ВЛИЯНИЕ КООПЕРАТИВНОГО ХАРАКТЕРА
СПЕЦИФИЧЕСКИХ ИНВЕСТИЦИЙ НА ИЗМЕНЕНИЕ
ПРАВОВОГО РЕЖИМА РЕГУЛИРОВАНИЯ
ВЕРТИКАЛЬНЫХ ОГРАНИЧЕНИЙ

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С середины 70-х гг. XX в. проблема «вымогательства» и сопутствующего ему 
недоинвестирования в специфические активы становится одной из центральных 
в рамках новой институциональной экономической теории. Традиционно 
теоретический анализ проблемы «вымогательства» был основан на рассмотрении 
так называемых «эгоистических» специфических инвестиций, при этом анализ 
другой разновидности специфических инвестиций называемой «кооперативными» 
inвестициями (или кросс-инвестициями), практически отсутствовал в 
экономической теории вплоть до самого конца двадцатого века, несмотря на то, 
что такие инвестиции широко распространены в бизнес-среде. Остановимся на 
подходе Che and Hausch, которые впервые осуществили попытку классификации 
специфических инвестиций подробнее. Их подход строится на предположении о том, 
что «внутренняя торговля является выгодной для обеих сторон на стадии ex post» (Che, Hausch, 1999, p. 128), т.е. исключается возможность разрыва отношений. 
Этот подход предполагает, что характер специфических инвестиций определяется 
прежде всего от того, кто является получателем позитивного воздействия от 
инвестиций. Однако при переходе к анализу реальных бизнес-кейсов этот подход к 
разграничению специфических инвестиций оказывается малопродуктивным. В 
рамках внутреннего торга, вообще говоря, затруднительно проводить разграничение 
между эгоистическими и кооперативными инвестициями: не столь важно, приведут 
ли специфические инвестиции одной из сторон к понижению издержек поставщика 
или же повышению выручки покупателя, поскольку и в том, и в другом случае на 
стадии ex post эффект от этих инвестиций будет поделен между сторонами в 
соответствии с той переговорной властью, которую они имеют в этом торге. Альтернативный подход к классификации удельных инвестиций (Дзагурова и 
Агамирова, 2014) опирается на направление этих эффектов во внешнем торговле (т. е. в 
рамках торгов с альтернативными партнерами). На основе этой классификации 
специфических инвестиций в данной статье анализируется взаимодействие

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THE COOPERATIVE SPECIFIC INVESTMENTS AND THE EVOLUTION OF THE LAW OF VERTICAL RESTRAINTS

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Since mid-seventies, the underinvestment in specific assets and the «hold-up» problem have been remaining a critical issue in new institutional economics. Till the very end of the twentieth-century theoretical analysis of «hold-up» problem was dedicated to consideration only of so-called «selfish» relation-specific investments which created an ex-post surplus for the investor. That means a seller invests in reducing his costs and a buyer invests to increase his benefits from the procured good or service. Another type of relation-specific investments called «cooperative» investments (or cross investments) attracted nearly no attention in the theory even though such investments were widespread in practice. By definition introduced by Che and Hausch in 1999, a distinctive feature of cooperative relation-specific investments is that they have a positive impact on the outside option of a trading partner, i.e., the outcome of terminating the contract at the ex-ante stage). An alternative approach to the classification of relation-specific investments (Dzagourova and Agamirova, 2014) relies on the direction of these effects in the external
trade (i.e., trade with alternative partners). There is a widespread belief that theoretical analysis played a crucial role in the evolution of vertical restraints (VRs) regulation. In order to check whether this statement is “history friendly” or not the article compares the dates of the key US antitrust cases concerning the VRs and the new economic theories through the lense of incentives for cooperative specific investments. It helps to show that the intention to maintain these incentives was the important factor caused the courts’ decisions, which in turn inspired the subsequent developments of economic theory. Considering the vertical restrictions as an instrument of risk sharing especially when the partners’ specific investments are cooperative may open the new possibilities for further improvement of the regulatory framework governing the vertical agreements. Therefore, according to (Menard, 2018, p. 4) this paper combines issues related to the micro-analytical level and macro-level at the same time.

