

## The future role of the non-competition goals in the interpretation of Article 81 EC

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*Article 81 EC Treaty fails to provide a mechanism for determining how to accommodate non-competition goals in EC competition law, and the conventional practices of the European Commission and the Community Courts do not allow for guidance in such matters. The problem arising from this failure is the main focus of the present article. It approaches the problem from both a constitutional perspective – by starting from the EC Treaty as a whole and subsequently dealing with the role of private parties in governance matters – and also from the substantive competition law perspective and its ‘modernised’ enforcement rules. The main thesis presented in the article is as follows: Non-competition goals cannot be taken into account in the interpretation of Article 81 EC unless they translate into economic benefits. Guidance on the ‘translation’ of non-competition goals into efficiency gains is urgently needed. It is rather this translation criterion, and not the question of whether some non-competition goals play a more important role than others vis-à-vis the competition goals, that establishes a ‘hierarchy’ among the public policies. An embryonic objective function of fundamental rights would equally have to pass the translation test.*

### 1. INTRODUCTION

The controversy over the impact of the elimination of competition as a value of the European Union (EU), with the entry into force of the *Lisbon Treaty*,<sup>1</sup> reflects the ideological gap between those who appreciate the long-term goal of competition, namely prosperity, and those who attach to competition a Darwinian connotation.<sup>2</sup> It remains to be seen whether shifting competition, as a value of the EU, into a Protocol to the *Lisbon Treaty* changes the status of competition on the theoretical level and the day-to-day business, or whether the effects of this shift are confined to a merely cosmetic step. In any event it is beyond doubt that the query here concerns the core of the market economy, notably the role of the market and its self-regulating capacity.

The relationship between the market and its intervention is a frequent subject for debate in the context of national constitutions, and increasingly within the EU. It becomes an ever greater challenge to reconcile the growing number of policies and activities. This will not change with the entry into force of the *Lisbon Treaty* even though the latter expressly tackles the question of the consistency between the policies and stipulates an obligation to take all of them into account in its actions.<sup>3</sup> The multi-level character of governance in the EU adds an institutional element to the complex substantive discussions.

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<sup>1</sup>Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, O.J. 17.12.2007, C 306/01, hereinafter *Lisbon Treaty*.

<sup>2</sup>See for some reactions, Waelbroeck, ‘The Reform Treaty for Competition Lawyers’, contribution to the ERA conference of 10th December 2007, slides on file with the author; European Commission, ‘Statement by European Commissioner for Competition Neelie Kroes on results of June 21–22 European Council – Protocol on Internal Market and Competition’, MEMO 07/250 of 23.6.2007, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/250&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited on April 20th 2008).

<sup>3</sup>Article 2 F and 5a Treaty on the Functioning of the EU (TFEU).

In very few cases, constitutions reflect unambiguous frameworks. The European Court of Justice (ECJ) has 'constitutionalised' the different European Community (EC) and EU Treaties and turned the EC into a legal order *sui generis*, whereas successive Treaty amendments extended the scale of policy fields and undoubtedly balanced the original market orientation. A high level of employment and social protection, equality between men and women, economic and social cohesion and solidarity among Member States currently<sup>4</sup> rank among the EC's explicit goals.<sup>5</sup> Those goals have gained significance, regardless of the fact that they do not necessarily impose specific legally binding obligations. Community institutions can hardly ignore provisions on environmental protection,<sup>6</sup> employment aspects,<sup>7</sup> cultural interests,<sup>8</sup> public health,<sup>9</sup> consumer protection,<sup>10</sup> or industrial policy.<sup>11</sup>

In the context of the fundamental freedoms, it is widely recognised that a number of non-market goals such as environmental protection,<sup>12</sup> public health,<sup>13</sup> or the protection of workers<sup>14</sup> are legitimate objectives, which the Member States may pursue and which may consequently restrict the free movement, provided the measures adopted meet the proportionality test. In competition law, Article 86(2) EC provides for a justification of measures adopted in the context of services of general economic interest. Article 87(2) and (3) EC enable Member States under certain conditions to grant state aid serving a non-market goal.

At a first glance and following a textual interpretation, Article 81 EC seems to be confined to competition-related aspects, while providing for a mere efficiency defence possibly outweighing restrictions of competition. Nevertheless, the European Commission, endorsed by the Community Courts, considered the following public policies<sup>15</sup>, non-competition goals<sup>16</sup>, public-interest<sup>17</sup>, and non-market goals<sup>18</sup> under different doctrinal approaches when applying the provision. For the purpose of the present study, a distinction will be made between *competition (-related)* and *non-competition* goals corresponding to the distinction between market- and non-market goals outside the field of competition law.

<sup>4</sup>Changes brought about by the *Lisbon Treaty* adopted in 2007 (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, O.J. 17.12. 2007, C 306/01) are mentioned expressly.

In the absence of express references, the version of the *Nice Treaty* is referred to.

The *Lisbon Treaty* even extends the non-market goals of the Union, see e.g. Articles 1 a EU, Article 2 EU and 2B-2F and 5 a TFEU.

<sup>5</sup>Article 2 EC.

<sup>6</sup>Article 6 EC, Article 174 EC f.

<sup>7</sup>Article 127(2) EC.

<sup>8</sup>Article 151(4) EC.

<sup>9</sup>Article 152(1) EC.

<sup>10</sup>Article 153(2) EC.

<sup>11</sup>Article 157(3) EC.

<sup>12</sup>ECJ, C-302/86, 1988 ECR 4607 *Commission v Denmark*.

<sup>13</sup>ECJ, C-41/02, 2004 ECR I-11375 *Commission v Netherlands*.

<sup>14</sup>ECJ, joined cases C-369/96 and C-376/96, 1999 ECR I-8453 *Arblade and Others*.

<sup>15</sup>Monti, 'Article 81 EC and Public Policy', (2002) 39 *Common Market Law Review*, 1057-1099 (title).

<sup>16</sup>See e.g. the terminology relied on by Schweitzer, 'Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Article 81 EC', EUI working paper, 2007; Quellmalz, 'Die Justiziabilität des Art. 81 (3) EG und die nichtwettbewerblichen Ziele des EG-Vertrages', (2004) *Wettbewerb in Recht und Praxis*, 4, 461-470, 461; Roth, *Zur Berücksichtigung nicht wettbewerblicher Ziele im Europäischen Kartellrecht - eine Skizze*, in: Engel and Möschel (ed.), *Recht und Spontane Ordnung*, Baden-Baden, 2006, 411-435; Komninos, 'Non-competition concerns: Resolution of Conflicts in the Integrated Article 81 EC', University of Oxford, Centre for Competition Law and Policy', L 08/ 2005, available at <http://denning.law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%2008-05.pdf> (last visited on 20th April 2008).

<sup>17</sup>Komninos, 'Non-competition concerns: Resolution of Conflicts in the Integrated Article 81 EC', University of Oxford, Centre for Competition Law and Policy', L 08/ 2005, available at <http://denning.law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%2008-05.pdf> (last visited on 20th April 2008), 6.

<sup>18</sup>Regarding the internal market: De Witte, *Non-market values in internal market legislation*, in: Shuibhne (ed.), *Regulating the Internal Market*, Edward Elgar, 2006, 61-86, 63.

The main criterion to classify a goal as a non-market goal/non-competition goal is the absence of a cost-benefit analysis as its driving force. They are directed towards the expression of public values such as environmental protection, health protection, or the protection of cultural heritage, whereas the free movement and competition aim at efficiency, lower prices, and the protection and production of material goods.<sup>19</sup> This does not detract a market goal from having beneficial effects on non-market goals or even being a pre-condition for its achievement.

The present article starts with a brief analysis of the main features concerning the relationship between competition and free movement rules. The analytical framework of Article 81 EC will serve as a background to display the options of how non-competition goals can influence the interpretation of the provision, and how the Commission and the Community Courts on the basis of Regulation 17/62 reconciled competition and non-competition goals.<sup>20</sup> In the absence of consistent treatment of non-competition goals under Article 81 EC in the past, the present article is designed to develop a framework for proceeding under Regulation 1/2003. To this end, the two questions will be addressed. First, it will be assessed whether guidance can be derived from an interpretation of the EC Treaty as a whole. Second, it will be ascertained to what extent an increasing role of private parties in governance matters justifies or even requires private parties to be able to rely on goals such as environmental protection and sound administration of justice in order to defend themselves against alleged breaches of competition law. After these more 'global' constitutional approaches to the key problem, the article will focus on the EC Treaty chapter on competition policy as such and assess the arguments on the role of non-competition policies intrinsic to competition law. It is to be ascertained whether the ongoing change towards a more outcome-related approach relying on economic theory suggests a solution for the reconciliation of the competition and non-competition goals. This question is intimately related to the role of the enforcement (modernisation) reform of 2004, and notably the issue of whether the decentralised application of EC competition law by a multiplicity of bodies requires straightforward rules. Ultimately, the search for a way to accommodate certain non-competition goals has to be carried out with a view to creating a legal framework for the implementation of certain policy goals by private regulation in the future.

## 2. THE FUTURE ROLE OF THE NON-COMPETITION GOALS UNDER ARTICLE 81 EC

### (A) COMPETITION LAW: ITS GOALS, ITS ADDRESSEES, AND ITS LIMITS

When compared to the free movement provisions,<sup>21</sup> competition law is characterised by, among other things, one obvious, but increasingly challenged difference, namely the addressees of the respective set of rules: the free movement provisions are directed against obstacles resulting from public (Member State) power whereas competition law addresses, as a general rule, obstacles created by private parties.<sup>22</sup> According to this classic notion, the free movement provisions and the competition rules have complementary functions: in *Consten and Grundig*, the ECJ emphasised that private parties should not resurrect the

<sup>19</sup>De Vries, *Tension within the Internal Market. The functioning of the internal market and the development of horizontal and flanking policies*, 2006, Groningen, 3.

<sup>20</sup>See for a comprehensive study e.g. Townley, *Article 81 EC Treaty: putting public policy in its place*, Ph.D. Thesis (EUI).

<sup>21</sup>For the purposes of the present work, the author considers the degree of convergence as sufficient to treat all fundamental freedoms the same way, similar Mortelmans, 'Towards Convergence in the Application of the Rules on Free Movement and on Competition?', (2001) 38 *Common Market Law Review*, 613f, 617; Behrens, 'Die Konvergenz der wirtschaftlichen Freiheiten im europäischen Gemeinschaftsrecht', (1992) 27 *Europarecht*, 145f.

