Constitutional Protection of Capitalism* (Oxford – Portland: Hart 2010), 118.

<sup>28</sup> *José Caramelo-Gomes*, »Unification in the Field of Property Law from the Perspective of European Law», in Wolfgang Faber – Brigitta Lurger (eds), *Rules for the Transfer of Movables. A Candidate for European Harmonisation or National Reforms?* (Munich: Sellier. European Law Publishers 2008), 241–247.

guards Member State competence to nationalise or privatise property.<sup>29</sup> The latter view seems to have become prevalent in the literature.<sup>30</sup> Whatever the right interpretation, the provision has not prevented European legislation or adjudication on matters that touch upon or directly concern property law. Examples of such legislation include Directive 93/7/EEC on the return of unlawfully removed cultural objects, Regulation (EC) 1346/2000 on insolvency proceedings, and Directive 2002/47/EC on financial collateral arrangements. The European Court of Justice (ECJ)<sup>31</sup> has entered the domain of property law in several cases on internal market freedoms.<sup>32</sup>

However, the provision has caused controversy in the EU legislative process. Perhaps the best-known example is the enactment of Directive 2000/35/EC on combating late payment in commercial transactions. As a part of this project, an attempt was made to harmonise the enforceability of simple retention of title clauses against third parties. This would have been a long-awaited reform. All the same, it failed due to Article 295 TEC (now 345 TFEU). According to *Michael Milo*, mere mention of this article seems to have prevented serious discussion of how the property law aspects of retention of title should be dealt with. This took place at the level of the Council, as a result of legal service department advice that the proposed provision on retention of title might contravene Article 295 TEC. Milo is very likely right in suggesting that the article was misused by this *deus ex machina* application.<sup>33</sup>

In order to prevent further misuses, be they either unfounded avoidance of legislative activity or overstepping competence, the interpretation of Article 345 TFEU needs to be clarified. This exercise is worthwhile since some property law related problems in cross-border trade and finance seem to be solvable only at a transnational level, a likely candidate for such a level being the European one. The study by Akkermans and Ramaekers is an important step towards a better understanding of the article's provision. Interestingly, Akkermans and Ramaekers conclude that Article 345 TFEU does not form an obstacle to the development of a European property law, that is, unification or harmonisation efforts in

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<sup>29</sup> *Jacobien W. Rutgers*, *International Reservation of Title Clauses. A Study of Dutch, French and German Private International Law in the Light of European Law* (The Hague: T.M.C. Asser Press 1999), 175–176.

<sup>30</sup> *Eva-Maria Kieninger*, »Introduction«, in *Eva-Maria Kieninger* (ed.), *Security Rights in Movable Property in European Private Law* (Cambridge: Cambridge University Press 2010), 21–22; *J.M. Milo*, »Combating Late Payment in Business Transactions: How a New European Directive Has Failed to Set a Substantive Minimum Regarding National Provisions on Retention of Title«, *European Review of Private Law* 2003, 383–384.

<sup>31</sup> Hereinafter, the term ECJ refers to the Court of Justice (European Union's highest court of law) and all its predecessors.

<sup>32</sup> For a comprehensive account of emerging European property law, see *Sjef van Erp – Bram Akkermans*, »European Union property law«, in *Christian Twigg-Flesner* (ed.), *The Cambridge Companion to European Union Private Law* (Cambridge: Cambridge University Press 2010), 174–185.

<sup>33</sup> *Milo* 2003, 385.



this field.<sup>34</sup> Sections 3.2 and 3.3 below briefly discuss two of their central arguments on the scope of the article. These arguments are particularly relevant for Europeanisation of property law, and they seem to give rise to some reservations. Then, section 3.4 considers the implications that these reservations may have for interpretation of the article.

### 3.2. *Is the Scope of the Article Limited to Ownership of Undertakings?*

Akkermans and Ramaekers argue that the reference in Article 345 TFEU to the system of property ownership should be interpreted as concerning only the ownership of *undertakings*. Thus, the article would merely establish the so-called neutrality principle, according to which the EU does not concern itself with whether undertakings are held in public or private ownership.<sup>35</sup> This principle entails that decisions on the nationalisation or privatisation of undertakings fall within the Member States' exclusive competence, albeit that this competence has to be used in conformity with internal market freedoms and competition law. Akkermans and Ramaekers support this interpretation with archival findings concerning the negotiations for the TEEC (1955 to 1957). They point out that the last text version before the final text of Article 222 TEEC (later 295 TEC, now 345 TFEU) included a qualification that limited the scope of the article to the ownership of undertakings. Furthermore, they believe that removal of this qualification for the final text was not intended to change the scope of the article. Therefore, in their view, Article 345 should also be interpreted as if the qualification was still in its provision.<sup>36</sup>

This interpretation leaves room for doubt because, as Akkermans and Ramaekers admit, it is unknown why the qualification was removed. The *travaux préparatoires* only reveal the different text versions and their chronological order. Akkermans and Ramaekers consider it significant that the qualification was removed at a meeting of the Heads of Delegation, and not at an intergovernmental conference at political level. They see this as an indication of the insignificance of the removal.<sup>37</sup> It is questionable, however, whether this conclusion can be drawn. After all, the motives behind this change, and who came up with it or commissioned it, cannot be deduced from the archival material.