**Keywords:** antitrust, cooperative relation-specific investments; vertical restraints, antitrust cases.

**JEL:** B52, E22, G11, K21

«History friendly» analysis and the liberalization of vertical restraints antitrust regulation

Economists often underline the close relationship between theoretical studies and competition regulations. Richard Posner in his book «The Problematics of Moral and Legal Theory» wrote: «... beginning around 1970, increased consensus and sophistication in the economic analysis of antitrust encouraged a more sophisticated judicial approach to antitrust law ... efficiency became the only accepted goal of antitrust. It is fair to say that at the beginning of its second-century antitrust law has become a branch of applied economics, has achieved a high degree of rationality and predictability, and is a success story of which all branches of the law and allied disciplines can be proud» (Posner, 1999, p. 229).

This concept is supported by other prominent members of the scientific community: «... it is impossible to have a full understanding of the development of antitrust policy without taking the contributions of academic scribblers into account ... » (Martin, 2007, p. 5); «...there is considerable evidence indicating that ... the ideas of economists affect how judges resolve antitrust cases ... antitrust law and industrial economics have evolved in tandem, with doctrine and enforcement policy lagging behind the formation of a consensus among economists...» (Kovacic, 1992, p. 300, 303).

The mitigation of VRs regulation can be explained by the evolution of scientific concepts from considering them in the context of horizontal interaction to the Chicago school theories demonstrated that VRs might have a positive impact on the intensity of competition. How plausible is this reasoning when applied to such area as vertical restraints regulation?

The goal of this article is to show that the relationship between economic theory and antitrust regulation is sometimes much more complicated and multifaceted. The object of our analysis is the judicial American cases determined the evolution of VRs regulation in the XX century. Our choice of these cases is due to two reasons. Firstly, the choice of the American judicial practice is explained by the role of the USA as the indisputable leader in the field of VRs regulation changes. Secondly, the precedence nature of the US legal system makes reasonable the comparison of two dates: the date of the court’s decisions and the date of pioneer scientific publication which are similar in theme.

This history friendly analysis calls into question the purely “normative” nature of changes in the antitrust regulation (as referred above) as applied to VRs.
An example of “history friendly” analysis is the Gary Herrigel criticism of the explanation of the prevalence dispersed corporate ownership in the US and the UK by (La Porta, Lopez-De-Silanes, Shleifer, Vishny, 1997; La Porta, Lopez-De-Silanes, Shleifer, Vishny, 1998) maybe consider as an example He shows that the absence of legal institutions protecting the interests of small shareholders did not prevent the rapid development of dispersed corporate ownership structure in both these countries (Herrigel, 2006).

Another example of the wrong causality that may be cited relates to the adoption of the Sherman Act, which was the first landmark federal statute in the US competition law. Robert Bork explains the adoption of the Sherman Act using the theory of allocative efficiency descends eventually to the benefit of consumers. In turn, Robert Lande views the legislative history of the Sherman Act through the lens of distributive justice and asserts that this does not necessarily follow, and even if the monopolist is efficient there is no evidence that cost savings and increased profits will be passed on to the consumer.

However, the adoption of the Sherman Act in 1890 has had nothing common of allocative efficiency and distributive justice. Many authors such as Richard Hofstadter, Richard Posner, George J. Stigler, Herbert Hovenkamp, David Millon (“Political economy of the Sherman Act. The first one hundred years” ed. by E. Tommas Sullivan, 1991) reject the borkian interpretation of legislative intent of the Sherman Act which was directed at promoting efficiencies:

David Millon: the Sherman Act’s design was “to control political power [of trusts] through decentralization of economic power” (Ibid., at p. 86);

Hofstader: “political impulse behind the Sherman Act was clearer and more articulate than the economic theory” (Ibid., at p. 27–28);

The Sherman Act was adopted in 1890 when economists’ understanding of monopoly and competition was limited and communication between economists and lawyers even more so (Posner, 1999, p. 228).

The crucial role in the adoption of the Sherman Act was played the Congress’ intention to protect small businesses and to weaken the political power of railway and oil companies (Gellhorn, Kovacic, Calkins, p. 17–22).

### Theoretical analysis of vertical restraints’ effects.

The liberalization of VRs regulation is often explained by the significant changes in the theoretical analysis which had occurred in the 20th century. In 20–30s Harvard school interpreted VRs through the lens of foreclosure – horizontal interactions, restricting competition. In 50–60s the economists of the Chicago school focused on procompetitive effects and the efficiency of vertical interactions. They demonstrated that VRs could eliminate the problem of “double marginalization” arising from the inclusion of production costs of the final product markups of firms that supply intermediate product (Spengler, 1950; Telser, 1960; Mathewson, Winter, 2003).

