Interpreting and Translating Competition Law: A Comparative Analysis of EU and US Methods of Interpretation within Competition Law and its Effect on Translations into Dutch

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Abstract

This research is a literature and jurisprudence study into the effect of the differences in legal interpretation between the EU legal system and the US legal system regarding competition law on the translation of competition law terminology into Dutch. Both EU and US competition law addresses broadly the same categories of anticompetitive behaviour - agreements, monopolisation, mergers - but the wording and interpretation of the legislative provisions varies. EU competition law is originally based upon US antitrust law, and therefore shares a lot of the same terminology. The US antitrust law has undergone some fundamental changes in its interpretation, which has in turn driven EU and US terminology further apart. Nowadays, there are vast differences in economic interpretation, political interpretation and legal interpretation. These differences in interpretation have influence on the translation of competition law terminology from US English and EU English, respectively, into Dutch. In the jurisprudence it is shown that the ECJ interprets textually and teleologically, where the US Supreme Court uses conservative purposivism. This leads to differences in the meaning of the same term. Generally, the US Supreme Court find an additional proof of inefficiency necessary in order to establish a competition violation. Both EU competition law and Dutch competition law do not need this additional proof. Therefore, the semantic meaning of competition law terminology is narrower in the US than in the EU. For translation into Dutch it must be assessed on a case-to-case basis whether it is necessary to add '*inefficiënte*' before a US term so that the target text reader has the same understanding of the legal term as the source text reader.

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List of Abbreviations

Commission	European Commission
EEC	European Economic Community
ECJ	Court of Justice of the European Union
EU	European Union
FTC	Federal Trade Commission
GC	General Court (of the European Union)
MNE	Multinational enterprise
RPM	Reseal price maintenance
RTD	Refusal to deal
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
US	United States

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Introduction

Cause

"EU Accuses Apple of Abusing Mobile-Payment Market Power" (Mackrael & Norman, 2022) and *"EU accuses Apple of breaking competition law over contactless payments"* (Timmins, 2022), are two of many headlines in newspapers all around the world on 3 May 2022, the day that the European Commission (hereafter: the Commission) has made it known that it preliminary finds that Apple breached EU competition law. The United States (hereafter: US) will watch this case closely; having accused the Commission of targeting its champion companies before, it is often displeased with these antitrust investigations into US-based multinational enterprises.

Even when both the US and the European Union (hereafter: EU) investigate the same conduct or merger, different outcomes have occurred. An example of such divergence in legal interpretation that caused political tension between the US and the EU was in the General Electric/Honeywell merger. The US approved GE's acquisition of Honeywell's aircraft engine division because it would lead to lower prices, increased efficiencies, and an increase in economies of scale to the benefit of customers. The EU rejected the transaction for essentially the same reasons; the merger would lead to a dominant force in aircraft engine and airplane leasing, stifling competitors and reducing choice in the relevant markets (Casas & Hardy, 2022). So, even though both antitrust laws are written in English, misunderstandings and even tension between the EU and the US have arisen when applying competition law. This could stem from interpretation issues: competition law in the US is not interpreted exactly the same as in the EU. Problems of interpretation between languages or between different versions of the same language usually stem from differences in legal systems. Some scholars find that the difficulty in legal

translation depends more on the structural differences between legal systems than on linguistic differences (De Groot, 2006 & Soriano-Barbarino, 2016).

Issue

Legal translation has become increasingly important in a globalised world. The increased use of economies of scale and scope means that nations are interdependent upon one another. The increase in worldwide trade leads to an increase in contracts between parties from different nations. Trade between different nations then leads to the use of both different languages and different legal systems. That is where legal translation and interpretation start playing an important role. Numerous organisations need legal documents translated. If a translation is not accurate enough, it can have severe legal consequences, because an improperly translated document can directly affect the rights of both people and businesses.

At the same time as the rise in importance of legal translation, competition law has become a hot topic all around the world because of the increasing power of a few multinational enterprises, such as Google, Microsoft and Amazon. The main legislators of competition law on the global stage are the US and the EU. Although EU competition law is originally based upon US competition law, the terms used in Article 101 and 102 of the Treaty on the Functioning of the European Union (hereafter: TFEU) differ from Section 1 and 2 of the US Sherman Act. Different approaches to the interpretation of legal terminology have led to misunderstandings and tension between the EU and the US. These different approaches are inherent to competition law. Competition regulations and the interpretation thereof are influenced by economics, politics, ethics, legal tradition, and history. Both competition law systems have developed out of different histories and different concerns, and upon closer examination, significant variations in law, policy, and

enforcement become apparent. It is in the interest of both sides of the Atlantic to better understand the interpretation of each competition law regime, in order to avoid misinterpretation and mistranslation. Therefore, the research question of this thesis is:

What is the effect of the differences in legal interpretation between the EU legal system and the US legal system regarding competition law on the translation of competition law terminology into Dutch?

Methodology

This research consists of a study of literature and a corpus consisting of EU and US jurisprudence. It will provide an overview, by analysing legal acts, jurisprudence and literature, of the different approaches to judicial interpretation within EU versus US competition law and the resulting differences in translating competition law terminology into Dutch. The corpus for this research is formed by EU and US competition legislation, which has been interpreted by certain comparable judicial decisions in the EU and US legal systems. These decisions will be analysed to see how those terms have been interpreted by the Court of Justice of the European Union (hereafter: ECJ) and the United States Supreme Court respectively, and whether the same terms have to be interpreted differently in the EU legal system compared to the US legal system.

The structure of this research is as follows. The aim of the first chapter is to describe the definition of law, of legal translation and of the differences between the main legal systems and its impact on legal translation, as well as legal interpretation and the methods for interpretation and their impact on legal translation. In the second chapter, competition will be defined. An in-depth description of the US and EU

competition policies and legal systems will be described, in order to find out what the laws are that need interpretation and translation. In the third chapter, the main differences in legal interpretation of US and EU competition legislation and its effect on translation into Dutch will be analysed. In the fourth chapter jurisprudence of the ECJ and the Supreme Court will undergo an in-depth analysis. The focus shall be on the different interpretations of similar competition violations and its effect on translation into Dutch.

Chapter 1: Legal interpretation

1.1 Law and legal translation

1.1.1 Defining law

Generally law is defined as a set of rules made by the government which orders society (Janssen, 2020). According to Barker (2020), law consists of rules of human conduct, imposed upon and enforced among the members of a given state. The main purpose of law is to order society and provide rules to resolve conflicts so that order can return. In order for there to be law, there needs to be both order, i.e. a system or method, and compulsion, meaning the enforcement of the rules applicable in a country. Grossi (2010, p. 2) finds that law does not only consist of power and order, but also in the manner in which society organises itself in accordance with certain historical values, basing its rules upon these values and observing them in day-to-day life. According to Grossi (2010, p. 3), law is an expression of society more than of the state. Law is therefore not static. It adapts to social reality, experience and logic and will vary over time. The validity of a legal system is based upon society's evolving norms of justice, morality and fairness, and not upon external presupposed norms.

1.1.2 Legal translation

Legal translation can be defined as the translation of legal texts. Legal texts, such as laws and codes, seek to establish clearly defined rights and duties for certain individuals. Legal translation aims to look for linguistic and juridical similarities between legal texts that belong to different legal systems. Legal translators ascertain that those legal texts are then rendered accordingly. They do so in order for the legal texts to be recognized as legitimate in court.

According to Joseph (1995, p. 14), legal translation stands at the crossroads of three areas of inquiry: legal theory, language theory and translation theory - and those areas are fundamentally interdeterminate. Legal theory is a necessary skill for a legal translator in order for the legal translator to understand the legal systems they translate from and into. For legal translators it is also important to be thorough in their knowledge and skills of both the source language and the target language. For legal translation, Matulewska et al. (2010) states, it is required from translators to have the most advanced level of proficiency in both translation languages, coming close to bilingual competence.

Understanding of translation theory is important in order to make the right choices within the translation process itself. However, according to De Groot (2006), legal translation's difficulty depends more on structural differences between legal systems than on linguistic differences. Indeed, even within two versions of the same language translation is challenging, because the structural differences lead to the existence of false friends. Soriano-Barbarino (2016) agrees that one of the central challenges facing translators of legal texts consists of the ability to fully understand the requirements of the various legal systems worldwide. Comparative law, therefore, plays an important role in legal translation, as it allows for the identification of similarities and differences among legal systems. Also, in addition to asymmetries between legal systems themselves, there may be inconsistencies between "*different branches and fields of law*" (Pommer, 2008, p.18). Comparative legal scholars can thus adopt a macro approach – comparing a whole legal system with another – but can also adopt a micro approach – examining the similarities and differences of individual legal concepts. Legal concepts may seem similar, but comparing one specific legal term to another may be necessary in order to properly translate such terms.

This has led to Monjean-Decaudin (2010) distinguishing between "*vertical*" and "*horizontal*" legal translation. A translator uses vertical legal translation when translating a legal text from a source language that is seen as higher in status to a language with a lower status, such as the translation of EU law from one of its working languages (French, English and German) into one other EU language, such as Dutch. The original language remains leading for the sake of legal interpretation. Horizontal legal translation is the translation between two languages of the same equal status. Horizontal legal translation is also possible between one and the same language, because legal terminology and legal discourse are "*system-bound, tied to the legal system rather than to language*" (Monjean-Decaudin, 2010). For this reason, multiple legal languages can exist within the boundaries of a natural language, depending on how many legal orders make use of that same language .

