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Regulating Prices in the European Union

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Abstract: Establishing open and undistorted competition within the internal market is a primary goal of the EU legal framework. Price controls, by contrast, are among the clearest derogations from this overarching objective. Yet much price regulation continues to occur within the internal market, the legal treatment of which is recognised to raise exceptional issues in the context of both positive and negative integration. This article explores the approaches within the EU legal framework to price regulation, broadly construed. Following a theoretical inquiry of the institutional and ideological challenges posed, a range of regulatory circumstances is considered: from competition enforcement, to the free movement rules, to examples of direct regulation through EU law. A tentative explanation for the distinctive treatment of price regulation is then advanced, premised upon the axiomatic role of the price formative mechanism in motivating the entrepreneurial impulses which underpin the internal market. The aim is to contribute to a more nuanced understanding of the challenges facing pursuit of 'open and undistorted competition' within a modern social market economy.

I. INTRODUCTION

> [A] measure which requires a product or service to be offered on the market at a determined price…is by its very nature contrary to the objective of achieving an open and competitive market.[1]

Establishing open and undistorted competition within the internal market is a primary goal of the European Union (EU) legal framework.[2] In developing a 'highly competitive social market economy,'[3] interventions focus on prevention and proscription of anticompetitive practices by undertakings and Member States, alongside harmonised efforts at sector liberalisation. Price controls, acknowledged as '*one of the most intrusive forms of intervention in the market*,'[4] are among the most '*extreme*'[5] derogations from this objective. Price is one

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[1] C-121/15 *ANODE* EU:C:2016:637, para.30.
[2] Alongside the substantive competition rules in Articles 101-109 TFEU, see references to avoiding distortions of competition in Articles 32(c), 113, 116 and 348 TFEU, and 'the principle of an open market economy with free competition' in Articles 119, 120 and 127 TFEU.
[3] Article 3(3), TEU.
[4] Opinion of Advocate General Poiares Maduro in C-58/08 *Vodafone* EU:C:2009:596, para.38.
[5] Opinion in *Vodafone*, para.42.

of, if not *the*, foremost dimensions of competition:[6] indeed, '*competition is, by its very essence, determined by price*'.[7] Yet, both because the competitive process is often imperfect, and because social considerations may override competitive ones within the wider context of the internal market, price regulation is not irreconcilable, *a priori*, with the goals and strictures of EU law. This article considers the treatment of price regulation in this context—located at the intersection of competition policy, social policy, and market integration—and explores the implications of the balance that is struck within the EU's so-called 'economic constitution'.[8]

EU law interacts with and regulates price-setting on three distinct levels.[9] First, via the competition rules, it constrains the ability of *individual undertakings* to set prices in certain instances. Examples range from a blanket proscription of price-fixing cartels, to more exceptional condemnation of excessive pricing by dominant firms. Second, EU law limits the ability of *Member States* to regulate prices, particularly under the free movement rules. It is here that the constituent elements of the 'social market' economy are most vulnerable to discordance. [10] An example is *Scotch Whisky*, where national efforts to impose minimum retail pricing for alcohol, motivated by public health concerns about hazardous drinking, conflicted with Article 34 TFEU insofar as the domestic regulation hindered access to the national market.[11] Third, and most unusually, there is scope for *direct implementation* of price controls as a matter of EU law. A prominent example is the Roaming Regulation, which capped and progressively reduced prices for mobile phone customers who use their devices abroad.[12]

The dilemma of price regulation within the EU is located at the confluence of two distinct yet related tensions: a regulatory friction and a sovereignty-based one. First, the task of price regulation is itself a much-disputed enterprise: price controls are criticised as costly, unnecessary, liable to abuse, and ultimately counterproductive. Yet the pragmatic recognition that unrestrained competition does not guarantee efficient or otherwise socially desirable outcomes means that the 'second best' solution of regulation is sometimes preferable. Effective controls require a close understanding of the relevant market, however, which links to the second friction, namely the sharing of regulatory jurisdiction between the EU and its Member States. The necessity and optimal scope of price controls may be most apparent domestically; yet differentiated regulation risks fragmentation, competitive distortions, and furtherance of national interests at the expense of integration. The approach of EU law must accommodate these tensions, alongside the inherent paradox of restricting price freedom within an ostensibly open marketplace.

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[6] See, e.g., Commission Decision of 9 November 2010 in Case AT.39258—*Airfreight*, para.900: 'Price being the main instrument of competition…'.
[7] Opinion of Advocate General Szpunar in C-148/15 *Deutsche Parkinson* EU:C:2016:394, para.18.
[8] Opinion in *Deutsche Parkinson*, para.1.
[9] Opinion in *Vodafone*, para.1.
[10] For discussion of the inherent tensions between the 'social' and 'market' within the internal market, see de Witte, "The Architecture of the EU's Social Market Economy" in Koutrakos & Snell (eds.), *Research Handbook on the Law of the EU's Internal Market*, Edward Elgar Publishing (2017).
[11] C-333/14 *Scotch Whisky* EU:C:2015:845.
[12] Regulation 717/2007 of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (OJ L171/32, 29.6.2007) ('Roaming Regulation').

The topic of price regulation is of great importance in practice within the EU, yet has been largely neglected within existing academic work. We argue here that it merits greater consideration, for two principal reasons. First, although viewed as a comparatively 'old-fashioned' instrument of market control, price regulation retains a notable prominence within the current EU legal framework. This is undoubtedly because, reflecting an historical fondness for such interventions within many European countries,[13] considerable price regulation continues to occur within the internal market today. Accordingly, the questions of whether, when and why EU law tolerates such intervention are of direct contemporary relevance at both EU and domestic levels. Second, the treatment of price controls under EU law is recognised to raise *exceptional* issues in the context of both negative[14] and positive[15] integration efforts, yet the existing literature has again failed to explain what is so special or unusual about regulating price.

This article aims to address the current scholarly gap by considering the mechanisms by which EU law interacts with, contrains and even mandates price regulation, in order to understand its distinctive status and often apparently inconsistent treatment. To do so, it draws upon a wide range of recent jurisprudence, legislation and administrative practice related to internal market regulation, to develop a taxonomy of perspectives under EU law. In identifying a tripartite balancing of competitive, integrationist and social concerns that underpin the approach to price regulation within the internal market, this article adopts a transversal approach, which endeavours to identify and analyse the treatment of analogous regulatory phenomena across differing areas of the EU legal framework. The central argument advanced hinges upon an overarching tension which conditions the treatment of pricing restraints within EU law generally: namely, that price alone is a deeply imperfect signal for welfare-enhancing human behaviour, yet regulatory limitations on price freedom threaten to negate the basic entrepreneurial impetuses upon which the internal market ultimately is premised.

The article is structured as follows. It first considers price regulation generally, addressing its treatment in economic terms (Section II), and its place within the institutional and ideological structure of the EU (Section III). Differing approaches under EU law are then considered: from a *punitive* approach under competition law (section IV); to a sceptical *prohibitive* approach under the free movement rules (section V); to a cautious yet more receptive *permissive* approach within certain sector liberalisation regimes (section VI); and an exceptional, essentially *prescriptive* approach incorporating price regulation into the fabric of the internal market (section VII). Section VIII considers in a more rounded fashion the dilemma of price regulation

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[13] See e.g. Gerber, *Law and Competition in Twentieth Century Europe*, OUP (1998).

[14] Discussing the atypical treatment of price regulation under the free movement provisions, see e.g. Barnard, *The Substantive Law of the EU: The Four Freedoms*, OUP (2016), 87; Alemmano, "Balancing Free Movement and Public Health: The Case of Minimum Unit Pricing of Alcohol in *Scotch Whisky*," 53 *CMLRev* 1037 (2016), 1047-51; and Opinion of Advocate General Bot in C-333/14 *Scotch Whisky* EU:C:2015:527, fn.53.

[15] Several of the most important cases considering the principle of subsidiarity concern EU-level efforts to control price regulation: see C-58/08 *Vodafone* EU:C:2010:321 and C-176/09 *Commission v Luxembourg* EU:C:2011:290.

under EU law, in particular its distinctive, often contradictory treatment and status. Section IX concludes briefly.

II. PRICE REGULATION AND ITS DISCONTENTS

We start with the ambiguous virtues of price regulation as such. Within neoclassical economics,[16] the free operation of the price formation mechanism is vital to the effective and efficient functioning of competitive markets. There is a default assumption that price should be determined, principally, by interaction of levels of supply and demand. Assuming a degree of substitutability between products, price is the most immediate parameter upon which undertakings compete. The price formation process moreover generates signalling effects which facilitate efficient behaviour. High prices suggest that demand outstrips supply, indicating that a market is profitable and thus inviting entry—which, other things being equal, should lower prices due to increased competition. Concomitantly, high prices force consumers to reflect upon the extent to which they value a product, resulting, in theory, in that scarce commodity being allocated to those who value it the greatest. In this manner, the price mechanism leads to an efficient distribution of finite resources.

The textbook understanding of market-clearing relies, however, upon assumptions which may not hold true. High prices cannot prompt greater competition if there are barriers to market entry, so that supra-competitive pricing and scarcity are prolonged. Equally, barriers to exit may extend over-supply and wastage. Rational consumer behaviour is, moreover, premised upon complete information—not always a given, particularly where the product or service is complex—; an ability to switch or do without in response to price-gouging—again, not always possible, particularly in the context of necessary goods, like electricity—; and an absence of externalities. Where *private* price formation delivers sub-optimal results, there is an argument for *public* pre-emption through regulation.[17] The immediate objective of most price regulation is, self-evidently, to constrain independent price-setting, whether through a fixed price or rate of return, a maximum price ceiling or minimum price floor, or more oblique forms of regulation such as a prohibition on practices like below-cost sales.[18]

Price controls are most frequently imposed in markets with natural monopoly or oligopoly components without free entry, where the undertaking(s) concerned are likely, absent intervention, to set prices near monopoly level.[19] Here the rationale for regulation is, typically, to prevent consumer exploitation through excessive retail prices, or to avoid market foreclosure, where high wholesale prices obstruct downstream competition. As the examples below nonetheless illustrate, price regulation has been imposed by Member States and the EU to further an even broader range of regulatory objectives, including social concerns—for

[16] Authoritative accounts include Mankiw & Taylor, *Economics* (3rd ed.), Thomson Learning (2014), particularly chpt.3.
[17] Generally, Baldwin, Cave & Lodge, *Understanding Regulation*, 2nd ed., OUP (2011), chpts.22 and 25.
[18] Decker, *Modern Economic Regulation*, CUP (2014), chpt.5.
[19] Motta, *Competition Policy: Theory and Practice*, CUP (2004), 25.

example, where prices for consumer essentials are maintained at lower levels, or for harmful goods at elevated levels—; or, more contentiously, to 'stabilise' ostensibly excessive competition. Price regulation can thus play a redistributive role, by preventing transfer of (arguably unfair levels of) wealth from consumers to producers. Moreover, price regulation is often inextricably linked to other controls, including access or quality requirements.[20]

Despite acknowledged weaknesses within price formation processes, price controls are the exception rather than the rule in contemporary practice.[21] Hostility arises on multiple fronts. Determining optimal regulated prices is a complex task.[22] Regulators must ensure that regulated entities retain incentives to operate efficiently, while ensuring that profits are neither excessive nor unviable. Regulation can have unintended negative consequences, such as rent-seeking, moral hazard, inefficient subsidies, or distortion of optimal supply and demand levels;[23] or regulatory lag may arise, whereby evolving market conditions render the regulated price increasingly inappropriate.[24] Indiscriminate application of controls might damage corporate incentives to invest, resulting in diminished innovation and a reduction in overall consumer welfare.[25] More broadly, the provocative public choice literature launched a fundamental attack on regulation as an inherently flawed or even corrupt enterprise that benefits only the regulated at the expense of broader public interest.[26] Although overstating the risk of capture,[27] public choice was influential, alongside more measured critiques that considered the potential costs and inefficiency of regulation,[28] in provoking efforts towards deregulation and regulatory reform. Specifically, there has been a movement from prescriptive forms of 'command-and-control' regulation, including price controls, to alternatives such as incentive-based regulation, market-harnessing mechanisms,[29] and 'nudge' strategies.[30] In its own practice, the EU emphasises 'better regulation'[31] and, increasingly, 'smart regulation,' defined as regulation '*of the highest quality possible*.'[32]

III. PRICE REGULATION AND THE EU 'ECONOMIC CONSTITUTION'

[20] Generally, Kahn, *The Economics of Regulation*, The MIT Press (1988).
[21] In most economies, price controls exist only within public utility sectors: Baldwin *et al.* (2011), 443.
[22] Generally, Viscusi, Harrington & Vernon, *Economics of Regulation and Antitrust*, 4th ed., MIT Press, (2005).
[23] Viscusi *et al.* (2005), 663-69.
[24] Viscusi *et al.*, 358.
[25] Baldwin *et al.* (2011), 476.
[26] See, e.g., Stigler, 'The Theory of Economic Regulation,' 2(1) *The Bell Journal of Economics and Management Science* 3-21 (1971).
[27] See, e.g., Posner, 'The Concept of Regulatory Capture: A Short, Inglorious History' in Carpenter & Moss (eds.), *Preventing Regulatory Capture*, CUP (2014).
[28] See, e.g., Breyer, *Regulation and its Reform*, Harvard University Press (1982).
[29] See, e.g., the EU's emissions trading scheme: Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L275/32, 25.10.2003).
[30] Baldwin *et al.* (2011), 110-133.
[31] European Commission, *Updating and Simplifying the Community Acquis* (COM(2003)71 final), 2 February 2003.
[32] European Commission, *Smart Regulation in the European Union* (COM(2010)543 final), 8 October 2010, 3.

Beyond such critiques, price regulation poses specific difficulties—ideological and practical—within the legal framework of the EU's internal market. While not prohibited *a priori*, the application of price controls is an almost contradictory exercise within this broader context. A core focus of this article is to explore how these tensions are manifested and accommodated within EU law.

As noted, EU law interacts with price-setting processes in three dimensions: by constraining private price-setting, limiting domestic regulation, and—occasionally—functioning as a vehicle for direct control.[33] The task of constructing and regulating the internal market is a competence shared between the Union and Member States.[34] Yet, while the core tension and trade-offs remain the same—when and to what extent should apparent market failures merit derogation from the archetype of open and undistorted competition?—the precise issues in each instance are quite distinct. Quasi-price regulation via antitrust must grapple with an inherent paradox of the competition process: although high prices are the textbook example of monopoly abuse, the conventional understanding of the market mechanism is premised upon self-maximising yet highly efficient price-setting by private actors. Where national controls are at issue, the key questions are why and how the EU legal framework should intervene to constrain the domestic regulatory choices of Member States. Where EU-level activity is under scrutiny, the questions are when and how the EU institutions should exercise their discretion, exceptionally, to mandate or impose price controls. Across these distinct dimensions, there are nonetheless recurrent overarching complexities, which condition and inform the discrete approaches within EU law.

First, price controls pose an ideological challenge, insofar as the internal market is premised upon open and undistorted competition. As the Court of Justice argued in *ANODE*, the free functioning of the price formation mechanism is integral to this objective.[35] Although it acknowledged in *Metro (II)* that price competition "*does not constitute the only effective form of competition or that to which absolute priority must in all circumstances be accorded*," it nonetheless maintained that such competition "*is so important that it can never be eliminated*".[36] Emphasis is placed upon freeing markets not merely from private anticompetitive conduct, but also unnecessary or ineffective public restraints.[37] While undistorted competition does not equate to unregulated competition, it reflects an ordoliberal preference for governmental interventions that aim, primarily, to buoy underlying market forces.[38] In keeping with much modern economic theory, EU law has a distinct preference for solutions that reinforce rather than overreach the market system.[39] State-imposed limitations on price competition, conversely, constitute '*a particularly strong limitation of rights to property and the*

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[33] See fn.9 above.
[34] Article 4(2)(a) TFEU.
[35] See fn.1 above.
[36] C-26/76 *Metro (II)* EU:C:1977:167, para.21.
[37] Recent pronouncements include C-100/05 *Commission v Italy (Trailers)* EU:C:2009:66, on free movement of goods, and C-554/12 *Commission v DEI* EU:C:2014:2085, concerning Article 106(1) TFEU.
[38] Generally, Moschel, "The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy" 157 *Journal of Institutional and Theoretical Economics* 3 (2001).
[39] Echoing Ogus, *Regulation: Legal Form and Economic Theory*, Clarendon Press (1994), 30.

freedom of economic initiative.'[40] Price regulation, insofar as it '*necessarily influences the freedom of the undertakings concerned to act in the market in question and hence the process of competition*,'[41] is formally at odds with the underlying philosophy of the internal market.