Indeed, it is possible that the qualification was removed with a view to broadening the scope of the article beyond mere ownership of undertakings. It is well established that the Member States' main concern with respect to Article

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<sup>34</sup> Akkermans – Ramaekers 2010, 313–314.

<sup>35</sup> For criticism of this view, see section 2.2 above.

<sup>36</sup> Akkermans – Ramaekers 2010, 299–302.

<sup>37</sup> *Ibid.*, 300.

222 TEEC was their competence to nationalise property.<sup>38</sup> Therefore, it seems unlikely that the Member States would have wanted to limit the provision safeguarding their competence to nationalise property to ownership of undertakings, and not to let it concern other property rights of similar importance.

Moreover, it is known that the text version before the one with the qualification concerning ownership of undertakings included, instead, a qualification concerning ownership of *means of production*.<sup>39</sup> This may give a hint as to why the qualification concerning ownership of undertakings was eventually removed. That is, the qualification concerning ownership of undertakings may have been seen as narrower than the one concerning ownership of means of production. Consider an example where an undertaking owns infrastructure or other assets that the undertaking's home Member State considers strategically important and wants to nationalise, without being interested in nationalising the undertaking as such. It seems clear that this nationalisation would lie within the scope of a qualification concerning means of production, whereas the same might not hold true for a qualification concerning ownership of undertakings. Thus, the qualification concerning ownership of undertakings may have been removed so as to broaden the scope of the article back to what it would have been with the qualification concerning ownership of means of production, or even broader.

### 3.3. *Is the Right of Ownership Excluded from the Scope of the Article?*

Akkermans and Ramaekers also argue that the expression *system of property ownership* does not refer to the right of ownership itself, but only to the way in which ownership is held, that is, to the question of public or private ownership. Accordingly, in their view, the content and objects of ownership are excluded from the scope of Article 345 TFEU. They support this with their impression that it is uncommon in property law to speak of a system of ownership, and that a formulation leaving out the word *system* would immediately give the article a different meaning for a property lawyer.<sup>40</sup>

This argument is not beyond question either. First, it may not be helpful to assess the wording of the article only on the basis of typical property law parlance because an article in a European treaty is an atypical context for that kind of parlance, which indeed is often very nationally-oriented. Akkermans and Ramaekers do recognise one common use for the expression *system of property ownership*, namely, defining the different types of ownership, such as fragmentary or unitary concepts of ownership. This remark may actually offer a key to

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<sup>38</sup> Daniela Caruso, »Private Law and Public Stakes in European Integration: the Case of Property«, *European Law Journal* 2004, 755–756; Akkermans – Ramaekers 2010, 302.

<sup>39</sup> Akkermans – Ramaekers 2010, 300.

<sup>40</sup> *Ibid.*, 302–304.

an alternative interpretation. In a treaty context, a reference to a system of property ownership could be understood as taking a comparative stance, thus recognising the differences between the various concepts of ownership, and as affirming that all of these concepts are accommodated in what the article prescribes.

Second, and more importantly, the right of ownership itself can, and should, be understood as a system. Concepts of ownership always conceal complex systems of norms and normative relations, and a particular concept of ownership can only be understood by viewing the relevant norms and normative relations in a systematic, organised way. An organised picture of these normative relations can be formed, for example, with the help of *Wesley Newcomb Hohfeld's* »fundamental legal conceptions«, which also makes the different concepts of ownership commensurable.<sup>41</sup> An extreme version of the idea of ownership as a system was presented by *Alf Ross*, a leading Scandinavian realist. According to Ross, the word *ownership* is a mere systematic connection between a group of conditioning facts (facts that »create ownership«) and a group of legal consequences (consequences that »ownership entails«). Generally, he thought of ownership as an empty word which has no semantic reference and which only serves the purpose of presentation.<sup>42</sup>

In the light of the foregoing, the expression *system of property ownership* could be understood, on linguistic grounds, as a reference to the right of ownership itself. However, knowing the article's purpose regarding Member State competence to nationalise property, the scope has to cover the ways in which ownership can be held. Regardless of that, it seems unnecessary to exclude the right of ownership from the idea of a system of property ownership. Quite the contrary, the right of ownership could be thought of as the nucleus of such a system.

Third, the negotiators for the TEEC may have been aware that the way in which the concept of ownership is understood may have consequences for political decision making concerning ownership. An example of such consequences can be taken from the memoirs of *Tage Erlander*, a social democrat and Sweden's long-time prime minister. He describes how Scandinavian realism broke down the old natural law based unitary concept of ownership, and how this altered Swedish socialist politics during the first half of the 20th century.