The above differences in legal systems and legal terminology make the translation process a form of cultural interaction, according to Botezat (2012, p. 642), who states that *"during the translation process, one replaces culture elements in functional ways and adapts the text to other culture norms. [...] During the translation of legal text to achieve adequacy [in function, structure and semantics] is possible only when that translator has legal literacy, both in foreign and native language"*. He believes legal translation to be functional translation. Introduced by Reiss and Vermeer, functional translation means that a translation must be fit for purpose; that is, it must be functionally adequate. For functional translation it is crucial for the legal translator to know why a source text is to be translated and what the function of the target text will be (Munday, 2010).

Botezat (2012, p. 647) presupposes that legal translators aim for adequacy. Where equivalence can be defined as the generality of content and semantic closeness of the

original and the translation, adequacy means the correspondence of translation as a process to these communicative conditions (i.e. its appropriateness). Some scholars disagree and find that legal translators search for functional equivalence, not adequacy (Šarčević, 2000). Equivalent translation consists of the conforming of the meaning of the authors' message in the target language for separate parts of a text or of a whole text. The translation must cover the cultural backgrounds of its target recipients. Adequate translation is a purpose-oriented translation of the source text and the compliance with its language signs in the target. The principle of equivalent effect (or functional equivalence) is understood to mean that "*the relationship between receptor and message should be substantially the same as that which existed between the original receptors and the message*" (Munday, 2010). This means that legal translators should find the closest natural equivalent to the source-language message. Šarčević (2000) finds that for legal translation there are three categories of equivalence: near equivalence, partial equivalence and non-equivalence. If a term in the source language has exactly the same semantic and pragmatic properties as its target language equal, then there is full equivalence.

Following the abovementioned descriptions of legal translation, Harvey (2002) found legal translation to have four main characteristics. The first characteristic is the nature of legal discourse, which means that the target text has legal effects. The second characteristic is that legal translation is a system-bound discipline. This system tends to be confined within national and linguistic boundaries (Groffier, 1990, p. 314). Legal translators must find equivalents for culture-bound terms regarding legal concepts, procedures and institutions. The third characteristic Harvey (2002) found in his research is fidelity: *"achieving an equivalent impact on the target reader, which may justify substantial changes to the original text to respect the stylistic conventions of the target legal culture"*. This fidelity must be to the uniform

intent of the instrument, so not necessarily to the source text itself, but to the intent of this text. The final characteristic of legal translation is 'ambiguity and interpretation'. The language of law is made by humans and derives its interpretation in a specific nation from ethics and politics. It thus relies on natural language. This causes ambiguity in interpretation between different legal contexts. When there is no equivalence of an institution, a division, a concept or a term in the target language, it is the translator's task to choose what method of translation is best to use, as to keep the style, lexical structure and the juridical meaning accurate (Weston, 1983, p. 207). The notion of equivalence is also at the heart of translating EU legal texts. Within the EU, translating is seen as a process of communicating the original text by establishing a relationship of identity or analogy with it as well as with the general translation practice in the EU.

1.2 Legal systems

In order to understand the interpretation of law from one legal system to the other and its influence on legal translation, it is necessary to understand the differences in legal systems between the US and the EU. It is possible to contrast civil- and common-law systems by asking who has the power and initiative to guide and shape litigation. The US legal system is largely derived from the common law system, originating from English tradition, albeit with more codification than the traditional English common law system. EU law is a form of international law, formed in mainland Europe, in which countries have civil law systems, and is thus highly codified. The differences between these two systems influence the way lawyers and judges apply and interpret law. It is therefore important for legal translation to understand the differences in the legal systems.

1.2.1 Common law and the US

Common law is a legal system based on precedent and case law, and characterised by a series of specific legal procedures aimed at remedying specific substantive situations (Grossi, 2010). One of the main characteristics of common law is that it is mostly uncodified. However, in the US there is more codification than in traditional common law countries. An example of this codification is the US Constitution. The common law is the basis of the US legal system, but in the past some States contained settlers such as the Dutch, German and Swedes, and the common law had to accommodate for the civil law custom (Mauk & Oakland, 2018). Therefore, there are two main sources of US law: common law and statutory law. This means that for translation from a US source text into a target text it is necessary to find out what field of law is to be translated and whether this field is based upon the common law or on the statutory law. If the source text is based upon statutory law, it is more similar to the civil law systems, whilst if the field of law is based upon common law, it is interpreted more closely to a classic common law system, such as the one in the United Kingdom.

Another main characteristic of the common law system is the principle of *stare decisis.* This principle holds the requirement that courts follow decisions of higher-level courts within the same jurisdiction. The hierarchy in the US for the federal court system is based on a three-tier structure. The US District Courts are the trial-level courts. The US Court of Appeals is one tier up and the first appeal court, while the US Supreme Court is the highest court and thus the final arbiter of the law. Depending on the level of the court, a precedent can be considered mandatory, or it can be considered persuasive. Whether a precedent is binding or persuasive relates directly to the application of the principle of *stare decisis*. Supreme Court decisions are considered binding for the lower courts. The Supreme Court even has the ability

to strike down laws passed by legislators if those laws are deemed unconstitutional. Supreme Court decisions can only be overturned by the court itself, with a constitutional amendment, or if the US Congress introduces legislation to overturn a decision of the Supreme Court (Mauk & Oakland, 2018). Besides the principle of *stare decisis*, the courts in the US apply the law and instead investigate the facts of a particular case. This means that one of the key features of US law is that it is a case-based system of law that functions through analogical reasoning and an hierarchical doctrine of precedent.

1.2.2 Civil law and the EU

Within a civil law system, law is written down. This is also called the codification of law. EU law is highly codified. The predecessor of the EU, the European Economic Community (EEC), was established by six countries: France, West-Germany, the Netherlands, Belgium, Luxembourg and Italy. All these countries have civil law systems and thus most laws have been codified. The EU is itself not a state. The EU's power to act must be explicitly conferred upon it by its Member States. This is called the 'principle of conferral' and is codified in Article 5, first paragraph, of the Treaty of the European Union (hereafter: TEU). Civil law systems do not rely as much as common law systems on case law. The principle of *stare decisis* is not applicable. Written law provides the rules of decision for many disputes, and if a judge does have to go beyond the letter of a code in resolving a dispute, this ruling will not necessarily become binding for other courts (Fine, 1997). Instead, civil law systems focus on general principles that can apply in general.

1.2.3 The effect of law systems on translation

Common law systems and civil law systems each have their own characteristics, which includes its own vocabulary used to express concepts, its own way of categorising rules, and its own techniques for expressing and interpreting rules

(David and Brierley 1985, p. 19). For example, the law in common law systems is spread out over case law, where the law in civil law systems is written down in a systemised way. The law system influences the way people view and apply law and thus shapes the very function of law in a society. Historical and cultural development transposes into the law system of a specific country, leading to the fact that elements of one legal system cannot simply be transposed into another legal system (Sarcevic 1997, p. 13). Within law, linguistic phenomena coming from different cultural systems and structures are peculiar to each language and country, thus challenging the translator's skills in the area. Translating within one law system is easier then between two different law systems, because the terminology and the way the law is being applied differs. Whether the same division of systems apply to competition law, which is more of a globalised field of law, will be further explored in the third chapter.

1.3 Legal interpretation

Law needs to be interpreted. Interpretation is the first step for a legal translator to understand the source text before it can be translated into the target text. Legal interpretation is the process of using legal materials to ascertain what the law is, or, more precisely, to ascertain legal obligations, powers, rights and privileges. This is primarily done by the courts, but also by legal scholars, lawyers, and by legal translators. The competences and means of legal interpretation differ between the EU and the US, because the legal systems differ.

1.3.1 The ECJ and the US Supreme Court

The ECJ and the US Supreme Court are the highest-level legal interpreters in EU law and US federal law, respectively. Both the ECJ and the US Supreme Court are courts of general jurisdiction, which is typical in common law countries, but it is not typical in the civil law countries of continental Europe. The ECJ interprets European Union

law, one subject of which consists of EU competition law. The US Supreme Court interprets federal law and the US constitution. US antitrust law is part of US federal law.

Decisions by the ECJ are made as an indivisible court, which means that the court speaks with one institutional voice and no dissents, as is common in civil law systems. The US Supreme Court, instead, speaks with a multiplicity of individual voices, dissenting opinions, concurring opinions, and, at times, in important constitutional cases, with only a plurality agreeing on the reasons why the winning party is entitled to judgment in its favour. Supreme Court justices construct the law through a process of interpretation, accretion, experimentation, argumentation, and trial and error (Rosenfeld, 2006, p. 635).

1.3.2 Methods of interpretation

Law can be interpreted in different ways by judges; the most common of which are the teleological method and the textual method, which are used in the civil law systems. The textual (or literal) approach means that interpretation is about discovering the objective meaning of a rule, whilst within the teleological approach the goals of the drafters are kept in mind (Klabbers, 2017). With the teleological interpretation the judge aims to find the goal behind the regulation and the values that the regulation is trying to protect. The teleological and textual ways of interpreting law are centuries old. Plato already argued that laws can be interpreted literally or according to their spirit, and he advocated for a spiritual interpretation.

Voltaire argued the opposite, finding that interpreting law means to corrupt it. According to Murray (2010), such historic tension still exists between the search for the true intent of a legal norm and the desire for certainty and transparency in the application of the law. In this regard, the textual approach guarantees a high degree

of predictability and creates legal certainty. It is used when wording of provisions are clear and precise. The teleological approach is an exercise of a court's powers of judicial review when a provision is vague or can be interpreted in multiple manners, where the objectives pursued by the legislator are taken into account.