Second, and linked to the priority granted to buttressing market forces over dictating outcomes, the EU and its institutions operate at what Dashwood termed '*the intermediate level of policy execution*'.[42] Although the principles of direct effect and primacy mean that EU law creates individual rights and duties, the EU typically regulates via Member States rather than through direct intervention in domestic markets. This limitation, moreover, reflects the sharing of jurisdiction within a Union that remains much less than a federation. The great bulk of price regulation within the internal market is devised and implemented nationally, with Member States demonstrating greater or lesser enthusiasm for intervention. The perceived necessity and tenor of price regulation is, furthermore, motivated primarily by domestic considerations, which raises concerns about capture, the quality of regulatory activity, and its potential for distortive effects.

Yet deference to domestic regulators can be defended insofar as the redistributive effects of price controls are legitimised by the political accountability of regulators and the link to a democratic mandate.[43] These legitimating forces are weaker for interventions originating in EU law, whether through positive or negative integration.[44] Although criticism of the EU's 'democratic deficit' may be overstated,[45] its infrastructure for democratic representation is a step further removed from citizens than in the national context. Given the extent to which price regulation represents a departure from standard laissez-faire models—but also that it may reflect societal preferences for valuable non-economic policy objectives—it seems appropriate to require sufficiently robust authority and accountability. Additionally, the nature of the regulatory process requires, typically, a detailed and nuanced understanding of the markets concerned, which may reinforce arguments for decentralisation.[46] Increasing criticism of the EU's one-size-fits-all approach to liberalisation,[47] for instance, suggests that more intensive forms of sector reorganisation may require a closer tailoring to market circumstances. (Conversely, the EU institutions are arguably better placed to understand the Union-wide implications of price controls.[48]) Thus, the treatment of price regulation, occurring at a further remove from regulated markets than analogous domestic processes, must be alive to potential criticisms on the bases both of democratic authority and effectiveness.

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[40] Opinion in *Vodafone*, para.38.
[41] *ANODE*, para.30.
[42] Dashwood, "States in the European Union," 23 *ELRev* 201 (1998), 213.
[43] Larouche, *Competition and Regulation in European Telecommunications*, Hart Publishing (2000), 124.
[44] Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, OUP (2005), 149-50.
[45] Compare Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union," 40 *JCMS* 603-24 (2002), and Follesdal & Hix, "Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik," 44 *JCMS* 533-62 (2006).
[46] Barnard (2016), 17.
[47] See e.g. Mizutani & Uranishi, "Does vertical separation reduce cost? An empirical analysis of the rail industry in European and East Asian OECD Countries" 43 *Journal of Regulatory Economics* 31-59 (2013).
[48] De Witte, "Sex, Drugs and EU Law: The Recognition of Moral and Ethical Diversity in EU Law," 50 *CMLRev* 1545 (2013), 1553-54.

A third consideration draws upon the principle of subsidiarity, which governs the threshold question of when positive action at EU level is appropriate.[49] Essentially a principle of regulatory restraint, subsidiarity limits the EU's ability to act to situations where it is best placed to implement a top-down EU-wide solution. Linked to the notion that the EU remains 'a constitutional order of States,'[50] subsidiarity reflects both the Member States' continued existence as sovereign states,[51] and sustained resistance to centralisation or even federalisation of Europe.[52] As Öberg argues, '*the core of subsidiarity is the right of Member States to diverge*'[53]—an (ostensible) right of particular relevance in the context of price controls.

Positive efforts at price regulation—whether alignment of domestic regulatory structures, or price controls implemented directly through EU law—have generated some of the most notable challenges under the subsidiarity principle.[54] As a shared competence, subsidiarity clearly constrains the EU when regulating the internal market.[55] In the context of much price regulatory activity, this threshold requirement may be difficult to satisfy. Price controls not only can and have been implemented successfully by national regulators, but the price-setting process benefits from a closer relationship between regulator and market.[56] Moreover, price controls involve significant incursions into both the economic independence of market actors and the residual freedom of Member States to make redistributive choices in respect of national economies.[57] Where positive integration is at issue, subsidiarity suggests that intervention at EU level is likely to be appropriate only where there are clear cross-border concerns which, moreover, pose insurmountable hurdles to national regulators—what Öberg labels '*transnational market failures*'[58]. Even where this may be the case, price regulation must be a proportionate response.[59]

In areas of negative integration—for instance, where the Court of Justice scrutinises domestic controls—the principle of subsidiarity is not formally binding. There is, nevertheless, an argument that the multi-layered constitutional structure of the EU means it ought to be respected in spirit. That is, mere divergence that is reflective of differing national preferences should not be viewed as inherently suspect.[60] This is important when considering whether EU law ought to pre-empt domestic regulatory choices: in essence, we must consider *which* polity is entitled to make the sorts of policy choices, both economic and

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[49] Article 5(3) TFEU.
[50] Dashwood (2000), 216.
[51] Dashwood (2000), 211.
[52] Craig, "Subsidiarity: A Political and Legal Analysis," 50 *JCMS* 72 (2012), 73.
[53] Öberg, "Subsidiarity as a Limit to the Exercise of EU Competences" *Yearbook of European Law* (forthcoming, 2017), 15.
[54] See fn.15 above.
[55] Article 4(2)(a), TFEU.
[56] Majone (2005), 149-50.
[57] Generally, Höpner & Schäfer, "A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europe" 33 *West European Politics* 344 (2010).
[58] Öberg (2016), 8.
[59] Article 5(4), TEU.
[60] See also Andreangeli, "Making Markets Work in the Public Interest: Combatting Hazardous Alcohol Consumption through Minimum Pricing Rules in Scotland," *Yearbook of European Law* (forthcoming, 2017), arguing that free movement should grant greater latitude to domestic policymaking under the principle of *conferral*.

social, reflected within price regulatory activity.[61] This links, moreover, to the vital question of proportionality, meaning, here, the extent to which EU law should probe the *appropriateness*, in substance, of domestic policy choices.[62]

The only area that escapes subsidiarity concerns is competition law, which comprises in effect instances of law enforcement against private firms. Nonetheless, the Commission has long insisted that it "*is not and does not wish to act as a price regulator*" in this context,[63] instead deferring to price-setting by (well-behaved) undertakings or domestic regulators. Notably, such reluctance is reconcilable with the logic of subsidiarity insofar as national competition authorities (NCAs) are more receptive to case theories and concomitant remedies premised upon unfair pricing.[64] Moreover, it perhaps reflects a deeper understanding of the rationale for regulatory restraint, or at least the dangers of over-instrusive intervention.

Accordingly, for a variety of ideological, constitutional and even practical concerns, price regulation occupies an uneasy position within the legal framework of the EU's economic constitution. Disfavoured but not proscribed, its treatment reflects a compromise between the archetype of free competition, the imperative of effective market governance, and the peremptory nature of certain non-economic concerns. The complexity of the balancing exercise is demonstrated by the range of approaches discernible within case-law and practice: a *punitive* approach penalising individual pricing practices, an antagonistic *prohibitive* approach that proscribes domestic controls, a *permissive* approach premised upon EU-level supervision of national regulation, and a *prescriptive* approach involving positive top-down regulation. Yet within each, broadly equivalent tensions can be seen, from issues of technical expertise and democratic authority, to the balance between self-determination and containment of distortive domestic preferences.[65] Each approach will be examined in turn, bearing in mind these overarching considerations.

IV. PRICE REGULATION VIA ANTITRUST: THE PUNITIVE APPROACH

We consider first EU competition law, the central concern of which is prevention or control of aggregations of market power that, ultimately, enable undertakings to raise prices to supra-competitive levels.[66] Here, price regulation is an essentially reactive *punitive* device; reflecting a determination that an undertaking's pricing practices exceed the permissible limits of its default freedom to engage in price competition.[67] Large swathes of EU competition law are addressed directly at price-setting, whether the concern is the manner in which prices are set or the effects that pricing structures may have on the wider market. Yet competition

[61] Scharpf, *Governing in Europe: Effective and Democratic?* OUP (1999), 63.
[62] See e.g. C-94/04 *Cipolla* EU:C:2006:758, para.61.
[63] European Commission, *XXVIIth Report on Competition Policy* (1997), 29.
[64] See fn.106 below.
[65] De Witte (2013), 1546-56.
[66] See e.g. European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (OJ C45/7, 24.2.2009), para.19, and T-472/13 *Lundbeck* EU:T:2016:449, para.386.
[67] C-62/86 *AKZO v Commission* EU:C:1991:286, para.70.

experts, including the Commission acting as antitrust enforcer,[68] typically resist conceptualising competition law as price regulation as such. In this section we explain, first, why the competition rules might be viewed as an instrument of price regulation; second, limitations to this approach in theory and practice; and third, recent developments that suggest an increased quasi-regulatory role in future.

Our focus is the antitrust rules in Articles 101 and 102 TFEU, prohibiting anticompetitive coordination and abuse of dominance respectively.[69] At first glance, competition enforcement provides the most immediate and flexible legal means to exert control over pricing, facilitating intervention at source by inhibiting or limiting the ability of economic actors to set prices at anticompetitive levels. These provisions thus represent a punitive model of regulation, insofar as firms may be punished for exclusionary or exploitative prices which offend against their proscriptions.

Characterising competition law as an instrument of price regulation has both negative and positive aspects. On the one hand, Articles 101 and 102 constrain the freedom of undertakings to set and charge whatever prices they wish: a freedom that is, moreover, the nominal basis of the entire free-market system. Infringement warrants sanctions against offending firms, typically fines. On the other hand, illegitimate prices are 'regulated' via enforcement activity to acceptable levels, whether directly as an aspect of the remedies imposed or indirectly by consequence of condemning existing prices. The almost inevitable outcome of enforcement against anticompetitive prices is that a revised pricing structure is imposed, which is dictated—more or less closely—by the requirements of the competition rules. Moreover, EU competition law provides a versatile and wide-ranging mechanism for intervention: enforceable by the Commission;[70] the various NCAs;[71] and, increasingly, private litigants before national courts, whose activities ostensibly complement and reinforce public enforcement.[72]

Yet the reality of EU competition enforcement, particularly by the Commission, is considerably removed from the archetype of price regulation. First, the Commission favours interventions that alleviate or prevent market foreclosure, and thus buoy competitive forces, rather than interventions that second-guess the workings of the competition process. Even where price lies at the heart of an investigation, there is considerable resistance to the notion that antitrust provides an appropriate vehicle by which to identify acceptable—or *un*acceptable—prices as such. Second, the task of price regulation implies not only the identification of appropriate pricing levels but also the availability of some coercive mechanism by which to impose publicly-devised prices on private actors going forward. Again, however, antitrust is an area where

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[68] See fn.63 above.
[69] While pricing commitments in merger proceedings may result, obliquely, in *de facto* regulation, such remedies are deeply disfavoured and, at least in theory, wholly exceptional: see Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ C267/1, 22.10.2008), para.17.
[70] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1/1, 4.1.2003), particularly Chapter III.
[71] Regulation 1/2003, particularly Articles 3 and 5.
[72] C-453/99 *Courage v Crehan* EU:C:2001:465.

the Commission has conventionally shied away from prescriptive remedies, although the coercive power of its considerable fines is undisputed.

The one area where antitrust collides unavoidably with the territory of conventional price regulation is the control of excessive pricing by dominant undertakings, as provided by Article 102(a) TFEU. Yet it is precisely in that context that both Commission and Court of Justice have exercised their most notable degree of regulatory restraint. Such reticence almost certainly reflects a broader scepticism regarding the advisability of antitrust enforcement against high prices as such; critiques which challenge the quasi-regulatory deployment of antitrust more generally. Recurrent concerns include the immediate difficulty, from an antitrust perspective, of distinguishing permissible and impermissible price levels, coherently and consistently;[73] alongside longer-term risks to incentives for innovation and investment.[74] Moreover, the remedies required, typically equivalent to command-and-control regulation, are considered more appropriate for sector-specific regulators to impose and monitor, for reasons of both capacity and accountability.[75] There is, accordingly, a consensus that, absent high barriers to entry or expansion, '*the market should, in principle, be able to self-correct in the short to medium term: high prices should normally attract new entrants or encourage existing competitors to expand.*'[76]

Thus, the clear focus of recent competition enforcement—at least outside the cartel context—has been against behaviour that results in anticompetitive foreclosure, with, moreover, a clear end-goal of open (and not merely re-regulated) market structures. In what follows we consider the conventional limitations to antitrust as a vehicle of price regulation, as well as recent developments that may suggest a greater role for competition law.

(i) Pricing as a Concern of Competition Law

First, competition enforcers in the EU, as elsewhere, are less concerned with absolute prices than with the structure and functioning of markets. While pricing is an integral element of many competition cases, it is rarely the ultimate concern; a distinction that may be illustrated by reference to recurrent theories of harm under both Articles 101 and 102 TFEU.

Under Article 101 TFEU, coordinated efforts to set prices are inherently suspect: any concertation that '*constitutes an attempt to influence free formation of prices…manifestly has as its object to restrict competition.*'[77] Most obviously, Article 101 prohibits price-fixing between ostensible competitors, particularly in the context of

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[73] O'Donoghue & Padilla, *The Law and Economics of Article 82 EC*, Hart Publishing (2006), 621-22; Motta, *Competition Policy: Theoru and Practice*, CUP (2004), 69; Evans & Padilla, "Excessive Prices: Using Economics to Define Administrable Legal Rules," 1 *Journal of Competition Law & Economics* 97 (2005), 110-13; and Akman & Garrod, "When are Excessive Prices Unfair?" 7 *Journal of Competition Law & Economics* 403 (2011).
[74] O'Donoghue & Padilla (2006), 622-25.
[75] O'Donoghue & Padilla (2006), 627-28.
[76] Opinion of Advocate General Wahl in C-177/16 *AKKA* EU:C:2017:286, para.48.
[77] Opinion of Advocate General Spzunar in C-74/14 *ETURAS* EU:C:2015:493, para.68.

hard-core cartels. Most horizontal price-setting cases are clear-cut—albeit not quite 'per se'[78]—violations of Article 101(1), although more ambiguous activities are also prohibited.[79] Article 101(1) has similarly been invoked against vertical price-setting, especially resale price maintenance (RPM).[80] The argument that an agreed price is 'fair' (or reflects the competitive level) is largely irrelevant to its permissibility, although this may serve to exempt the arrangement under the Article 101(3) exception rule.