The unitary concept of ownership was split into several partial concepts, each of which could acquire new content as a consequence of societal intervention. It became possible to change, or even to repeal, an isolated aspect of ownership by a decision of the government or other organisation, while leaving the other aspects unaffected. The question of who should be the formal owner lost

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<sup>41</sup> See *Wesley Newcomb Hohfeld*, »Some Fundamental Legal Conceptions as Applied in Judicial Reasoning«, *Yale Law Journal* 1913, 28–58.

<sup>42</sup> *Alf Ross*, »Tû-tû«, *Harvard Law Review* 1957, 818–821.

some of its importance, and consequently socialisation lost its dominant position in socialist theory and became a matter of mere expediency.<sup>43</sup>

Of course, this is not to suggest that the negotiators knew about these developments. However, they may have recognised that the technicalities and the politics of ownership are not strictly separate matters. This, then, could be seen as an indication of Member State incentives to include such technicalities (the features of the right of ownership itself) in the scope of the article.

### 3.4. *An Open-ended but Clarified Interpretation*

The study by Akkermans and Ramaekers shows that the question of public or private ownership of undertakings belongs to the core of the scope of Article 345 TFEU. Yet, as sections 3.2 and 3.3 above suggest, it is still unknown whether that is also the whole of the scope. Thus, for the time being, it seems necessary to accept that interpretation of the article remains to some extent open-ended.

It can perhaps be safely assumed that the article is meant to leave some sphere of political-economic decision making to the Member States' exclusive competence. The sphere's limits are difficult to define, though. An attempt to outline these limits could be based on the assumption that the Member States' exclusive competence can pertain only to matters of at least similar magnitude (public importance) to those concerning the question of public or private ownership of undertakings. When it comes to the harmonisation efforts necessary in order to secure the proper functioning of the internal market, this clarification should be sufficient. This is the case because hardly any such efforts could be caught by the article.

This interpretation can be supported by *Brigitta Lurger's* observation that property law is in many respects similar, and related, to contract law. According to Lurger, it cannot really be said that one is more public or political than the other.<sup>44</sup> If this holds true, it becomes hard to explain why Article 345 TFEU should give reason to any exceptionalism regarding property law.

With respect to negative harmonisation, as Akkermans and Ramaekers suggest, the ECJ would probably apply the dichotomy between existence and exercise developed in its case law on intellectual property rights.<sup>45</sup> In the context of positive harmonisation, Article 345 TFEU might become, at best, something similar to what *Daniela Caruso* calls a promise of collective reflection in private

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<sup>43</sup> *Tage Erlander, 1901–1939* (Stockholm: Tidens Förlag 1972), 125–126. See *Toni Malmi-nen*, »So You Thought Transplanting Law Is Easy? Fear of Scandinavian Legal Realism in Finland, 1918–1965«, in Jaakko Husa – Kimmo Nuotio – Heikki Pihlajamäki (eds), *Nordic Law – Between Tradition and Dynamism* (Antwerp – Oxford: Intersentia 2007), 80–81.

<sup>44</sup> *Brigitta Lurger*, »Political Issues in Property Law and European Unification Projects«, in Martijn W. Hesselink (ed.), *The Politics of a European Civil Code* (The Hague: Kluwer Law International 2006), 52.

<sup>45</sup> Akkermans – Ramaekers 2010, 310–311. See also section 5.2 below.

law matters of public significance, or in other words, a promise that the distributive implications of harmonisation will be made visible and discussed.<sup>46</sup> In this role, the article could serve the legitimacy of law making.<sup>47</sup>

## 4. Article 345 TFEU and Competition Law Provisions

### 4.1. *The Basic Relationship is Simple*

Akkermans and Ramaekers suggest that Article 345 TFEU shows that EU law is neutral concerning the question of public or private ownership of an undertaking but that, nevertheless, nationalisation must be in conformity with internal market law, and especially competition law (as understood broadly).<sup>48</sup> It is a well-known fact that, for instance, EU competition law prohibitions against competition-restricting contracts and abuse of a dominant market position apply to all undertakings offering goods on a market. In addition, an actor, even when publicly owned or acting in the public interest, may easily be perceived as an *undertaking engaged in economic activity*.<sup>49</sup> As Akkermans and Ramaekers' view can be sustained and adopted as a starting point, the following is intended to provide a more elaborate discussion on the relationship between EU competition law and Article 345 TFEU. Attention is paid both to the »core of competition law«, that is, the prohibitions laid out in Articles 101 and 102 TFEU, as well as to law on state aid, public procurement and merger control. The last three in particular, however, are not dealt with in detail.

### 4.2. *EU Competition Law Prohibitions and Article 345 TFEU*

Regardless of Article 345 TFEU (whoever may own companies) the application of EU competition law (how companies must behave) is not precluded. Even if Article 345 TFEU is mainly understood as a statement about the neutrality of the EU approach regarding state or private owning of undertakings as such, it can be noted that the choice allowed by Article 345 TFEU does not change the fact that the actions of Member State-owned or public companies are, similarly to the actions of any undertakings, strongly regulated by the EU. An actor re-

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<sup>46</sup> To some degree, this promise would address Lurger's plea that, before deciding on unification of property law, the political and social issues at stake in this field should be thoroughly assessed. See Lurger 2006, 53–54.