They have demonstrated that although the vertical restrictions could reduce inter-brand competition, they have a positive impact on the intensity of intra-brand competition. In his article entitled “Why the manufacturers want fair trade?”, Lester Telser claims that if retailer A provides a service and charges a price that covers the cost of the service, then a rival retailer B can offer the product without providing the service at a lower price and attract customers that obtain the service from retailer A. It causes a free-rider problem that leads to the under-provision of services, imposing minimum RPM weakens the price competition and stimulates the non-price competition: extra efforts for promotion and maintenance of goods, staff training, consulting, performing warranty and repair, etc. (Telser, 1960).

While paying tribute to authors of these theories it should be noted that the problem of vertical restraints regulation discussed from that point of view during judicial proceedings long before the advent of these theoretical approaches.
Notably, the “free riding” dealers and the positive influence of imposing by a supplier minimum resale price maintenance were considered in the first antitrust case of Park & Sons (1907).1

The other versions “service theories” have developed in the 80–90s. Scholars have dedicated mostly to a non-price competition (Sherer 1983; Marvel, McCafferty, 1984; Comanor, French, 1985; Rey, Tirole, 1986; Caillaud, Rey, 1987; Mathewson, Winter, 1987; Rey and Stiglitz, 1995; Hovenkamp, 2005; Marvel, 2010). In particular, Patrick Rey and Joseph Stiglitz show that the seller can use exclusive territories to upload if the product has the following parameters: high quality, complex technical specifications or belongs to the group of luxury goods (Rey and Stiglitz, 1995). Then some of these services were identified by the new institutional, economic theory as relation-specific investments.

However, this problem was discussed already in the 1963 case of White Motor2, the Supreme Court considered territorial, and price restrictions separately at the first time and stated that price fixing and other restraints did not create “an integral part of the whole distribution system” as was found early in the case of Bausch & Lomb (1944).3

There is a free room for a positive approach: practical experience shapes intuitive ideas which in turn promote the formation of economic theories. As the subsequent discussions have usually been conducting with the use of newly developed scientific terminology, it may create a fallacy of “reverse causality”: changes of a regulatory regime that was not initially generated by theoretical analysis have been attributed to the economic theories whose development they were previously stimulated.

If we suggest that these theories have preceded judicial proceedings, it is necessary to understand the motives that the courts had been guided in making these decisions.

Cases which had influenced on liberalization of VRs regulation have their specificity: courts have demonstrated a clear understanding of importance “necessity to maintain incentives for the implementation of cooperative relation-specific investments” (saying in modern terms). But the absence of a theoretical framework could lead to erroneous judging due to such argumentation in the other cases which were not dedicated the problem of specific investments.

At present, it is possible to analyze this process through the lens of modern terminology of the new institutional, economic theory, appeared as a result of evolution theoretical approaches mentioned below.

The cooperative relation-specific investments and the evolution of the US antitrust law

Since mid-seventies, the «hold-up» problem and accompanying underinvestment in specific assets have been remaining a critical issue in the new institutional economics. The traditional theoretical analysis of «hold-up» problem was based on consideration of so-called «selfish» relation-specific investments that have had positive effects on the investing party’s utility (in particular, the selfish are specific investments in the model of Oliver Hart (Hart, 1995)). For example, if a supplier makes selfish specific investments, it allows him to reduce the level of costs of the production unit. Full specificity of selfish investments suggests that supplier can decrease his costs only if a trade occurs with the “primary” buyer; if selfish investments are partly specific, the supplier can achieve the cost reduction also with alternative buyers. Similarly, fully and partially specificity of investments of the buyer affect the level of revenue it receives (Hart, 1995, p. 37).

Another type of relation-specific investments called «cooperative» investments (or cross investments) was underestimated in economic analysis up to the very end of the twentieth century despite the fact that such investments are widespread. The term “cooperative

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specific investments” (cooperative specific investments) was first introduced in the article of Che and Hausch “Cooperative investments and the value of the contract” (Che, Hausch, 1999). In their article, the distinction between selfish and cooperative relation-specific investments was based on the direction of the positive effects created by specific investments in the internal trade (i.e. trade between primary partners). Other words such an approach do not suggest the situation when partners can terminate the trade and choose alternative partners (Che, Hausch, 1999). Such preposition makes it rather difficult to distinguish the type of relation-specific investments because that fact who will get the surplus of relation specific investments also will determined by the bargaining power of each partner.