Under Article 102 TFEU, the default approach is quite different: the concept of open and undistorted competition *necessarily* relies upon unilateral price-setting by economic operators, and indeed many argue that it is the lure of potential monopoly profits that ultimately drives competition and innovation.[81] Nonetheless, even in the context of single-firm conduct the Commission is concerned with pricing practices by dominant undertakings that foreclose markets or exclude competitors.[82] Potential price-related abuses include fidelity-inducing rebates;[83] low prices with predatory effect;[84] margin squeezes involving a disjuncture between wholesale and retail prices charged by vertically-integrated undertakings;[85] price discrimination;[86] and constructive refusals to deal, whereby high access prices constitute an effective refusal to supply.[87]

Thus, in most cases where pricing practices are challenged, the core concern is not the price in itself, but rather its broader context or market impact. Conspiracy is the implicit evil of cartels: ostensibly independent economic operators colluding to extract greater profits. Cartels are likened to theft offences,[88] a characterisation reflected in increasing use of criminal sanctions.[89] RPM is disfavoured, not only because it softens competition and can lead to immediate price increases, but also because it may facilitate collusion, diminish innovation, or inhibit entry by efficient suppliers.[90] Foreclosure is the core concern of exclusionary pricing under Article 102,[91] as reflected by the Commission's 'as efficient competitor' standard to govern intervention.[92] This is seen vividly in the treatment of predatory pricing, perhaps the most counterintuitive of abuses: a dominant firm with 'deep pockets' distorts the market by attracting customers with unrealistically low short-term prices, intending to drive competitors from the market and entrench its dominance longer-

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[78] In theory, any breach of Article 101(1) may be justified under Article 101(3): T-17/93 *Matra Hachette* EU:T:1994:89, para.85. The Commission, however, is sceptical that hardcore restraints like price-fixing might satisfy the exemption criteria: *Guidelines on the application of Article 81(3) of the Treaty* (OJ C101/97, 27.4.2004), para.46.
[79] See e.g. C-286/13 *Dole* EU:C:2015:184.
[80] See e.g. C-161/84 *Pronuptia de Paris* EU:C:1986:41.
[81] Opinion in *AKKA*, para.117.
[82] *Enforcement Priorities*, paras.23-27. See also O'Donoghue & Padilla (2006), 603.
[83] See e.g. C-413/14 *Intel* EU:C:2017:632.
[84] See e.g. C-202/07 *France Télécom* EU:C:2009:214.
[85] See e.g. C-280/08 *Deutsche Telekom* EU:C:2010:603.
[86] See e.g. T-228/97 *Irish Sugar* EU:T:1999:246.
[87] See e.g. C-7/97 *Oscar Bronner* EU:C:1998:569.
[88] See, e.g., Commissioner Neelie Kroes, *Taking Competition Seriously—Antitrust Reform in Europe* (SPEECH/05/157), Brussels, 10 March 2005: "…*when we break up cartels, it is to stop money being stolen from customers' pockets*."
[89] See e.g. Whelan, *The Criminalization of European Cartel Enforcement*, OUP (2014).
[90] European Commission, *Guidelines on Vertical Restraints* (OJ C130/1, 19.05.2010), para.224.
[91] *Enforcement Priorities*, para.19.
[92] *Enforcement Priorities*, para.23.

term.[93] In each instance, the underlying objection is not that the price charged in itself is unacceptable, but rather that it has been determined, or affects the market, in an anticompetitive manner.

The principal exception is Article 102(a), which expressly cites as an example of abusive conduct, 'directly or indirectly imposing unfair purchase or selling prices'. The Court of Justice in *United Brands* confirmed that this prohibition applies where dominant firms charge a price that is disproportionate, or bears no reasonable relationship, to the economic value of the product concerned.[94] It applied a demanding two-part test to determine excessiveness: requiring that, first, the difference between costs incurred and price charged was excessive, and second, the price charged was unfair in itself or compared to competing products.[95] Yet more recently in *AKKA*, the Court clarified that the so-called '*United Brands* test' is not exhaustive.[96] It accordingly accepted that excessiveness might be established, *inter alia*, through consistent comparison with prices in other Member States, adjusted where necessary to take account of relative purchasing power, provided that any differences were significant and persistent.[97] The complexities inherent in this evaluative exercise, however, were highlighted by Advocate General Wahl: from a risk of counterproductive false positive errors, to problems of *ex ante* uncertainty for firms, and administrative costs associated with on-going monitoring and enforcement.[98] He thus argued that excessive pricing should be held exist, *if at all*, only in markets with regulatory barriers to entry yet absent effectual supervision by sector regulators,[99] given that such problems are consequently amenable to neither self-correction nor regulatory supersession.

Perhaps unsurprisingly, for many years the Commission pursued excessive pricing claims only exceptionally.[100] Beyond the Commission's stated reluctance to act as 'price regulator,'[101] its own economic experts counselled against intervention,[102] and exploitative abuses are a notable omission from guidance on the Commission's enforcement priorities.[103] A rejection decision from 2004 is instructive: although prices were high, the services provided were particularly valuable, and thus it could not be established that price bore no reasonable relationship to value.[104] While the prices charged may have been suboptimal, this decision exemplifies Advocate General Wahl's contention that antitrust cannot fruitfully concern itself with

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[93] *AKZO*, paras.70-72.
[94] C-27/76 *United Brands* EU:C:1978:22, para.250.
[95] *United Brands*, para.252.
[96] C-177/16 *AKKA* EU:C:2017:689, para.37.
[97] *AKKA*, paras.38&55.
[98] Opinion in *AKKA*, paras.103-105.
[99] Opinion in *AKKA*, paras.48-49.
[100] Gal, "Monopoly Pricing as an Antitrust Offence in the US and the EC: Two Systems of Belief About Monopoly?" 49 *Antitrust Bulletin* 343 (2004), 376.
[101] European Commission, *XXVIIth Report on Competition Policy* (1997), 77.
[102] Report by the EAGCP, *An Economic approach to Article 82*, July 2005, p.11.
[103] *Enforcement Priotities*, para.7.
[104] Commission Decision of 23 July 2004 in COMP/A.36.568/D3—*Scandlines v Port of Helsingborg*.

any claimed deviations from a perfectly competitive price, but must restrict itself to those which are unambiguously problematic.[105]

Yet this apparent orthodoxy is not immune from challenge. Most obviously, NCAs have proven more receptive to exploitative concerns, pursuing Article 102 cases with an exploitative element—particularly excessive pricing—at more than double the rate of the Commission over the first decade of decentralised enforcement under Regulation 1/2003.[106] Such a division of labour is consistent with our observations regarding the distinctive subsidiarity concerns raised by price regulation, even though the principle has no binding effect here: NCAs are arguably better placed to identify pricing practices raising public policy concerns, and to take and implement such—effectively redistributive—decisions.

Yet certain areas of the Commission's recent enforcement practice, too, disclose a greater concern with unfair prices. A first group of cases involves commitment decisions under Article 9 of Regulation 1/2003. In effect, this procedure provides a flexible vehicle by which to tackle more complex—and often contentious—case theories, making it well-suited to address on-going pricing problems. The commitment procedure, and relevant decisions, are considered below.

A second group involves horizontal price-fixing in the context of payment systems. Here, the Commission has pursued a series of enforcement actions, some as infringement decisions[107] and others as commitment decisions,[108] against multilateral interchange fees (MIF) agreed by financial institutions that operate payment card networks. Notably, in these cases the primary concern is not that the price-setting activity is anticompetitive, but rather that the agreed price is excessive compared with an optimal competitive price. The outcome in each instance has accordingly been, rather than abandonment of the MIF mechanism, instead a substantial lowering of existing fee levels. Such cases therefore evince greater concern with ultimate (re)distribution than with operation of the competition process, disclosing a distinctly regulatory mentality. It was not unexpected, therefore, that the EU institutions subsequently opted to overreach the market mechanism with a top-down Regulation setting maximum MIF levels across the internal market, a development considered further in section VII below.

Finally and most prominently, following several high-profile enforcement actions taken by NCAs,[109] the Commission has expressed greater willingness to intervene specifically against excessive prices that result in consumer exploitation. While reiterating a default position that *'[t]he last thing we should be doing is to set ourselves up as a regulator, deciding on the right price*,' Competition Commissioner Vestager nonetheless argued that the EU

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[105] *AKKA*, paras.101-107 & 128.
[106] European Commission, *Staff Working Document on Ten Years of Antitrust Enforcement under Regulation 1/2003* (COM(2014)453), 9 July 2014, paras.65-73.
[107] Commission Decision of 19 December 2007 in COMP/34.579—*MasterCard*, COMP/36.518—*EuroCommerce* and COMP/38.580—*Commercial Cards* (OJ C264/8, 6.11.2009); upheld on appeal in C-382/12 P *MasterCard* EU:C:2014:2201.
[108] Commission Decisions in COMP/39.398—*VISA MIF* of 8 December 2010 (OJ C79/8, 12.3.2011) and 26 February 2014 (OJ C147/7, 16.5.2014).
[109] See, e.g. Competition and Markets Authority, *Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK*, Case CE/9742-13, 7 December 2016.

has '*a responsibility to the public*' to tackle excessive pricing in certain instances, particularly relating to vital consumer products.[110] This culminated in a formal investigation into alleged 'price-gouging' in the pharmaceutical sector, an investigation the Commission describes as the first of its kind.[111] It coincides, moreover, with greater emphasis on the extent to which competition enforcement might secure, not merely the high-level goals of efficiency and market interpenetration, but also the more tangible, though politically-loaded, objective of increased societal fairness.[112] While scepticism exists as to whether such developments represent legitimate *popular* or more troubling *populist* concerns,[113] a renewed focus on the symptoms of market power rather than its causes reflects implicit acknowledgement that the promise of 'open and undistorted competition' may be insufficient to protect consumer welfare.

(ii) Remedial Structures available in Competition Cases

The second way in which competition enforcement conventionally diverges relates to the outcomes of regulatory action. Whilst price regulation culminates in a specified pricing structure requiring adherence by regulated firms, competition enforcers are more reluctant to 'pick winners'. Even where antitrust imposes *negative* obligations proscribing particular pricing practices, on-going *positive* duties to charge specific prices, determined *ex ante* and applying to future market behaviour, are more problematic conceptually and more unusual in practice.

Conventionally, the primary enforcement mechanism for EU competition law has been Commission infringement decisions. The express wording of Article 7 of Regulation 1/2003 empowers the Commission to "*impose on [defaulting undertakings] any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.*" Yet the Commission has, typically, restricted itself to (increasingly high) fines, and, where ambiguity exists as to whether an infringement is continuing, a formal statement requiring it to be brought to an end; this might entail, as in *Microsoft*, binding obligations to resolve on-going problems.[114] Accordingly, infringement decisions often *proscribe* existing anticompetitve price-setting arrangements or price structures, but do not *prescribe* the 'competitive' price going forward. As the *Microsoft* saga demonstrates, ostensibly proscriptive remedies can become prescriptive where difficulties

[110] Speech of Commissioner Vestager, "Protecting Consumers from Exploitation," Chillin' Competition Conference, Brussels, 21 November 2016.
[111] European Commission Press Release, *Antitrust: Commission opens formal investigation into Aspen Pharma's pricing practices for cancer medicines*, IP/17/1323, Brussels, 15 May 2017.
[112] Speech of Commissioner Vestager, "Competition for a Fairer Society," 10th Annual Global Antitrust Enforcement Symposium, Georgetown, 20 September 2016.
[113] Lamadrid de Pablo, "Competition Law as Fairness," 8 *JECLAP* 147 (2017).
[114] T-201/04 *Microsoft* EU:T:2007:289, confirming Microsoft's obligation to provide interoperability information to resolve a refusal to supply.

arise in implementing the original sanction.[115] Nonetheless, at least initially, Article 7 decisions adhere to the tort-crime model of antitrust.[116]

As such, infringement decisions are of limited use for direct price-setting: such decisions inform market participants of prices that they *cannot* charge, rather than those they must. The strict proportionality requirement within Article 7 has been advanced to explain the Commission's reluctance to deploy it more robustly to include, *inter alia*, pricing obligations,[117] insofar as the Commission has the burden of establishing that such remedies are suitable, necessary and represent the least restrictive alternative.[118] Yet arguably this also reflects an 'antitrust' as opposed to 'regulatory' approach to market governance: freeing the market of barriers to competition, but not second-guessing what the competitive outcome might entail.

Two recent developments suggest, however, that any rigid dichotomy between ostensible 'antitrust' and 'regulatory' remedial structures is misplaced, thus mirroring well-established critiques of US antitrust resulting from its consent-decree practice.[119] The first and more speculative change, advocated by certain scholars[120] and hinted at in the recent *ARA Foreclosure* decision,[121] is a possibility that the Commission becomes more forceful in applying its little-used remedial powers under Article 7. *ARA* notably involved, alongside a finding of infringement and fines, an obligation on the defendant to divest certain infrastructure to avoid future abuses. While the facts are unusual—the defendant had a *de facto* statutory monopoly, the divesture commitment was offered by the undertaking, and it received a discounted fine in return—the decision suggests greater willingness by the Commission to use its Article 7 powers in a more muscular, multi-dimensional fashion.[122]

The second, more significant development lies in the commitment procedure under Article 9 of Regulation 1/2003. This enables the Commission to conclude investigations without any finding of breach, based on binding commitments by the undertaking(s) concerned to modify their behaviour or structure. Two aspects of the procedure facilitate its application to achieve quasi-regulatory outcomes such as price controls. First, given that Article 9 decisions do not entail any formal finding of breach,[123] and because the consensual nature means that appeal is unlikely,[124] it is unsurprising that recurrent use has been made of the procedure to conclude cases that involve more contentious or novel theories of harm, including those targeted directly at

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[115] Microsoft was subsequently fined an additional €860 million for failure to provide the mandated information: T-167/08 *Microsoft* EU:T:2012:323.
[116] See e.g. Crane (2008) "Antitrust Antifederalism" 96 *California Law Review* 1, 14-15.
[117] Wagner-Won Papp, "Best and even better practices in commitment procedures after Alrosa: The dangers of abandoning the "struggle for competition law"" 49 *CMLRev* 929 (2012).
[118] C-441/07 P *Commission v Alrosa* EU:C:2010:377, para.39.
[119] See, e.g., First, "Is Antitrust Law?" 10 *Antitrust* 9 (1995).
[120] Wagner-Von Papp (2012), 960.
[121] Commission Decision of 20 September 2016 in AT.39759—*ARA Foreclosure* (OJ C432/6, 23.11.2016).
[122] See e.g. Wollmann, "*ARA Foreclosure*: A Step Towards 'Consent Decrees' in EU Antitrust Proceedings" 8 *JECLAP* 167 (2017).
[123] Pursuant to Recital (13), Regulation 1/2003, the Commission cannot find infringements or impose fines in Article 9 cases.
[124] Appeals have been brought by third parties: see C-441/07 P *Commission v Alrosa* EU:C:2010:377, and T-342/11 *CEEES* EU:T:2014:60.

unfair pricing. Examples include *S&P*,[125] premised explicitly upon the setting of "unfairly high fees;" *Rambus*,[126] involving so-called 'patent ambush,' in effect an excessive pricing claim coloured by a standard-setting context; and several decisions against *Visa*,[127] alleging in essence excessive prices following co-ordinated price-setting. For the Commission, commitment decisions present a benign mechanism by which to conclude arguably more dubious cases, including the sorts of quasi-regulatory theories that might require on-going pricing commitments for resolution.

Second, unlike the largely retributive function of infringement findings,[128] Article 9 decisions aim to identify and implement prospective solutions to on-going market problems. Whilst some commitments are one-off, others involve continuing obligations to specific behaviour. Most notably, in several cases the agreed remedy has involved future pricing commitments: whether a fixed price (*S&P*, *IBM*[129]), a percentage value (*Rambus, VISA*) or both (*RICS*[130]). Moreover, Article 9 decisions, unlike the infringement procedure,[131] may involve voluntary commitments to adhere to monitoring structures, an important addition, for instance, to the commitments in *RICS* following market-testing.

The scope for Article 9 to facilitate and legitimate the use of competition law as a vehicle for price regulation should not be overstated, however. First, commitment decisions are available only in a subset of cases, excluding cartels and serious non-cartel abuses.[132] Second, such decisions require the consent of defendants: commitments cannot be imposed unilaterally, so Article 9 decisions are excluded where defendants refuse to cooperate or fail to offer sufficiently persuasive commitments. At most, therefore, commitment decisions approximate to a form of co-regulation between the Commission and, crucially, *willing* defendants. As noted, voluntarism was similarly a key element of the hybrid procedure in *ARA*. Finally, concerns have been raised about the commitment procedure *qua* legal (rather than regulatory) instrument, particularly the extent to which it introduces uncertainty to the underlying antitrust rules, given that Article 9 decisions do not, formally, represent statements of competition law.[133] Thus, the Commission has signalled an intention to make greater use of Article 7 where clear precedents would be of value.[134] Yet such an approach may impede its application in precisely the sorts of quasi-regulatory pricing cases that, as discussed, lie at the boundaries of contemporary competition law.