<sup>47</sup> Caruso 2004, 765.

<sup>48</sup> See Akkermans – Ramaekers 2010, 314 and *passim*.

<sup>49</sup> See further, for instance *Ivo Van Bael – Jean-François Bellis*, Competition Law of the European Community, Fifth Edition, (Alphen aan den Rijn: Wolters Kluwer 2010), 17–21. On the exception in Article 106(2) TFEU see also, for instance, *D.G. Goyder – Joanna Goyder – Albertina Albors-Llorens*, Goyder's EC Competition Law, Fifth Edition, (Oxford: Oxford University Press 2009), 562–569.

garded as part of the state can thus be found to have participated in a cartel, or, which is significantly more common, to have abused its dominant market position.

Moreover, regardless of the existence of Article 345 TFEU, the acceptability of *private* companies' market behaviour in the Member States is, of course, subject to evaluation under EU competition law. Thus the ways in which assets are used in the Member States are everything but issues belonging to the exclusive legislative competence of the Member States. It is noteworthy that the threshold for application of EU competition law is low and based on the potential effect of behaviour on trade between Member States – this possible effect being very often present.<sup>50</sup>

On the basis of case law at the EU level, it is clear that Article 345 TFEU cannot be relied on to escape the prohibitions against competition-restricting contracts and against abuse of a dominant market position. Furthermore, apparently no fields of economic activity would be generally exempted from the applicability of Articles 101(1) and 102 TFEU on the basis of Article 345 TFEU. In contrast, the EU courts have explicitly rejected attempts to justify competition-restricting behaviour by using the former Article 295 TEC (or its predecessor), for instance, with respect to intellectual property rights<sup>51</sup> and rights to concrete objects such as freezers.<sup>52</sup> It is noteworthy that in the ECJ's considerations, Article 345 TFEU does not obviously affect the reasoning on applicability of EU competition law.<sup>53</sup>

### 4.3. *The State and the Markets*

Article 106(2) TFEU sets out a rule that exempts certain actions of a public benefit nature from the scope of EU competition law prohibitions. These actions encompass the market behaviour of undertakings entrusted with the operation of services of general economic interest or having the character of a fiscal monopoly *if* the application of competition rules would obstruct performance of the particular tasks. However, the exception is of narrow applicability.<sup>54</sup> Further-

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<sup>50</sup> Moreover, even the *content* of national competition law provisions is also restricted by Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

<sup>51</sup> See Joined cases 56 and 58/64 *Consten and Grundig* [1966] ECR 00299.

<sup>52</sup> See case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-04653. See also the opinion of Advocate General *Cosmas* in case C-344/98 *Masterfoods v HB Ice Cream* [2000] ECR I-11371, paras 105–106.

<sup>53</sup> See also *Peter Oliver*, »Competition and Free Movement: Their Place in the Treaty», in Takis Tridimas – Paolisa Nebbia (eds) *European Union Law for the Twenty-First Century. Rethinking the New Legal Order*, volume 2. Internal Market and Free Movement Community Policies. (Oxford – Portland: Hart Publishing 2004), 172–173.

<sup>54</sup> See, on Article 106(2) TFEU (former Article 86(2) EC), for instance *Van Bael – Bellis* 2010, 921–952.

more, broadenings of the scope of the 106(2) exemption by means of invoking Article 345 TFEU are presumably just not possible.<sup>55</sup> Acceptable ways of use of state-owned assets – and situations where exceptions are allowed – are from the competition law point of view exhaustively dealt with by Articles 106 and 101–102 TFEU. Considering Member States or their derivatives acting on markets, the space left for them by Article 345 TFEU seems rather insignificant from the point of view of EU regulation of economic activity.

To move on from economic activity pursued by states, it may also be asked if EU competition law hurdles may exist even for *merely legislating* on systems of property ownership in the Member States. Whether – and in what circumstances – a Member State can be found to have infringed EU competition law prohibitions just by maintaining legislation in effect, that is, acting in its official function and not as an undertaking engaged in economic activity, is an interesting question. After all, the recognised scope of the prohibitions laid down in Articles 101(1) and 102 TFEU concerns *undertakings*.