<sup>22</sup>ECJ, C-177 and 178/82, 1984 ECR 1797 Van de Haar, paragraphs 11f.

restrictions upon trade between Member States, which are prohibited by the free movement rules.<sup>23</sup> Accordingly, both sets represent a coherent set of rules, the purpose of which was seen in the establishment and the maintenance of the common market.<sup>24</sup>

The complementary function of both sets of rules is increasingly contested. The free movement rules are invoked against private parties. More and more claims are found that consider the efficient allocation of resources, the predominant goal of EC competition policy, instead of focusing on the individual economic rights. Regarding the goals of competition (law and policy), this implies a shift from an approach focusing on the protection of the economic freedom of market participants and of market integration, towards an outcome-orientation. One which conceives of consumer welfare as the exclusive (or at least) prominent goal of EC competition law<sup>25</sup>, apparently and increasingly prevailing over the integration goal. Accordingly, competition is considered a mere instrument to enhance economic efficiency. To begin with, the goals of EC competition law do not derive from the textual interpretation of Article 81 EC. The institutions in charge of applying the provision shape them by means of interpretation. Depending on the respective schools of thought prevailing at a certain point in time, we are facing a variety of approaches to competition law. The current challenge consists of reconciling freedom and rights-based approaches dominating especially German competition law, and the outcome-based ones influenced by current US competition law and a large part of the UK's scholarship. Next to the shift regarding the goals of EC competition law, the 'more legalistic' methodology seems to be replaced by a more flexible 'economic' approach, which is stated in a number of recent explanatory documents.<sup>26</sup>

Regardless of the stance taken with respect to the goals of EC competition law, the non-market goals are generally not considered as competition goals. A different problem is the reconciliation of competition and non-competition goals. The wording of Article 81 EC when compared to Article 87 EC, or the justification grounds under the free movement provisions, does not appear to allow for a consideration of non-competition goals. Instead, it points clearly to the possibility that a restriction of competition may be outweighed by the efficiencies an agreement brings about. It follows from the EC Treaty text that competition is not an absolute goal.

#### (B) CONFLICTS OF GOALS UNDER ARTICLE 81 EC IN THEORY

Express mechanisms on how to reconcile the several goals in the context of Article 81 EC are not included in the Treaty. The reconciliation of competition and non-competition goals can be based on a number of options: an *ipso facto* exception, the possibility of an implicit derogation on the basis of the allocation of competences between the EC and the Member States, or on the basis of fundamental rights. Furthermore, non-competition goals can be accommodated by virtue of the narrow interpretation of the scope of the term 'undertaking', in the context of a 'public policy/non-economic/European' rule of reason,

<sup>23</sup>ECJ, C-56 and 58/64, 1966 ECR 322 *Consten Grundig*. This was spelt out in the *Spaak Report* of 1955 of 21 April 1956, 18-19 and later underlined in ECJ, C-177 and 178/82 1984 ECR 1797 *Van de Haar*, paragraph 11f.

<sup>24</sup>AG Van Gerven, C-145/88, 1989 ECR 3851 *Torfaen*, paragraphs 21f.

<sup>25</sup>See e.g. the European Commission, 'Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty' (Text with EEA relevance); OJ. C 101 of 27.04.2004 (hereinafter 'Guidelines on Article 81 (3) EC'), paragraph 13; European Commission, 'DG competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses', paragraph 4; CFI, T-168/01, 2006 ECR, II-2969 *GlaxoSmithkline Services Unlimited v Commission of the European Communities*, paragraphs 121, 171.

<sup>26</sup>European Commission, 'Guidelines on the application of Article 81(3) EC', *above*, paragraph 5.

the Article 81(3) exemption, or even on the basis of a balance between the two *constitutional goals* outside of the EC Treaty framework (which was so far proposed by scholars).<sup>27</sup>

The mechanisms that determine the way in which the balance is struck are to be linked to the different institutions and their competences, e.g. the fact that it is an administrative rather than a judicial body that decides and the manner according to which internal decision-making is structured. Internal factors relating to the decision-making process, policy discretion, and (standards of) the review may influence the decision. In the interpretation of Article 81 EC, the application of Article 81(3) EC by the Commission as a collegial organ under the former enforcement regime, and the scope of review before the European Court of First instance (CFI) represented important factors that had an impact on the outcome. This demonstrates that the enforcement rules and institutional particularities shape the interpretation of the substantive law to a considerable extent.

#### (C) THE CONFLICT OF GOALS IN PRACTICE

There is no doubt that the Commission, frequently endorsed by the Community Courts, did consider several non-competition policies under Article 81 EC. This was widely accepted as:

Powers conferred upon the Commission under Article 81(3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end, certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market.<sup>28</sup>

Without aiming at covering all kinds of non-competition policies, which have played a role in the case law, the present section is designed to give an overview of a selection of the most relevant cases in which non-competition goals appear to have been taken into account or at least considered in the interpretation of Article 81 EC.

#### I. EXPRESS DEROGATIONS LAID DOWN IN THE TREATY

Certain fields are excluded from the scope of the competition rules on the basis of the Treaty. This includes Articles 32 (1) (2), 36 (1) EC which stipulate that as a general rule, the common market shall extend to agriculture and trade in agricultural products, whereas the rules on competition shall apply only to the extent determined by the Council. The Court has expressly held:

that where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect. That was done in the case of the production of and trade in agricultural products...<sup>29</sup>

Furthermore, the Court has unequivocally upheld the applicability of the competition rules to many 'special sectors' such as the banking, insurance or energy sectors which may benefit from derogations in some Member States.<sup>30</sup> Thus, especially against the background of the existing exception mechanism laid down in Article 81(3) EC (and also the exceptions

<sup>27</sup>Komninos, 'Non-competition concerns: Resolution of Conflicts in the Integrated Article 81 EC', *above*.

<sup>28</sup>ECJ, C-26/76, 1977 ECR 1875 *Metro v Commission*, paragraph 21.

<sup>29</sup>ECJ, joined cases 209/84 to 213/84, 1986 ECR 1425 *Ministère Publique v. Asjes*, paragraph 40. Affirmed as a general rule by AG Jacobs, C-67/96, 1999 ECR I-5751 *Albany*, paragraph 123.

<sup>30</sup>The Court has largely rejected claims that the competition rules should not be applicable in certain sectors such as

- transport (ECJ, joined cases 209/84 to 213/84, 1986 ECR 1425 *Ministère Publique v. Asjes*, paragraphs 40-52)
- banking (ECJ, C-393/92, 1994 ECR I-1477 *Almelo*, paragraph 33 f. implicitly),
- insurances (ECJ, C-45/85, 1987 ECR 405, *Verband der Sachversicherer v Commission*, paragraph 13f.)

laid down in Article 86(2) EC or 87(2) and (3) EC), the scope of the competition rules should only be limited to very exceptional cases and where it is expressly stipulated.

It follows from the textual interpretation of the Treaty that there is no general *ipso facto* exception for non-competition goals, even if they are laid down in other parts of the Treaty. This conclusion was reached by several Advocates General with regard to social policy goals.<sup>31</sup> At least implicitly, this view is vindicated in the case law applying, e.g., Article 81 and 86 EC in the field of employment and employment related pensions.<sup>32</sup>

## II. IMPLICIT DEROGATIONS RESULTING FROM THE ALLOCATION OF COMPETENCES BETWEEN THE COMMUNITY AND THE MEMBER STATES AND FROM FUNDAMENTAL RIGHTS

In the absence of a general written and express derogation for non-competition goals from EC competition law, one may wonder whether the allocation of competences, and in particular the principle of conferred powers as stated in Article 5(1) EC, allows for guidance regarding the interplay of the two goals. In this respect, one could argue that the ECJ has shielded a number of fields from EC competition law on the basis of national competences and the protection of democratic self-determination, which is rooted in the national political process. This would amount to a derogation from EC competition law along the lines of the allocation of competences.

Even though the powers of the Community to legislate, e.g., in the field of social policy or environmental protection, are considerably limited,<sup>33</sup> the Court has not felt precluded from applying the free movement rules and competition law in fields which clearly fall under national competences. The Court has thereby placed emphasis on the claim that the Member States must exercise their competencies in respect of EC competition and the internal market rules. Therefore, the focus is shifted to the effects of the *exercise* of a national competence instead of its mere *existence*. This reasoning was identified in several fields of law including the context of the fundamental freedoms and labour market related issues such as the right to strike. The Court recently stressed that Article 137 (5) EC did not exempt the Member States from compliance with the fundamental freedoms:

In that respect it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law...<sup>34</sup>

The same was stated earlier with respect to the application of the fundamental freedoms in the areas of social security law,<sup>35</sup> EU-citizenship read in conjunction with the non-discrimination provision Article 12 EC,<sup>36</sup> direct taxes,<sup>37</sup> and sport.<sup>38</sup> According to the Court,

<sup>31</sup>AG Jacobs, C-67/96, 1999 ECR I-5751 *Albany*, paragraph 130. Similar EFTA Court, E-8/00 *Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) with Norsk Kommuneforbund*, paragraph 35 pointing to the limited character of the exception referring to AG Jacobs in *Albany*. AG Lenz, C-415/93, 1995 ECR I-04921 *Bosman*, paragraph 273.

<sup>32</sup>ECJ, C-41/90, 1991 ECR I-1979 *Höfner and Elser*.

<sup>33</sup>E.g. Article 137 (2), 141 (3) EC; Article 175 EC.

<sup>34</sup>ECJ, C-438/05, nyr, *ITF & FSU v. Viking Lines*, paragraph 40. See also AG Mengozzi of May 23rd 2007, C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others*, paragraph 59. Confirmed by the Court, ECJ, C-341/05, judgment of 18th Dec 2007, nyr, *Laval un Partneri Ltd*, paragraph 87.

<sup>35</sup>ECJ, C-372/04, 2006 ECR I-04325 *Yvonne Watts*, paragraph 92.

<sup>36</sup>ECJ, C-192/05, 2006 ECR I-10451 *Tas-Hagen and others*, paragraph 21f.

<sup>37</sup>ECJ, C-403/03, 2005 ECR I-6421 *Egon Schenpp v. Finanzamt München*, paragraph 19.

<sup>38</sup>The case law is extremely inconsistent. One line of arguments excludes the non-market, purely sporting rules, from the scope of the fundamental freedoms, drawing the line along the (absence of an) economic activity (which is transferred by

the social character of a measure does not suffice to exclude it from being characterised as an aid within the meaning of Article 87 EC.<sup>39</sup>

It is controversial whether the free movement rules and the competition rules can be equated as such. In the present context, the case law mainly developed under the free movement rules regarding the scope of the provisions can be and has been transposed to competition law.<sup>40</sup> It can thus be derived from the case law that national competences do not shield the Member States from the respect for Community law, and in particular the wide and functionally interpreted scope of the free movement and the competition rules. Hence, no valid conclusion can be drawn from the allocation of competences as such. Even in the absence of legislative powers of the EC, the national measures need to be compatible with the EC internal market and competition rules.