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[125] Commission Decision of 15 November 2011 in COMP/39.592—*Standard & Poor's* (OJ C31/8, 4.2.2012).
[126] Commission Decision of 9 December 2009 in COMP/38.636—*Rambus* (OJ C30/17, 6.2.2010).
[127] See fn.108 above.
[128] See e.g. Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (OJ C167/19, 13.6.2013), para.1.
[129] Commission Decision of 13 December 2011 in COMP/39.692—*IBM Maintenance Services* (OJ C18/6, 21.1.2012).
[130] Commission Decision of 20 December 2012 in COMP/39.654—*Reuters Instrument Codes (RICs)* (OJ C326/4, 12.11.2013).
[131] In *Microsoft*, paras.1271-1278, the General Court held that the Commission cannot, in an infringement decision, impose a monitoring trustee on defendants.
[132] According to Recital (13), Regulation 1/2003, excluding "*cases where the Commission intends to impose a fine*."
[133] See fn.123 above.
[134] See, e.g., "Interview with Johannes Laitenberger, Director-General for Competition, European Commission" *The Antitrust Source*, June 2017

(iii) Competition Law as a Corrective to Domestic Price Regulation

Finally, consideration must be given to a further, disputed, intersection between price regulation and EU competition law, namely application of the latter to conduct already subject to domestic controls. Under the restrictive 'State action' doctrine, the mere fact the market behaviour is subject to *ex ante* sector-specific regulation does not immunise the undertaking concerned from application of competition law, *unless* the regulatory framework either removes any possibility for independent (anti)competitive activity or all scope for competitive forces to arise.[135] The ostensible justification is that sector-specific regulation and competition law pursue discrete policy objectives, so that undertakings must ensure that their market behaviour conforms with each set of legal obligations.[136] A more sceptical explanation, however, is that sector-specific regulation is almost invariably enacted and enforced domestically, though it may originate in EU-level Directives.[137] Accordingly, in many antitrust cases in which State action issues arise, at the heart of the dispute lie claims regarding the distortive effects of national rules.

Deutsche Telekom provides a vivid illustration of how such conflict can extend to price controls. Here, the incumbent telecommunications operator in Germany, DT, was held to have engaged in an abusive margin squeeze by maintaining an insufficient spread between wholesale and retail prices for fixed-line telephone access.[138] The case theory proceeded on the basis that wholesale prices were set by the domestic regulator, while retail prices had been approved under a maximum price cap applying to a 'bundle' of retail products. Despite the apparent pervasiveness of regulatory influence, DT was considered to have sufficient residual freedom to avoid the squeeze, and indeed, a 'special responsibility' to take steps to do so.[139] Yet at the core of the antitrust case lies a different clash, namely Germany's failure to implement telecommunications tariff rebalancing, contrary to its obligations under EU law.[140] Thus, a supranational *public* dispute between the EU and its Member State over the appropriateness of domestic price regulation was effectively repackaged as one involving *private* manipulation of price formation, enabling the Commission to dismantle the problematic regulatory structure *de facto*, without the complications of the *de jure* procedures available to challenge national rules.[141]

The approach of *Deutsche Telekom* and its implications foreshadow the scepticism that the Commission and Courts frequent demonstrate towards both the design and implementation of domestic price regulation. Not only does the case give little weight to the appropriateness or authority of price-setting by the national regulator; moreover, the defendant was granted only the slightest allowance to reflect the comprehensiveness

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[135] *Deutsche Telekom*, paras.80-82; see also C-359/95 P & C-379/95 *Ladbroke Racing* EU:C:1997:531, paras.33-34

[136] Opinion of Advocate General Mazak in C-280/08 *Deutsche Telekom* EU:C:2010:212, para.21.

[137] See, generally, Monti, "Managing the Intersection of Utilities Regulation and EC Competition Law" 4 *Competition Law Review* 123 (2008).

[138] *Deutsche Telekom*, paras.169-183.

[139] *Deutsche Telekom,* paras.176-181.

[140] Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L192/10, 24.7.1990).

[141] In particular, Articles 258 & 260 TFEU. Confirming the permissibility of this approach, see *Deutsche Telekom*, paras.44-47.

of the pricing constraints it faced, namely a 10% reduction in fine.[142] An analogy might be drawn to the principle of legality and its limitations within EU law, pursuant to which an undertaking may not claim a legitimate expectation in or seek to rely upon an unlawful act.[143] The failure to give substantial import to the domestic regime suggests, implicitly, that it could not be considered a legitimate feature of the domestic market; presenting neither a plausible defence for the defendant's pricing practices nor a reasonable (albeit imperfect) estimation of appropriate price levels in the German telecommunications markets. We return to this sceptical perspective below.

At this juncture, two principal takeaways emerge. The first is a notable regulatory restraint, apparently premised on the idea that *de facto* price regulation is an inappropriate task for the EU in its guise as competition regulator. (A degree of restraint perhaps more remarkable given the frequent criticism that the Commission is too willing to intervene under competition law in other contexts.[144]) Thus, we see a first instance of the idea that regulating prices is 'special'—or especially disfavoured—under EU law. Influenced by Chicago School thinking, Advocate General Wahl provided a searing exposition of these concerns: public interference with the private price formation mechanism almost invariably generates suboptimal results, given both the elusiveness of any would-be competitive price and the high cost and risks of intervention.[145] The oblique attack on national price regulation in *Deutsche Telekom* further accords with this logic. Yet greater receptiveness in recent practice, expressly premised on pursuit of a fairer society, belies the notion that open and undistorted competition is invariably the best route to enhanced consumer welfare. We shall see this tension reoccur in the scenarios examined in sections V to VII.

Second, the procedural powers available at EU level appear to make a significant difference to substantive outcomes. Specifically, antitrust enforcement moves closest to the archetype of price regulation with the commitment procedure, whereby the Commission has formal powers to make binding and enforce any regulatory bargain agreed. Yet, under Article 9, pricing remedies remain a 'bargain' in a literal sense, insofar as ostensibly regulated entities must agree to and indeed nominally propose their own restraints. A question thus arises as to whether there is scope for a more coercive approach to pricing remedies in antitrust cases where defendants are unprepared to make the necessary concessions, or whether the risks of erroneous and counterproductive intervention outweigh potential benefits. Moreover, marked asymmetry exists between proscribing existing pricing practices and prescribing ostensibly optimal 'competitive' prices going forward. Such asymmetry reoccurs in the examples discussed later in this work, and thus we might ask

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[142] *Deutsche Telekom*, para.279.
[143] See, e.g., C-188/83 *Hermann Witte* EU:C:1984:309, para.15; C-162/84 *Vlachou* EU:C:1986:56, para.6; and C-155/14 *Evonik Degussa and AlzChem* EU:C:2016:446, para.58.
[144] See e.g. Fox, "We Protect Competition, You Protect Competitors" 26 *World Competition* 149 (2003).
[145] See fn.98 above.

whether the concerns identified and solutions reached in this essentially micro (i.e. firm-level) context have resonance in the more macro context of the relationship between the EU and Member States.

V. INDIRECT PRICE REGULATION I: THE PROHIBITIVE APPROACH

We move from price-setting by private entities to price regulatory activity by public entities, whether Member States or the EU itself. Arguably, the default approach within the internal market is, in keeping with its ideological tenor generally, one of deep scepticism and reluctance towards price regulation. We term this the *prohibitive* approach: as a derogation from the precept of open and undistorted competition, price controls are incompatible with the EU legal framework unless justified by a legitimate and proportionate objective. This suspicion is illustrated, implicitly albeit most convincingly, by the sheer absence of direct price controls within positive EU law. Instead, most EU legal rules addressing this question concern efforts to constrain or prohibit price controls implemented domestically, most obviously under the free movement rules.

The fundamental rules guaranteeing free movement within the internal market provide its foundation, prohibiting domestically-imposed obstacles to the circulation of goods, services, establishment, workers and capital between Member States. Price regulation poses a conceptual conundrum here. Price controls are close to the antithesis of free unencumbered competition between private market actors, and thus present a fundamental departure from the archetype of 'open' competition underpinning the internal market. Yet, formally, the free movement rules are unconcerned with barriers to competition *as such*, but instead, with barriers to trade (and, *by consequence*, competition) between different national markets that comprise the discrete components of the ostensible single market. While EU law pursues the clear goal of market interpenetration through removal of barriers to trade, the internal market does not mandate that such trade is wholly unregulated domestically, provided that national regulatory frameworks do not impose implicit barriers to foreign competition. Free movement is not precisely equivalent to 'free markets,' therefore, insofar as the latter implies unrestricted economic activity more generally.[146]

Famously, in *Keck*, the Court of Justice drew a conceptual distinction between national rules that limit the commercial freedom of *all* economic operators, whether originating in the home or another Member State, and those which make life more difficult for *foreign* manufacturers or service providers, and thus hinder market interpenetration.[147] Domestic price controls clearly limit the ability of traders to determine, privately and independently, the price of goods or services. As such, price regulation has the potential to dampen and distort competition in absolute terms.[148] Provided such regulation disadvantages domestic and foreign traders to an equivalent extent, however, it cannot constitute a barrier to trade *between* Member States, but

[146] For discussion of the market access principle, and its implicit limits, see Barnard (2016), 19-24.
[147] C-267/91 *Keck and Mithouard* EU:C:1993:905, paras.14-17.
[148] *Keck*, para.13.

merely a restriction on trade *within* the national market. Unlike other ostensible 'selling arrangements,'[149] moreover, price controls do not generate an obvious incumbency advantage for established domestic operators, by, for instance, imposing positive obstacles to entry[150] or restricting the possibility of cross-border sales[151]—beyond, of course, making the market potentially less profitable and thus less desirable to entrants. Moreover, the mere fact that certain Member States refrain from regulating prices, or do so less restrictively, cannot imply that more exacting regulation elsewhere poses an obstacle to free movement.[152]

Convincing though this logic may be, the Court of Justice subsequently proved more receptive to arguments that apparently neutral controls impose barriers to accessing national markets which constitute a particular disadvantage for traders from other Member States. While acknowledging the residual freedom of Member States to regulate absent EU-level harmonisation, the Court has held that price controls might obstruct the free movement of, variously, goods,[153] services[154] and establishment.[155] The Court's reasoning suggests a deep appreciation of the significance of price within the market process, in terms of both the competitive vitality and economic viability of economic actors. This, in turn, arguably links to ordoliberal thinking on the centrality of individual economic freedom within the economic constitution.[156] These cases thus reflect the ideological tension that arises where domestic controls limit or distort competition within the ostensibly free internal market—a tension particularly apparent in recent decisions.[157] These dual concerns may help to explain why, in evaluating the treatment of price regulation, one leading commentator suggests that, without saying so explicitly, the Court views such cases as a distinct—and arguably unique—category.[158]

On the one hand, price controls may hinder access to national markets by limiting the *competitive vitality* of traders from other Member States: as the Court of Justice held forcefully in *Deutsche Parkinson*, '*price competition lays the basis for [foreign traders'] potential to access the [host] market directly and to continue to be competitive in it*.'[159] Cases in this vein recognise that price is the most immediate parameter of competition. Where regulation restricts, *de jure*, the ability of new entrants to compete on price, this may have the effect, *de facto*, of preventing entrants from competing at all. This might be the case where particular products can be produced more cheaply in the home Member State—echoing the classic Ricardian notion of comparative advantage—yet where fixed or minimum price controls within the host Member State prevent the foreign trader from

[149] *Keck*, para.16.
[150] C-34/95 *De Agostini* EU:C:1997:344.
[151] C-108/09 *Ker-Optika* EU:C:2010:341.
[152] C-565/08 *Commission v Italy* EU:C:2011:188, para.49.
[153] See e.g. *Scotch Whisky*. While *Keck* held that price regulation falls outside Article 34 where applied equally and without discriminatory impact, *Scotch Whisky* suggests that such controls are likely to be viewed as a 'measure having equivalent effect' hindering market access and thus, *prima facie*, an infringement (para.32, following approach of Opinion, paras.59-60).
[154] See e.g. *Cipolla.*
[155] See e.g. C-465/05 *Commission v Italy* EU:C:2007:781, and C-442/02 *CaixaBank France* EU:C:2004:586.
[156] See e.g. Lovdahl-Gormsen, *A Principled Approach to Abuse of Dominance*, CUP (2010), 95-104.
[157] The movement away from *Keck* supports this view; contrast the earlier approach of Poiares Maduro, "Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights" 3 *European Law Journal* 55 (1997), 65.
[158] Barnard (2016), 87, fn.127.
[159] *Deutsche Parkinson*, para.24.

reaping the competitive advantage of its lower costs.[160] Alternatively, regulation may deprive entrants of the effective competitive strategies necessary to break into new markets and increase market share. Price controls may prevent entrants from engaging in innovative pricing practices, which might distinguish their products from those of domestic incumbents;[161] from using price competition to overcome reputational or other incumbency advantages of established domestic undertakings;[162] or, where foreign traders are at a disadvantage in the quality of the product they can provide, from compensating customers through lower prices.[163] Finally, limitations on price competition may stifle the ability of entrants to compete via higher quality, where the effect is to prevent foreign traders from offering products which, though more costly, represent added value for consumers.[164]

On the other hand, price controls may hinder access by threatening the *economic viability* of new entrants. Achieving a positive equilibrium between income and costs is necessary to ensure that entrants can remain within the marketplace and potentially develop as effective competitors. Price regulation might function to exclude foreign traders, however, where a fixed or maximum selling price is set at an unreasonably low level in comparison to their costs.[165] Such an outcome may arise where a pricing scheme is devised only by reference to the situation of undertakings established in the host Member State, which differs from that of foreign undertakings.[166] Here, the domestic controls generate what is in effect a margin squeeze between costs incurred by the foreign trader upstream and the maximum price obtainable downstream. The effect is that the foreign trader cannot compete profitably—and in the longer-term, probably cannot compete at all—in the host Member State.[167] Cases of this variety thus grapple with a limitation inherent within the truism that competition policy ought to protect the competitive process rather than competitors: although the latter might introduce inefficiencies in the short-term, in the longer-term the existence of rivals is indispensable to healthy competition.

Finally, several recent cases hint at a more fundamental objection to price regulation, reflecting the antithetical nature of price controls within an ostensibly free market. Chief amongst these is *Scotch Whisky*. In holding that domestic regulation of alcohol pricing constituted a 'measure having equivalent effect' (MEE) contrary to Article 34 TFEU, the Court spoke broadly about the potential for price regulation to impinge upon '*the free formation of prices*,'[168] which '*constitutes the expression of the principle of free movement of goods in conditions of effective competition.*'[169] Such language suggests that the concern with price regulation is not merely that it may

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[160] See e.g. C-82/77 *van Tiggele* EU:C:1978:10, paras.14&18.
[161] *Caixa-Bank France*, paras.12-14.
[162] *Cipolla*, para.59; Case C-465/05 *Commission v Italy*, para.125.
[163] C-148/15 *Deutsche Parkinson* EU:C:2016:776, paras.24-27.
[164] C-465/05 *Commission v Italy*, para.119.
[165] C-65/75 *Tasca* EU:C:1976:30, para.13.
[166] Opinion of Advocate General Poaires Maduro in C-94/04 *Cipolla* EU:C:2006:76, para.69.
[167] See, to this effect, *Tasca*, para.10.
[168] *Scotch Whisky*, para.44,
[169] *Scotch Whisky*, para.20.

disfavour foreign traders, but that it may create an inherently uncompetitive market structure which disadvantages all traders—and, consequently, consumers—regardless of origin.