An alternative approach to the classification of relation-specific investments (Dzagurova and Agamirova, 2014) relies on the direction of these effects in the external trade (i.e. trade with alternative partners) (Table 1).

<table>
<thead>
<tr>
<th>Supplier: Partially specific cooperative investments decreasing investor outside options</th>
<th>Partially specific cooperative investments decreasing investor outside options</th>
<th>Full specific cooperative investments decreasing investor outside options</th>
</tr>
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<tr>
<td>Buyer: Hybrid investments</td>
<td>Partially specific selfish investments</td>
<td>Partially specific selfish investments decreasing the investor outside options</td>
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Table 1

Effects of supplier’s relation-specific investments in external trade and the types of these investments

Cooperative specific investments involve greater risk than selfish ones because the partner who receives the positive effect of such investments may terminate the trade with the investing party. Also, additional problems for a possible decline of the reserve utility – the implementation of cooperative specific investment may limit and hamper its contacts with alternative partners (Dzagurova, 2012, p. 37–42). Accordingly, hoping to receive benefit from cooperative specific investment, the firm must devote considerable attention to ensuring that her partner had sufficient incentives to implement them.

Address to materials of antitrust cases considered the VRs, which suggests that this problem had attracted the attention of the courts for many decades before economic theory had developed an adequate language to describe it. The term “cooperative specific investments” was introduced into economic analysis only 10-15 years ago, at that time the court analyzed the substantive problem of creation of incentives for cooperative specific investments in processes more than a century ago.

Court decisions concerning the legality of VRs repeatedly emphasized the importance of incentives for cooperative specific investments. In fact, for the most part, those decisions we were talking about situations in which the vendor tried to create incentives to dealers made a specific investment, the main benefit of which was got by the supplier. The costs associated with the implementation of such investments were too risky for the dealer because if buyer terminated the trade with the supplier than he realizes the benefit of these investments with another partner was not possible, as a result, the dealer was faced with significant losses.
In this paper, we analyze the several cases that have shaped the evolution of the VRs regulation in the US in the XX century. The first of them is the Park & Sons case (1907) in which minimum resale price maintenance was first discussed as an instrument to counter the dealers free riding (or in modern terms, as an instrument to maintain dealers incentives for cooperative specific investments). Although the judge decision did not create a precedent, later it was cited many times in other cases such as Bausch & Lomb, Albrecht, Business Electronics и Leegin.

United States V. Bausch & Lomb Optical Co., 321 U.S. 707 (1944)
A major manufacturer of optical accessories Bausch & Lomb sold part of its products through an exclusive distributor-the company Soft-Lite, which in turn resold it under its own brand. In order to gain access to these products, wholesalers had to meet the quality requirements set by Soft-Lite together with Bausch&Lomb. The next participant in the distribution chain were retailers, who supplied optical glasses with various options of frames, only if they had a license Soft-Lite. Bausch & Lomb together with Soft-Lite in the framework of their policy imposed on retailers the minimum resale price.
For the first time, the Supreme Court simply claimed that selection its customers was essential for Soft-Lite due to the luxurious nature of its products and its aim to achieve “the highest standard of service.” However, it was not classified as sufficient justification for vertical restrictions, and as a result, the District Court called these contracts “a patch upon an illegal system of distribution of which they have become an integral part.”

The first step on the way to the liberalization of VRs regulation in American judicial practice was made in case of White Motor (1963) in which non-price VRs was defined separately from the price category of VRs (nevertheless non-price VRs began to consider under the rule of reason only in 1977 in Sylvania case).