Due to the increasing significance of fundamental rights in EC law, it has been argued that a recognised fundamental right could detract from the application of EC economic law, in particular the free movement provisions and competition law.<sup>41</sup> This approach will increasingly gain importance with the binding force of the rights laid down in the EU Fundamental Rights Charter with the entry into force of the *Lisbon Treaty*.<sup>42</sup> Similar to the above arguments presented in the context of the allocation of competences, the Court has underlined in the context of the free movement provisions that the recognition of the existence of a fundamental right will only lead to a balancing with the other goals of the Treaty, and not to an a priori hierarchy.<sup>43</sup> This was expressly confirmed in relation to the right to strike.<sup>44</sup> The same has to analogously apply to the determination of the scope of EC competition law.<sup>45</sup> In the context of competition law, one would face the problem of the direct horizontal effect of the fundamental rights unless an *objective function* is developed and recognised according to which the fundamental rights 'radiate' throughout the Treaty. In any event, fundamental rights cannot *per se* limit the scope of Article 81 EC.

### III. LIMITATIONS ON THE SCOPE OF COMPETITION LAW: DEROGATIONS CREATED BY THE COURT

Collective bargaining agreements are, under certain conditions, sheltered from EC competition law, and in particular from the application of the norm on the prohibition of cartels.<sup>46</sup> Contrary to the US legal order where the antitrust immunity of those agreements

analogy by some to competition law, CFI, T-313/02, 2004 ECR II-3291 Meca-Medina, paragraph 42), the other one is to apply the Wouters criteria to the non-market aspects (ECJ, C-519/04 P, 2006 ECR Meca-Medina, para 42).

For the divergence and converge of the competition and free movement rules, see CFI, T-313/02, 2004 ECR II-3291 Meca-Medina; ECJ, C-519/04 P, 2006 ECR Meca-Medina, further Szyszczak, 'Competition and Sport', (2007) 32 European Law Review, 95-110; it is beyond doubt that there is no genuine competence of the EU for sport.

<sup>39</sup>ECJ, C-241/94, France v Commission, paragraph 21.

<sup>40</sup>ECJ, C-41/90, 1991 ECR I-1979 Höfner and Elser; CFI, T-313/02, 2004 ECR II-3291 Meca-Medina; ECJ, C-519/04 P, 2006 ECR Meca-Medina; ECJ, C-309/99, 2002 ECR I-1577 Wouters. See also regarding agreements under Article 81 (1) EC European Commission, XXIIIrd Report of the Commission on Competition Policy, COM (94), 161, point 77: 'it is clear that agreements which restrict competition continue to be prohibited by Article 81 (1), even if the parties invoke environmental protection in order to justify them'.

<sup>41</sup>See the parties' submissions in ECJ, C-438/05, nyr, ITF & FSU v. Viking Lines; AG Jacobs, 1999 C-67/96, 1999 ECR I-5751 Albany, paragraph 144f.

<sup>42</sup>Article 6 TFEU.

<sup>43</sup>ECJ, C-438/05, nyr, ITF & FSU v. Viking Lines, paragraph 44.

<sup>44</sup>Ibid., paragraph 44.

<sup>45</sup>AG Jacobs, C-67/96, 1999 ECR I-5751 Albany, paragraphs 131, 163.

<sup>46</sup>ECJ, C-67/96, 1999 ECR I-5751 Albany International v Stichting Bedrijfspensioenfonds Textielindustrie, paragraphs 59, 60; EFTA Ct., E-8/00, 2002 EFTA Ct. Rep. 114 Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) with Norsk Kommuneforbund, paragraph 59.

has been hotly debated earlier by the legislator and the courts,<sup>47</sup> the ECJ was confronted for the first time with the question at the EC level in the *Albany* case in the late 1990s.

The Court exempted certain collective bargaining agreements *ipso facto* from the scope of the competition rules.<sup>48</sup> It grounded its decision in the balancing of two Treaty goals of implicitly equal rank, the inherent character of the restriction in the collective agreements, and the interpretation of the Treaty as a whole. It concluded that

[i]t is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 8[1](1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment. ... It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 8[1](1) of the Treaty.<sup>49</sup>

The Court confirmed the *Albany* exception in *Van der Woude* regarding a sectoral health insurance scheme resulting from the conclusion of a collective agreement (which improved working conditions because it provided means and reduced costs) and rejected the *ipso facto* exception in *Pavlov* with respect to the unilateral establishment by a liberal profession of a pension scheme not based on a collective agreement.<sup>50</sup> On the basis of the homogeneity rules in the EEA-Agreement (Articles 6 and 3(2) EEA) and the respective statements including social policy objectives under the EEA-Agreement, the EFTA Court—in a slightly different factual situation—adopted the same test, clearly stressing that this only applies to collective agreements for the improvement of work and employment.<sup>51</sup>

#### IV. ARTICLE 81 (1) EC AND THE ‘EUROPEAN RULE OF REASON’

Contrary to the structure of Section 1 of the Sherman Act, Article 81(3) EC expressly provides for an *exemption* of certain anti-competitive practices. The separation of the scope of Article 81(1) and (3) EC has long been a source of controversy among scholars as well as between the Commission and the Community Courts, and the distinction was crucial under the earlier enforcement regime. Despite the textual and structural differences between the EU and the US provision, the idea of a ‘rule of reason’ has repeatedly been brought into play in EC competition law, be it by scholars or by the parties to the proceedings.<sup>52</sup>

<sup>47</sup>Viol, *Die Anwendbarkeit des Europäischen Kartellrechts auf Tarifverträge - unter rechtsvergleichender Betrachtung der Rechtsordnungen der Schweiz, der USA und Deutschlands*, 2004, Universität St. Gallen, Hochschule für Wirtschafts-, Rechts-, und Sozialwissenschaften, Doctoral Thesis; Camesasca and Van den Bergh, ‘Irreconcilable principles? The Court of Justice exempts collective Labour Agreements from the Wrath of Antitrust’, (2000) 25 *European Law Review*, 5, 492-508, 492, 494; AG Jacobs, C-67/96, 1999 ECR I-5751 *Albany*, paragraphs 96f.

<sup>48</sup>ECJ, C-67/96, 1999 ECR I-5751 *Albany International BV and Stichting Bedrijfspensioenfonds Textielindustrie*.

<sup>49</sup>*Ibid.*, paragraph 60. Confirmed in ECJ, C-222/98, 2000 ECR I-7111 *Hendrik van der Woude v Stichting Beatrixoord*, paragraphs 23-27.

<sup>50</sup>ECJ, C-222/98, 2000 ECR I-7111 *Hendrik van der Woude v Stichting Beatrixoord*, paragraph 22; EFTA Ct., E-8/00, 2002 EFTA Ct. Rep. 114 *Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) with Norsk Kommuneforbund*, paragraph 53.

<sup>51</sup>EFTA Ct., E-8/00, 2002 EFTA Ct. Rep. 114 *Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) with Norsk Kommuneforbund*, paragraph 44. Stressing, however, the limited character of the exception, paragraph 35.

<sup>52</sup>See e.g. Forrester/Norall, ‘The Laicisation of Community Law: Self-help and the Rule of Reason: How Competition Law is and could be applied’. (1984) 21 *CMLR*, 11. Joliet, *The Rule of Reason in Antitrust Law, American and Common Market Law in Comparative Perspective*, 1967; Siragusa, in: Ehlermann/Laudati, (eds.), *European Competition Law Annual, 1997 - The Objectives of Competition Policy*, Oxford, 1998, 543, 547; *Whish*, *ibid.*, 495, 499.



The most controversial questions include the assessment of an agreement in its legal and economic context, the new markets, the so-called ‘ancillary restraints’ cases<sup>53</sup>, and the consideration of non-competition aspects. The lasting doctrinal difficulties and inconsistencies will not be dealt with in depth in the present work. It is recognised, as in the context of the US ‘rule of reason’, that neither of the recognised cases of a balance within Article 81(1) EC—except the *Wouters* situation—openly admits non-competition objectives as such.<sup>54</sup>

The possibility to reconsider the rule of reason was assumed relevant in the *Wouters* decision.<sup>55</sup> The object of the scrutiny was a Dutch regulation concerning the legality of multidisciplinary partnerships between members of the Bar and other professionals, adopted by the Bar of the Netherlands. The Court was asked whether the regulation at issue amounted to a decision of an association of undertakings within the meaning of Article 81(1) EC. After confirming the character of the regulation as a decision of undertakings despite the fact that the constitution of the Bar was regulated by public law, the Court discussed the restriction, and found adverse effects on competition.<sup>56</sup> Nevertheless, the Court held that:

...not every agreement between undertakings or every decision of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty [ . . . . ]. . . . account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience [ . . . . ]. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.<sup>57</sup>

The Court further ruled that the regulation’s restrictive effects, having regard to the prevailing perceptions of the professions of the state, do not go beyond what is necessary in order to ensure the proper practice of the legal profession.<sup>58</sup>

The ECJ transferred the *Wouters* test to the area of sport in the judgment *Meca-Medina*.<sup>59</sup> It has been concluded above that despite the absence of a Community competence, the interference of EC law with national competencies is not precluded and growing. The ECJ consistently placed sport within the scope of Community law ‘in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty.’<sup>60</sup> In most of the earlier cases, the compatibility of the contested regulations with the fundamental freedoms was assessed. Sport is attributed a large social importance which justifies regulatory rules which

<sup>53</sup>See for an overview on the case law AG Léger, C-309/99, 2002 ECR I-1577 *Wouters*, paragraph 103f.; in ECJ, C-161/84, 1986 ECR 353 *Pronuptia*; ECJ, C-250/92, 1994 ECR I-5641 *Gotttrup Klim*.

<sup>54</sup>AG Léger, C-309/99, 2002 ECR I-1577 *Wouters*, paragraph 104.

<sup>55</sup>ECJ, C-309/99, 2002 ECR I-1577 *Wouters*.

<sup>56</sup>*Ibid.*, paragraph 86f.

<sup>57</sup>*Ibid.*, paragraph 97f.

<sup>58</sup>*Ibid.*, paragraph 109.

<sup>59</sup>ECJ, C-519/04 P, 2006 ECR *Meca-Medina*, paragraph 42.