Care ought to be taken against reading too much into a single judgment. First, the phrase, '*the free formation of prices*,' was introduced by the Advocate General[170] specifically in relation to the CMO Regulation for agricultural products,[171] although the Court adopted this wording more broadly.[172] Moreover, in concluding that the impugned controls constituted a MEE, the Court endorsed the reasoning of the Advocate General,[173] who emphasised the extent to which the regulation might cancel out the competitive advantage of imports,[174] thus aligning with established case-law.[175] Yet, the apparently expansive language chimes with the earlier decision in *Commission v Italy*, where the Court spoke of price regulation as a potential impediment to market access—contrary, in that instance, to Articles 49 and 56 TFEU—insofar as it might deny entrants the opportunity to compete '*under conditions of normal and effective competition*' within the host Member State.[176] Again, this suggests that it is not merely the potentially discriminatory impact of such regulation, but rather its distortive effects more broadly, that conflict with the principle of open competition.[177] Although the Court in *Commission v Italy* concluded that the regulation did not, in fact, hinder market access, it did so on the basis that, in practice, it permitted independent price-setting, thus allowing 'proper remuneration'[178]—and, implicitly, allowing the market mechanism to function. A principled objection to interference with the price formation mechanism may also explain the Court's vehemence in *Deutsche Parkinson*, which celebrates the virtues of price competition in the strongest terms.[179]

Regardless of the conceptual basis upon which price regulation constitutes a barrier to free movement, Member States retain the possibility of justifying such controls by reference to proportionate countervailing public policy considerations. It is here that the domestic impetus behind price regulation is of paramount significance: whilst EU law acknowledges the importance, and possible precedence, of certain '*non-economic public policy aims*,'[180] not every domestic concern provides a legitimate reason to deviate from open competition. To exempt *prima facie* restrictive regulation, Member States must demonstrate that it '*serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective which it pursues and*

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[170] Opinion in *Scotch Whisky*, para.37.
[171] Regulation 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations 922/72, 234/79, 1037/2001 and 1234/2007 (OJ L347/671, 20.12.2013).
[172] *Scotch Whisky*, para.44.
[173] *Scotch Whisky*, paras.31&32.
[174] Opinion in *Scotch Whisky*, para.59-60.
[175] See e.g. *van Tiggele*, cited in the Opinion in *Scotch Whisky*, para.65.
[176] C-565/08 *Commission v Italy* EU:C:2011:188, para.51.
[177] See also Opinion of Advocate General Mazak in that case, describing the principal objection to the legislation as constituting a 'restriction on the contractual freedom' of service users (EU:C:2010:403, para.32). Such language echoes the mere 'limitation on commercial freedom' that presumptively fell *outside* the purview of the free movement rules under *Keck* (para.14), yet was assumed to constitute an obstacle to free movement in *Commission v Italy*, *if* mandatory in nature.
[178] C-565/08 *Commission v Italy*, para.53.
[179] *Deutsche Parkinson*, para.43.
[180] Opinion in *Deutsche Parkinson*, para.1.

does not go beyond what is necessary in order to attain it'.[181] The burden on proof lies with Member States,[182] emphasising the presumption that national obstacles to price competition conflict with EU law.

In scrutinising any public policy objective advanced to justify price regulation, a core question is the extent to which EU law can or should presume to 'second guess' the policy choices of Member States. The free movement rules are not a prescription for legislative harmonisation,[183] and Member States retain freedom for divergent regulation within their confines. Price regulation, alongside the domestic policy concerns that underpin it, is often an inherently *political* activity,[184] both in its initial recognition of legitimate countervailing non-economic values and in the choice of regulatory mechanisms deployed to protect or further those values.[185] To that extent, as Advocate General Spzunar recognised, '*[i]t is obviously not for the Court to interfere in national political and democratic processes and to prejudge certain political choices*.'[186] Yet, as cases like *Essent*,[187] *Viking*,[188] and *Laval*[189] demonstrate in different contexts, the fact that fundamental domestic policy considerations are at issue neither excludes application of the free movement rules nor means the latter must yield to the former. Balancing the objective of establishing the internal market against '*sensitive matters of a non-economic nature*'[190] is, therefore, '*a delicate task*'.[191]

Member States have relatively broad latitude in identifying public policy concerns that might, in theory, justify restrictions on price competition. Echoing our discussion in section II above, the Court accepts that price controls might further such objectives in various ways. Upper limits can enhance consumer protection by preventing price gouging, particularly where consumers lack market power.[192] Price regulation may encourage practices viewed as socially desirable—such as consumer saving[193]—or, conversely, discourage undesirable practices—such as alcohol abuse.[194] More problematic are cases where controls play a 'moderating role,'[195] to neutralise perceived 'excessive'[196] or 'ruinous'[197] competition. Here, the regulatory concern is that price competition might unbalance the existing market equilibrium by, for instance, encouraging 'cream-skimming' behaviour that neglects peripheral or vulnerable consumers[198] or less

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[181] *Cipolla*, para.61.
[182] *Deutsche Parkinson*, para.35.
[183] Opinion in *Cipolla*, para.58.
[184] *Scotch Whisky*, para.38.
[185] Opinion in *Scotch Whisky*, para.83.
[186] Opinion in *Deutsche Parkinson*, para.78.
[187] C-105/12 *Essent* EU:C:2013:242, concerning public ownership of energy infrastructure.
[188] C-438/05 *Viking Line* EU:C:2007:772, concerning the right to strike.
[189] C-341/05 *Laval* EU:C:2007:809, concerning the right to strike.
[190] Opinion in *Deutsche Parkinson*, para.38.
[191] Opinion in *Deutsche Parkinson*, para.1.
[192] Opinion in C-565/08 *Commission v Italy*, para.34.
[193] *Caixa-Bank France*, para.19.
[194] See e.g. *Scotch Whisky*, para.35.
[195] Opinion in C-565/08 *Commission v Italy*, para.34.
[196] *Cipolla*, para.62.
[197] *Deutsche Parkinson*, para.33.
[198] *Deutsche Parkinson*, para.33.

profitable product categories,[199] or which leads to a deterioration in quality as suppliers cut costs to cut prices.[200] While the Court is not unreceptive to such concerns,[201] justifications of this variety may shade into purely *economic* arguments, which cannot provide a legitimate ground for derogating from free movement.[202]

The mere existence of a valid public policy concern does not automatically legitimate domestic controls, however, as Member States are furthermore bound by the principle of proportionality. Any regulation must therefore be limited to measures that are both suitable and necessary to achieve the relevant public policy objective.[203] The exactingness with which the proportionality criterion is applied is, arguably, the decisive aspect of the balancing of domestic and EU-level interests. Advocate General Bot thus argued for '*a certain degree of restraint*' in this analysis:[204] both in order to grant Member States some discretion over policy choices on issues of, primarily, domestic concern,[205] and because of the inherent ambiguity of the exercise, which involves a measuring and balancing of fundamentally different (and, sometimes, intangible and even unknowable) phenomena.[206] In *Scotch Whisky*, the Court adopted a reasonableness standard to assess whether the proportionality requirement was satisfied;[207] an approach that ostensibly gives Member States a certain leeway, reflecting the once-removed status of the EU institutions to the essentially domestic choices that underlie most regulation.[208]

Yet, the Court's recent decisions on price regulation suggest, in practice, a more exacting approach than the language of reasonableness implies. The Court shows few qualms about questioning, and effectively second-guessing, domestic choices in an area acknowledged to be of significant importance—human health—and one which, moreover, lies primarily within the competence of Member States.[209] In *Scotch Whisky*, a decidedly unconvinced Court indicated that, although minimum pricing might be *suitable* to combat alcohol misuse, it should not be considered *necessary*, insofar as a tax increase could achieve the same result in a less restrictive manner.[210] (A viewpoint rejected, notably, when the case returned to the domestic level.[211])

More trenchantly, in *Deutsche Parkinson*, the Court rejected categorically Germany's assertion that fixed prices were *suitable* to protect the supply of medicinal products by supporting a network of bricks-and-mortar pharmacies, despite the referring court's view that regulation was the only means available (and thus, *necessary*) to achieve this outcome. Although the holding may be explained partly by an absence of plausible

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[199] C-531/07 *LIBRO* EU:C:2009:276, para.34.
[200] *Cipolla*, para.62.
[201] *Cipolla*, paras.62-67.
[202] Opinion in *Deutsche Parkinson*, para.42.
[203] See also discussion in Opinion in *Scotch Whisky*, paras.71-76.
[204] Opinion in *Scotch Whisky*, para.82.
[205] Opinion in *Scotch Whisky*, para.83.
[206] Opinion in *Scotch Whisky*, para.84.
[207] *Scotch Whisky*, paras.36&56.
[208] See also de Witte (2013), 1570-71.
[209] Article 6(a) TFEU.
[210] *Scotch Whisky*, paras.45-50.
[211] 'The fundamental problem with an increase in tax is simply that it does not produce a minimum price': *The Scotch Whisky Association and Others v The Lord Advocate and the Advocate General* [2016] CSIH 77, para.196.

evidence,[212] the case is nonetheless remarkable for the willingness of the Court to substitute its own (equally subjective) reasoning for that of the delinquent Member State. Of particular significance is its receptiveness to certain—markedly hypothetical[213]—arguments advanced by the Advocate General to provide a counter-narrative to that of the Member State, including suggestions in respect of the potential effects of price competition;[214] and, in a manner arguably conflating *ought* with *is*, the ways in which internet-only pharmacies might serve all segments of the population.[215] Thus, the Court effectively questioned the *substance* of the domestic policy choices.[216] What remains unclear is the source of this hostility: whether the Court was concerned about poor quality national regulation, or, echoing public choice critiques, whether it suspected a disjuncture between stated and actual regulatory motives. Either antagonism brings attendant dangers: an unduly rigorous and somewhat speculative proportionality analysis risks slipping from a judicial to full-merits review standard; whereas questioning the underlying motives of Member States arguably runs contrary to the principle of mutual trust that is demanded, at least of Member States, under EU law. Ultimately, the key question is why the Court of Justice is better placed to make such essentially normative determinations, whether based on technical expertise or its pan-Union perspective.[217] The apparent willingness of the Court to embrace substantive review stands in marked contrast, moreover, to its reluctance to perform a similar function under the subsidiarity principle in the context of price regulation originating at *EU* level.[218]

Where, more exceptionally, Member States involve *private* market actors in the *public* task of price regulation, the broader EU competition framework may provide an alternative avenue to scrutinise and prohibit such behaviour. As noted, where anticompetitive price-setting is carried out by undertakings themselves, it may be caught by Articles 101 or 102. To avoid situations where equivalent private interests are cloaked in public authority and escape scrutiny, those prohibitions—read with Article 5 TEU (duty of loyal cooperation)—impose obligations on Member States.[219] This may be the case where Member States require or encourage abusive price-setting by dominant undertakings or the adoption of rate-fixing agreements, or where national rules lose the character of public legislation when responsibility is delegated to private operators for decisions affecting the economic sphere.[220] Alternatively, where anticompetitive pricing structures are maintained by an undertaking yet attributable to a state measure, the Member State may be

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[212] See, e.g., *Deutsche Parkinson*, para.42.
[213] In distinction to the 'gradual empirical turn' within the Court's approach to proportionality: see Alemmano (2016), 1049.
[214] The Court was persuaded that price competition was as likely to generate higher quality services than the lower quality ones feared by Germany (para.40, adopting reasoning of Opinion, para.47): arguable, yet wholly speculative, and curiously missing any consideration of possible free-riding effects that are a central concern of contemporary antitrust discourse.
[215] 'People with reduced mobility could greatly benefit from being able to place orders online and having them delivered directly to their home. Even if they are not accustomed to the alleged intricacies of ordering online, they will often have someone at their side (a carer, a (grand)child, a neighbour etc.) who is': Opinion in *Deutsche Parkinson*, para.52, endorsed by the Court, para.37.
[216] On the implication of a substantive principle of proportionality, see de Witte (2013), 1566-70.
[217] See concerns expressed by de Witte (2013), 1569-70; also Andreangeli (2017).
[218] Rationalising the reluctance of the CJEU to engage in substantive subsidiarity analysis, see Öberg (2016), 16-17.
[219] See also discussion in Opinion in *Cipolla*, paras.31-37.
[220] *Cipolla*, para.47. As *Cipolla* demonstrates, the threshold for finding violation is high (paras.44-54).

accountable under Article 106(1) TFEU.[221] If, however, price regulatory activity is necessary to ensure provision of so-called 'services of general economic interest,' Article 106(2) TFEU may, in theory, exempt the behaviour from application of, *inter alia*, competition law.[222]

VI. INDIRECT PRICE REGULATION II: THE PERMISSIVE APPROACH

Although an openly sceptical approach typically governs ad hoc domestic price regulation, within a narrower subset of economic conditions there is greater recognition of, if not the desirability of price controls, at least their inevitability. Reflecting a pragmatic recognition of the sometimes necessity of intervention, the 'lesser evil'[223] is to centralise and standardise arrangements for domestic regulation through an overlay of more *permissive*, essentially supervisory EU rules. Price controls are not inherently suspect, yet the discretion of Member States is constrained, with an underlying assumption that the scope for resultant distortions is similarly diminished.

While the granular details of these supervisory schemes differ between sectors,[224] those circumstances where default hostility is replaced by tentative tolerance share characteristics which inform and influence the tenor of supervision. First, each of the sectors concerned has been subject to some degree of EU-level liberalisation or harmonisation, which sought to transform tightly-controlled and segmented national markets into contestable and competitive components of the internal market. EU law was thus the catalyst for creation of the market forces which Member States might subsequently seek to restrict. Adoption of positive legislation also suggests pan-Union interests that might be imperilled through disparate domestic controls.

Second, in each sector, liberalisation has not, however, involved a complete realignment of market governance rules with an EU-level archetype.[225] Member States retain scope to adopt divergent regulation, with possible disruptive effect. Absent deeper harmonisation—which, in the areas concerned, would prove politically contentious and potentially inefficient—the more pragmatic approach may be to accept the possibility of diversity but minimise its potentially disruptive impacts.

Finally, the sectors concerned are, typically, marked by structural features—economies of scale, network effects, natural or legal monopoly components—which mean that unregulated market activity is unlikely to

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[221] See e.g. Commission Decision of 10 February 1999 in Case No.IV/35.703—*Portuguese airports* (OJ L69/31, 16.3.1999).
[222] See e.g. T-289/08 *BUPA v Commission* EU:T:2008:29, where the Court accepted that a State-imposed 'risk equalisation scheme,' which required transfer payments between private health insurers in order to standardise consumer premiums, could be exempted on this basis.
[223] Echoing language of Advocate General Szpunar in *Deutsche Parkinson*, para.79.
[224] In addition to the approaches considered below, further examples are seen in natural gas (Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L211/94, 14.8.2009), Articles 3(2) & 41(1)(a)), rail (Directive 2012/34/EU of 21 November 2012 establishing a single European railway area (OJ L343/32, 14.12.2012), Articles 29-36), and ground-handling (Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ L272/36, 25.10.1996), Article 16(3)).
[225] In keeping with the logic of the shared competences: Article 4 TFEU.

generate 'effective' competition even after ostensible liberalisation, so that the ordinary price formation mechanism may generate suboptimal outcomes.[226] These difficulties are reflected, *inter alia*, in the frequency with which antitrust enforcement has been deployed against individual pricing practices.[227] Moreover, in the background in most instances are societal concerns—such as public service provision, or public health—that extend beyond the purely economic. These factors explain why domestic price controls are implemented with notable frequency in such markets: '*[l]iberalisation, if it is not to be at any cost to individuals, makes a certain amount of regulation necessary when the market does not function adequately*.'[228] These economic and social features provide a rationale for acceptance of regulation as a 'lesser evil'.

The electricity sector, where the continued presence of natural monopoly segments creates persistent structural barriers to competition, provides a clear example. Here, although the ultimate objective is to secure 'transparent market-based mechanisms for the supply and purchase of electricity,'[229] the liberalisation framework acknowledges the continuing necessity for price supervision. The Third Electricity Directive expressly permits Member States to impose public service obligations with respect to, *inter alia*, price.[230] It moreover requires Member States to ensure universal service for households (and, where preferred, small enterprises), premised upon 'reasonable, easily and clearly comparable, transparent and non-discriminatory prices.'[231] The Directive also *mandates* regulatory approval of wholesale-level transmission and distribution tariffs,[232] reflecting the potential for inefficient pricing practices upstream to create bottlenecks to retail competition. This reflects the 'essential facility' nature of such infrastructure, a parallel to the realm of antitrust,[233] thus recognising the extent to which unduly high input prices may have knock-on negative effects downstream. Consistent with the logic of the permissive approach, however, the liberalisation framework does not determine access prices; instead, this is delegated to national regulators, albeit acting within the circumscribed EU supervisory framework.