Newer approaches to interpreting law within the civil law system are the systematic approach, the judicial precedent approach, and the historical practices approach. The systematic method entails the reading of a specific law in light of the place this law occupies in the relevant regulation, and that regulation in the larger scheme of the law. Within the historical practices approach, the judge bases its interpretation on the sources of the current regulation, such as legislative history. The judicial precedent-approach is similar to the common law principle of *stare decisis*, and is used in civil law systems to comply with established case law.

These interpretation methods are commonly used in civil law systems in the EU. The ECJ gives priority to the teleological approach over other methods of interpretation, since the Treaties itself are very purpose-driven. The ECJ uses the teleological interpretation seeking to achieve the objectives set out by the Treaties, especially those provisions regarding greater EU integration. It takes into account not only the teleological interpretation of a single provision but its teleological interpretation in the whole context of the EU legal order.

The US Supreme Court can use the same main approaches for interpreting statutes. US Supreme Court Justice Oliver Wendell Holmes (1899) defines textualism: *"We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used"*. So, textualism looks at the ordinary meaning of the language of the text. Only when on

the very face of the statute, it is clear that there is a mistake of expression, textualists will allow for the interpretive doctrine of *lapsus linguae* (slip of the tongue) to be applied. The purposive approach, which is the common law version of the teleological method, is an approach to statutory and constitutional interpretation under which common law courts interpret a statute within the context of the law's purpose. The US also has a 'weak purposivism' method, where courts consult the statute's purpose only as a device for interpreting vague provisions of its text and in no circumstances override the text.

Where the ECJ has a tendency towards the teleological approach, in the US the tendency for textualism or purposivism depends on which approach is followed by the majority of the judiciary. The US Supreme Court justices tend to be classified as either progressive or conservative. Purposivism is often associated with progressivism, and textualism with conservatism. Buchanan & Dorf (2020) find that textualism is often used as a "*smokescreen by conservative judges to reach ideologically acceptable outcomes*", and the same has been said for purposivist justices. In the 1970s purposivism was the main approach of the Supreme Court, but nowadays the Court has a strong tendency towards textualism. Even modern purposivists take the statutory text as their starting point.

1.3.4 The effect of interpretation methods on translation

The method of interpretation has effect on translation. Civil law legal systems general have a purposive orientation. This means that not only the words in the legislative text, but also the intention of the legislator is taken into account. Legal texts within civil law systems must both be flexible and unique in order to adapt to legal purposes. This means that civil law texts use broad wording and principles that can be applied in many different cases. Common law systems have an indictive legal tradition, where every word has its own specific weight. For legal interpretation this

means that words are pulled apart, so as to disambiguate the text. This tension between precise accuracy and flexibility makes translation between these systems so difficult. When translating a common law text, a legal translator has to very carefully choose the correct term, because terms have such importance in a common law system. The other way around, a legal translator might not find equivalent terms for the broad general principles that the civil law systems use.

Chapter 2: EU & US Competition Law

2.1 Defining competition

Competition is described as "*a process of rivalry between firms seeking to win customers' business over time*" (Whish & Bailey, 2018, p. 4). More specifically, according to the Directorate-General for Competition (2014), competition is *"a basic mechanism of the market economy which encourages companies to offer consumers goods and services at the most favourable terms. It encourages efficiency and reduces prices. In order to be effective, competition requires companies to act independently of each other, but subject to the competitive pressure exerted by the others"*.

The idea of a marketplace where buyers and sellers meet is key for competition (Lorenz, 2013). Buyers prefer the prices to be as low as possible, and sellers prefer them to be as high as possible. Unless there is a monopoly, sellers will have to compete with one another. This will result in more choice for consumers, more innovation on the part of the sellers, lower prices and efficiency. A monopoly is a market where there is only one supplier. That supplier acts as a price setter. The opposite of a monopoly is a market with perfect competition. Perfect competition is solely a theoretical concept; it is a utopia that assumes products are homogeneous, that there are a large number of firms in the market that all act as price takers, that there are no barriers to entry and exit and that all sellers and buyers in the markets have perfect information. This would lead to prices being as low as possible and a maximum output. This would then lead to maximise social welfare and the achievement of allocative and productive efficiency, whilst in a monopolist market these efficiencies are not achieved and even some of the consumer welfare being transferred to the monopolist in the form of profit.

Any real-world market will lie somewhere between a monopoly and perfect competition; where exactly depends on the market in question. In order to assess the degree of competition that could be achieved in a given market, factors such as the number of firms, the cost structure, the level of product differentiation, the significance of barriers to entry and the available information concerning the market all play a role (Lorenz, 2013).

2.2 US Competition Law

Competition law has its origin in the US at the end of the 19th century during the period of industrialization. Improvements in the transportation and communication sectors led to a large increase of the respective markets' sizes. Firms exploited these economies of scale and scope, and at the same time mergers became legalised. This led to an impressive merger wave in the 1880s and 1890s, which resulted in large firms within large single markets.

2.2.1 The Sherman Act

The Sherman Act was enacted by the US Congress as a criminal federal statute to pursue the abovementioned trusts and other unfair business practices. The act passed almost unanimously. The act is enforceable by public agencies and consists of criminal penalties of up to three years. It consists of two sections. Section 1 of the Sherman Act focuses on concerted action between two or more individuals or entities:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony […]."

Section 2 focuses upon the establishment or maintenance of a monopoly by a single individual or entity:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony […]".

The first time the Supreme Court truly enforced the Sherman Act was in United States v. Trans-Missouri Freight Ass'n (1897), in which it established that all price agreements are illegal. This was the first practical application of Section 1 of the Sherman Act. In 1911 the American Tobacco trust, a merger of five tobacco companies engaging in a campaign of purchasing minor companies, controlling stock interest in other competitors and starting price wars to increase its power and drive other manufacturers out of business, was condemned and dismantled by the Supreme Court for attempting to monopolise the market and therefore restraining trade. This case was the first successful attempt to apply Section 2 of the Sherman Act.

The language of the Sherman Act is very broad. In fact, the language is so broad, that the Supreme Court argues that a pure textual interpretation of the Sherman Act would mean that also agreements that do not harm competition would fall under its scope (Whish & Bailey, 2018). According to Crane (2021), "*Scholars and judges widely agree that the U.S. antitrust statutes are open-textured, vague, indeterminate, and textually unilluminating*". This would then essentially delegate the responsibility for actually defining violations of the Sherman Act to the federal courts, using the purposivist approach. It would also mean that antitrust law under the Sherman Act is a common law statute. The latter may seem a *contradictio in terminis*, because a statute is written

law, but because the statute is seen as vague it essentially delegates the application of antitrust law to the courts.

2.2.2 The Clayton Act

In 1914 the Clayton Act was established which extends antitrust law to cover mergers capable of reducing competition, to include private antitrust lawsuits, to prohibit price discrimination between different purchasers, and to prohibit tying arrangements and exclusive dealings. The Clayton Act codifies some *per se* prohibitions (i.e. price discrimination and tying arrangements) that were established to be anticompetitive by US Supreme Court in its jurisprudence. It thus codifies important jurisprudence, which is uncommon for a common law system, but normal for a civil law system. The Clayton Act is also the answer to the issue that mergers were not yet illegal, yet some mergers can severely affect the amount of competition in a given market.

Interestingly, the two main antitrust acts have inherently different characteristics. The Sherman Act is a common law act, in the way that the Supreme Court finds the statutory texts to disclose little of importance. The courts instead use dynamic judicial interpretation. The Clayton Act is codified jurisprudence, which is a typical characteristic of a civil law system. Within antitrust case law it is mainly the Sherman Act that is being applied by the courts. Therefore, the way US antitrust law is being interpreted by the US Supreme Court leans more towards common law than towards civil law, and the Court tends to interpret the Clayton Act in a common law-manner as well.

2.3 EU Competition Law

For a long time in Europe less importance was given to antitrust with respect to the US. The reason for that was that European countries are smaller than the US, and the

problem of large firms was not so relevant. On the contrary, there was the need to reinforce the size of the firms in order to compete with US firms. Each country wanted to protect their 'national champion', which allowed for monopolist companies within European countries.

2.3.1 European integration

This changed when European integration started taking place. European integration commenced with a common market for coal and steel. The principal aim was to create a common market without barriers for coal and steel. Competitive markets are the only instrument for ensuring such aim. Since the 1957 Treaty of Rome, with the establishment of a common European market for all goods, competition rules have been part of European law. There were multiple reasons for the adoption of competition rules in the EEC Treaty, such as diminishing the danger of German economic power, as well as the principle of free competition to reach market efficiency, avoiding discrimination, economic progress and the welfare of citizens and the establishment of the common market. The European Coal and Steel Community's competition law provisions were derived from a draft prepared by the Harvard school lawyer Robert Bowie at the request of Jean Monnet (Jones and Sufrin, 2016). The provisions by a US legal scholar thus served as a model for the predecessors of Articles 101 to 109 TFEU.

2.3.2 Article 101 and 102 TFEU

Sources of EU law can be divided into primary and secondary legislation. The most important source of competition law is Title VII, Chapter 1 TFEU. There are two sections. The first section, consisting of Articles 101 up and until 106 TFEU, constitute anti-competitive agreements and abuse of dominant position, as well as giving the proper competences for executing competition law to the authorities, mainly to the Commission.

The main articles on material antitrust law are Articles 101 and 102 TFEU. Article 101, first paragraph, TFEU codifies the prohibition of forming a cartel and sums up the hardcore restriction.

"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object of effect the prevention, restriction or distortion of competition within the internal market […]".