<sup>60</sup>ECJ, C-36/74, 1974 ECR 1405 *Walrave*, paragraph 4. The case involved nationality based discrimination, which one would normally assume to fall foul of what is now Article 12 EC’s prohibition of such practices. The Court treated the composition of the national sport of teams as unaffected by the prohibition where their formation is ‘a question of purely sporting interests and as such has nothing to do with economic activity’; ECJ, C-415/93, 1995 ECR I-4921 *Bosman*, paragraph 73; ECJ, C-13/76, 1976 ECR 1333 *Donà v Mantero*, paragraph 12. In this case, the Court, citing its decision in *Donà*, again adopted the formula but stated that ‘this restriction on the scope of the provisions in question must, however, remain limited to its proper objective.’

may, however, also have an economic impact. In *Meca-Medina*, anti-doping rules adopted by the International Olympic Committee were analysed in light of the competition rules: apparently endorsing a broad application of the 'sporting exception' from competition law and the free movement rules, the Court of First Instance (CFI) widely disregarded their potential economic repercussions.<sup>61</sup> On appeal, the ECJ repeated the established jurisprudence based upon the decision in *Walrave*.<sup>62</sup> As to the application of *Wouters* to the case at hand, the ECJ generally endorsed the application of Article 81 EC to the anti-doping rules, taken within the overall context of support for an anti-doping policy in sport. Rejecting an abstract assessment of the rules in question regarding their compatibility with the competition rules, and also rejecting the equation of a restriction on the freedom of action of the parties and a restriction of competition, it was to be considered 'whether the consequential effects of the restriction of competition are inherent in the pursuit of those objectives (*Wouters and Others*, paragraph 97), and are proportionate to them.'<sup>63</sup> The ECJ confirmed the Commission's appreciation that the goal of the rules in combating doping for the fair conduct of competitive sport included the safeguard of equal chances for athletes, their health, and the integrity and objectivity of competitive sport and ethical values in sport.

#### V. ARTICLE 81 EC: THE NOTION OF THE 'UNDERTAKING'

With regard to the scope of Article 81 EC *ratione personae*, the classic test has been established in the *Höfner* decision. According to the ECJ, the functional understanding of the term 'undertaking' covers 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.'<sup>64</sup> This implies that the type of the activity performed rather than the characteristics of the actors, which perform it, is relevant.

If an undertaking engages in an activity in the public interest, which forms part of the *essential functions of the state*, it is not regarded as an undertaking within the meaning of Article 81 EC.<sup>65</sup> Regarding the criterion of *solidarity* and the degree of solidarity, which characterises many bodies related to social security, the only helpful conclusion resulting from the jurisprudence is that competition law does not apply where solidarity is predominant and the entities in question exercise an exclusively social function (*Poucet, Cisa*).<sup>66</sup> A social aim is not in itself sufficient to preclude the application of Article 81 EC. Under this heading, the Court has analysed the relationship between risk and contributions, and between the contributions and benefits within a certain scheme and across several schemes. Furthermore, the supervision of the activity of a certain body by the state has proven of particular importance. Moreover, cultural organisations and organisations operating in the area of public health are not sheltered from the personal scope of the competition rules.<sup>67</sup> Undertakings operating in the field of environmental protection are

<sup>61</sup>For this reason criticising the judgment *Weatherill*, *Anti-Doping Rules and EC Law*, (2005) 26 *European Competition Law Review*, 7, 416-421.

<sup>62</sup>ECJ, C-519/04 P, 2006 ECR *Meca-Medina*, paragraph 25f.

<sup>63</sup>*Ibid.*, paragraph 42.

<sup>64</sup>ECJ, C-41/90, 1991 ECR I-0135 *Höfner and Elser*, paragraph 21.

<sup>65</sup>ECJ, C-343/95, *Diego Cali*, paragraph 22f, regarding the task of anti-pollution surveillance exercised by a private undertaking holding an exclusive right. See also ECJ, C-364/92, *SAT Fluggesellschaft v Eurocontrol*, regarding an air traffic control organisation in charge of maintaining and improving air navigation safety.

<sup>66</sup>ECJ, C-218/00, *Cisal*, paragraph 37f.; joined cases C-159/91 and 161/91, *Poucet et Pistre*; C-244/94 FFSA; joined cases 264/01, C-306/01; C-354/01 and C-355/01 AOK *Bundesverband*; cf. for an overview over the case law, De Vries, *Tension within the Internal Market. The functioning of the internal market and the development of horizontal and flanking policies*, 2006, Groningen, 3; AG Poiares Maduro, C-205/03P, 2006 ECR I-6295, *Federación Española de Empresas de Tecnología Sanitaria v Commission of the European Communities*; Townley, C., *The Concept of an 'Undertaking': The Boundaries of the Corporation – a discussion of agency, employees and subsidiaries*, in Amato, G., and Ehlermann, C.-D. (eds.), *EC Competition Law: a critical assessment* (2007) Hart Publishing, Oxford.

<sup>67</sup>ECJ, C-155/73 *Sacchi* (Television undertakings fulfilling a task which concerned the public and which was of cultural and informative nature); joined cases, C-180/98 to 184/98, *Pavlov* (self-employed specialists in medical services), paragraph 76;

equally subject to the competition rules.<sup>68</sup> Thus, the broad material and personal scope of the application of Article 81 EC can hardly be delimited by non-market policies as a general rule.

#### VI. ARTICLE 81 (3) EC

Whereas Article 81(1) EC deals with the determination of a restriction of competition under the conditions laid down, the agreement can nevertheless be upheld if cumulatively it 1) improves the production or distribution of goods or promotes technical or economic progress, 2) allows consumers a fair share of the benefit, 3) does not contain any indispensable restriction, and 4) does not substantially eliminate competition. Whether Article 81(3) EC can be applied in relation to non-competition policies, will ultimately depend on the room provided by the wording (unless a balance is struck outside the Treaty structure).

The earlier case law has shown that EC competition law was not limited to the pursuit of efficiency as its exclusive goal and economic theory as the prevailing methodology. In some cases, the practice was quite favourable to the consideration of non-competition goals in the interpretation of Article 81(3) EC, invited by the open textured wording of Article 81(3) EC. It was the institutional constraints in the decision-making practice of the Commission and the endeavour to implement the Treaty as a whole that have contributed to the former practice. The following cases deal with employment considerations and environmental protection. Due to the opaque and dissatisfying legal solution on how to treat book price fixing under Article 81 EC, the issue is not dealt with in detail.<sup>69</sup>

#### METRO

Within the framework of Article 81(3) EC under the former exemption monopoly, the Commission considered the effect of a selective distribution agreement on the creation or maintenance of jobs, and the Court confirmed that selective distribution systems might conform to Article 81(1) EC.<sup>70</sup> It was pointed out in the judgment that the goal of EC competition law is to reach workable competition, which was defined as the degree of competition necessary to achieve basic requirements and the attainment of the objectives of the Treaty, 'in particular the creation of the internal market'.<sup>71</sup> The Court went on to hold that

Powers conferred upon the Commission under Article 81(3) show that the requirements for the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and that to this end, certain restrictions on competition are permissible, provided that they are essential to the attainment of those objectives and that they do not result in the elimination of competition for a substantial part of the common market.<sup>72</sup>

Within the assessment of Article 81(3) EC, the obligation to participate in the network, namely to sign cooperation agreements that include advance supply contracts for at least six months and obligations relating to stocks, was considered a restriction of Article 81(1) EC, contrary to the Commission's interpretation. The Court went on to hold that with respect to the first condition of Article 81(3) EC, the conclusion of supply contracts for six months

ECJ, C-475/99, *Ambulanz Glöckner*, paragraph 20, (medical aid organisation to which the public authorities had delegated the task of providing the public ambulance service).

<sup>68</sup>ECJ, C-203/96, *Dusseldorf* (waste disposal plant); CFI, T-151/01, order of 24th May 2007, nyr, *Duales System Deutschland*.

<sup>69</sup>See e.g. Monti, G., *EC Competition Law*, Cambridge, 2007, 102f.; Schmid, 'Diagonal Competence Conflicts between European Competition Law and National Regulation - A Conflict of Laws Reconstruction of the Dispute of Price Fixing', (2000) 1 *European Review of Private Law*, 153-170.

<sup>70</sup>*Ibid.*, paragraph 20.

<sup>71</sup>*Ibid.*, paragraph 20.

<sup>72</sup>ECJ, C-26/76, 1977 ECR 1875 *Metro v Commission*, paragraph 21.

taking account of the probable growth of the market should make it possible to ensure a certain stability in the supply of the relevant products and due to their short duration, a certain flexibility to changes in the market. Regular distribution was assumed to be more beneficial to the producers, wholesalers, and retailers since the variety of available products increased. Following these statements, the Court ruled that

[f]urthermore, the establishment of supply forecasts for a reasonable period constitutes a stabilizing factor with regard to the provision of employment which, since it improves the general conditions of production, especially when market conditions are unfavourable, comes within the framework of the objectives to which reference may be had pursuant to Article 8[1] (3). The direct benefit to consumers was seen in that the agreements ensured continued and thus regular supplies and the provision of a wider range of goods by retailers for private consumers. The agreement and its exemption were therefore upheld.

#### STICHTING BAKSTEEN

In the case *Stichting Baksteen*,<sup>74</sup> a series of agreements were concluded between a number of Dutch brick producers aiming at a reduction of production capacities (by closure of production units, halting production in some production sites, etc., including an enforcement system of fines and a financing system) to overcome difficulties linked to overcapacities in the sector, especially the imbalance between supply and demand and unfavourable market trends. A social plan was negotiated for the sector with the trade unions, which was supposed to make sure that the restructuring operation would lead to redeployments. The agreement in question was found to restrict the means of production. The Commission exempted the agreement under Article 81(3) EC on the grounds that the considerable overcapacity could not be cured on the basis of individual cuts and the market forces: it maintained that

[i]n a market economy, it is primarily the task of individual firms to identify the moment at which their surplus capacities become financially untenable and to take the necessary steps to reduce them.<sup>75</sup>

It went on, however,

[i]n the case in question, the forces present on the market were and still are unable individually to make the necessary capacity cuts to restore and eventually maintain an efficient competitive structure. That is why the firms concerned organized, together and for a limited period, the necessary structural adjustment.

This was considered justified due to the low elasticity in demand, the low degree of flexibility in the brick production process and the fact that independently, no firm would have made the decision to reduce the capacity, and a means to increase the profitability of the Dutch brick industry by modernizing the production plants that were expected to lead to lower fixed costs and therefore a return to normal competitiveness.

After this statement, the Commission went on as follows:

In addition, because the closures are coordinated, restructuring can be carried out in acceptable social conditions, including the redeployment of employees. It can, therefore, be concluded that the agreement helps to improve production and to promote technical and economic progress.<sup>76</sup>

As to the fair share arising as a benefit to the consumer resulting from the agreement, the Commission stressed the long-term benefits of a healthy industry and the short-term advantage of continuing competition and adjustments, which justified in the short-term

<sup>73</sup>Ibid., paragraph 43.

<sup>74</sup>Commission Decision of 29 April 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/34.456 94/296/EC, Official Journal L 131, 26/05/1994 P 15 -22 *Stichting Baksteen*, paragraphs 29-31.

<sup>75</sup>Ibid., paragraph 20.