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[226] See e.g. Lovdahl-Gormsen (2010), 92, arguing that price regulation is a natural implication of supporting less-efficient competitors in liberalising markets.
[227] In the telecommunications sector, see e.g. C-202/07 *France Télécom* EU:C:2009:214, C-280/08 *Deutsche Telekom* EU:C:2010:603 and C-295/12 *Telefónica* EU:C:2014:2062. In the electricity sector, see e.g. Commission Decision of 26 November 2008 in COMP/39.388—*German Electricity Wholesale Market* and COMP/39.389—*German Electricity Balancing Market* (OJ C36/8, 13.2.2009). In relation to airport charges, see e.g. Commission Decision of 10 February 1999 in Case No IV/35.703—*Portuguese airports* (OJ L69/31, 16.3.1999); Commission Decision of 10 February 1999 in Case No IV/35.767—*Ilmailulaitos/Luftfartsverket* (OJ L 69/24, 16.3.1999); and Commission Decision of 26 July 2000 (*Spanish Airports*) (OJ L208/36, 18.8.2000). In relation to pharmaceutical products, the market distortions introduced by differentiated domestic price controls were explored in the (in)famous judgment in C-501/06 *GlaxoSmithKline* EU:C:2009:610; see also the Commission's on-going investigation into price-gouging in the sector, fn.111 above.
[228] Opinion of Advocate General Ruiz-Jarabo Colomer in C-265/08 *Federutility* EU:C:2009:640, para.43.
[229] Recital (35), Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L211/55, 14.8.2009) ('Electricity Directive').
[230] Article 3(2), Electricity Directive.
[231] Article 3(3), Electricity Directive.
[232] Articles 32(1) and 37(1)(a), Electricity Directive.
[233] See fn.87 above.

Within the telecommunications sector, where EU liberalisation has had greater success,[234] the treatment of domestic regulation is less generous. Here, liberalisation is explicitly premised upon the progressive reduction of *ex ante* regulation as competition develops.[235] Thus, there is an express preference for retail *and* wholesale arrangements negotiated 'on a commercial basis',[236] which implies price-setting in accordance with ordinary principles of supply and demand. While the liberalisation framework provides explicit authorisation for domestic price controls where necessary,[237] this option is *only* available following a finding that one or more operators hold 'significant market power'.[238] This mirrors the antitrust notion of dominance,[239] premised upon an absence of competitive constraints, thus suggesting that ordinary price-setting processes cannot work well in the circumstances.[240] Nonetheless, regulatory interventions must avoid 'market distortion'[241] that would prove counterproductive on balance. Market assessments are subject to periodic review,[242] with an obligation to remove existing regulation where the threshold requirement is no longer met.[243] Furthermore, the Commission has progressively narrowed the list of markets in which controls might be warranted.[244] Accordingly, despite express recognition of the residual permissibility of price regulation even within ostensibly liberalised markets, the discretion of Member States is significantly curtailed, at least acting *qua* telecommunications regulators.[245]

The Directive on Airport Charges[246] provides further variation. While the explicit aim is to establish a common regulatory framework for charges at major EU airports,[247] the Directive stops far short of specifying prices. Instead, it establishes a series of 'common principles'[248] that govern 'the essential features of airport charges and the way they are set'.[249] Beyond these, the Directive is notably permissive in terms of

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[234] Pelkmans & Luchetta, *Enjoying a Single Market for Network Industries?* Notre Europea—Jacques Delors Institute, Studies & Reports 95 (February 2013), 31.
[235] Recital (13), Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (OJ L108/7, 24.4.2002) ('Access Directive').
[236] Recital (5), Access Directive.
[237] Article 13, Access Directive.
[238] Article 8, Access Directive.
[239] Namely, 'a position of economic strength affording [an undertaking] the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers': Article 14(2), Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ L108/33, 24.4.2002) ('Framework Directive'), reflecting the definition from *United Brands*, para.65.
[240] *Enforcement Priorities*, para.11.
[241] Recital (7), Access Directive.
[242] Article 7, Access Directive.
[243] Article 16(3), Framework Directive.
[244] In accordance with Article 7(2), Access Directive; compare the ever-diminishing approaches in the Commission Recommendations of 11 February 2003 (OJ L144/45, 8.5.2003), 17 December 2007 (OJ L344/65, 28.12.2007) and 9 October 2014 (OJ L295/75, 11.10.2014), respectively.
[245] Member States retain residual ability to regulate on alternative bases, such as consumer protection powers: *Vodafone*, para.43.
[246] Directive 2009/12/EC of 11 March 2009 on airport charges (OJ L70/11, 14.3.2009) ('Airport Charges Directive').
[247] Recital (2), Airport Charges Directive.
[248] Article 1(1), Airport Charges Directive.
[249] Recital (2), Airport Charges Directive.

the procedure or methodology to be followed,[250] whether charges are set by airport operators or public regulators,[251] and the absolute level of fees. The primary objective is to regulate the relationship between airport management authorities and users (i.e. airlines), and specifically, to prevent abuse of market power by the former.[252] Yet, pursuit of this goal requires neither centralisation nor full harmonisation: it is sufficient simply to guide domestic price-setting through a series of EU law obligations that are non-negotiable, but hardly unduly onerous.

Finally, a 'peculiar'[253] form of supervision is contained in the Transparency Directive,[254] which regulates price-setting for medicinal products. Such controls accommodate multiple policy considerations: securing a consistent supply of necessary medicines; minimising expenditure of finite public resources; and protecting private incentives for research and innovation. Against this background, the Directive acknowledges the *prima facie* legitimacy of regulation, whether imposed directly through price controls, or indirectly through purchasing activity of national health systems. It nonetheless seeks to constrain the discretion of Member States—and minimise potential obstacles to free movement—by imposing procedural requirements, including time-limits and a duty to give reasons. As *Deutsche Parkinson* illustrates, these comparatively high-level obligations have proven insufficient to avoid (perceived) market distortions. Yet the failure of efforts to strengthen and update the Transparency Directive,[255] due to 'no foreseeable agreement' among legislators,[256] demonstrates the national sensitivities and divergent interests at play.

Together, these examples illustrate both the overarching logic of the permissive approach and the extent to which the details of each regime depend upon the specific market dynamics. By structuring national decision-making for price regulation, whether by limiting the circumstances in which controls are permissible or by mandating the procedures to be adopted, in each instance the EU-level supervisory framework limits, but does not remove completely, national discretion. Consistent with the principles of subsidiarity and proportionality, both of which prioritise the 'least restrictive alternative,' these examples are concerned with setting 'rules of the game,' but not prejudging actual results. Recurrent use is made of principles of good

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[250] See e.g. recitals (2), (15) and (17); confirmed in *Commission v Luxembourg*, para.70

[251] The Directive preserves the right of Member States to apply 'additional regulatory measures' such as direct regulation of charges, provided these comply with EU law, but does not mandate such an approach: Article 1(5), Airport Charges Directive.

[252] Confirmed in *Commission v Luxembourg*, para.42.

[253] Language taken from the Commission's website describing the Directive, available at https://ec.europa.eu/growth/sectors/healthcare/competitiveness/products-pricing-reimbursement/transparency-directive_en (accessed 8 December 2017).

[254] Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems (OJ L40/8, 11.2.1989) ('Transparency Directive').

[255] Proposal for a Directive of the European Parliament and of the Council relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of public health insurance systems (COM(2012)084 final), 1 March 2012.

[256] See Annex to Commission Work Programme 2015 (COM(2014)910 final), 16 December 2014, p.10. The Proposal was formally withdrawn in OJ C80/17, 7.3.2015.

governance—including timeliness,[257] transparency,[258] non-discrimination,[259] consultation,[260] objectivity,[261] and verifiability[262]—which bind and constrain Member States when engaging in price regulation. This structural approach, on the one hand, seeks to influence but not predetermine the substantive scope of domestic controls; on the other, it serves to pry open often opaque and perhaps murky domestic processes to greater scrutiny, at both national and EU levels.[263] Each of the examples discussed above, moreover, involve duties to inform the Commission of measures to implement the required decision-making framework and/or of specific decisions taken under it.[264] These obligations serve a twofold purpose: to condition and constrain domestic policymaking insofar as it takes place, overtly, in the 'shadow of hierarchy;' and to provide early warning of inadequate domestic structures or distortive controls.

The underlying objective is to depoliticise price regulation, turning it into a largely technocratic enterprise. By constraining the discretion of Member States and throwing light on regulatory processes and outcomes, EU law seeks to limit the extent to which domestic regulation might favour vested private or public interests at the expense of the competition process. The permissive approach shares with the public choice movement a scepticism regarding the inherent unreliability of regulators, but not, it seems, the regulatory enterprise more generally. Implicit is a suspicion that, left to their own devices, national regulators may favour domestic over Union interests, or social over economic ones. Yet the answer is not, as public choice would have it, to abandon or prohibit price regulation entirely. Instead, EU law seeks the more constructive path of channelling domestic regulators towards better policymaking, with due regard, amongst other things, for competition implications.

This is illustrated by an increasing use of rigorously *independent* national authorities to implement and administer supervisory requirements. Both the electricity and telecommunications frameworks mandate legally distinct and functionally independent national regulators.[265] Each authority must exercise its powers impartially and transparently,[266] including a prohibition on seeking or taking instruction from other bodies, public or private.[267] Such requirements are intended to increase the authority of domestic regulators and the predictability of their decisions, in order '*to remove any reasonable doubt as to the neutrality of that body and its*

[257] Article 7, Access Directive; Article 6, Airport Charges Directive; Articles 2-5 & 7, Transparency Directive.
[258] Articles 13(4) & 15, Access Directive; Articles 3-5 &7, Airport Charges Directive; Article 3, Electricity Directive; Articles 2-5, Transparency Directive.
[259] Article 3, Airport Charges Directive; Article 3, Electricity Directive;
[260] Article 6, Framework Directive; Article 6, Airport Charges Directive; Articles 37(2), Electricity Directive.
[261] Article 3, Airport Charges Directive; Article 2(2), Transparency Directive; Article 8(4), Access Directive.
[262] Article 2(2), Transparency Directive.
[263] Similarly, de Witte (2013), 1573.
[264] Article 3(10), Electricity Directive; Article 11(3), Airport Charges Directive; Article 8(5), Access Directive; Articles 2-3 & 6-8, Transparency Directive.
[265] Article 3(2), Framework Directive and Article 35(4)(a), Electricity Directive.
[266] Article 3(3), Framework Directive and Article 35(4), Electricity Directive.
[267] Article 3(3)(a), Framework Directive and Article 35(4)(b)(ii), Electricity Directive.

imperviousness to external factors'.[268] Implicit is the assumption that exposure to such factors would diminish the effectiveness of domestic regulatory activity, coupled with a strong conviction of the relative efficiency of bureaucratic regulation in contradistinction to political decision-making. The Airport Charges Directive similarly requires establishment of 'national independent supervisory authorities' to mediate in the event of failure to reach agreement on charges.[269] More radically, one proposed innovation within the (now failed) revisions to the Transparency Directive was the requirement for a designated independent body to impose penalties *against* defaulting Member States where regulators fail to comply with time-limits.[270]

The permissive approach emphatically does not give carte blanche to Member States, however. A corollary of the constrained discretion permitted is that, where exceeded when imposing price controls, the errant Member State stands in violation of EU law. That is, the mere fact that the EU legal framework envisages the possibility of price regulation does not equal a presumption that any domestic controls are acceptable. The energy sector illustrates this tension. As discussed, EU law not only contemplates price regulation in the electricity and gas sectors, but indeed requires a degree of supervision in wholesale markets. Following its energy sector inquiry, the Commission was nonetheless strongly critical of regulated *retail* tariffs, which it argued could have '*highly distortive effects and…pre-empt the creation of liberalised markets.*'[271] Starting in *Federutility*,[272] and reaffirmed in *ANODE*,[273] the Court of Justice has split the difference by confirming the continuing power of Member States to imposed retail controls, while articulating demanding requirements, procedural and substantive, to be satisfied where Member States exercise that power. The latter proved a stumbling block in *Commission v Poland*, where, regardless of whether market circumstances merited intervention, the price controls at issue—unlimited in time, and applicable without distinction to all consumers—represented a disproportionate incursion into liberalised gas markets.[274] Prices determined by the interplay of supply and demand thus remain the preferred option and final objective.[275] Ultimately, even when EU law adopts a more permissive approach to price regulation, domestic controls may prove incompatible with the internal market.

VII. DIRECT PRICE REGULATION: THE PRESCRIPTIVE APPROACH

[268] C‑424/15 *Ormaetxea Garai* EU:C:2016:780, paras.45-46. Although addressing the recast Framework Directive, the almost identical provisions in the Electricity Directive suggest the reasoning applies equally.
[269] Article 11, Airport Charges Directive.
[270] See fn.255, draft Article 8.
[271] European Commission, *DG Competition Report on Energy Sector Inquiry* (SEC(2006) 1724), 10 January 2007, para.1047.
[272] C-265/08 *Federutility* EU:C:2009:640.
[273] Specifically in the context of the Third Energy Package: *ANODE*, para.35.
[274] C-36/14 *Commission v Poland* EU:C:2015:570.
[275] *ANODE*, para.26.

Finally, we consider more direct or interventionist means by which EU law seeks to control pricing, namely, '*by regulating prices at [Union] level.*'[276] Such regulation contrasts with more indirect approaches, in which EU law has an essentially negative function, '*imposing limits on national regulations on prices'*.[277] It also contrasts with ad hoc regulation via antitrust enforcement, providing, at least in theory, systematic solutions to market failures rather than punitive responses to individual conduct. Such regulation is explicitly recognised by the Court of Justice as '*exceptional*,' justified only in '*unique'* circumstances.[278] Two examples will be considered, exploring the rationales for and broader implications of this approach.

Of the indirect methods of price regulation, the prohibitive approach is an essentially polarised one: the EU prerogative of developing and protecting market competition pitched against Member State interest in restricting a competitive parameter. The more permissive approach is largely cooperative: the EU and Member States collaborate to devise and implement controls that strike an appropriate balance '*between the free market and regulation, between competition and the implications of the general interest*'.[279] Cooperation breaks down only where Member States exceed the terms of the permission granted by the EU law. At their core, however, both reflect the ideological challenge of price regulation within ostensibly free markets: the former is unavoidably viewed as a deviation from the archetype of the latter. Moreover, both presuppose a dichotomy between EU law—as a centralising, neutralising force, on course towards ever-greater competition—and national laws—as a source of divergence and distortion.

Our final approach, conversely, addresses several—highly atypical—instances in which EU law is *itself* a vehicle for harmonised price controls imposed directly within domestic markets. In a sense, these examples are closer to the punitive approach discussed in section IV, whereby the operative dichotomy is similarly a distinction between private market action and EU-level public control. It is thus unsurprising that both were preceded by antitrust enforcement. Yet the underlying approach to market supervision is, from another perspective, wholly at odds with the philosophy behind the competition rules: rather than discrete interventions to eliminate specific anticompetitive conduct, instead these examples demonstrate a complete overreaching of the price formation mechanism.

An overt commitment to open and undistorted competition pervades conventional responses to market dysfunction under EU law: namely, reinforcement of existing competitive dynamics—whether by structural reform, removing regulatory restraints that inhibit competition, or antitrust enforcement against private actors—as opposed to overstepping those forces through price controls.[280] To the extent that EU law makes provision for price regulation, typically it does so through alignment of domestic processes towards a Union

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[276] Opinion in *Vodafone*, para.15.
[277] Opinion in *Vodafone*, para.15.
[278] See *Vodafone*, para.67, where the Court endorsed the approach in Recital (13), Roaming Regulation.
[279] Opinion in *Federutility*, para.53.
[280] An approach seen, for instance, in the outcomes of the Commission's energy and pharmaceutical sector inquiries: see European Commission, *Pharmaceutical Sector Inquiry. Final Report*, 8 July 2008, and fn.205 above.

archetype. This 'intermediate'[281] approach arguably reflects the most appropriate allocation of '*proper political accountability*'[282] between the EU and Member States, given the plurality of '*legitimate regulatory goals*'[283] that might be pursued. Despite such reservations, however, EU law retains the formal capacity to embrace more prescriptive interventions through *ex ante* price controls: devised and imposed at EU level, taking effect within national markets, and applying directly to the activities of private actors. The two examples we consider are the Roaming and Interchange Fee Regulations. In both instances, the control mechanism comprises a price ceiling, from which domestic regulators have little or no ability to deviate. Bearing in mind the logic of subsidiarity, these examples raise questions about when and why such *exceptional* EU-level regulation is warranted. It is thus necessary to understand and compare the objectives behind and regulatory circumstances of both Regulations. Although the sheer dearth of such legislation limits our sample size, it is possible to discern recurring themes which may serve to explain the precedence granted to EU-level action.