White Motor Co. v. The United States, 372 U.S. 253 (1963)
In this case, the appellant, White Motor Co., was a manufacturer of trucks and spare parts for trucks who sold products not only to distributors, dealers but also directly to large users. Agreements with distributors and dealers instituted by the appellant limited exclusive territories and persons or classes of persons for each distributor and dealers. In particular, the only company who could sell trucks and White Motor’s spare parts directly to the public entities was the manufacturer.
Moreover, distributors agreed to charge the same price as the appellant charged selling its products directly to dealers. This type of agreement constituted 5% of White Motor Co. sales. As the percentage of price fixing was low, the Supreme Court refused to apply the Bausch & Lomb precedent. The Supreme Court stated that price fixing and other restraints did not create “an integral part of the whole distribution system” as found in the case of Bausch & Lomb. However, it confirmed that the per se rule applied in this case of price fixing.
This contradicts the ruling in Bausch & Lomb. Even if only a small percentage of sales of the manufacturer’s products was involved, it was a price restraint and should thus be considered. Indeed, the issue here is the unwillingness of the Supreme Court to set a precedent on exclusive territorial restraints and to protect a small producer.
Thus, the Court took into account the position of the White Motor. Co. refers to the importance of protecting specific investments of distributors and dealers through exclusive

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The cooperative specific investments and the evolution of the law of vertical restraints

The appellant argued that the restrictions in question were “fair, reasonable and necessary” to compete against large competitors; its distribution system was the only method they had to compete effectively. The Supreme Court did not deny that such a practice was a practicable means of a small company to compete with aggressive competitors. The Justice also argued that such a restriction could allow the manufacturer to penetrate a market if the manufacturer was a small company, or if it started with a “risky” product, or in order to ensure that its products were promoted and serviced.

The agreements of White Motor. Co. concluded with its distributors and dealers, assumed the obligation to carry out the training of their staff so that they would be more qualified to advise users about the specifications and features of the product White Motor. Co. Such training was associated with significant expenditures, representing an investment, which had a high degree of specificity and risk.

Schwinn was not a newcomer but a well-established manufacturer in contrast to the White Motor. Co. Schwinn produced bicycles and spare parts for bicycles. In 1951, it was the largest manufacturer of bicycles in the US with a market share of 22.5%. Its market share decreased to 12.8% in 1961, and the largest bicycle company became Murray Ohio Manufacturing Company, which increased its market share from 11.6% in 1951 to 22.8% in 1961. However, Schwinn’s production increased throughout these ten years, despite its reduced market share. One of Schwinn’s methods of sale included sales to retailers under the “Schwinn Plan.” The Plan covered more than half of Schwinn’s distribution, around 75% in 1962. It was based on a form of franchising which did not prevent the franchisees from selling other brands but required the promotion of Schwinn products and purchasing only from a distributor authorized to sell in that exclusive territory. The distributors with exclusive territories were authorized to sell only to the franchisees and not to other dealers.

In the same way, as in White Motor, the Supreme Court chose not to evaluate the practice of exclusive territories and customer groups for distributors. However, at this time, the Court took into account the Bausch & Lomb precedent, exclusive territory and the consolidation of the consumer groups, interpreted as “an integral part of the whole distribution system” with price-fixing. The government argued that once distributors purchased goods from the manufacturer, they could not be territorially restricted in their sales because the distributors owned the goods. The Supreme Court agreed with the government’s argument. The Court stated that the distributors should have been free to decide whom they would deal with.

However, the Supreme Court further explained that this case included unilateral conduct on the part of the manufacturer, based on the franchising and allocation of territories. The Court claimed that under Section 1 of the Sherman Act, the outcome was different regarding whether the manufacturer completely retained ownership and the risk of loss or not. The District Court ruled that territorial restrictions per se illegal if used once the products were sold to distributors. The Supreme Court confirmed this, however, it also argued that the per se rule did not apply in territorial vertical restrictions in franchising systems in cases where the manufacturer remained the owner of the products. Thus, it overruled the 4-year old case of White Motor without providing any new data supporting this change. However, the per se rule applied only to some territorial restraint situations and did not apply to franchising systems, as later confirmed by lower courts.

The reasoning of the Schwinn was based on the fact that the franchising system was applied for maintaining incentives of small firms to implement specific investments. In particular, according to the terms of the contract, the franchisee had to provide service

guarantees and consultation to consumers. These specific investments were cooperative because the manufacturer got a surplus from them. Namely, it allowed him to strengthen its reputation and to compete successfully with competitors.

However, the court emphasized the need to protect specific investments. The Court drew attention to the fact that “franchising system was a way for smaller companies to compete effectively and efficiently with larger, integrated companies”.