<sup>76</sup>Ibid., paragraph 27f.

possibly higher prices to the consumers.<sup>77</sup> *Inter alia* due to the limitations in time, the agreement was regarded as indispensable to the attainment of the objectives in question.<sup>78</sup>

#### ENVIRONMENTAL PROTECTION

In the *Exxon/Shell* decision, the Commission indicated that environmental advantages 'will be perceived as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of 'increasing public concern'.<sup>79</sup> In the *DSD* decision, the Commission considered not only the costs savings as a result of the scale and scope of advantages resulting from the agreement to benefit consumers, but also the improvement of the environment by a reduction in packaging volume.<sup>80</sup>

In the *CECED* decision,<sup>81</sup> an agreement on the production and the importation of washing machines was subject to scrutiny, which *inter alia*, prescribed the cessation of the production and the importation of certain types of washing machines with high-energy consumption.

First, the Commission ascertained a number of anticompetitive effects such as the reduction of consumer choice and technical diversity by prohibiting production and importation of certain types of washing machines. Nonetheless, the Commission granted an exemption because the agreement was designed to reduce the potential energy consumption of the new washing machines replacing the phased out ones, which was considered as indirectly reducing pollution from energy generation; and this latter effect was deemed 'more economically efficient' than without the agreement.<sup>82</sup> The Commission specified the following benefit: the individual economic benefit, which the Commission maintained that savings on electricity bills would allow the consumer to recoup the increased costs of upgraded, more expensive machines within a specified period of time.<sup>83</sup> Furthermore, a price decrease was expected for the future.<sup>84</sup> As to the collective environmental benefits, the Commission relied on Article 174 EC and pointed out that account can also be taken of the costs of pollution.<sup>85</sup> The Commission estimated the savings in marginal damage from avoided CO2 emissions (external costs):

On the basis of reasonable assumptions, the benefits to society brought about by the CECECED agreement appear to be more than seven times greater than the increased purchase costs of more energy-efficient washing machines. Such environmental results for society would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers of machines.<sup>86</sup>

In this light, the agreement was considered 'likely to contribute significantly to technical and economic progress whilst allowing users a fair share of the benefits.'<sup>87</sup> The guidelines on Article 81 (3) EC 'codify' this extension of the consumer's term.<sup>88</sup> The guidelines on horizontal cooperation agreements contain a special section on environmental agreements and

<sup>77</sup>Commission Decision of 29 April 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/34.456 94/296/EC, Official Journal L 131, 26/05/1994 P 15 -22 Stichting Baksteen, paragraphs 29-31.

<sup>78</sup>*Ibid.*, paragraph 36f.

<sup>79</sup>European Commission, Decision 94/322, O.J. 1994, L 144/20, Exxon/Shell, paragraph 71.

<sup>80</sup>European Commission, Decision 2001/837, O.J. 2001, L 319/1, Duales System Deutschland, paragraph 148.

<sup>81</sup>Commission decision of 24 January 1999 relating to a proceeding under Art. 81 EC and 53 of the EEA Agreement (Case IV.F.1/36.718.CECECED), 2000/475/EC, O.J. 26.7.2000 L 187/47 CECECED.

<sup>82</sup>*Ibid.*, paragraph 48.

<sup>83</sup>*Ibid.*, paragraph 52. See for a broad notion of the term 'consumer' in the context of public health, European Commission, Decision 94/770, O.J. 1994, L 309/1 Pasteur Mérieux-Merck, paragraph 83f.

<sup>84</sup>*Ibid.*, paragraph 53.

<sup>85</sup>*Ibid.*, paragraph 55.

<sup>86</sup>*Ibid.*, paragraph 56.

<sup>87</sup>*Ibid.*, paragraph 57.

<sup>88</sup>European Commission, 'Guidelines on the application of Article 81(3) of the Treaty', above, paragraph 85.

welcome the implementation of national or EC environmental legislation by private agreements.<sup>89</sup>

#### VII CONCLUSION WITH REGARD TO THE FORMER COMMISSION PRACTICE AND THE CASE LAW

The (incomplete) survey has demonstrated that several non-competition goals have been taken into account in the practice of the Commission, and were endorsed by the Community Courts. It is, however, not clear which non-competition policies can be taken into account, which ones have an economic facet, or whether they enjoy all equal rank *vis-à-vis* the competition goals or whether some of them are liable to trump the competition goals. The Court has underlined that the allocation of competences between the Member States and the EC does not serve as means for delineations of spheres other than regarding its powers to legislate. The same applies to fundamental rights, which similarly do not trump other goals *per se*.

In the *Albany* case the exemption of certain collective bargaining agreements was based on the interpretation of the Treaty as a whole, which at the same time could be backed by efficiency gains resulting from the agreements. As such a rigorous *ipso facto* derogation does not allow for a balancing process, it has to be interpreted narrowly. What has been decided with regard to labour relationship agreements can in no way be transposed to any employment-related argument to exempt anticompetitive agreements. The situation in the *Metro* case is a completely different one: the efficiencies established originated in the selective distribution, and the employment considerations served as an *obiter dictum*<sup>90</sup>. This is an additional argument at best, without being decisive and conclusive for the establishment of the required benefits assessed under the first condition of Article 81(3) EC.

Whether the *Albany* approach can be linked to the normative superiority of a certain non-competition goal<sup>91</sup> is highly questionable. A hierarchy among the non-competition goals<sup>92</sup> could be derived from several factors such as the wording and the degree of the obligations, or from the instruments that a certain non-competition policy provides for, i.e. whether they are of legally binding force or whether they are limited to coordinating and complementing functions. Furthermore, the fundamental rights character of a provision may be insightful in this regard.

To begin with, one could certainly come to the conclusion that there are textual differences, e.g. when it comes to the cross-sectional clauses or Article 2 or 3 EC. This could be assumed with respect to environmental protection (Articles 2, 6, 174 EC and the reformulation of the 'shall' into a 'must' in the current Article 6 EC).<sup>93</sup> Under the free movement rules, the Court relied on the current Article 6 EC and ruled as follows:

Moreover, as stated in the third sentence of the first subparagraph of Article 130r(2) of the EC Treaty, environmental protection requirements must be integrated into the definition and implementation of other Community policies. The Treaty of Amsterdam transferred that provision, in a slightly modified form, to Article 6 of the Treaty, which appears in Part One, headed Principles.<sup>94</sup>

<sup>89</sup>Above., paragraph 179f. See also European Commission, Decision 2001/837/EC of 17 Sept. 2001, OJ. 2001, L 319/1, paragraph 142f. *DSD*. In this decision, certain exclusivity clauses in a country wide system for the collection and recovery of sales packaging and environmental legislation were exempt alluding to the technical and economic progress.

<sup>90</sup>See for the use of this term in the context of Article 81(3) also Gyselen, The substantive legality test under Article 81 (3) EC – Revisited in the light of the modernisation initiative, in: Von Bogdandy/Mavroidis/Mény (eds.), *European Integration and International Co-ordination, Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, The Hague and others, 2002, 197f.

<sup>91</sup>In this direction Monti, G., *EC Competition Law*, above, 94.

<sup>92</sup>See in general Basedow, Zielkonflikte und Zielhierarchien im Vertrag über die Europäische Gemeinschaft, in: *Festschrift Everling*, Baden-Baden, 1995, 49f, 50.

<sup>93</sup>Describing the evolution of environmental protection in the Treaty in relation to other Treaty policies, Wasmeyer, 'The Integration of environmental protection as a general rule for interpreting community law', 38 CMLR (2001), 159f., but not giving priority to environmental protection when compared to other Treaty goals, *ibid.* 163.

<sup>94</sup>ECJ, C-379/98, 2001 ECR, I-2099 PreussenElektra, paragraph 76.

In this case, the shift of the cross-sectional clause into the first part of the Treaty can in any event merely imply that environmental protection and other policies are on a par. It cannot be derived from such a step that it takes a *priori* priority vis-à-vis other goals. In the interpretation of Article 81 EC, the Court has always avoided to mention Article 6 EC, contrary to the free movement rules and public procurement law<sup>95</sup>. In both of the latter fields of law, state power (in one form or another) is involved. In addition, the Court has relied on grounds such as the proper functioning of a profession or sport and anti-doping rules, which are not even mentioned in the Treaty, thus lack a legal basis.<sup>96</sup> Furthermore, the relevant provisions dealing with non-competition goals hardly ever address the question of a relationship between several goals. They do in no way suggest how interdependencies could be structured and how value conflicts could be solved. Therefore, the textual argument is a weak one, and no non-competition goal is more 'influential' than another.

The argument concerning the instruments comes close to a competence-related argument. Even though traditional fields of Member States' legislative powers such as the health care sector or the field of social policy are core elements of national sovereignty, they do not preclude the respect of EC law in these areas, mainly due to the broad and functional interpretation of the scope of EC economic law. The only conclusion that can be drawn from the instruments attached to a certain goal is the following: wherever certain powers are laid down in the Treaty (comprehensive legislative powers or powers including coordination and complementing measures), the instrumentalisation of competition law for the same goals would undermine the complex architecture of the codified mechanisms. The rather complex provisions governing the 'open method of coordination' serve as a telling example in this regard.

Neither can the fundamental rights character of a provision establish an *priori* hierarchy between several goals. The exercise of almost all fundamental rights can be restricted. Fundamental rights provisions will play an enhanced role in the future case law, even though in competition law their direct applicability would require a comprehensive discussion about the horizontal effect (beyond the situations in which they are invoked against public power). In order to influence the relationships between private parties, the objective dimension would have to be strengthened in order to assign to them the status of a general principle radiating into any field of law. The right to collective bargaining in Article 28 of the EU Charter of Fundamental Rights, for instance, could serve as a 'sounder basis' for the exception as given by the Court in *Albany*, and might influence the Court's appreciation of the 'legitimate content' of collective agreements for this immunity or influence the interpretation of the term 'undertaking'.<sup>97</sup> Thus, it seems that the impact of fundamental rights is slowly approaching an objective function, leading to the obligation to interpret any other provision in conformity with the fundamental right at issue. Such an objective

<sup>95</sup>See e.g. ECJ. C-513/99, 2002 ECR I-7213 *Concordia Bus Finland*, paragraph 45 (Article 6 was put forward by the parties), paragraph 57.

<sup>96</sup>It has been stated in the context of the internal market legislation and non-market goals that the possibility to pursue non-market values does not depend on whether a particular value is expressly recognised in the text of the Treaty or as a general principle of law, de Witte, *Non-market values in internal market legislation*, in: Shuibhne (ed.), *Regulating the Internal Market*, Edward Elgar, 61-86, 69.