The Roaming Regulation sets EU-wide prices for mobile roaming services. 'Roaming' occurs when mobile customers use their phones abroad. To supply coverage, home providers purchase wholesale network access within host Member States. Historically, rates for wholesale access were high, reflected in equally inflated retail prices. Identified as a dysfunctional market by a Commission sector inquiry,[284] the issue was initially pursued through antitrust enforcement and 'soft' law efforts.[285] When these failed to generate reductions in rates,[286] the Commission chose a more distinctly 'regulatory' solution: an EU-wide maximum for wholesale access, plus a limitation on the permissible retail mark-up to 130% of wholesale prices.[287] This sought to address the 'core problem' that prices for roaming stood '*in no meaningful relationship to the underlying costs*,'[288] resulting in '*unjustifiably high*' charges.[289] Entering in force in 2007[290] and initially covering only voice calls, it was extended to text messages[291] and internet data, while costs were reduced progressively.[292] Finally, from June 2017, roaming surcharges have been abolished outright within the EU.[293]

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[281] See fn.42 above.
[282] Opinion in *Vodafone*, para.1.
[283] Opinion in *Vodafone*, para.9.
[284] European Commission, *Working Document on the Initial Findings of the Sector Inquiry into Mobile Roaming Charges*, 13 December 2000.
[285] See European Commission Press Releases IP/05/901, "Commission warns consumers on cost of using mobile phone abroad and targets lack of price transparency," 11 July 2005; IP/05/1217, "Commission launches consumer website on the costs of mobile roaming in Europe," 4 October 2005; and IP/04/1458, "Commissioner Reding welcomes EU-wide investigation on cost of using a mobile phone abroad," 10 December 2004.
[286] Commission Staff Working Paper, *Impact Assessment of Policy Options in Relation to a Commission Proposal for a Regulation of the European Parliament and of the Council on Roaming on Public Mobile Networks within the Community* (COM(2006)382 final), 12 July 2006, 12-13.
[287] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on roaming on public mobile networks within the Community and amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services* (COM(2006)382 final), 12 July 2006.
[288] COM(2006)382, 17.
[289] COM(2006)382, 22.
[290] Roaming Regulation.
[291] Regulation 544/2009 of 18 June 2009 amending Regulation 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (OJ L167/12, 29.6.2009).

Our second example concerns interchange fees for payment cards. Interchanges fees comprise the costs levied by card system operators to merchants that accept payment, and have long been subject to public criticism and regulatory scrutiny.[294] These concerns were reflected in the Commission's sector inquiry into retail banking, which identified, *inter alia*, large variations in fees across Member States alongside generally high levels. [295] Initially, antitrust enforcement was considered sufficient to address these problems;[296] eventually, the Commission opted for a more durable approach with a specific Regulation on fee-setting.[297] The core function of the Interchange Fee Regulation is to cap maximum permissible fees for consumer credit and debit transactions involving four-party payment card schemes, such as Visa and MasterCard.[298] In devising fee levels, the Commission took account of both economic theory and existing administrative practice;[299] the Regulation thus sets maximum fees of 0.2% for consumer debit card transactions and 0.3% for consumer credit card transactions.[300] The key pricing provisions took effect from December 2015.

Despite factual differences, numerous elements unite these distinct examples, which may explain their regulatory priority within EU law. First, both markets were subject to considerable scrutiny within the framework of the EU's *competition policy* powers prior to enactment of the relevant Regulations. This indicates the pre-existence of significant market dysfunction; circumstances that were, moreover, a source of substantial EU-level concern. Commission sector inquiries, appropriate where 'circumstances suggest that competition may be restricted or distorted,'[301] were carried out in each, illustrating the importance of these markets within the context of the internal market. Both inquiries revealed a risk of high pricing resulting from excessive market power;[302] which in each instance prompted competition enforcement, pursuing such behaviour from an antitrust standpoint.[303] Yet the subsequent decisions to regulate demonstrate both the intrinsic limitations of regulation through antitrust enforcement, and the value-added of *ex ante* price controls to address persistent market power.

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[292] Regulation 531/2012 of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ L172/10, 30.6.2012).
[293] Regulation (EU) 2015/2120 of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ L310/1, 26.11.2015).
[294] See, e.g., Malaguti & Guerrieri, *Multilateral Interchange Fees: Competition and regulation in light of recent legislative developments*, European Credit Research Institute Research Report No.14, January 2014, 17-18.
[295] Communication from the Commission, *Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on retail banking (Final Report)* (COM(2007)33 final), 31 January 2007.
[296] See fns.107 and 108 above.
[297] European Commission, *Proposal for a Regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions* (COM(2013)550 final), 24 July 2013.
[298] Regulation (EU) 2015/751 of 29 April 2015 on interchange fees for card-based payment transactions (OJ L123/1, 19.5.2015) ('Interchange Fee Regulation'), particularly Article 1.
[299] COM(2013)550, 8.
[300] Articles 3&4, Interchange Fee Regulation.
[301] Article 17(1), Regulation 1/2003.
[302] See fns.284 and 295 above.
[303] Other activities within both sectors have similarly attracted antitrust scrutiny: see T-328/03 *O2 (Germany)* EU:T:2006:116, and T-461/07 *Visa Europe* EU:T:2011:181.

In the case of roaming, competition law proved largely incapable of addressing the exploitative oligopolistic behaviour at issue, meaning that regulation was necessary to secure an effective outcome. Although investigations were pursued against network operators, alleging abuse of dominance through excessive wholesale pricing,[304] such efforts suffered from difficulties in establishing dominance, alongside the inherent stringency and uncertainty of the *United Brands* test to demonstrate excessiveness.[305] The Commission alluded to the 'complexity' of enforcement,[306] and, once the Roaming Regulation was adopted, it closed on-going investigations without findings of breach.[307]

Interchange fees, by contrast, come readily within the ambit of Article 101 TFEU. As discussed in section IV, antitrust enforcement has included commitment decisions involving Visa,[308] and an infringement decision against MasterCard.[309] Despite these successes, the piecemeal and essentially individualised nature of the remedies implemented provided an inadequate response to the systemic market failure at issue. The Commission thus determined that a top-down regulatory approach was required in lieu of 'ad hoc'[310] efforts.

Second, in each instance the rationale for regulation was not merely a desire to increase efficiency: both, additionally, reflect *social* and *integrationist* concerns. Consumer protection was a key impetus for the Roaming Regulation, as high costs were perceived as exploitative of non-business travellers in particular.[311] Thus, the Commission called for '*a clear demonstration that Europe can act in the interest of citizens in a case where Member States are not equipped to act*.'[312] For the Interchange Fees Regulation, it was small and medium-sized merchants—who pay interchange fees in the first instance, and lack the economic clout to negotiate favourable rates individually—that shouted loudest (and lobbied hardest) for intervention. In both instances, price regulation was the means by which access to these increasingly important products could be secured, on realistic terms, primarily for the benefit of individuals and businesses without substantial market power. Significantly, in each case the ostensible social concern had a pan-Union existence or identity, thus warranting recognition at EU level. This contrasts with the divergent social concerns that prompt domestic price regulation, which, as discussed, are granted only circumscribed deference.

Additionally, both sectors involve significant cross-border elements. Accordingly, their effective functioning—including affordable access—links to development of the internal market, thus providing a

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[304] Commission Press Releases IP/04/994, "Commission challenges UK international roaming rates," 26 July 2004, and IP/05/161, "Commission challenges international roaming rates for mobile phones in Germany," 10 February 2005.
[305] Klotz, "The Application of EC Competition Law (Articles 81 and 82) in the Telecommunications Sector," in Koenig, Bartosch, Braun & Romes (eds.), *EC Competition and Telecommunications Law*, 2nd ed., Kluwer Law International BV (2009), 132-33.
[306] COM(2006)382, p.38.
[307] Commission Press Release IP/07/1113, "Commission closes proceedings against part roaming tariffs in the UK and Germany," 18 July 2007.
[308] See fn.108 above.
[309] See fn.107 above.
[310] Speech of Commmissioner Joaquin Almunia, "Introductory remarks on proposal for regulation on interchange fees for cards, Internet and mobile payments," (SPEECH/13/660), 22 July 2013.
[311] COM(2006)382, 19-20.
[312] COM(2006)382, 26.

plausible rationale for the necessity and appropriateness of EU-level intervention. By its nature the levying of additional costs for use of mobile phones between Member States constitutes a barrier to integration and free movement: indeed, market segmentation is inherent within roaming as a service category. Although the internal market element is not intrinsic to payment cards, card systems are a central component of *e*-commerce infrastructure. A well-functioning integrated payment market is accordingly portrayed as vitally important, if not practically indispensable, to development of the digital internal market,[313] again particularly from the perspective of ordinary consumers and smaller businesses. Notably, both roaming and the development of *e*-commerce are components of the Commission's wider—and wildly ambitious—'Digital Single Market' strategy.[314] In both instances, therefore, the Commission grounded its subsidiarity analysis in the transnational nature of the markets—and market *failures*[315]—at issue.[316]

Article 114 TFEU accordingly provides the legal basis for both Regulations. Although providing wide-ranging legislative powers, formally Article 114 does not grant the EU legislature any '*general power to regulate the internal market*'.[317] Hence, it was necessary to establish a 'disfavouring of cross-border economic activity,' and not merely a hindrance of economic activity as such.[318] Both Regulations proceed on the assumption that, absent EU-level regulation, disparate and potentially distortive national price controls were likely to arise.[319] An interesting question is whether the EU would have authority to legislate absent domestic divergence: that is, might the EU legislature intervene purely to address inefficient or otherwise socially-undesirable price-setting by private actors? Arguing tentatively in the affirmative in *Vodafone*, Advocate General Poaires Maduro drew parallels to *Viking* and *Laval*, which involved application of the free movement provisions to private parties due to '*the direct impact that private acts…could have on free movement*'.[320] Where private economic activity involves a *direct* disfavouring of cross-border trade, he argued, the EU legislature should have capacity to regulate that behaviour. Where it involves wholly domestic trade, however—for instance, efforts to control the price of '*suitcases or restaurant meals*'[321]—the necessary link to cross-border trade is lacking. In such circumstances, the task of price regulation, if necessary, falls to Member States unless an alternative legislative basis exists.[322]

It is worth comparing, finally, the differing scope of the regimes. In one sense, the Roaming Regulation is more intensive and ambitious. It mandates wholesale- *and* retail-level controls, on the basis that wholesale

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[313] See, e.g., Interchange Fee Regulation, recitals (6) and (9).
[314] Communication from the Commission, *A Digital Single Market Strategy for Europe* (COM(2015)192 final), 6 May 2015.
[315] Echoing Oberg, see fn.58 above.
[316] COM(2006)382, 7, and COM(2013)550, 14.
[317] C-376/98 *Germany v Parliament and Council* EU:C:2000:544, para.83.
[318] Opinion in *Vodafone*, para.22 (emphasis added). On this point, see COM(2006)382, 6, and COM(2013)550 final, 3.
[319] Accepted in the context of the Roaming Regulation in *Vodafone*, para.47, and spelled out in recitals (12) and (13) of the Interchange Fee Regulation.
[320] Opinion in *Vodafone*, para.21.
[321] Opinion in *Vodafone*, para.22.
[322] A possibility is the 'flexibility provision' under Article 352 TFEU, which provides a residual basis for legislation 'to attain one of the objectives set out in the Treaties' in the absence of 'the necessary powers,' but requires Council unanimity.

regulation alone would not ensure that savings pass to consumers, while retail regulation without a reduction in costs might create a margin squeeze.[323] Moreover, the Commission's ultimate objective was the complete elimination of roaming charges, essentially rendering the service category obsolete (at least within 'fair use' parameters). The progressive reduction in rates might be viewed as akin to forcing the internal market, insofar as operators must price *as if* a single market for mobile telephony services exists; whereas, in reality, mobile markets remain segmented along national lines. The Interchange Fee Regulation is less far-reaching in this regard. The Commission rejected a complete ban on interchange fees for debit cards on the basis that the market was insufficiently mature,[324] and similarly rejected retail regulation, implicitly suggesting that this might intrude too far into private economic activity.[325]

Yet the ultimate reach and impact of the Interchange Fee Regulation may be much greater than that of the Roaming Regulation. The latter involves a deep incursion into commercial freedom, yet confined within narrow circumstances. The Interchange Fee Regulation, conversely, addresses a broader subject-matter—payment card transactions—and governs fees for cross-border *and* domestic consumer card transactions. In practical terms, it represents a significant step beyond regulation in furtherance of specific EU objectives, and towards regulation of the functioning of national markets as such.[326] This, in turn, suggests a further departure from the logic of subsidiarity, alongside a declining tolerance for domestic divergence or disparities. Central to both Regulations is implicit acknowledgement that the concept of effective competition within the internal market is more complex than the language of 'free,' 'open' or 'undistorted' competition suggests.[327]

VIII. DILEMMAS OF PRICE REGULATION UNDER EU LAW

The starting premise of this article has been that the treatment of price regulation under EU law is recognised as atypical, for reasons as-yet under-explored in existing jurisprudence and literature. In our efforts to tease out why this might be the case, we have seen that it is also complex and multi-faceted, with a wide-range of approaches—punitive, prohibitive, permissive, and proscriptive—discernible within the legal and regulatory framework. The preceding sections have nonetheless sought to demonstrate that, whether manifested in uncharacteristic restraint in antitrust enforcement, a distinctive hostility under the free movement rules, or sporadic and explicitly extraordinary instances of top-down regulation, the treatment of restrictions on

[323] COM(2006)382, 6.
[324] COM(2006)382, 13.
[325] COM(2006)382, 12.
[326] The validity of the Interchange Fee Regulation is the subject of an on-going reference procedure under Article 267 TFEU: C-304/16 *American Express Co. v The Lords Commissioners of Her Majesty's Treasury* (OJ L123/1, 19.5.2015).
[327] See, e.g. Recital (12) of the Roaming Regulation, which recognises the regime it establishes as a 'departure' from the competition-focused approached of telecommunications regulation generally. The logic of the Interchange Fee Regulation, according to Recital (9), is that limiting one dimension of economic freedom is necessary to promote competition longer-term.

pricing freedom under EU law diverges from what might be considered the 'conventional' approach to equivalent legal and economic issues. In this penultimate section we consider why price regulation is so problematic in the context of the internal market, and explore the circumstances in which EU law nonetheless endorses such controls as compatible with the goal of open and undistorted competition.

The treatment of price regulation within EU law accommodates many contrasting regulatory impetuses, which extend beyond the bare pursuit of undistorted competition as such. Within competition policy, there is friction between the default preference for unencumbered price-setting versus the pragmatic reality of sometimes-dysfunctional markets. In the realm of integration, there are questions of whether and when price controls create distortions that ripple across the internal market, alongside tensions arising from delegation of price supervision to domestic regulators. Justifications for regulation take us into the delicate territory of social policy, raising questions of how and to what extent non-economic considerations can be addressed within the overtly competitive structure of the internal market; and whether the EU can and should challenge domestic regulatory preferences. As the examples above illustrate, there is no single or simple answer in most instances.

In practice, price regulation remains an inherently domestic activity, meaning that EU law plays an essentially secondary role in constraining or directing interventions. Challenging questions of subsidiarity—when should EU law intervene?—and proportionality—to what extent should EU law pre-empt domestic regulatory choices?—accordingly abound. Two potential sources of concern with respect to domestic regulation implicitly pervade EU law. First, there is the issue of competence: whether domestic regulators have sufficient ability to design and implement effective controls to minimise distortions within the otherwise open and competitive internal market. Second, there are issues of integrity and fidelity to the Union: whether domestic regulators can be trusted to work alongside and in furtherance of integration and competition, or whether they might fall prey to capture by vested national interests, whether public or private.