Szyszcak has discussed the issue by evaluating the functions of competition law prohibitions and Article 28 TEC (now Article 34 TFEU).<sup>56</sup> On the basis of her analysis it would appear that the maxim of »EU markets should be competitive« or a similar principle *behind* the prohibitions against competition-restricting contracts and abuse of a dominant market position may well be infringed by national law, but the problem would not necessarily be tackled via competition law prohibitions. Instead, Article 28 TEC (or nowadays, Article 34 TFEU) may be, or may have been, used due to its different nature and better suitability to challenge the law of a Member State. However, Szyszcak points out that this may be problematic since *discrimination* as an element of applying Article 28 TEC (34 TFEU) is difficult to construct in these cases.<sup>57</sup>

Nevertheless, a significant line of case law also approaches the »EU markets should be competitive« maxim referring to competition law prohibitions and

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<sup>55</sup> See also *Grith Skovgaard Ølykke*, »The Definition of a 'Contract' Under Article 106 TFEU«, in Erika Szyszcak – Jim Davies – Mads Andenæs – Tarjei Bekkedal (eds) *Developments in Services of General Interest. Legal Issues of Services of General Interest. Part 1.* (The Hague: TMC Asser Press 2011), 107, footnote 17, intriguingly approaching Article 345 TFEU as suggesting that public undertakings do not need special attention (compared to other undertakings) under Article 106(1) TFEU (on undertakings that have been granted special or exclusive rights). This approach shows that Article 345 TFEU may be read as a message that EU competition law applies equally to all undertakings precisely *because of* the choices left for the Member States under Article 345 TFEU.

<sup>56</sup> Erika Szyszcak, »State Intervention and the Internal Market«, in Takis Tridimas – Paolisa Nebbia (eds) *European Union Law for the Twenty-First Century. Rethinking the New Legal Order. Volume 2. Internal Market and Free Movement Community Policies.* (Oxford – Portland: Hart Publishing 2004), 217–238.

<sup>57</sup> See Szyszcak 2004, 222–225 and, for instance, case 181/82 *Roussel Laboratoria BV and others v État néerlandais* [1983] ECR 03849. See also Kamiel Mortelmans, »Towards Convergence in the Application of the Rules on Free Movement and on Competition?« in *Common Market Law Review* 38 2001, 631–635.

recognising the intertwinement of former Articles 3(1)(g) TEC and 10 TEC (or their predecessors), free movement, and competition law provisions.<sup>58</sup> Hence the ECJ shows that prohibitions against competition restrictions *bind the Member States* not only when they participate in economic activity through their units or publicly owned companies, but also regarding acting in the official function of the state, as tools to further the internal market – a goal that imposes obligations on the Member States by virtue of the Treaties.<sup>59</sup> No complete equivalent<sup>60</sup> exists for Article 3(1)(g) TEC in the new Treaty system, but Article 4(3) TEU sets out the principle of sincere cooperation, formerly covered by Article 10 TEC.<sup>61</sup>

From the point of view of undertakings, the possibility of state-imposed obligations to act contrary to EU competition law has been recognised in case law as a possible justification for breaches by undertakings of EU competition law prohibitions.<sup>62</sup> Even if competition infringing behaviour is thus exceptionally allowed for undertakings, the Member State in question may face legal consequences for its own infringement. Hence, the activities allowed to Member States by Article 345 TFEU – whatever the scope of these activities is perceived to be – may be restricted by EU competition law combined with the obligation to facilitate the establishment and furthering of the internal market.

EU competition law, as understood broadly, also restricts Member State interference in the markets and private economic activity through strict rules on acceptable state aid and on public procurement. Both fields of law are based on the idea of the state's ability to significantly disturb the effective competitive process on the markets. As a remarkable and well-financed actor, the state could protect national champions – undermining efforts to create a functioning internal market in the EU. When it comes to public procurement, abuse of a dominant position on the buyer side of the markets is pre-emptively prevented by legislation on procurement procedures. Concerning both state aid and public procure-

<sup>58</sup> See case 13/77 *SA G.B. Inno B. M. v ATAB* [1977], ECR 02115; case C-2/91, *Meng* [1993] ECR I-05751; case C-35/96 *Commission v Italian Republic* [1998] ECR I-03851; case C-198/01 *CIF v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-08055; case C-338/09 *Yellow Cab Verkehrsbetriebs GmbH v Landeshauptmann von Wien* [2010] ECR 0000 (not yet published), paras 25–26. See also an extensive analysis by Van Bael – Bellis 2010, 882–896.

<sup>59</sup> According to Article 3(1)(g) TEC, the activities of the Community include a system ensuring that competition in the internal market is not distorted. According to Article 10 TEC, the Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community. The Member States must also facilitate the achievement of the Community's tasks and they must abstain from any measure which could jeopardise the attainment of the objectives of the Treaty (consolidated text, OJ C 321E of 29 December 2006).

<sup>60</sup> See, however, Article 3(3) TEU and Protocol 27 on internal market and competition.

<sup>61</sup> Also Article 4(3) TEU has already been referred to in the context of Member States' obligations and EU competition provisions, see case C-338/09 *Yellow Cab Verkehrsbetriebs GmbH v Landeshauptmann von Wien* [2010] ECR 0000 (not yet published), paras 25–26.

<sup>62</sup> Undertakings may not, however, automatically justify anti-competitive behaviour by, for example, referring to the fact that the national authorities were aware of the behaviour and allowed it. On state compulsion and similar doctrines, see Van Bael – Bellis 2010, 47–52.



ment law, it is notable that the existence of a real business risk and thus, the possibility *to fail and go bankrupt* is also protected by the same legislation. Failing firms are a natural phenomenon on markets and a part of the desired competitive process in the EU.