<sup>97</sup>Ryan, *The Charter and Collective Labour Law*, in: Hervey and Kenner (ed.), *Economic and Social Rights under the EU Charter of Fundamental Rights - A Legal Perspective*, Hart Publishing, 2003, 67-91, 82f.

function has served as the point of departure for their indirect horizontal effect as recognised under German constitutional law<sup>98</sup>, for instance. It must not be overlooked that even if a fundamental right such as a right to health (care), freedom of expression, or a right to strike radiates throughout the Treaty, and its impact on anticompetitive agreements could nonetheless be 'filtered' and conditioned upon the ability to translate into the effects that Article 81 EC is capable to take into account.

The interpretation of the term 'undertaking' has assumed a particular judicially created exemption from the scope of Article 81 EC, which is based on an overall assessment of several factors such as solidarity in the form of mutualisation of risks and the social function of a body. Legal certainty is widely lacking in the way the Court excludes certain bodies from the scope of the competition rules and thereby avoids in many cases that a balance according to Article 86 EC can be struck.

The cases *Wouters and Meca Medina* reflect the increasing recourse to self-/private regulation of certain sectors. They have imported the 'European Rule of Reason' into competition law and with it, non-competition goals neutralising or outweighing restrictions of competition. This has invited commentators to observe a certain convergence concerning the justification grounds recognised under the free movement provisions. Specifically *Wouters* has shown that certain regulatory aspects<sup>99</sup> bear both a competition-related element (the proper functioning of a profession for the benefit of the consumer) and a non-competition element (the sound administration of justice). The problem consists in particular of discerning the public interest beyond the mere (collective) self-interest of the respective body and the goal of ensuring the functioning of a profession and/or sector in the absence of state influence. Moreover, it is not clear to what extent the national character of the non-competition interest matters since the *Wouters* case has so far been the only case in which it was expressed clearly that a national interest was at stake. In the absence of state influence, the public interest was not clearly defined and established.

In the context of Article 81(3) EC the Commission stretched the wording to integrate employment issues and environmental protection into the four conditions. The early *Metro* case has shown that the beneficial effects of an agreement on employment did not influence the *rationes decidendi*. Employment aspects were mentioned as an additional argument within the assessment of the first condition of Article 81(3) EC and linked to the respective economic crisis situation. This leads us to consider the so called '*crisis cartels*', which taken at face value, clearly violate Article 81 (1) EC since they 'limit or control production' within the terms of Article 81(1) b EC. Closing production units clearly and inevitably leads to a sharp increase in unemployment and social dislocation. From an economic perspective, the production capacity of such an industry would have to decline to the point where they matched available demand. Again, and similar to the cases mentioned earlier, the employment-related aspects were taken into account in addition to the pro-competitive ones under the first condition of Article 81(3) EC without being conclusive as such. Like in the *Metro* case, the employment considerations were—at least not openly—decisive. This type of case highlights the need to stress that Article 81(3) EC is in the first place (and arguably exclusively) an efficiency defence and any argument not translating into efficiency gains proves merely cosmetic. These cases demonstrate that the notion of efficiencies is to be clarified. Besides, mechanisms on how to assess non-competition goals through the lens

<sup>98</sup>See the German Federal Constitutional Court (Bundesverfassungsgericht) in the Lüth case, BVerfGE 7, 198 of 15 January 1958: The court derived the indirect horizontal effect of the fundamental right from the objective function of the values in the constitution for the whole legal order and ruled that private law obviously cannot escape from the influence of values underlying constitutional rights. This meant that the respective private law provisions are to be interpreted in the light of the constitutional right in question from which a certain intellectual content radiates into private law. A dispute between private parties on the rights and duties remains substantively and procedurally a dispute of private law. This has become known as the 'Theorie der mittelbaren Drittwirkung'. See further in English language Cherednychenko, 'EU Fundamental Rights, EC Fundamental Freedoms and Private Law', 1 European Review of Private Law, 2006, 23-61, 30.

<sup>99</sup>See for a classification as 'regulatory ancillarity' Whish, *Competition law*, 5th ed., London 2003, 120-123.



of economic efficiencies are urgently needed. This includes the standard of proof, the question of prognoses, as well as guidance on how to quantify and measure their effects. It might be helpful to provide guidance for experts on the one hand and for non-specialised bodies on the other.

To a certain extent, this task has already been carried out in the field of environmental protection: the avoidance of environmental damage has economic parameters and can arguably be measured. Particularly the extension of the term of the *consumer* to benefits of the society as a whole, represents an innovation and places emphasis on the potential of environmental protection to modify and re(de)fine the analytical framework of efficiencies. This innovative step of conceiving of the internalisation of externalities as efficiencies is not uncontested, specifically in the light of the difficulties related to measurement, predictability of the damage, and its quantification.<sup>100</sup> Regardless of the possibility of normative superiority of environmental protection when compared to other non-competition goals, the decision ('codified' in the guidelines on Article 81(3) EC) exhibits the exclusive concern of Article 81(3) as economic efficiency, whereas the concept is inherently an open one. As to the methodology and the instruments, non-competition policy concerns can be accommodated to the extent that they are quantifiable on the basis of prognosis and therefore translatable into economic benefits. It is rather this criterion, which makes environmental protection adaptable to Article 81 EC. An *a priori* normative superiority when compared to other non-competition goals can hardly be argued convincingly. This is confirmed by the guidelines on horizontal agreements when it comes to the assessment of Article 81(3) EC. The guidelines expressly highlight the positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined under Article 2 and 174 of the Treaty, provided that the agreements are compatible with the competition rules.<sup>101</sup>

Ultimately and in the light of the above, a framework for agreements is necessary that is compatible with EC competition law for situations in which private regulation is regarded more beneficial than public regulation. Next to the lack of clarity for guidance resulting from the former case law, the ongoing policy shifts and the institutional reforms represent additional arguments in order to clarify and possibly reconsider the former practice and a development of a straightforward concept for the role of non-competition policies.

#### (D) GUIDANCE FOR THE FUTURE ROLE OF NON-COMPETITION POLICIES UNDER ARTICLE 81 EC

##### I. INTERPRETATION OF THE TREATY AS A WHOLE

Starting from the notion of the unity of a legal order, guidance for the future role of the non-competition goals could be derived from the interpretation of the Treaty as a whole. In light of the instrumental function of the internal market and competition as laid down in Article 2 EC, the question has frequently arisen as to whether the relationship between goals and instruments reflects a certain *hierarchy* between the market and non-market goals, and thus a normative choice for any particular economic regime, with the consequence that it would direct the interpretation of Article 81 EC in an individual case.

<sup>101</sup>Very critical Basaran, 'How should Article 81 EC address agreements that yield environmental benefits?', (2006) 27 European Competition Law Review, 9, 479-484.

<sup>102</sup>Commission notice of 6 January 2001: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, Official Journal C 3 of 06.01.2001, paragraph 192.

The relationship between means and ends laid down in Article 2 EC has existed since the beginning of the European Economic Community (EEC). The founding members held divergent views on the relation between the market and intervention.<sup>102</sup> There is no doubt that the project of European Integration is largely based on the aspiration of an internal market to overcome the 'diseconomies of scale', whereas the competition rules were in the beginning closely tied to this concern. In particular the spill-over of the market goals into the area of non-market goals highlighted the need to deal with aspects such as social policy, environmental protection, or the protection of health.

Regarding the sources of the non-competition goals that played a role in the context of competition law, some decisions have relied on Articles 2 and 3 EC,<sup>103</sup> certain (political) declarations,<sup>104</sup> the Treaty's policy chapters including their provisions,<sup>105</sup> international conventions and agreements and their interpretation,<sup>106</sup> fundamental rights provisions recognised at the EU level or not<sup>107</sup> and in addition to secondary legislation, implemented by an agreement.<sup>108</sup> Cross-sectional clauses have rarely been relied on.<sup>109</sup> Against this background, it must be ascertained whether market goals prevail over non-market goals as a matter of principle, which reflects the choices between the market and intervention and thus for a certain economic model.

#### PRECEDENCE OF MARKET GOALS

Particularly in relation to the earlier versions of the Treaty, a number of authors claimed that the market-goals took precedence over non-market goals and, in some areas, continue to see a clear predominance of the market.<sup>110</sup> The policies added by the Treaties of Maastricht and Amsterdam, which are invoked against this neo-liberal conception, do not, according to some observers, contradict the finding of market predominance because they merely announce principles and do not entail full powers for the Community institutions.<sup>111</sup> In this view, competition and free movement remained (and still remain) 'at the heart of [the Community's] legal system'.<sup>112</sup>

<sup>102</sup>In Germany, the ordo-liberal view predominated, whereas in France and Italy public ownership and state planning were widely applied in a market framework. The Benelux countries took middle ground. In the academic debate: *Constantinesco* identified three positions: 1) The French in favour of planification; 2) The Germans defending the 'soziale Marktwirtschaft', 3) others defending an open economic constitution, e.g. *Pescatore*, *Mertens de Wilmars*, *Verloren van Themaat*, *Constantinesco* himself. See further *Sauter*, 'The Economic Constitution of the European Union', (1998) 4 *Columbia Journal of European Law*, 27-68, 50.

<sup>103</sup>See e.g. ECJ, C-6/72, 1973 ECR 215 *Continental Can*, paragraphs 24-25; ECJ, C-67/96, 1999 ECR I-5751 *Albany International BV and Stichting Bedrijfspensioenfonds Textielindustrie*, paragraph 54.

<sup>104</sup>CFI, T-313/02, 2004 ECR II-3291 *Meca-Medina*, paragraph 38, referring to the declaration on Sport No 29 annexed to the final act of the Amsterdam Conference.

<sup>105</sup>Commission decision of 24 January 1999 relating to a proceeding under Art. 81 EC and 53 of the EEA Agreement (Case IV.F1/36.718.CECED), 2000/475/EC, OJ 26.7.2000 L 187/47 *CECED*, paragraph 55: Article 174 rectification of environmental damage at the source.

EFTA Ct., E-8/00, 2002 EFTA Ct. Rep. 114 *Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) with Norsk Kommuneforbund*, paragraph 42.

<sup>106</sup>ECJ, C-67/96, 1999 ECR I-5751 *Albany International BV and Stichting Bedrijfspensioenfonds Textielindustrie*, paragraph 55: Article 1 of the Agreement on social policy (OJ 1992 C 191, p. 91). AG *Jacobs*, C-67/96, 1999 ECR I-5751 *Albany*, paragraph 143f; European Convention on Human Rights, 1961 European Social Charter.

<sup>107</sup>AG *Jacobs*, *Albany*, above, paragraphs 144-163. EFTA Ct., E-8/00, 2002 EFTA Ct. Rep. 114 *Landsorganisasjonen i Norge (Norwegian Federation of Trade Unions) with Norsk Kommuneforbund*, paragraph 43.

<sup>108</sup>Commission Decision of 17 September 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Cases COMP/34493 and others), 2001/837/EC, OJ L 319, 04/12/2001, 1-29 DSD, p. 143.