Article 102 TFEU prohibits the abuse of a dominant position by one undertaking:

"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. […]"

2.3.3 State aid law and mergers

The second section, Articles 107 up and until 109 TFEU, codifies a special branch of competition law: EU state aid law. This section governs the measures necessary to prevent anti-competitive state aid and is not addressed to undertakings but to the Member States. The provisions aim at preventing distortions of competition through the granting of economic benefits to selected undertakings from State resources. The main provision of this section is Article 107, first paragraph, TFEU, which prohibits State aid incompatible with the internal market:

"[...] any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the

production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

Secondary regulation regarding EU competition law consists of law regulating mergers. The EU Merger Regulations controls mergers that take place at EU level. The regulation is binding and directly applicable to all the Member States. The regulation requires compulsory notification to the Commission by those parties involved in forming a concentration which exceeds certain turnover thresholds.

Article 101 and 102 TFEU, as well as Article 107 TFEU on State aid, follow a long run socioeconomic movement promoting integration of the internal market in order to create an ever closer union and a level playing field through economies ties between the Member States. Consumers are protected by maintaining an open market and preserving alternative products. This entails that a conduct has more chance of being found anticompetitive if it somehow creates obstacles affecting the open access of other firms to the market or harm a level playing field within the EU (Levita, 2020).

Chapter 3: Interpreting and translating EU and US competition law

3.1 Interpreting competition law in the US

In the previous chapter it was established that the US Supreme Court finds the Sherman Act to not be precise enough for textual interpretation, and instead to give to the Court a 'mandate' to create a common law of competition, by using the purposivist interpretation. Eskridge and Ferejohn (2001) understand the Sherman Act has created an "*ongoing economics-focused dialogue among judges, executive branch officials, private attorneys, academics (especially economists), and legislators and their staffs.*" Interpretation of the statute is "*purposive rather than simple text-bounded or originalist,*" and US antitrust laws "*generate a dynamic common law implementing its great principle and adapting the statute to meet the challenges posed to that principle by a complex society*". This then leads to discussions within the Supreme Court of either a progressive common law-approach, or a conservative one.

3.1.1 Progressivism and the Harvard school

Competition law is very closely aligned with economic models of supply and demand, in order to determine whether a company is indeed (attempting to) monopolise the market, or whether the effect of companies working together is indeed detrimental to consumer welfare. In the US there are two main schools of thought regarding economic interpretation of competition law. The first school, the Harvard school, was first used by the US Supreme Court in 1940 in Socony-Vacuum Oil Co. v. Smith (1939), and is closely linked to progressive politics. In this case the Supreme Court reaffirmed the principle of *per se* prohibition of price agreements, just as it was first established in the aforementioned Trans-Missouri Freight Association-case, whilst in the time between these two cases the concept of full prohibition of a certain conduct was let loose as a reaction to the Great Depression. This means that there are specific conducts that are illicit *per se* given the anticompetitive effects they

produce and cannot be reserved under an economic efficiency perspective. The strictness of the Supreme Court and its reasoning behind it is clearly stated in United States v. Topco Assocs., Inc. (1972):

"Antitrust rules in general, and the Sherman Act in particular, are the Magna Carta of the free enterprise. […] Each and every business - no matter how small - has the freedom to compete. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy".

All in all, the Harvard school aims at reducing the discretion of the courts by establishing *per se* violations in order to create legal certainty. It was no longer allowed for lower courts to take the specific circumstances of a case into account once the Supreme Court established a *per se* violation. This period can be summed up as a strict interpretive period of the Sherman Act and the Clayton Act.

3.1.2 Conservatism and the Chicago school

The Harvard School was criticised by the University of Chicago, which stressed the efficiency rationale. With the aim of removing progressive political preferences from antitrust legal analysis, Chicago scholars argued that maximizing consumer welfare should be the sole goal of antitrust law. They held that markets were more robust and self-correcting than existing antitrust policy allowed and that government interventions often accelerated market inefficiencies rather than making them more competitive (Philips Sawyer, 2019). This resulted in business practices once considered anticompetitive to become legal. The applications of antitrust law narrowed, starting in 1977 when the Supreme Court adopted this rationale in Continental T.V., Inc. v. GTE Sylvania, Inc (1977). The Supreme Court decided in this case that non-price vertical restraints should be subject to a rule of reason. This

judgement adheres to the Chicago school, where *per se* rules can impede the very behaviour the antitrust laws are designed to protect - and therefore, one must assess competition cases keeping in mind the 'rule of reason'.

The conservative view of antitrust law is closely linked to the Chicago School. Since the 1990s the Supreme Court has acknowledged some of the limitations of Chicago-style antitrust policy. The downside of the Chicago school is that the Court trusted markets over government intervention, with critics stating that the Court did not evaluate properly enough dominant firm conduct, mergers and acquisitions, and vertical restraints for anticompetitive market effects (Philips Sawyer, 2019). Nowadays, there is a mix of Harvard, Chicago and post-Chicago[1], depending on the severeness of the anticompetitive conduct, and on the composition of the Supreme Court. At the moment, the Supreme Court consists of mostly conservative justices.

All in all, the Supreme Court does respond to shifting political imperatives and economic theories. According to Philips Sawyer (2019), "*we might rightly conclude that the antitrust wheel will continue to turn*" because "*new economic thinking often responds to changes in both economic conditions and political preferences*". These changes are already starting to show, with a shifting viewpoint towards more enforcement with regards to the digital economy. A rule of thumb is that antitrust enforcement is funded more by the federal government when the democrats are in power, and less when republicans are in power, because the republicans put more faith in the market being able to optimize itself. US Assistant Attorney General Jonathan Kanter wants to reinforce the enforcement of US antitrust laws. Kanter wants to focus on protecting competition, adapting current antitrust laws to reflect market realities,

[1] The post-Chicago school relies on behaviouralism, game theory and economic modelling to find out what the desired level of competition is in a market and how a company (or multiple companies) negatively influences such a market.

and reviving the enforcement of Section 2 of the Sherman Act. He will focus on protecting competition and move away from what has become known over the years as the 'consumer welfare standard', which he notes is actually not reflected in the actual language of the antitrust laws (Kanter, 2022).

3.1.3 Textual interpretation of US antitrust law

Kanter's statement on the language of US antitrust law not mentioning a 'consumer welfare standard' reflects a change in perspective towards the purposivism of US antitrust law – leaning again towards a more progressive approach. Until now it has been widely accepted that US antitrust law needs to be interpreted by the Court, however, not all scholars agree that the semantics of the text of the Sherman Act are actually so broad that the textual approach could not be used. According to Farber & McDonell (2005), "*the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest*". The Supreme Court has, Crane (2021, p. 1207) argues, chosen not to follow the textual meaning of the Sherman Act. Crane argues that the Court departed from text and original meaning towards reading down the antitrust statutes in favour of big business. He finds that the courts read an "*a textual rule of reason into Section 1 of the Sherman Act to transform an absolute prohibition on agreements, restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite*". So, well it is widely accepted that the purposive approach is used to US antitrust law, with either a conservative or progressive approach to US antitrust law, some scholars do actually see room for a textual interpretation of the Sherman Act. This would lead to a much more stringent enforcement of US antitrust law, because the statute leaves almost no room for any agreement that restricts trade.

3.2 Interpreting competition law in the EU

When the US was moving away from the Harvard approach and towards the Chicago approach, EU competition law was just established and started taking shape. The regulators of the EU took inspiration from US antitrust law for establishing its own rules. The EU neither fully adopted the Harvard school, nor the Chicago school, but was influenced by both schools: there is a significant amount of codification of *per se* rules, but there are also exceptions.

3.2.1 Competition law for an internal market

Competition policy in the EU exists in order to apply rules to make sure companies compete fairly with each other, so that there is more choice, innovation, cheaper goods and services and better quality of goods and services. According to the Commission (2014), competition policy is a "*vital part of the internal market*". The goals of EU Competition law are the creation of a competitive market economy and the completion of the internal market. The first goal means creating an internal market that is characterised by undistorted competition. This goal is mentioned in Protocol No. 27 on the internal market and competition, in which the contracting parties consider that "*the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted*". The second goal, also called the goal of market integration, is one of the main overall goals of the EU. Article 26 sub 1 and 2 TFEU describe both this goal and the definition of an internal market:

"The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market […]. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties".

A competitive market is the only instrument for ensuring the aim of an internal market without frontiers. Besides EU-based goals, competition policy also seeks to protect competition for the benefit of society as a whole. According to the Commission (2009), this does not mean each and every competitor needs to be protected: *"The Commission is mindful that what matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market"*.

Above mentioned goals of EU competition policy are the reasons why the EU is fighting anti-competitive behaviour, and needs to be kept in mind while interpreting EU competition law. It is meant to protect the process of fair competition by prohibiting agreements that restrict competition, by prohibiting the abuse of a dominant position by an undertaking, by preventing mergers that could lead to a significant decrease in effective competition and by prohibiting State aids that lead to distortions of the market.

3.2.2 Workable competition and the European School

As discussed under 3.1, there are multiple factors for creating the optimal amount of competition in a given market, such as the number of firms and the level of product differentiation. In the EU, all these factors combined are called workable competition, a term adopted from John Clark[2]. The Court of Justice of the European Union has endorsed the concept of workable competition and has defined it in Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities (1977):*"The requirement that competition shall not be distorted implies the existence on the*

[2] Clark first mentions the concept of workable competition in his 1940's article 'Toward a Concept of Workable Competition', in *The American Economic Review*, Vol. 30, No. 2, Part 1.

market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market".

Article 101 and 102 TFEU are thus interpreted teleologically by the Commission and the ECJ. The goals of EU competition law are the creation of the internal market and consumer welfare.