The respondent, GTE Sylvania Inc., a manufacturer of television sets, adopted a new franchise plan in 1962 selling directly to its smaller franchised retailers and granting each retailer one non-exclusive territory. Sylvania hoped that this new distribution system would increase its market share. The new franchise plan was a success with Sylvania’s market share increasing by approximately 5% between 1962 and 1965. At the time, the company was the eighth largest manufacturer of color television sets in the US. In 1965, Sylvania decided to franchise Young Brothers, an established television retailer in San Francisco, as an additional retailer because Sylvania was not satisfied with the existing retailers’ sales in that geographical market. The proposed location for Young Brothers was approximately one mile from a retail outlet operated by the petitioner, Continental T.V., Inc., which was a successful Sylvania franchisee. Continental did not agree with the location for the new retailer claiming that it was against Sylvania’s marketing policy, to which Sylvania disagreed. Continental then replaced a large order of Sylvania’s products with televisions from Phillips. At the same time, Continental was negotiating with Sylvania for the opening of a new store in Sacramento in California. Sylvania refused and terminated Continental’s franchises.

In the decision in Sylvania, the Court first considered the distinction between price and non-price VRs. In this case, he did not go to the Schwinn precedent, citing the fact that the market share of Sylvania was much smaller than the market share of Schwinn and taking into account the non-exclusive nature of the applied constraints. As a result, the case was considered under the rule of reason.

Sylvania established direct contact with franchisees. Thus it hoped that this would force the franchisee to make a great effort to promote their products. As described above, the agreement with a franchisee suggested the obligations for the organization of promotions, providing technical support and training. Sylvania was very interested in these cooperative specific investments of the franchisees because it expected that they would contribute to the growth of its market share. This calculation has justified itself, and the market share of Sylvania in the period from 1962 to 1965 increased 2.5 times from 2% to 5%.

In contrast to the position taken by the court of justice in the White Motor and Schwinn, the trial court focused its attention on the need to assess the pro-competitive effects that are achieved as a result of vertical territorial restrictions.

In this case, the Court ruled that Sylvania has passed the ownership of its products to Continental. Thus, under Schwinn, the Court should apply the per se rule unless this case fell outside the Schwinn doctrine. Furthermore, the Court’s language brought some confusion as it used the term “franchising” in this case and it was the franchising system that was exempt from the per se rule under Schwinn. Indeed, the Court did not clarify the meaning of the term “a franchising system” in both cases and it is arguable whether Sylvania’s system was a genuine franchising system. The Court observed that the restraint in question could reduce intrabrand competition and simultaneously stimulate interbrand competition. The Court recognized that intrabrand competition had been reduced because the number of sellers had been limited by and within vertical territorial restraints. This observation of the difference between intrabrand and the interbrand competition was not discussed in Schwinn.
In contrast to Schwinn, Sylvania held a small market share, and its products were competing with some substitutive TV sets. Therefore, at the interbrand level, consumers were able to switch to other products easily. Moreover, the practice potentially promoted interbrand competition because of the small market share and the existence of other competitors in the competitive market.

The Supreme Court listed several benefits of non-price VRs. Firstly, the manufacturer who wishes to penetrate the market can use vertical territorial restraints to motivate retailers to sell its products and to cover investments. Secondly, established manufacturers can use vertical territorial restraints to facilitate promotion and services which influence the competitiveness of its products and eliminate free riders. The Court, therefore, reasoned that there was no justification for the distinction between “sale and non-sale transactions” as introduced in Schwinn. The Court overruled Schwinn explaining that the per se rule was not justified as non-price VRs also had pro-competitive effects, thus returning to the rule of reason.

The importance of creating incentives for cooperative specific investments emphasized by the court in the context of discussing whether the application of price VRs is reasonable. As already mentioned, for the first time this happened in 1907 in the proceedings on the application of the minimum resale price maintenance in the case of Park & Sons. Subsequently, this issue was raised in such cases as Bausch & Lomb, Albrecht, Business Electronics and Leegin.


Company Herald Co. carried out the distribution of newspapers through independent carriers, which were allocated an exclusive territory and which was forbidden to exceed the recommended maximum resale price. Such carriers include the company, Albrecht. For several years Albrecht faithfully has been executing the terms of the agreement. However, in 1961 Albrecht ceased to follow the pricing policy of the supplier. In response to the Herald in 1964, he violated the terms of the contract on granting of exclusive territory. Albrecht, hoping that the emergence of a competitor will force Albrecht to lower the price level. In response, Albrecht filed a lawsuit against its supplier, Herald Company.