<sup>109</sup>Article 151(4) could come into play, but is rarely relied on by the Court.

<sup>110</sup>Basedow, *Zielkonflikte und Zielhierarchien im Vertrag über die Europäische Gemeinschaft*, in: *Festschrift Everling*, Baden-Baden, 1995, 49f, 50; Dreher, 'Der Rang des Wettbewerbs im europäischen Gemeinschaftsrecht', *Wirtschaft und Wettbewerb* 1998, 656f, p. 658, relying on the emphasis on the common market and Community fundamental rights in the professional sphere.

<sup>111</sup>Baquero Cruz, *Between Competition and Free Movement*, 2002, Hart Publishing, p. 79.

<sup>112</sup>*Ibid.*, p. 79.

## A MIXED ECONOMIC CONSTITUTION WITH A SYSTEMIC GUARANTEE OF THE MARKET MECHANISM

In the last decade, authors have increasingly agreed on the existence of a basic leading framework principle, notably in the light of the introduction of Article 4 (1) EC with the *Maastricht Treaty* ('Systementscheidung'<sup>113</sup> /-garantie'<sup>114</sup>) of market economy with free competition. At the same time, this does not exclude a 'mixed constitution'.<sup>115</sup> The characteristic element of a mixed constitution is that it excludes a systemic change towards a model of centralised, planned economy and results in requirements of justification for interventions.<sup>116</sup> This reflects a widely recognised rule-exception mechanism, which does not however, establish an a *priori* hierarchy within an individual norm. There is broad consensus that the intervention rights at the EC level have been extended within the last decade.<sup>117</sup> This has led some authors to the characterisation of a 'socially and ecologically qualified' internal market<sup>118</sup>, which does not say anything about the weight of each goal in the individual case.

## AN OPEN ECONOMIC CONSTITUTION

Other observers have openly contested the idea of a hierarchy with regard to the Treaty goals and principles. Some authors contended from the beginning that the EC legislator was (and is) free to shape the economic order in any chosen direction.<sup>119</sup> Regardless of whether one supports that this has been the prevailing view from the beginning of the E(E)C, it seems to be the dominant view today. Community law scholars and in an increasingly clear manner also the Court conceive of the different goals and tasks of the Community as being on a par. This would mean that conflicts are resolved on a case-by-case basis and amount to discretionary choices. This reasoning underlies the judgment in *Albany* applying to social policy goals, and was expressly mentioned in the opinion of AG Jacobs preceding the judgment regarding the relationship between social and competition policy<sup>120</sup>. The recent *Laval* and *Viking Lines* cases have affirmed that both the market-related and social policy goals are a *priori* equally recognised values of the EU.<sup>121</sup> This conclusion cannot be affected by the elimination of competition as a goal in the Treaty by the *Lisbon Treaty*, placed into the protocol No 6, which shares the rank of primary law. Moreover, the shift does not affect the chapter on competition policy. Besides, Article 2 B of the Treaty on the Functioning of the EU states that the EU has exclusive competence on the establishing of competition rules 'necessary for the functioning of the internal market'. Against this background, a balance is to be struck on a case-by-case basis and with the limit of nullifying any of the interests involved. Due to the indeterminacy of the 'constitutional' provisions and in the absence of a specific methodology for reconciling them, the institutions in charge are required to balance the goals in accordance with the Treaty framework, which has largely shifted the focus to the mechanisms and values internalised in a certain institution.<sup>122</sup>

<sup>113</sup>Hatje, *Wirtschaftsverfassung*, in: V. Bogdandy (ed.), *Europäisches Verfassungsrecht - Dogmatische und theoretische Grundzüge*, Heidelberg, 2003, 683-745, 692f.

<sup>114</sup>Drexel, *Wettbewerbsverfassung - Europäisches Wettbewerbsrecht als materielles Verfassungsrecht*, in: V. Bogdandy (ed.), *Europäisches Verfassungsrecht - Dogmatische und theoretische Grundzüge*, above, 747-802, p. 759.

<sup>115</sup>Hatje, *Wirtschaftsverfassung*, in: V. Bogdandy (ed.), *Europäisches Verfassungsrecht - Dogmatische und theoretische Grundzüge*, 683-745, 692.

<sup>116</sup>Hatje, *Wirtschaftsverfassung*, in: V. Bogdandy (ed.), *Europäisches Verfassungsrecht - Dogmatische und theoretische Grundzüge*, Springer, 2003, 683-745, 692, 693.

<sup>117</sup>Müller-Graff, *Europäische Wirtschaftsverfassung im Umbau?*, *EuZ*, 6, 2004, 126-136; Hatje, *Wirtschaftsverfassung*, in: V. Bogdandy (ed.), *Europäisches Verfassungsrecht - Dogmatische und theoretische Grundzüge*, Springer, 2003, 683-745, p. 709.

See for a good overview Sauter, 'The Economic Constitution of the European Union', (1998) 4 *Columbia Journal of European Law*, 27-68, 50f.

<sup>118</sup>This term is used by Kahl, in: Callies/Ruffert, eds., 2nd ed., Neuwied, 2003, *EUV, EGV*, Article 14, paragraph 23.

<sup>119</sup>Verloren Van Themaat, *Die Aufgabenverteilung zwischen dem Gesetzgeber und dem Europäischen Gerichtshof bei der Gestaltung der Wirtschaftsverfassung der Europäischen Gemeinschaften*, *Festschrift für Hans von der Groeben*, Baden-Baden, 1987, p. 425. Everling, (1982) *Europarecht*, 301, 311.

<sup>120</sup>ECJ, C-67/96 1999 ECR I-5751 *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie*, paragraph 54. Even more clear AG Jacobs in *Albany*, above, paragraph 179.

<sup>121</sup>ECJ, C-341/05, judgment of 18th Dec 2007, nyr, *Laval un Partneri Ltd*, paragraphs 104, 105; ECJ, C-438/05, nyr, *ITF & FSU v. Viking Lines*, paragraphs 78, 79.

<sup>122</sup>Poiares Maduro, *We the Court, The European Court of Justice and the European Economic Constitution. A Critical Reading of Art. 30 of the EC Treaty*, Oxford, 1998, 151.

## COMMENT

Regardless of the emphasis on the market-oriented conception of the EEC at the beginning of European Integration, the dynamic character of the Community does not prevent the conclusion that today market and non-market goals are on a par. What has expressly been decided by the Court with respect to the rank of a social policy objective of the Union could equally be argued with regard to environmental protection, in particular on the basis of Article 6 EC. Thus, the market is not assigned an a priori higher rank than other non-competition goals of the EU. The weight of each respective goal can only be determined on a case-by-case basis and in light of the respective specific provisions. This does not imply a balance between two constitutional goals outside of Article 81 EC as other provisions expressly provide for balancing mechanisms to reconcile several Treaty goals.<sup>123</sup> The exact legal consequences of the cross-sectional clauses are unclear, unclear in legal value, but not to be disregarded.

## II. INCREASING PARTICIPATION OF PRIVATE PARTIES IN MATTERS OF GOVERNANCE

## THE PUBLIC-PRIVATE DISTINCTION

The original separation between the free movement provisions and competition law is increasingly blurry. It was mainly based on the different nature of the actors restricting cross-border trade, to distinguish whether private or public power was involved. The major rationale behind the (doubtlessly controversial) dichotomy between 'the private and the public realm' relates to the motivation underlying the actions and the (political, legal, administrative) accountability of the actors for the respective actions. Regardless of what the founding fathers of the Treaty had in mind, and whether this distinction was already present at that time, the new forms of regulatory structures are necessary and also in the light of the possibility to rely on the dynamic interpretation of the Treaty rules compared to the 1957 public international law dominated interpretation.

There is no doubt that the conventional wisdom of predominant public (and at the same time state-centred), command-control characterised power, accountable to a territorially defined and highly homogeneous community is to be reconsidered in light of the dis-aggregation of the nation state, the emergence of governance-concepts at the trans-national level, and the tendencies towards growing participation of civil society in governance matters.<sup>124</sup> Privatisation, liberalisation, and deregulation in many Member States of the EU have drawn more attention to the function of the competition rules. This has assumed particular relevance in the fields of public security, trade unions, and professional self-regulation.

Against this background, the pursuit of non-competition policies in competition law, i.e. the pursuit of the public interest by agreements concluded by private parties, could be considered as a practically viable or even necessary and legally admissible step, in line with

<sup>123</sup>In favour of a constitutional balance of the competition goals and the non-competition concerns, Komminos, 'Non-competition concerns: Resolution of Conflicts in the Integrated Article 81 EC', University of Oxford, Centre for Competition Law and Policy', L 08/ 2005, available at <http://denning.law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%2008-05.pdf> (last visited on 20th April 2008).

<sup>124</sup>See e.g. Schiek, 'Private rule-making and European governance – issues of legitimacy', (2007) 32 *ELRev.* (4) 443-467. E.g. European Commission, '5th environmental action programme, Towards Sustainability', OJ. 1993, C 138/5, p. 16.

an increasing shift toward private governance and the form of self-regulation of certain sectors.<sup>125</sup> Self-regulation is cherished especially for its potential to enhance (substantive) self-determination of certain sectors by representing and balancing ideally all affected interests and democratic legitimacy, next to the contribution to efficiency gains due to expertise and flexibility.<sup>126</sup> Where public functions are delegated to private actors, public accountability mechanisms are inevitably lost and the preservation of legal responsibilities of those acting on behalf of the public authorities becomes crucial.<sup>127</sup>

Private regulation was particularly encouraged in the area of environmental protection as a new method of governance in the form of voluntary commitments and agreements.<sup>128</sup> The Commission's Green Paper on corporate social responsibility generally confirms this approach, according to which companies voluntarily decide to contribute to a better society and a cleaner environment by the integration of social and environmental concerns in their business operations.<sup>129</sup>

Self-regulation faces a number of concerns: created to serve the interests of the regulatees, the rules may be in tension with the public interest. Ideally, self-regulation should not foster monopolisation, but rather enable two or more self-regulation agreements to formulate alternative regimes.<sup>130</sup> Professional self-regulation can restrict entry to the market, serve rather the professions than the consumer, or distort price competition concerning fees.<sup>131</sup>

This brief overview shows that uncontrolled self-regulation cannot be accepted. Despite the conceptual difficulties to separate the public and the private sphere, fundamental differences remain. The fact that state bodies are politically and legally accountable to the electorate or its representatives is regarded as legitimising the powers and providing individuals protection against abuse. Where private parties undertake to achieve public goals, it would, first and foremost, have to be defined, what the public interest is and whether they do indeed pursue the public interest.