Article 101, third paragraph, TFEU allows for an exemption to the prohibition of cartels if the benefits for society outweigh the negative effects. When establishing EU competition law, the EU legislators have mainly focused on consumer protection. With the Article 101, paragraph 3, TFEU-exemption they have also given relevance to productive efficiency. According to Baldwin et al. (2012), this exemption incorporates a codified application of the rule of reason of the Chicago school. Both the European school and the Chicago school agree that in a market the sum of producer and consumer surplus should be maximised.

According to most other scholars, however, a Chicago school-style of interpretation does not fit EU competition law (EE&MC, 2016). The European school shares some values with the Chicago school, but also differs on key issues. In general, economics do not play as big a role in competition policy in the EU compared to the US. There is no big divide between approaches in Europe, like there is with the progressive Harvard school and the conservative Chicago school. The main concern is raising competitive opportunities for small and medium-size firms, as well as raising the economic level of worse-off nations, and general notions of 'fairness'. The main

difference between the Chicago school and the European school is thus the difference in the goals that competition policy aims to reach:

"Tension emerges in particular when economic scholars with a Chicago School background advocate their school of thought and economic analysis in EU competition law cases. An application of the Chicago laissez-faire ideology to EU competition problems simply does not fit with the aims of EU competition law, which is embedded in the clearly pre-defined economic order of the Lisbon Treaty thereby integrating the values and objectives of the European society."

So, albeit both schools seem to promote consumer law, only within the EU treaties it is laid down how wealth gains should be equitably and fairly distributed between members of society. The position of the European school is that welfare gains should be attributed fairly and equitably between both consumers and producers. Within the Chicago school consumer welfare is enhanced by the creation of efficiencies. Which market participant receives the actual wealth is not valued. It considers efficiency gains as politically neutral, and regards wealth transfer to be politicised (Posner, 1981, p. 92). The term consumer welfare is thus interpreted differently by both schools.

3.3 Effect of interpretation on translation

Both EU and US competition law addresses broadly the same categories of anticompetitive behaviour - agreements, monopolisation, mergers - but the wording and interpretation of the legislative provisions varies. There are vast differences in economic interpretation, political interpretation and legal interpretation. These differences in legal interpretation have influence on translation practices and methods. In the first chapter it was established that one of the central challenges

facing translators of legal texts consists of the ability to fully understand the requirements of the various legal systems worldwide. Legal translation bears the added burden of taking into account legal aspects that are not found in other texts. Comparative law and legal interpretation, therefore, plays an important role in legal translation, as it allows for the identification of similarities and differences among legal systems. Translating competition law is a form of legal translation. It differs from other forms of legal translation, because competition law in general is a branch of law which transcends national boundaries more easily, and therefore has more universal terminology compared to other branches of law. EU competition law lies at the heart of EU law and European integration. It has contributed significantly to the establishment of the internal market (Patel & Schweitzer, 2013). It is originally based upon US antitrust law, and therefore shares a lot of the same terminology. US antitrust law was the first of its kind in the world. It has undergone some fundamental changes in its interpretation, which has in turn driven EU and US terminology further apart.

3.3.1 Antitrust Common Law vs. Competition Civil Law

Following the common law tradition, antitrust law in the US is more court-based compared to EU competition law. The US federal courts elaborate upon open-ended statutes through an iterative process of case law. This is a bottom-up approach. Litigants, including antitrust government agencies, and defendants plead their version of antitrust interpretation to the court. The European system, on the other hand, was built from the top down, with the Commission having a significant *de facto* discretion of how competition law is enforced (Fox, 1999). So, US antitrust law is interpreted as a common law statute, and therefore the Supreme Court is much more of a law-maker. In the EU, instead, competition law is significantly more codified, and the ECJ acts more like an investigator. The ECJ 's role is to establish the

facts of the case and to apply the provisions of Articles 101-109 TFEU and secondary competition regulations.

For legal translators it is important to understand that each national law constitutes an independent legal system, because this means that each system has its own terminology, underlying conceptual structures, rules of classification, sources of law, methodological approaches and socio-economic principles. All these factors have major implications for legal translation when communication is channelled across different languages, cultures and legal systems (Šarčević, 2000). One of the key features of US antitrust law is that it is a case-based system of law that functions through analogical reasoning and an hierarchical doctrine of precedent, where EU competition law functions through interpreting the codified laws in the TFEU. Furthermore, the function and style of the legal doctrine differ in the US compared to the EU. Within civil law systems the focus is on legal principles. These principles are abstract and can apply in many different cases. Within the common law system the focus is on fact patterns; the analysis of facts and the extraction of specific rules, and then the determination of a narrow scope of each rule (Cao, 2007).

According to De Groot (2006) it can overall be said that the degree of difficulty of legal translation is related to the degree of affinity of the legal systems and languages in question. So, the wider the system gap between legal systems, the wider the legal language gap. For translation into Dutch this means that translating from EU English is less difficult than translating from US English. This is especially true in the case of competition law, because Dutch competition law is a codification into Dutch law of Articles 101 up and until 109 TFEU. Furthermore, the case law of the ECJ is also applicable in the Netherlands.

3.3.2 Competition vs. Antitrust

A difference between EU competition law and US competition law that stands out when interpreting is the translation of 'competition law' itself. In the US the term used is 'antitrust law', whilst in the EU 'competition law' is more common. There is a difference in interpretation between these two terms: competition law also includes European State aid law, while antitrust law only deals with cartels, abuse of dominant position or monopolisation and mergers. State aid law exists only within the European Union, and was introduced to prevent a race to the bottom between different member states with regard to giving subsidies to large national companies. It is codified in Article 107 TFEU. Antitrust can also be used in a translation to EU English, but only if State aid law is excluded from the definition of the term. This is the case when the legal text is about cartels, abuse of dominant position, and mergers. Translating EU competition law into EU antitrust law would therefore be an error if in that particular text State aid law is included in the definition of EU competition law.

In Dutch the translation for 'competition' is '*mededinging*'. Competition law is called '*mededingingsrecht*'. Because Dutch competition law is a codification of EU competition law, aforementioned translation sees to the EU definition of competition law, so including state aid law. The translation for 'antitrust' is '*antitrust*'; the translation method used here is borrowing. Sometimes a literal translation of antitrust to '*antikartel*' is used. After all, a 'trust' refers to a group of businesses that team up or form a monopoly in order to dictate pricing in a particular market. However, as we have seen in the second chapter, US antitrust law encompasses more than solely the formation of cartels. If a particular source text is only about cartels, this translation could be used. If a source text is about more than cartels the

translation of antitrust into '*antikartel*' does not suffice and, instead, *'antitrust'* should be use.

3.3.3 Undertaking vs. Person

In the sections above it stands out that the Sherman Act uses 'person' where the TFEU uses 'undertakings'. Albeit this may seem a narrow legal interpretation, the difference between the terms 'undertaking' and 'person' has major legal consequences. This is a difference in the choice of the legislator and does have consequences for the interpretation and translation of competition law. In Section 7 of the Sherman Act the word person is defined: *"[...] shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."*

The concept of an undertaking is not codified the EU treaties, and had to be defined by the ECJ. The ECJ uses a functional approach and first defined the concept in Klaus Höfner and Fritz Elser v Marcotron GmbH (1990): *"The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed"*. The concept of economic activity covers all commercial functions consisting in offering goods and services on a given relevant market irrespective of the source of remuneration. According to the ECJ in J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten (2002), it does not matter whether the undertaking is actually legally a company; an undertaking under EU competition law can also be a public authority that is involved in an economic activity. The same entity may qualify as an undertaking for purposes of EU competition law with regard to one activity and may fall outside the scope with

regard to another activity, according to ECJ in Firma Ambulanz Glöckner v Landkreis Südwestpfal (2001). It is also irrelevant whether the services in question are not at the current time offered by private undertakings. If it is possible for the activities to be carried out by private entities, then it constitutes an economic activity.

So even though the EU undertaking seems to be smaller in definition at first sight, it is actually very broad. The main difference between the choice of person versus undertaking from a legal interpretation perspective has to do with the criminal law aspect of the Sherman Act which the TFEU does not have: the fines imposed by the Commission under Article 101 or 102 TFEU are pure administrative fines. No one can go to jail for violating a competition regulation in the EU, whilst in the US that is a possibility under the Sherman Act. This means that US antitrust law is not only administrative law, but also criminal law, where in the EU competition law is solely administrative law.

For translators it is important to be aware that US antitrust law has a criminal law aspect. Not all target text readers may be aware of the criminal aspect of US antitrust law, which could have severe legal consequences in case charges will be brought against a European company for a possible violation of the Sherman Act. Within the EU only the undertaking can be fined, but in the US managers could possibly be prosecuted criminally. It is therefore useful to translate 'person' in the Sherman Act with *'natuurlijk persoon'* in Dutch, so as to make clear that it not only businesses that can be prosecuted under the Sherman Act, but also those persons running these businesses.

With regards to the translation of the EU term 'undertaking': this is a specific 'EU English' word, which means that the word does not exist in US English. Because an

undertaking is so broad, also including non-profits and even government agencies that act on the private market, it is best to use borrowing as a translation method when translating into US English. The word 'undertaking' was also uncommon in British English before the United Kingdom joined the European Economic Area. According to Biel and Sosoni (2019), *"in respect of undertaking, the top authority on British English, Oxford English Dictionary, which lists undertaking as being used since the 14th century mainly in the sense of action or a pledge or promise (e.g. a contractual obligation), does not record the sense of a business or a company in its undertaking entry and the closest related sense is much more specialised, which is a business or occupation of a funeral undertaker only. So in this case the EU generic term coincides with a local narrow term. This is illustrative of the translators' tendency to resort to literal equivalents, calquing solutions from other languages, and at the same time resorting to the existing words which have an established (different) meaning in a given language"*.