The Supreme Court decided to recognize the setting of maximum resale price maintenance is illegal per se.

The concern of the court was an establishment of the maximum resale price at the too low level, i.e., the level which would be “sufficient to cover distributor costs to ensure effective levels of service and information services for consumers.” In other words, the decision was entirely dictated by the awareness of the importance of creating and maintaining incentives for cooperative specific investment.


In this case, the Supreme Court overruled the Dr. Miles doctrine (1911), which set the per se rule for minimum price maintenance because vertical price restraints can have procompetitive effects according to “respected economic analysts.” The Court went even further by announcing the application of the rule of reason to all vertical price restraints including vertical price fixing.

Leegin, a manufacturer, designer and distributor of leather goods and accessories, started to sell women’s belts and other products under the brand name “Brighton” across the US in 1991, selling to small independent boutiques and specialized stores. Leegin’s policy was based on promoting better and more personal treatment, more services and satisfactory experience for consumers. In 1997, Leegin wrote letters to its retailers announcing a new policy, which included minimum price fixing, refusing to sell to retailers
such as PSKS who would sell below the prices. In December 2002, Leegin found out that PSKS was selling its products at 20% below the minimum prices. PSKS explained to Leegin that other nearby retailers were doing the same. Therefore, it had dropped their prices to compete. PSKS refused to increase its prices of Brighton products, and thus Leegin terminated the contract.

The Supreme Court concluded that policies for establishing a minimum resale price are illegal per se according to the precedent of Dr. Miles Medical Co. V. John d. Park & Sons Co., 2XX U. S. 373 (1911) and the Court of Appeal agreed with this decision. However, the Supreme Court subsequently reversed that decision.

In this case, the court justified the establishment of a minimum resale price (which is still considered illegal by the European Commission), explaining that “by establishing a minimum resale price, the manufacturer intended to encourage its distributors to implement specific investments in providing the optimum level of pre-sales of additional services to promote the product”. The positive effect of cooperative specific investment was very important for the producers because it has contributed to consolidate his reputation. In this sense, the establishment of minimum resale price must solve the problem of free riding in the implementation of specific investment, by providing protection and also have a stimulating effect on inter-brand competition.

**Conclusion**

“The canonical narrative views the latter’s turning points as almost invariably triggered by changes in the economists’ notion of competition: from classical laissez-faire to neoclassical perfect competition, from 1930s imperfect competition to Harvard structure-conduct-performance (SCP) approach, from the Chicago revival of price theory to the modern game-theoretic view. A corollary of such a narrative is that both the Congress and the Supreme Court just applied the ideas flowing from the economists’ debates along the years. However, an alternative reading of US antitrust history is possible….., including that the economists’ influence on the evolution of US antitrust law turns out to have been far less important than usually believed” (Giocoli, 2008, p. 749).

The analysis shows that many theoretical concepts developed in the second half of the twentieth century, in fact, are based on important performances, described in Court decisions taken decades earlier. Ronald Coase, write that “the opinions of judges became the starting point for economic analysis” (Coase, 1972, p. 67). He believes that “with the development of antitrust policy in the United States, interest in antitrust aspects of industrial organization came to dominate the subject” (Coase, 1972, p. 66). In particular, the authors of the “Guidelines on VRs” carry out in a separate section purely theoretical description of the pro-competitive effects of VRs and made frequent references throughout the document to these theoretical concepts.

We can conclude that economic theory is not so much initiated a change in the VRs regulation norms, then many developed ideas contained in judicial decisions, it is possible to specify, drawing attention to the role played in those decisions risks associated with cooperative specific investments. Despite the fact that the term itself was first used just 15 years ago, from the descriptions of court decisions, from the early twentieth century this theme permeates the vast number of antitrust trials, which identified significant changes in the vertical restraints’ regulation. It is the awareness of judicial authorities of the need to create and maintain incentives for cooperative specific investment that has led to the liberalization of VRs regulation.

This understanding is significant not only because it allows us to consider the liberalization of VRs regulation with a new angle of view. Consideration of VRs, as a tool for decreasing of the riskiness of cooperative specific investment, allows to identify areas for further improvement of regulation norms.
REFERENCES