#### 4.4. Merger Control and Article 345 TFEU

Interestingly, it seems that EU merger control, which frequently results in Commission decisions on whether it is acceptable for a certain undertaking to buy another undertaking (and which also precludes application of national law by the Member State and prevents clearance of a merger based on national law in a national procedure),<sup>63</sup> has not been actively discussed in the context of Article 345 TFEU. However, Akkermans and Ramaekers' interpretation, which is also a generally understandable reading of Article 345 TFEU, may be perceived as a key point when it is argued that Article 345 TFEU and EU competition law on mergers are compatible with each other. That interpretation emphasises that Article 345 TFEU allows differences in *systems* of property ownership while staying silent on EU interference in property ownership or the right to property as such.

Nevertheless, under merger control competition law, mere acquisition of another undertaking may be prevented without requiring detection of actual anticompetitive behaviour or anticompetitive intent on the markets. The question of who owns companies is exactly the point on which merger control law turns.<sup>64</sup> EU merger control rules are, in a way, a significant restriction on Member States' ability to legislate on issues remarkably close to systems of property ownership, that is, regarding the *characteristics* of such a system, like the marketability of shares.

## 5. Article 345 TFEU as a Limitation on Application of Competition Law to Intellectual Property Rights?

### 5.1. Intellectual Property Rights as a Defence in Competition law

Objections to competition law intervention are sometimes raised on the grounds that since the challenged conduct is covered by intellectual property rights, application of competition law is not appropriate.

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<sup>63</sup> See Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), at recitals 17–18 and *passim*.

<sup>64</sup> Compare with legislation and case law on abuse of a dominant market position: it is completely acceptable to gain an increasingly significant market share. A dominant position itself is not prohibited, only certain behaviour by a dominant undertaking.

This section considers such intellectual property right related defences based on Article 345 TFEU.<sup>65</sup> It is argued that Article 345 TFEU and concepts reflecting it do not generally play a decisive role as a defence to competition law violations. This is because the substantive standards for establishing a violation of competition law generally suffice for avoiding conflicts with Article 345 TFEU and, in fact, are more desirable for striking an appropriate balance between competition and intellectual property policies.

## 5.2. Direct Application and Reflections of Article 345 TFEU

It is occasionally argued that Article 345 TFEU would be infringed by applying competition law to limit the ability of intellectual property rights holders to exercise their rights. For instance, in *Consten & Grundig v Commission* it was argued (unsuccessfully) that a Commission decision that enjoined use of a national trade mark to restrict parallel imports violated Article 345.<sup>66</sup> In relation to intellectual property rights, Article 345 TFEU has also been (unsuccessfully) invoked in actions concerning interim measures to protect copyright in *IMS*

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<sup>65</sup> Defences based on, for example, breach of international obligations concerning intellectual property rights are sometimes also raised, but are beyond the scope of this paper. See, for example, Case T-201/04, *Microsoft v Commission* [2007] ECR-II 3601, paras 777–813 (rejecting Microsoft's argument that Article 13 of the WTO/TRIPS Agreement would have been violated by the European Commission decision to require the company to share interoperability information); Case T-289/01 *Duales System Deutschland* [2007] ECR-II 1691, paras 180–192 (rejecting allegations that remedies for an abuse were disproportionate in view of the principles reflected by, for instance, Article 21 of the WTO/TRIPS Agreement).

<sup>66</sup> *Consten & Grundig v Commission* [1966] ECR 299, 345–346. The Court reasoned: »Article 222 confines itself to stating that the 'Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. The injunction contained in Article 3 of the operative part of the contested decision to refrain from using rights under national trade-mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 85(1). The power of the Commission to issue such an injunction for which provision is made in Article 3 of Regulation No 17/62 of the Council is in harmony with the nature of the Community rules on competition which have immediate effect and are directly binding on individuals. Such a body of rules, by reason of its nature described above and its function, does not allow the improper use of rights under any national trade-mark law in order to frustrate the Community's law on cartels.» See also Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR-II 4653, paras 164–173 (rejecting arguments on disproportionate infringement with rights to property recognised under current Article 345 TFEU; stating that restrictions can be imposed under the EU competition rules on the exercise of property rights provided that the restrictions are not disproportionate and do not affect the substance of the right). These cases illustrate the recognition even early on of potential conflicts between national intellectual property rights and the EU four freedoms and competition rules as well as how they have been resolved.