For translating into Dutch, it is best to translate it to *'onderneming'*, mainly because this is the term used in the Dutch version of the TFEU. Translating 'undertaking' into *'bedrijf'* could be confusing, as there are differences in legal interpretation between *'kleine- en middelgrote ondernemingen'* and *'midden- en klein bedrijf'*. The first is the definition of small and medium enterprises under EU law (and is used often when practising EU competition law), and the second is the definition of small and medium enterprises under Dutch law. These legal definitions differ from one another, and it is therefore better to consistently translate 'undertaking' to *'onderneming'*.

3.3.4 Monopolisation vs. Abuse of Dominant Position

The US ban on monopolisation finds no exact parallel within the EU. There is a case of monopolisation under the US Sherman Act (including attempts to and

conspiracies to monopolize) if one firm has sufficient market power to control prices and exclude competition. Both anticompetitive behaviour and an intent to monopolise need to be established. According to the US Supreme Court, possession of monopoly power exists from seventy percent of the market shares. To prove the intent to monopolise, there needs to be a wilful acquisition of such market shares and the maintenance of such power.

Article 102 TFEU codifies the prohibition of the abuse of a dominant position by an undertaking. A dominant position is not the same as a monopoly or attempt to monopolise. The ECJ defined a dominant position in United Brands Company and United Brands Continentaal BV v Commission of the European Communities (1987) as a *"position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers"*. The ECJ specifically added in Hoffman-La Roche & Co. AG v Commission of the European Economic Communities (1979) that such a position does not preclude some competition, *"which it does where there is a monopoly or quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment"*. This dominant position can be found by a combination of multiple factors, such as having a significant market share, having a dominance as a consequence of a technologically leading position, and being active on a market with barriers to entry.

Dominance itself is not unlawful; a firm can grow to dominance by lawful competition. Where the presence of a dominant position can be objectively

established, the abuse of such a position is much more subjective. Convictions for abusive practices are grounded on the existence of a potential asymmetry among undertakings. This means that some practices are prohibited for some undertakings and allowed for others. It is the behaviour of the specific undertaking that matters, and that behaviour is abusive if it has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

Monopolisation and abuse of dominant position thus seem to be similar at first glance, but actually have different legal meaning. In Europe, dominant firms have "*a special responsibility not to distort competition*", according to the ECJ in France Télécom SA v. Commission of the European Communities (2009). The idea of distortion extends further than the closest parallel in U.S. law, which is the prohibition of actual and attempted monopolisation. The US version of Article 102 TFEU - the rules on exclusionary conduct - are much less strict. Also, the EU's threshold for establishing market dominance is usually lower than the US one. In US antitrust law even a market share of 100% can be treated as insufficient where there is ease of entry for competitors. The Commission however, finds a dominant position usually to start from 50% - and under certain conditions already at 40%. With regards to conduct is excessive pricing, for example, this is seen as a classic violation of Article 102 TFEU, but it does not cause a breach of the Sherman Act. US competition law also treats vertical restraints more leniently than EU competition law does. So, conduct declared illegal under Article 102 TFEU might be legal under US antitrust law if a US firm with monopoly power engages in it. US antitrust law is not as regulatory as EU competition law but rather concentrates on preserving conditions, whereby free-market forces can constrain price and ascertain optimal production (Fox, 1999).

Thus, monopolisation and abuse of dominant position may at first glance seem functionally equivalent, but in fact that is not the case. A legal translator should be aware of the differences in legal interpretation between these two legal terms in order to avoid using a 'false friend' between these languages. For translating from a target text into Dutch, the correct translation for the US 'monopolization' is *'monopolisering'*, and the translation of the EU's collocation 'abuse of dominant position' is *'misbruik van machtspositie'*. It is important to maintain this collocation both in the source language as in the target language, so that it is clear that the terminology follows from Article 102 TFEU.

4 Interpretation of competition law by the Courts and its effect on translation

Law is always changing with the evolving of society. Competition law is not immune to these dynamic society-driven processes. Although it is guided by economic analysis, it is also possible to identify distinct social, economic and political foundations, which give competition law different goals on each side of the Atlantic, and thus foster the diversity between EU and US competition law. According to Kovacic (2001), different levels of economic development, market realities, government and enforcement structure all dictate differentiation in the composition of national competition provisions and their implementation. In the corpus of typical antitrust violations chosen below, it is shown how the ECJ and the US Supreme Court actually interpret competition law. The corpus in this chapter consists of typical antitrust violations that have occurred in both the EU and the US. It is impossible to discuss all types of anticompetitive conduct in this research. A selection has been made based upon Article 102 TFEU and upon relatively recent jurisprudence in the conducts that fall under Article 102 TFEU. These typical anticompetitive conducts form competition law terminology. Terminology is the most visible part of the language of law. Terms are lexical units. They are supported by their definition, and historically and culturally anchored in their legal tradition. It is up to the translator to identify equivalence between source law terminology and target law terminology, or, if there is no equivalence, to deal with such a situation by choosing the correct translation method. It is therefore necessary to analyse the source term in comparison to its potential equivalent in the target language.

4.1 Tying

Tying is the practice of conditioning the sale of one product (the tying good) on the sale of another (the tied good). By requiring a consumer to purchase one good or service in connection with another product, the seller reduces consumer autonomy and restrains competition in the market for the tied product.

4.1.1 Tying regulations

Because tying interferes with competition, it is traditionally illegal *per se* in the US, and also breaches Article 102 TFEU. EU and US competition law thus seems similar when it comes to tying practices. Within the field of software however, manufacturers can often present compelling cost-saving arguments when faced with a tying accusation. The US Supreme Court and the ECJ have responded differently to these arguments.

4.1.2 US: United States v. Microsoft

In United States v. Microsoft Corporation (2001), the plaintiffs alleged a *per se* tying liability, while Microsoft countered with an integrated products argument. The US Circuit Court reasoned that software bundling must create efficiencies for consumers because even firms without market power (and thus unable to coerce consumers into purchasing a tied product) bundle software. With such consumer efficiencies in mind, the court found that tying charges stemming from software bundling would no longer be subject to a per se analysis. Instead, software bundling is to be analysed under a more flexible rule of reason. So, even though tying was laid down by the US legislators in the Clayton Act, which is a much more semantically precise statute compared to the Sherman Act, the Supreme Court still does not use the textual approach and instead interprets tying dynamically under a conservative purposive approach.

4.1.3 EU: Microsoft versus Commission

In its 2004 decision, the Commission scrutinized Microsoft's practices, including the bundling of Windows Media Players and Windows OS. The Commission fined Microsoft € 479 million for violating Article 102 TFEU. First of all, the Commission established a dominant market for the tying product (Windows OS). The Commission found Microsoft to have more than 90% market share. It also found that there were significant barriers to entry for potential competitors. For establishing abuse of such dominant position, it found the fact that it was not possible to buy Windows OS without Windows Media Player to deprive customers the ability to choose freely. Finally, it rejected the justifications stated by Microsoft – that uninstalling it was possible, and that competing media players were downloadable and popular in use – by stating that the sheer prevalence of the abuse of dominance precludes the Commission from entertaining procompetitive justifications, because "*the market may already be tipping in favour of [Windows Media Player].*" Microsoft appealed this decision, but the GC ruled in favour of the Commission.

4.1.4 Transatlantic legal interpretation of tying and its effect on translation

When it comes to tying practices in software, the US and the EU have different approaches. The US was not pleased with the decision of the Commission and the ruling of the GC, as it would have preferred the EU to also move towards a rule of reason approach in software tying cases:

[…] it is unfortunate that the largest antitrust fine ever levied will now be imposed in a case of unilateral competitive conduct, the most ambiguous and controversial area of antitrust enforcement."(Hewitt Pate, 2004).

For interpreting EU to US competition law and vice versa it is thus important to keep in mind the difference in strictness when applying tying regulations in the case of software. This is especially important for the political sensitivity regarding this topic.

In the statement above it is clear that the US finds the EU to be too harsh on the US's national champions. Where in the US a software bundle *potentially* breaches US competition law, in the EU a software bundle *actually* breaches EU competition law. The Commission and the ECJ interpret tying textually. In Article 102 TFEU it is stated specifically that it is prohibited for dominant undertakings to make the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract. The ECJ also uses a teleological approach, keeping in mind the goal of the internal market by ensuring sufficient competition in the market. It is not willing to create more room in the case of software tying, because it want to ascertain a level of competition remains in the product market.

The US Circuit Court did not follow its original approach of *per se* violation of tying and therefore violated the principle of *stare decisis*. The shift from the progressive Harvard School to the conservative Chicago School influenced this decision. The US Circuit Court used a teleological approach to US antitrust law by reasoning that there were consumer efficiencies to the bundling of software, and thereby moving to a rule of reason approach. So, even though both the ECJ and the US Supreme Court use (at least partly) the teleological approach, the outcomes in the respective cases and therefore the interpretation of competition law differ. This can be traced back to the different goals in competition law between the US and the EU, where the US almost solely focuses on consumer efficiencies, and the EU keeps its goals of the internal market in mind.