At its core, nonetheless, the distinctive treatment of price regulation under EU law may be explained by reference to the central, indeed axiomatic, role of the price formation mechanism in the context of the self-sustaining internal market. As we have seen, express acknowledgement of the foundational relationship between the free formation of prices and the concept of 'open and undistorted competition' is found throughout the jurisprudence. From an antitrust perspective, any effort by private parties "*to influence free formation of prices*" is considered to "*manifestly [have] as its object to restrict competition*".[328] Under the free movement rules, the Court again forcefully defends the importance of "*the free formation of prices*"[329] from Member State interference, emphasising that "*price competition lays the basis for [traders'] potential to access the market directly and to continue to be competitive in it.*"[330] Even where domestic regulation is anticipated by EU-level

[328] See fn.77 above.
[329] See fn.168 above.
[330] See fn.159 above.

harmonisation, the Court nonetheless takes the view that "*a measure which requires a product or service to be offered on the market at a determined price…is by its very nature contrary to the objective of achieving an open and competitive market*."[331] Moreover, the "*exceptional*" and "*unique*" nature of top-down price regulation by the EU itself is overtly acknowledged.[332]

Yet the conceptual and practical challenges extend beyond mere recognition that the notion of undistorted competition implies an absence of public control over price formation. Specifically, price-setting lies at the heart of the well-functioning internal market, insofar as it operates as both the facilitator of and the reward for exactly the sort of economic behaviour upon which the very existence of the internal market is premised. Price controls thus have a direct negative impact on the interior motivations of would-be economic operators, without which the internal market cannot exist in a meaningful sense. Price regulation accordingly differs from other market restrictions, be they limitations on who can provide a product,[333] the form in which is delivered[334] or circumstances surrounding promotion[335] or sale.[336] The latter may render market participation less attractive, but do not challenge the fundamental impetuses of entrepreneurship. Arguably, only outright prohibitions on particular product or service categories are more restrictive of economic freedom than price regulation; the outcome ultimately pursued, incidentally, in the context of the Roaming Regulation.[337]

Although the definition of "*economic activity*" in EU law is sufficiently broad to encompass non-profit entities,[338] the practical reality is that the vast majority of undertakings operate primarily if not solely to make profits. In the short term, a firm's ability to decide upon and charge a commercially acceptable price, taking account of both the level of competition it faces and its desire to realise a reasonable profit margin, is likely to be determinative of both its capacity and its incentive to enter or to continue to compete within a marketplace. Insofar as price regulation deprives individual firms of freedom to engage in self-maximising price-setting behaviour, it may dissuade or even entirely prevent such participation. This harms the frustrated trader, denied the opportunity to realise its individual economic freedom through involvement in the internal market, and also the competitive process and consumers more generally, who suffer the ill-effects of a less buoyant marketplace.

In the longer term, the presence of price regulation reduces the prospects for market participants to earn future supra-competitive profits, pursuit of which is considered to play a vital role in motivating competition between individual firms. This concern was well-articulated by Scalia J in the US Supreme Court

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[331] See fn.1 above.
[332] See fn.278 above.
[333] See, e.g., C-319/92 *Haim* EU:C:1994:47.
[334] See, e.g., C-133/95 *Rau* EU:C:1987:244.
[335] See, e.g., Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (OJ L149/22, 11.6.2005).
[336] See, e.g., Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L95/29, 21.4.1993).
[337] See fn.293 above.
[338] See, e.g., C-475/99 *Ambulanz Glockner* EU:C:2001:577, and C-113/07 *SELEX* EU:C:2009:191.

decision in *Verizon v Trinko*, who argued that, *"[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk-taking that produces innovation and economic growth.*"[339] The existence of price regulation, or a possibility of its future enactment, inevitably reduces the likelihood that an effective economic operator, who succeeds in increasing its market share through competition on the merits—a "*pristine monopolist*,"[340] in US parlance—, will be able subsequently to reap its otherwise legitimate reward of higher prices. Knowledge, *ex ante*, of its diminished prospects for greater returns *ex post* may, in theory, dissuade the rational firm from seeking a monopoly from the outset. This means, in practice, that it may compete less vigourously, refraining from the sorts of risky or resource-intensive activities that tend to underpin both short-term and longer-term efficiency gains.

Accordingly, price controls not only restrict the immediate vitality and potentially the viability of competition within regulated segments; more generally, their recurrent use and tolerance could inhibit the essential competitive forces, between but also within Member States, that development of the internal market seeks to foster and protect. This fundamental concern, we argue, underlies each of the approaches to price regulation discussed above. In the antitrust context, EU law prioritises market opening and access concerns. Conversely, there is a clear reluctance to 'pick winners,' seen both in the Commission's hesitancy when presented with allegedly unfair pricing practices, as well as its strong aversion towards (involuntary, at least) pricing controls as antitrust remedies. Advocate General Wahl's assessment in *AKKA* provides the clearest explanation for the Commission's unusual restraint: the elevated risks of false positives and counterproductive impacts in the longer-term mean that this is an area of antitrust where, in effect, the game may not be worth the candle.[341]

Under the free movement rules, we argued, the default approach is one of scepticism and hostility. Domestic price controls are condemned even where the link to interstate trade is tenuous to the point of non-existence; instead the objection appears to be much deeper, concerning a fundamental disconnect between regulated prices and so-called '*conditions of normal and effective competition*'.[342] Although EU law does not outlaw, *a priori*, domestic restrictions on private price formation, departures from the norm of open and undistorted competition are unusually closely scrutinised and narrowly circumscribed, as discussed in sections V and VI.

More specifically, this understanding of the distinctiveness of price regulation may help to reconcile the apparently conflicting outcomes in *Keck* and *Scotch Whisky*.[343] The logic of *Keck*, in the abstract, is unimpeachable: insofar as domestic rules merely regulate *intra*state trade, they should fall outside the purview of free movement. Yet, arguably, the real mischief that concerned the *Keck* court was not the domestic price

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[339] *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
[340] *Berkey Photo, Inc. v. Eastman Kodak Company*, 603 F.2d 263 (1979).
[341] See fn.98 above.
[342] See fn.176 above.
[343] See fn.153 above. For further discussion, see Alemmano, 1047-51.

control at issue, but rather the approach within—and criticism of—earlier Sunday trading cases.[344] Thus, the *Keck* court provides the right answer, but arguably to the wrong question. *Scotch Whisky* leaves intact the basic reasoning of the judgment, but clarifies that significant restrictions on pricing freedom fall outside the safety of the 'selling arrangements' conceit. Indeed, the restraint at issue in *Keck*—a blanket rule against below-cost pricing—presents serious problems from a competition policy perspective, insofar as lower prices are precisely what competition is intended to deliver. Post-*Scotch Whisky*, a national rule that limits trading hours one day per week might still avoid classification as a genuine hindrance to market access;[345] but a rule that neuters the profit-seeking impulses of potential new entrants cannot similarly escape criticism.

Finally, to conceive of price regulation as not merely at odds with, but indeed substantively inimicable to, development of the internal market—in particular, the underlying interplay of forces of supply and demand premised upon the free-functioning of the price formation mechanism—serves to demonstrate just what is *so* extraordinary about the examples of EU-level regulation discussed in section VII. Although we sought to identify plausible and consistent reasons as to why, exceptionally, top-down price controls were considered suitable and necessary, the most compelling takeaway may be the extent to which both Regulations are so far from the norm of approaches to market supervision within EU law.

Deferring to the so-called 'invisible hand' as the principal means of market regulation, facilitated by the free-functioning of the price formation mechanism, brings the additional advantage of avoiding the need for top-down regulation to supplant private decision-making. This, consequently, minimises two distinct sources of regulatory tension within the internal market. Where the task of price regulation lies with the EU itself, whether setting individual prices under competition law or mandating harmonised prices under Article 114 TFEU, we saw that concerns exist both with regards to the EU's ability to identify and impose optimal prices, and the legitimacy, broadly construed, of decisions to do so. Conversely, divergent controls enacted by Member States raise concerns both regarding the absolute quality of regulation and a potential fragmentary impact on market integration. Given that internal market regulation is a shared competence, decisions to deviate from the default of private price formation almost unavoidably raise difficult questions about which competent regulator should have priority to determine alternative market outcomes. Accordingly, a robust defence of the importance of price freedom within EU law brings the oblique benefit of forestalling this dilemma.

Of couse, although competitive markets tend to benefit consumer welfare, efficiency is far from the only socially-important value recognised within EU law. As illustrated by the preceding discussion, it is well-established that limitations on pricing freedom may be justified in the broader public interest within the social

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[344] "…contrary to what has previously been decided…": *Keck,* para.16.

[345] A concern flagged by Spaventa, "Leaving *Keck* behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*," 34 *ELRev* 914 (2009), 929.

market economy.[346] We argue, however, drawing upon the extended understanding of the principle of proportionality as articulated in *Fedesa*,[347] that the approach to price regulation within EU law exhibits considerable scepticism about whether regulating prices can *ever* constitute the so-called "*least onerous*" or least restrictive alternative measure available to achieve even legitimate public policy objectives. This is seen, in the realm of antitrust, in the strong default preference for interventions that reinforce existing market forces, on the assumption that well-functioning markets can self-correct and eliminate exploitative harms in the longer-term. *Scotch Whisky* and *Deutsche Parkinson* illustrate the recent willingness of the Court of Justice to second-guess the substance of politically-sensitive domestic policy decisions, and in particular, to conclude that Member States ought to opt instead for *specified* alternatives to price regulation. As a 'lesser evil' approach, the permissive attitude discernible within the sector-specific directives necessarily accepts the appropriateness of domestic price controls in certain contexts. Yet comparatively tight EU-level supervision of the manner and circumstances in which pricing restraints can be implemented, alongside muscular enforcement against domestic regulation considered to exceed the limited discretion granted to Member States, suggest a more suspicious, indeed hostile approach in practice. Finally, what is exceptional about the top-down instances of EU-level price regulation considered above is precisely that, in the market circumstances at issue, the EU institutions were prepared to accept that no less onerous alternative solutions existed to remedy the identified dysfunctions. When the validity of the Roaming Regulation came before the Court of Justice in *Vodafone*, moreover, the Court expressly rejected a 'best possible option' standard of review in favour of the more deferential 'manifest inappropriateness' standard, justifying its approach on the basis that the EU legislature (but not, it would seem, Member States) "*must be allowed a broad discretion in areas in which its action involves political, economic and social choices*".[348] Thus, price regulation is frequently an *available* policy option, but is rarely viewed as *optimal*—unless, of course, the EU institutions decide the contrary.

Another important, and largely overlooked, aspect of the treatment of price regulation is its relationship to the internal market *qua* single market. As argued, domestic rules that limit private price-setting are formally anathema to the philosophical bent of development of the internal market. Yet this desire to preserve the free functioning of the price formation mechanism, and specifically, to stamp out divergences in domestic practices regarding price regulation, belies the inherent difficulties of harmonising prices. It is considerably more straightforward for EU law to prompt alignment of, for instance, domestic rules governing sales practices or qualification of providers than it is to require the elimination of price differences between Member States. As Advocate General Wahl noted in *AKKA*, "*elements such as—to name but a few—domestic taxes, the particular characteristics of the national labour market and local consumers' preferences may significantly affect the final prices of the relevant product or service.*"[349] Moreover, as the Court itself acknowledged, "*there are, as a*

[346] See, e.g., fns.180 & 228 above.
[347] C-331/88 *ex parte FEDESA* EU:C:1990:391, para.13.
[348] *Vodafone*, para.52.
[349] Opinion in *AKKA*, para.40

general rule, significant differences in price levels between Member States for identical services, those differences being closely linked with the differences in citizens' purchasing power".[350] Considering the validity of the Airport Charges Directive, Advocate General Mengozzi similarly argued that different national circumstances mean that quite different fee levels may remain appropriate across the EU, even applying common principles for price-setting.[351] In this regard, again, the Roaming Regulation was quite extraordinary, implying as it did that a single appropriate price (nominally, price cap) could be identified for and applied across the 28 Member States. (The Interchange Fee Regulation sidesteps this problem by adopting a percentage-of-transaction-value approach.) Persistent, often significant, differences in price across the internal market—'organic' in the sense that they arise as a result of variances in supply and demand, rather than public or private manipulation of the price formation mechanism—arguably call into question the contention that price regulation functions as an appreciable barrier to market interpentration. Even absent domestic controls, *de facto* variations in the effective price across the internal market may have similar negative effects on incentives for participation and competitive behaviour. Forcing complete alignment of prices is (largely) beyond the remit and indeed the concern of EU law. Yet what the numerous cases addressing price regulation demonstrate is that differences attributable to 'artificial' intervention—such as price controls—are inherently suspect in a way that organic differences simply cannot be.

Finally, it is instructive to note the variety of procedural postures identifiable across the jurisprudence addressing price regulation. These cases should not be read, solely or even primarily, as an EU-level institutional attack on domestic controls. In fact, many of the most prominent decisions, from *Keck* to *Scotch Whisky*, initially involved somewhat opportunistic attempts by traders to invoke EU law to attack inconvenient national rules; efforts that receive varying degrees of assistance from the Court of Justice. Others involve Member State attempts to challenge EU-level efforts to control[352] or mandate price regulation,[353] typically premised on subsidiarity concerns. Of course, the Commission retains jurisdiction to pursue Member States whose pricing controls might infringe EU law and thus amount to a failure to fulfil EU-level obligations.[354] As cases such as *Deutsche Telekom* illustrate, however, what is ostensibly the most proper legal approach may not be the most strategically effective one. Most interesting going forward perhaps is the increasing decentralisation of the antitrust rules, involving both NCAs and private plaintiffs in enforcement at national level. Experience with the former suggests that domestic enforcers are more ready to pursue alleged exploitative harms than their EU-level counterpart; it is hardly to be expected that private litigants will exercise greater restraint. What is remarkable about this wide-ranging catalogue is the diversity

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[350] *AKKA*, para.46, approving of Opinion in *AKKA*, para.85.
[351] Opinion in *Commission v Luxembourg* EU:C:2010:776, para.87
[352] See, e.g. *Commission v Luxembourg.*
[353] For instance, in the on-going litigation regarding the Interchange Fee Regulation, C-304/16 *Amex* (fn.326 above), Advocate General Campos Sanchez-Bordona has advised that the reference be rejected because both parties to the nominal dispute—American Express and the UK Treasury—agree about the (minimalist) interpretation of the Regulation preferred: see Opinion at EU:C:2017:524, paras.23-48.
[354] Article 258 TFEU; see, e.g., *Commission v Italy* (fn.152 above) and *Commission v Poland* (fn.274 above).

of perspectives it reveals: not only the winners and losers of the wealth redistribution that price controls frequently represent, but also broader constitutional and even restitutionary concerns. The dilemma of regulating prices within the EU thus raises legal issues that are exceptional yet transcend easy categorisation; this article has sought to throw greater light upon these complex questions.

IX. CONCLUSION

That 'money makes the world go round' is a contemporary cliché, and the operation of the internal market is no exception. The free-functioning of the price formation mechanism is, at least in theory, pivotal to its effective operation: both to secure an efficient distribution in the short-term, and to incentivise greater economic activity within the internal market in the longer-term. Moreover, market regulation by means of the 'invisible hand' bypasses the often-controversial question of which polity, the EU or its Member States, should have jurisdiction to 'pick winners' and determine the optimal market outcome going forward. Yet the treatment of price regulation under EU law points to certain paradoxes that lie within the concept of a 'highly competitive social market economy'. Pricing and the price formation mechanism are central components of any system of open competition; yet free formation of prices cannot alone guarantee effective competition, nor it is indispensable to well-functioning markets in the broader sense. The social policy concerns and market conditions that underpin most regulation are typically national in origin and nature; yet the existence of multiple discrete and discordant price control structures is inapposite in moving towards an ostensible single market. Price regulation and its discontents within EU law thus reflects the inherent tensions and compromises that arise from an inevitable sharing of regulatory jurisdiction within the internal market, alongside the complications that stem from a plurality of legitimate yet conflicting regulatory goals.

This article has sought to unpick the treatment of price regulation, identifying and exploring discrete strands within EU case-law and regulatory practice: considering punitive, prohibitive, permissive and even prescriptive perspectives. The various approaches adopted provide insight into the complexity of both the underlying regulatory phenomenon and the wider task of developing the internal market within a multilevel institutional structure. The article has further advanced a tentative explanation for the acknowledged distinctive status of price regulation within EU law. Crucially, such controls restrict not only how or how vigorously undertakings can compete within the internal market, but may also impact more fundamentally upon the interior motivations and entrepreneurial impluses which determine whether economic actors are prepared to participate at all in the market process. The approach of the Court of Justice in *Metro (II)* thus comes more readily into focus:[355] price competition is not an absolute value, yet EU law is deeply reluctant to sanction any wholesale departure from its axiomatic market model. 'Open and undistorted competition' is thus both slogan and archetype, though not, ultimately, an unbending prescription within EU law.

[355] See fn.36 above.