*Health*<sup>67</sup> and trade mark rights in *Duales System Deutschland* proceedings against the European Commission.<sup>68</sup>

Defences against application of competition law to intellectual property have also been raised on the basis of concepts such as the existence and the specific subject matter of intellectual property rights.<sup>69</sup> Although defences based on these concepts do not appear to concern application of Article 345 TFEU directly,<sup>70</sup> these concepts seem to reflect protections offered by the Article to intellectual property rights.<sup>71</sup>

The implications of the concepts for competition law treatment of intellectual property rights can be summarized as follows.<sup>72</sup> While the *existence* of rights as such cannot constitute abuse of a dominant position, the *exercise* of intellectual property rights beyond their specific subject matter can constitute abuse. Thus, for instance, in *AstraZeneca* the European Commission noted that certain misleading representations made by the dominant firm to acquire supplementary protection certificates («SPCs») did not belong to the protected subject matter of SPCs that could have been shielded from competition law intervention.<sup>73</sup> Moreover, even the exercise of rights that seem to belong to the specific subject matter of intellectual property rights can, ultimately, be challenged when those rights are exercised in violation of competition rules.<sup>74</sup> Thus even refusal

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<sup>67</sup> Order of the President of the Court of First Instance, Case T-184/01 R [2001] ECR-II 2349; Order of the President of the Court of First Instance, Case T-184/01 R [2001] ECR-II 3193, para. 143 (recognising the public interest of protecting intellectual property rights as expressed by Article 345 TFEU); Order of the President of the Court, Case C-481/01 P (R), [2002] ECR-I 3401, para. 82 (Article 345 TFEU was not decisive for the outcome of the decision by the President of the Court of First Instance and the plea concerning its alleged irrelevance was without effect).

<sup>68</sup> Order of the President of the Court of First Instance, Case T-151/01 R [2001] ECR-II 3295, para. 222 (public interest in the protection of property as expressed by Article 345 TFEU did not prevail over the interest to bring an abuse of a dominant position to an immediate end).

<sup>69</sup> On this and other aspects of the relationship between (national) intellectual property rights and EU competition law and free movement rules, see generally, for example, *David T. Keeling*, *Intellectual Property Rights in EU Law. Volume I. Free Movement and Competition Law* (New York Oxford University Press 2003). For analysis of the existence/exercise dichotomy in the context of Article 345 TFEU, see Akkermans – Ramaekers 2010, 310.

<sup>70</sup> For instance, in actions before the Court of Justice, pleas based on these concepts do not refer to Article 295 TFEU but are typically assessed in the context of Article 102 TFEU, which concerns abuse of a dominant position.

<sup>71</sup> Commission decision of 15 June 2005 (COMP/A. 37.507/F3 – *AstraZeneca*), para. 741 («This dichotomy, which has gradually been abandoned in later case law, and been replaced by the concept of the subject-matter of the right in question, reflects the principle that Community law does not affect the property laws in the different Member States (Article 295 of the Treaty).»)

<sup>72</sup> For a review of the case law, see, for example, Case T-201/04, *Microsoft v Commission* [2007] ECR-II 3601, paras 319–331.

<sup>73</sup> Commission decision of 15 June 2005 (COMP/A. 37.507/F3 – *AstraZeneca*), para. 742.

<sup>74</sup> See, for example, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission*, paras 48–50 (while the exercise of the exclusive right of reproduction in copyright law cannot in itself constitute an abuse, it may do so in exceptional circumstances that involve abusive conduct); Case 238/87 *Volvo v Veng* [1988] ECR 6211, paras 7–9 (even though exercise of the

to license intellectual property rights – arguably the hallmark of the subject matter of intellectual property rights – has been held capable of constituting abuse of a dominant position in »exceptional circumstances».<sup>75</sup>

Accordingly, the existence and specific subject matter of rights may benefit from at least some protection against and deference to application of competition law. However, their concrete effects may be limited because the mere existence of intellectual property rights has little practical relevance when their exercise can be triggered by markedly minimal activities (e.g. refusal to license) and because ultimately even the specific subject matter of rights is not beyond competition law but can be intervened against in circumstances where they are exercised in violation of competition law.<sup>76</sup> Despite the limited concrete scope, the concepts of existence, exercise and specific subject matter do act as a relatively simple screen for at least excluding concerns about violating Article 345 TFEU, which helps avoid the need to apply Article 345 directly. Moreover, the concepts also reflect a degree of deference to intellectual property rights as a matter of substantive antitrust law and analysis that may seek to avoid the goals of intellectual property being undermined without sufficient justification. As argued below, though, substantive antitrust standards alone generally avoid these two concerns.

### 5.3. *Sufficiency and Desirability of Applying Primarily Competition Law Standards*

The question about a potential infringement of Article 345 TFEU may often be moot since rigorous application of the standards for prohibiting restrictive agree-

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exclusive rights for protected design cannot in itself constitute an abuse, their exercise may do so if it involves certain abusive conduct). See also discussion in *BBC v Commission* [1991] ECR-II 535, para. 58 (»However, while it is plain that the exercise of the exclusive right to reproduce a protected work is not in itself an abuse, that does not apply when, in the light of the details of each individual case, it is apparent that that right is exercised in such ways and circumstances as in fact to pursue an aim manifestly contrary to the objectives of Article 86. In that event, the copyright is no longer exercised in a manner which corresponds to its essential function, within the meaning of Article 36 of the Treaty, which is to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86 ... In that case, the primacy of Community law, particularly as regards principles as fundamental as those of the free movement of goods and freedom of competition, prevails over any use of a rule of national intellectual property law in a manner contrary to those principles.»)