The term 'tying' is interpreted differently in the US compared to the EU, but only in software cases. This distinction is important for translators to be aware of, because

before the US Circuit Court's judgement, the legal terms were interpreted similarly. In the case of software, translators need to know about the rule of reason approach to software, because it means that the term 'tying' does not have the same meaning as in non-software cases. So, in normal tying cases the word 'tying' has the same meaning in both the EU civil law system and the US common law system. This is because competition law is a globalised field of law, which means that most legal terms are universal. However, when translating a legal text about tying in the field of software, the term has a different legal meaning. The meaning of tying within EU case law and non-software US case law, is that tying is the practice of conditioning the sale of one product on the sale of another. However, within US software cases, tying is the practice of *illegally* conditioning the sale of one product of another. Another definition could be: the practice of conditioning the sale of one product on the sale of another *without consumer efficiency*. Because in US software cases the illegal aspect of tying now needs to be proved by showing that there are no consumer efficiencies, the definition of tying is semantically narrowed. For translating into Dutch the word 'tying' can in both cases either be translated with '*koppelverkoop*', or by using the translation method of borrowing, and therewith keeping the source text term. The Dutch legislation with regards to tying is based upon EU legislation. Therefore, the semantic meaning of '*koppelverkoop*' is the same as within the EU. That semantic meaning is similar in the US, except when the legal text or case concerns software, where a better translation would be *'inefficiënte koppelverkoop'*.

4.2 Resale price maintenance

Within antitrust law there are two types of vertical restraints. An example of a price-focused vertical restraint is 'resale price maintenance' (hereafter: RPM). There is a case of RPM if a manufacturer can stipulate the prices at which retailers must sell its product.

4.2.1 US: State Oil and Leegin

RPMs are one of the more hardcore vertical restraints and were for a long time also treated as such in the US. In US legal practice RPM almost always amounted to *per se* illegality, following the precedent set in Dr. Miles Medical Co v. John D. Park & Sons Co. (1911). In State Oil Co. v Khan (1997), the Supreme Court reversed the long-standing precedent of *per se* violation and held that RPM was to be judged under the rule of reason. The Court acknowledged in this case that "*a supplier might […] fix a maximum resale price in order to prevent his dealers from exploiting a monopoly position*". In order to establish unlawful RPM a causal link between the monopolist's actions and its market power must be shown, as well as prove of an anticompetitive effect.

Although the Supreme Court had started to move away from a *per se* violation with regards to RPM, the Court only officially overruled Dr. Miles with its judgement in Leegin Creative Leather Products, Inc. v. PSKS, Inc. (2007) more than a decade later. In the Leegin-case the Supreme Court, using the conservative purposivist approach, established that the legality of RPMs are to be reviewed under the rule of reason. For this decision, the Court used economic literature from the University of Chicago, in which the majority of economists were in favour of the rule of reason-approach to RPMs. The US Supreme Court ordered that the prior approach to RPM *"hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices."*

4.2.2 EU: Consten and Grundig

RPM in EU competition law is considered to be a restriction 'by object', as it is codified in Article 102 TFEU. In the case Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Communities (1966), the Commission took the stance that competing parallel imports from one state to another had to be unhindered. Where the US loosened its approach to RPM, the ECJ confirmed that it maintains its strict approach to RPM by agreeing with the Commission: *"Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of [Article 101, first paragraph, TFEU] merely because it might increase the former"*. For its judgement the ECJ uses a strict literal approach to Article 102, in which it is specifically stated that RPMs are unlawful.

4.2.3 Transatlantic legal interpretation of RPM

The ECJ in Consten and Grundig reaffirms its purpose-driven approach to EU competition law, by using a strict textual interpretation. That may seem contradictory to the goals of EU competition law, but the goal of the internal market is properly reflected in the restrictions 'by object', so there is no need for the ECJ to deviate from the semantic text of Article 102 TFEU. The US Supreme Court took an opposite view in Leegin Creative Leather Products, Inc. v. PSKS (2007), stating that the Court has from the beginning "*treated the Sherman Act as a common-law statute […] Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions*." In other words, the statutory texts disclose little of importance, the Supreme Court refuses to use a textual approach, and instead uses a conservative purposive approach to RPMs. The ECJ and the Supreme Court thus use opposite interpretation methods regarding RPMs.

Even though both courts interpret RPMs in opposite way, the term used is the same. Because EU competition law (and most of the rest of the world's competition law) is originally based upon US antitrust law, competition law terminology is for the biggest part universal. Competition law and the concurrent terminology were established in the EU based upon a draft by the US Harvard scholar Robert Bowie. This means that before the Chicago school became popular, RPMs had the same legal meaning in the EU and in the US. This also means that both terms have the same translation into Dutch: '*verticale prijsbinding*'. Nowadays, however, the legal meaning of the US RPM is semantically narrower then the EU RPM, because there is an additional burden of proving inefficiency. In some legal texts, especially texts comparing EU competition law to US antitrust law, this difference in legal interpretation will have to be made clear by the legal translator. In such cases the extra burden of proving inefficiency could be explained into the Dutch target text by translating RPM to '*inefficiënte verticale prijsbinding*'.

4.3 Refusal to deal

Refusal to deal or supply (hereafter: RTD) is neither legal nor illegal under EU or U.S. antitrust law *per se*. This is the case because, in principal, competition law does not restrict the right of traders to freely exercise their own independent discretion as to parties with whom the trader will deal. RTDs are a form of a non-price vertical restraints. Vertical restraints are contractual restraints between firms that operate at different levels of the production process. In the US, vertical restraints can be challenged under Section 1 of the Sherman Act as an unreasonable restraint of trade, or under Section 2, as exclusionary conduct in furtherance of monopoly power. It must be shown that the agreement in question is likely to harm competition. In Contintenal T.V., Inc. v GTE Sylvania, inc. (1977), the first case in which the US

Supreme Court adopted the rule of reason-approach to antitrust law, the Court held that non-price vertical restrictions were to be judged under this rule of reason. It must be shown that agreements are likely to have "*genuine adverse effects on competition*".

4.3.1 US: The Trinko-case

That RTDs can fall under the Sherman Act was first recognized by the Supreme Court in United States v. Colgate & Co (1919) and exists when the company refusing has a "*purpose to create or maintain a monopoly*". This test is also called the 'intent test'. The federal courts used this test for decades. The federal courts ruled strictly in RTD cases and introduced the 'essential facilities doctrine'[3] even to lawfully acquired monopolies. The courts were using a progressive purposivism approach to RTDs.

This strict interpretation of RTDs came to an end with the Supreme Court's judgement in the Trinko-case in 2004. The Supreme Court stated that *"firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."* The Supreme Court herewith rejected the essential facilities doctrine developed by the lower courts and thus severely limited the scope of unlawful RTDs under Section 2 of the Sherman Act. It also developed, besides the already existing 'intent test', the 'profit-sacrifice test'. Only if a monopolist engages in an unprofitable RTD, it is assumed that the firm has taken that course of action only to increase barriers to competition, i.e. to earn greater monopoly profits in the future.

[3] The essential facilities doctrine is a type of anti-competitive behaviour in which a firm with market power uses a bottleneck in a market to deny competitors entry into that market.

So, in US antitrust law a duty to deal is only acknowledged when a firm with monopoly power makes an unjustified change in a course of dealing which it voluntarily entered before, when this is to the detriment of the market and its consumers. The mere fact that conduct of a monopolist reduces competition by injuring a competitor does not create a breach of US antitrust law. Aggressive competition strategies are not unlawful as long as they benefit consumer welfare.

4.3.2 EU: Bronner-case

The first time the ECJ had to determine the application of Article 102 TFEU on RTDs was in the Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents v Commission of the European Communities (1974), where it decided that a dominant firm's RTD constitutes an exclusionary abuse under Article 102 TFEU if it excludes competitors from entering or remaining in the downstream market. In United Brands Company and United Brands Continentaal BV v Commission of the European Communities (1987) the Court held that even in the case of a refusal to supply to a distributor in the upstream market, a duty to deal could arise under certain circumstances, in order "*not [to] stop supplying its long standing customer who abides by regular commercial practice, if the orders placed by that customer are in no way out of the ordinary*". Based upon these two cases, the essential facilities doctrine was interpreted broadly by the Commission, applying it to port and other transport infrastructures, which placed greater responsibility on the owners of such facilities and a duty to supply was more likely to appear to new as well as existing customers, sometimes even if they could compete without access to the facility.

In Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertreibgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG (1998) the ECJ limited the broad approach to RTDs. The Court considered whether a dominant undertaking could be

required to supply new customers seeking access to its products for the first time. The ECJ found that the obligation for dominant firms to grant access to their facilities is limited to a narrow set of exceptional circumstances: "*The following circumstances, in particular, must be considered to be exceptional: in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market; in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand*". In order to establish whether a service is indispensable, it is at the very least necessary to establish that it is not economically viable for a competitor of equal size to create its own product or service. Indispensability can therefore only be assumed if the creation of an alternative solution is impossible even for a hypothetically similar sized competitor of the dominant undertaking.

With Bronner the ECJ significantly narrowed the approach by requiring a specific set of requirements to be fulfilled cumulatively to grant a duty to deal. Only if a refusal to deal concerns an indispensable facility, owned by a dominant firm, which is likely to exclude all competition, a duty to deal might occur.

4.3.3 Transatlantic legal interpretation of RTD

Even though both EU competition law and US antitrust law generally restrict abusive conducts by dominant undertakings concerning RTDs, the ECJ and the US Supreme Court diverge significantly on the question under what conditions a single firm should have a duty to deal with another. The EU favours judicial intervention in order to safeguard competition in the internal market, whilst the US has set a higher threshold for qualifying RTDs as anticompetitive, finding judicial

intervention in RTD cases not at all times to be effective and necessary for the free market.

The US Supreme Court went from a progressive purposivist approach to a conservative purposivist approach. The ECJ interprets teleologically as well, but chooses a different direction, allowing the Commission to use the essential facilities doctrine, albeit only for indispensable facilities. RTDs thus have a semantically narrower meaning in the US compared to the EU. In the US two tests need to be fulfilled in order to establish a RTD (the intent test and the profit sacrifice test), where in the EU only the 'indispensability test' is used for defining RTDs.

Just like with RPM, RTDs are a universal term within competition law. When the US Supreme Court and the lower courts followed the precedent of the Colgate-case, the definition of RTDs in the EU and the US were very similar. Since the Trinko-case, however, the definitions are not so similar anymore: the US definition of RTDs consists of two tests and the impossibility of the essential facilities doctrine, where the EU definition of RTDs consist of only one test and does include the essential facilities doctrine. Even though both courts interpret RPMs in opposite way, the term used is the same. Both terms again have the same translation into Dutch, which can either exist in a literal translation or a borrowing. The borrowing is most common, meaning that the target text word (refusal to deal) remains in the source text. A literal translation is also possible: *'weigering tot levering'*. The Dutch definition of RTD is the same as the EU definition of RTD. It is again for the legal translator to decide, when translating form US English into Dutch, whether it is necessary in the given legal text to explain the US-style RTD to the target text reader. This could be done by adding the words 'intentional' and 'non-profitable' to the translation: *'een bewuste, onrendabele weigering tot levering'*.

4.4 Predatory pricing

Predatory pricing is the pricing of goods or services at such a low level that other businesses cannot compete with it and are forced to leave the market. It may consist a violation of antitrust law under Section 2 of the Clayton Act, and it is seen as a violation 'by object' under Article 102 TFEU.

4.4.1 US: Brooke v. Brown

US antitrust law subjects predatory pricing-allegations to a strict test. This test is developed by the Supreme Court in Brooke Group Ltd v. Brown & Williamson Tobacco Corp. (1993). The Court found that Section 2 of the Clayton Act, which prohibits price discrimination, leaves room for the Court to define what consists of price discrimination. Predatory pricing can be a form of price discrimination, if two requirements are fulfilled: (i.) the monopolist must charge prices that are below some measure of their incremental costs; and (ii.) there must be a realistic prospect that the monopolist will be able to recoup these initial losses. The Supreme Court stresses the second requirement, stating that without recoupment, *"predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced"*. According to the Supreme Court, without recoupment consumer welfare enhances, even if predatory pricing causes the target painful losses, because it produces lower prices in the market. The Supreme Court, by following the Chicago school of consumer welfare, thus uses a conservative purposivist approach to predatory pricing.

4.4.2 EU: France Télécom

Within the EU, authorities must only prove that a company has charged a price below its average variable cost. If such price is established, the behaviour is presumed to be predatory. There is no need for the authorities to prove the inability of recoupment of losses, according to the ECJ in France Télécom SA v. Commission

of the European Communities (2009). The ECJ explains in this case that the lack of any possibility recoupment of losses is not sufficient to prevent the undertaking concerned from reinforcing its dominant position, because it would still further reduce competition and limit consumers choice: "*following the withdrawal from the market of one or a number of its competitors, so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further reduced and customers suffer loss as a result of the limitation of the choices available to them.*"

4.4.3 Transatlantic legal interpretation of predatory pricing

Where in the US recoupment is seen as an essential element of predatory pricing, in Europe it is not a requirement, albeit the ECJ said the Commission can still use it as a relevant factor for the determination whether a practice is abusive. It could for example assist in excluding economic justifications other than the elimination of a competitor, or assist in establishing that a plan to eliminate a competitor exists.

The Supreme Court uses a conservative purposivist approach to predatory pricing. The US approach focuses on the consumer welfare and the free market, as developed by the Chicago school. The ECJ uses a combination of the textual and teleological approach, using the text to as a base for a restriction on price discrimination and the teleological approach to ascertain more concentrated markets, which is one of the goals of EU competition law.

For translating the concept of predatory pricing into Dutch, there are different terms that could possibly be used, such as *'het hanteren van dumpprijzen'*, or *'afbraakprijzen'*, or *'roofprijzen'*. However, in most literature the term is translated using borrowing as the translation method, and therewith remains 'predatory pricing'. For interpretating the concept of predatory pricing from EU to US English or vice versa, and from US

English to Dutch, it is important to keep in mind the difference in the requirement of recoupment, and, if necessary in the context of a specific text, specify US-style predatory pricing by calling it 'non-recoupable predatory pricing', or, in Dutch, '*onterugverdienbare* predatory pricing', or '*onterugverdienbare roofprijzen hanteren*'.

Conclusion

Both the literature and the corpus show that the ECJ uses a combination of the literal and teleological approach when assessing competition law cases. Articles 101 and 102 TFEU are clear texts, where competition violations are (non-exhaustively) summed up. It also clearly states which types of conduct could possibly be justified and which cannot be justified. Where a competition violation is not specifically named in Article 101 and 102 TFEU, the ECJ interprets the law teleologically. It keeps the goals of EU competition law – market integration and the creation of an internal market that is characterised by undistorted competition - in mind when assessing competition cases.

For legal interpretation purposes US antitrust law is the odd man out. Where most US statutes are interpreted textually, US antitrust law is instead interpreted purposively. The Supreme Court finds the Sherman Act to be too broad to be interpreted textually. It first started interpreting antitrust law with progressive purposivism, as influenced by the Harvard school. The Supreme Court then changed its stance towards conservative purposivism and started applying the efficiency rationale in its case law. Therewith it applies the Chicago school, with the aim to maximise consumer welfare.

For translation purposes, the terminology used in US antitrust law and EU competition law consists of many false friends. The terminology is similar, but the actual meaning of the terms can differ severely, because the economic and political stances on competition policy differ, and therewith its legal interpretation. Where in the US consumer welfare means the lowest possible prices for consumers, in the EU multiple factors are taken into account because of the use of the concept of 'workable competition', such as remaining a sufficient amount of competition in a given

market, and giving consumers a choice between multiple products. Dutch competition terminology is a translation of EU competition terminology, because EU competition law is implemented into the Dutch legal system. This means that the meaning of the Dutch competition terms in the table below are semantically and pragmatically the same as the EU terms. The translation from US terminology to Dutch terminology is semantically similar, because of the universality of competition law terminology. However, the legal interpretation of those terms differs, making full equivalence impossible. Therefore it is up to the legal translator to decide on a case-by-case basis whether it is necessary to explain the US term. By adding 'inefficient' in front of legal terms such as tying and RPM it can be made clear that there is an extra requirement under US antitrust law to establish a violation of the Sherman Act, namely that it is subject to the Chicago-style rule of reason, which leads to functional equivalence.

Type of conduct illegal under EU competition law	**What about US competition law?**	**EU English to Dutch translation**	**US English to Dutch translation**
Tying and bundling (violation by object)	Per se breach under Section 1 of the Sherman Act or Section 3 of the Clayton Act, except for software bundling, which is subjected to a rule of reason	Koppelverkoop, tying	Koppelverkoop, or, in case of software tying: inefficiënte koppelverkoop, (inefficient) tying
Refusal to supply (unless justified by objective grounds) and the essential facilities doctrine	Refusal to supply may breach Section 2 of the Sherman Act; the essential facilities doctrine is generally not used within US antitrust law and therefore usually does not breach Section 2 of the Sherman Act	Weigering tot levering or refusal to supply; essential facilities-doctrine	Weigering tot levering or refusal to supply; essential facilities-doctrine

Resale price maintenance (violation by object)	RPM may breach Section 2 of the Sherman Act but is subject to a rule of reason	Verticale prijsbinding	(Inefficiënte) vertical prijsbinding
Predatory pricing	Predatory pricing breaches Section 2 of the Clayton Act if there is no recoupment of losses	Predatory pricing; roofprijzen hanteren	(Onterugverdienbare) predatory pricing; (onterugverdienbare) roofprijzen hanteren

There is a changing sentiment with regards to this Chicago-style maximisation of consumer welfare in the US. Heading into 2022, US lawmakers and regulators continue to grapple with limiting the power of tech companies. There is a growing sentiment from society to hold companies like Meta, Google, Apple and Amazon accountable under US antitrust laws. Assistant Attorney General Kanter has marked a significant shift in antitrust philosophy and enforcement strategy, which would align the US approach much closer to the EU approach. He wants to move away from the efficiency rationale towards focusing on competition itself.
This change in sentiment is something for translators to be aware of. If the US Supreme Court adheres to this sentiment, EU and US competition law could become more aligned. That could also mean that it is possible for certain legal terms to be able to be translated literally, both from US English into EU English and from US English into Dutch, because the terms would have the same legal meaning. It would mean that there are fewer false friends between EU and US competition law terminology, and more chance of full equivalence when translating US antitrust terminology into Dutch.

For now, however, the US Supreme Court has not stepped away from its conservative purposivism and therefore it is essential for translators to be aware of the differences in legal interpretation between the US Supreme Court and the ECJ. The justices of the Supreme Court also do not seem likely to adhere to the Assistant

Attorney General's approach, as the majority of the Supreme Court leans towards conservatism.[4] However, the US Congress has also introduced new bills in the Senate, such as the Ending Platform Monopolies Act and the Competition and Antitrust Law Enforcement Reform Act of 2021. The first bill aims at promoting competition and economic opportunity in digital markets by eliminating the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses; and the latter bill prohibits exclusionary conduct that presents an appreciable risk of harming competition. If these bills get adopted, it could leave less room for the Supreme Court to use its conservative purposivist approach. A properly written bill that has to be interpreted textually could bring US and EU competition law closer together.

[4] An example of this conservatism is the recent overturn by the Supreme Court of the precedent set in Roe v Wade.

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