<sup>75</sup> See n. 72 above and, for example, Case T-201/04 *Microsoft v Commission* [2007] ECR-II 3601, paras 319–331, for the conditions under which refusals to license can constitute such »exceptional circumstances» that abuse of a dominant position results.

<sup>76</sup> Perhaps the final frontier is whether mere acquisition of intellectual property rights could in some circumstances categorically avoid competition law by not constituting any exercise of the rights (and even preceding their existence). On this issue, see, for example, *Joseph Straus*, »Patent Application: Obstacle for Innovation and Abuse of Dominant Position under Article 102 TFEU?», *Journal of European Competition Law & Practice* 2010, 189–201.

ments and abuses of dominant position are generally sufficient for avoiding conflicts with national systems of property ownership.

It seems that prejudice to national systems of property ownership would rarely (if ever) arise when intervention in intellectual property rights is based on the application of sound substantive standards. First, no risk of prejudice of applying competition law may arise since national systems of intellectual property rights already recognise various public policy limitations to the rights, including those resulting from national competition policies.<sup>77</sup> Since national systems of intellectual property rights recognise that intellectual property rights are subject to limitations imposed by competition policy, EU competition law is generally unlikely to go beyond those limitations recognised in national laws and thus prejudice national systems of property ownership.<sup>78</sup> Second, any intervention in national intellectual property rights that may result from application of EU competition law is unlikely to rise to the level of prejudicing national systems of intellectual property ownership. In particular, competition law interventions in intellectual property rights are limited to specific instances which are subject to robust standards for establishing actual, likely or presumed harm to competition.<sup>79</sup> Because these interventions only concern extremely limited aspects of the exclusive rights conferred by intellectual property rights (rather than all or the most exclusive rights let alone mere existence of rights) and do so only in highly specific circumstances where typically a dominant position and other specific circumstances are required, any impact that would rise to the level of prejudicing national systems of property ownership is highly unlikely.

Finally, resolving potential conflicts between the goals of competition and intellectual property policies can be better achieved by employing the substantive standards of competition law for analysis and regulation of practices than by applying formalistic distinctions based on the existence, exercise or specific subject matter of rights. The standards of competition law for assessing particular practices allow, in particular, concerns about undermining incentives to innovate to be addressed more specifically than under the simplistic and formal concepts of the scope of lawful exercise of intellectual property rights. Moreover, the concepts of existence, exercise and specific subject matter of rights lack a sound theoretical basis and explanatory power for determining why and when conduct involving intellectual property rights should remain beyond competition law intervention and when it should not. In contrast, standards of substantive competition law analysis are at least based on explicit theoretical and legal bas-

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<sup>77</sup> These limitations are also recognised, for example, in Article 40 of the WTO/TRIPS Agreement.

<sup>78</sup> See also *Flughafen Frankfurt* OJ [1998] L 72/30 (discussing restrictions on exercise of property in national laws).

<sup>79</sup> See n. 64 above.

es that yield predictable outcomes and can avoid potential conflicts with the goals of intellectual property policies.

## 6. Conclusion

Due to its vague wording, the provision presently found in Article 345 TFEU has caused confusion as to the restrictions and possibilities it gives rise to. Interpreting the provision and unveiling its functions in the context of general economic integration are substantially hindered by the lack of explanations for introducing such a provision in this context in the first place, as well as for broadening its wording. As concepts of EU law, *property*, *ownership* and *systems* are to be interpreted autonomously, they may therefore deviate from their standard meanings in national legal systems.

Interdisciplinary research, as undertaken above, entails a promise of solving some of the provision's riddles. First, historical perspectives illuminate the meaning of the statement on (systems of) property ownership in ways which may have received too little attention in practice. As Article 345 TFEU is part of a complex multi-level system of law, which grows together with European integration and establishes a delicate balance between the provisions of the Treaties, it is likely that amendments to the Treaties as well as their interpretations by the ECJ rebalance the provision. As a consequence, both the meaning and the functions of the article may have changed in the course of the integration process. However, the questions of how and to what extent this has happened are still open.

Second, Article 345 TFEU is perceived differently and its significance varies in the fields of law which have interfaces with the provision. For instance, in the context of Europeanisation of property law, the role of the provision is still to some degree open. By contrast, as to competition law, the provision cannot be considered deeply significant. In this respect, however, several questions require more elaborate research. One of these is how the provision's relationship to matters such as European competition policy has developed and what that might imply. Are there, say, new problems that will only become apparent once Article 345 TFEU has been properly studied, such as regarding the way in which the provision coheres with the established applications of competition law? In addition, although this provision does not seem to prevent the property law harmonisation that the proper functioning of the internal market is likely to require, it has not been proven wholly meaningless in this field. Therefore, the extent to which the provision possibly safeguards Member State competence to decide about (the core of) their systems of property law is a question to be studied further.