#### THE CASE LAW OF THE US SUPREME COURT ON THE NON-COMPETITION CONCERNS UNDER SECTION 1 OF THE SHERMAN ACT

It is particularly these differences between the public and the private realm that are demonstrated by the US case law on the influence of non-competition goals in the context of Section 1 of the Sherman Act. The Supreme Court has clearly rejected the justification of anticompetitive conduct on the basis of non-competition goals. An ethical rule of a professional association prohibiting anti-competitive bidding was alleged to be justified on the basis of the protection of public health, safety, and welfare. The SC stated that

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality – they are “illegal per se.” In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the

<sup>125</sup>The term ‘governance’ is referred to in the present context as a counterpart to the traditional notion of ‘government’. ‘Governance’ epitomizes a broader concept concerning a number of elements such as the actors, policy instruments, and decision-making structures.

<sup>126</sup>Schiek, ‘Private rule-making and European governance – issues of legitimacy’, (2007) 32 ELRev. 443-467, 443f.

<sup>127</sup>Gilmour and Jensen, ‘Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of ‘State Action’’, (1998) 58 Public Administration Review, 3, 247-258, 249.

<sup>128</sup>See e.g. European Commission, ‘The 6th Environment Action Programme. Environment 2010 – Our future, our choices’, COM (2001) 31final.

<sup>129</sup>European Commission, Green Paper Promoting a framework for Corporate Social Responsibility, COM (2001) 366final.

<sup>130</sup>Ogus, ‘Self-Regulation, Encyclopedia of Law and Economics’, No. 9400, 1999, 587f., 595.

<sup>131</sup>See for a discussion in the context of liberal professions, Van den Bergh and Montangie, ‘Competition in professional service markets: Are Latin notaries different?’, 2 Journal of Competition Law and Economics 189-214, 198.

restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress. [Footnote 18]<sup>132</sup>

It went on as follows:

'The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favourably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad<sup>133</sup>

The Supreme Court's approach is supported by scholars who claim that market failures should be remedied by Congress and that private parties, regardless of what they claim to pursue, are usually motivated by self-interest.<sup>134</sup> It is argued that courts<sup>135</sup> cannot easily discern the parties' intent, and that private parties are not the appropriate and accountable persons to balance social harms and benefits resulting from anticompetitive conduct.<sup>136</sup> There is no reason to defer the decision to private parties about the prevailing public policy.<sup>137</sup> Congress is said to be able to act rather quickly (which cannot be said about the EU legislator). Unaccountable private parties, unlike legislative bodies, do not provide the procedural safeguards that further fairness and minimize the risk of misguided and arbitrary decisions.<sup>138</sup> *Ex post* (costly and sometimes difficult) governmental or judicial control and oversight is considered as an inadequate and not equally legitimate safeguard against improper private decision-making.<sup>139</sup>

We can conclude from the role of the non-competition policies in the US antitrust law and the normative underpinnings that political choices are not well placed in the hands of the courts and private parties. (This issue will be dealt with in further detail in the section on enforcement.) This is mainly due to the difficulties relating to the determination of the public interest and its proof. This has to be applied regardless of the difficulties in finding a proper definition of the public interest. Interest group pressure and potential rewards to bureaucrats motivated by personal gain have led public choice theories to resist the existence of a public interest at all.<sup>140</sup> But even those who resist public choice explanations as too extreme tend to think that private parties play a narrow and mostly rent-seeking role in governance.<sup>141</sup> Exactly this aspect underlines the lack of legitimacy of the agreements. The state action cases<sup>142</sup> demonstrate that any sort of established state influence justifies limits on competition law, which cannot apply to private parties as such beyond the mere economic benefits that their agreements incorporate. Only where private parties can be subject to particular procedural accountability mechanisms, similar derogations appear justified.

<sup>132</sup>US Supreme Court, 435 US 679, 692 *National Society of Professional Engineers v. United States*.

<sup>133</sup>US Supreme Court, 435 US 679, 695 *National Society of Professional Engineers v. United States*.

<sup>134</sup>Goldman, 'Politically Correct Corporation and the Antitrust Laws: The Proper Treatment of Non-economic or Social Welfare Justifications under Section 1 of the Sherman Act', (1995) 13 *Yale L. & Pol' Rev.*, 137f., 161.

<sup>135</sup>Even though the enforcement structure differs between the US antitrust law and the EU, private enforcement and thus the role of courts is assigned growing significance in the EU.

<sup>136</sup>*Ibid.*, p. 147.

<sup>137</sup>*Ibid.*, p. 150.

<sup>138</sup>*Ibid.*, p. 152.

<sup>139</sup>*Ibid.*, p. 153.

<sup>140</sup>Freeman, 'Private parties, public functions', (2000) 52 *Admin. L. Rev.*, 842f, 844.

<sup>141</sup>Freeman, 'Private parties, public functions', (2000) 52 *Admin. L. Rev.*, 842f, 845.

<sup>142</sup>Baquero Cruz, 'The State Action Doctrine', in: Amato and Ehlermann (ed.), *EC Competition Law. A critical Assessment*, Oxford, 2006, 551f, 551, e.g. ECJ, C-13/77, 1977 ECR 2115 *INNO v. ATAB*, paragraphs 28-31. *Ibid.* C-267/86, 1988 4769 *Van Eycke v ASPA*, paragraph 16.

## III. SHIFT OF THE GOALS AND THE METHODOLOGY OF EC COMPETITION LAW

In the last decade, EC competition law has been re-conceptualised with respect to its theoretical foundations concerning its goals and its methodological approach.

The guidelines on Article 81 (3) EC<sup>143</sup> state as follows:

The guidelines establish an analytical framework for the application of Article 81(3). The purpose is to develop a methodology for the application of this Treaty provision. This methodology is based on the economic approach already introduced and developed in the guidelines on vertical restraints, horizontal co-operation agreements and technology transfer agreements. The Commission will follow the present guidelines, which provide more detailed guidance on the application of the four conditions of Article 81(3) than the guidelines on vertical restraints, horizontal co-operation agreements and technology transfer agreements, also with regard to agreements covered by those guidelines.<sup>144</sup>

The ever-controversial plurality of goals of competition law and policy is increasingly challenged: it remains a political decision to determine the goals of competition law and select the methodology of how to achieve the goals. Decisions in competition cases require that a certain economic model be – in a simplified version – translated into law. As many recent legislative acts and policy documents suggest, the range of goals is being limited and directed towards consumer welfare<sup>145</sup> and away from economic freedom and market integration, to be established increasingly with the help of economics. As the US antitrust history has shown, it is imperative to identify which economic approach is adopted, and also in relation with the needs of enforcement (which equally depends on political decisions).<sup>146</sup> This search for the goals of EC competition law is a process that is still ongoing. The notion of consumer welfare (total versus consumer surplus and the definition of the term ‘consumer’) and the concept of efficiency require further clarification in order to facilitate their application. Despite these conceptual questions, the currently prevailing instruments to assess the markets, their failures, and possible remedies seem to provide an indicator that any non-competition goal has to be compatible with the prevailing goals of competition policy and the methodology to achieve them.

In the *White Paper on Modernisation*, the Commission had stressed that the purpose of Article 81 (3) EC is ‘to provide a legal framework for the economic assessment of restrictive practices and not to allow the application of the competition rules to be set aside because of political considerations.’<sup>147</sup> In the *Guidelines on Horizontal Agreements*, the benefits under the first condition of Article 81 (3) are referred to as ‘economic benefits’.<sup>148</sup> The guidelines on the application of Article 81 (3) EC confirm this approach by stating that ‘[g]oals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article 81 (3).’<sup>149</sup> These documents, though lacking binding force, suggest that Article 81 (3) EC should be considered as a full-blown efficiency defence. This tendency was anticipated in the 2000 *Vertical Guidelines*<sup>150</sup>, which referred to the first condition of Article 81 (3) EC as referring to several types of efficiencies.

<sup>143</sup>European Commission, ‘Guidelines on the application of Article 81(3)EC’, *above*.

<sup>144</sup>Above, paragraph 5.

<sup>145</sup>European Commission, DG Competition, ‘Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses’, 2005, paragraph 4; European Commission, ‘Guidelines on the application of Article 81(3) EC’, *above*, paragraph 13.

<sup>146</sup>See further Monti, G., *EC Competition law*, Cambridge, 2007, 54.

<sup>147</sup>European Commission, ‘White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty’, Commission programme No 99/027, paragraph 57.

<sup>148</sup>*Ibid.*, paragraph 32.

<sup>149</sup>European Commission, ‘Guidelines on the application of Article 81(3)EC’, para 42.

<sup>150</sup>European Commission, ‘Guidelines on Vertical Restraints’, OJ C 291, 13.10.2000, 1–44, paragraph 136f.

In this light, the Guidelines introduced a full-blown *efficiency defence* and placed emphasis on the immediate<sup>151</sup> gain of the benefits for consumers and on a narrow understanding of the identity of the markets, where the restriction takes place and where the efficiencies arise.<sup>152</sup> This underlines the outcome-orientation of a new approach and seems to exclude a total welfare standard by specifying the beneficiaries of the agreements.

It is recognised that competition is not an absolute value. This leads us back to the question of whether the non-market goals permeate the Treaty chapter on competition policy or whether the latter is moving towards a specialised framework based on its own goals and methodology, without being detached from the overall goal of economic integration.<sup>153</sup> The present author defends the position that a non-competition goal can only be taken into account in the context of Article 81 EC given they have an economic facet and can thus be balanced against anti-competitive effects. Accordingly, the intrusion of non-competition goals is allowed where their respective effects are pro-competitive, i.e. where they cure market failures by enhancing information, by rectifying imbalances of power, or by internalising externalities. This would make obsolete the assessment of the establishment of efficiencies as a precondition before dealing with the effects resulting from the non-competition goal.<sup>154</sup> This does not preclude a clarification and modification of the analytical framework for efficiencies. Difficulties of measurement and evaluation and predictability of the prognoses should not be underestimated, even though the majority of the assessments will be made *ex post*.

To remain faithful to this analytical framework, research needs to be undertaken to what extent non-competition goals bear a market-related facet (beyond the field of environmental protection as mentioned above). In the context of the labour market, economists have widely scrutinised the positive and negative effects of labour laws.<sup>155</sup> Similarly, the market of regulated professions has been analysed from an economic perspective.<sup>156</sup> A new attempt to assess the book price resale maintenance from the economic perspective seems worthwhile.

#### IV. ENFORCEMENT REFORM 2004

##### THE ABOLITION OF THE EXEMPTION MONOPOLY AND THE LEGAL EXCEPTION

Regulation 1/2003 is concerned with the effective and uniform application of Articles 81 and 82 EC,<sup>157</sup> aiming at the protection of competition in the market,<sup>158</sup> bridging the tensions between the effective supervision, and simplifying administration in the absence of regular administrative decisions.<sup>159</sup> The most important feature is the shift from the exemption monopoly under Article 81(3) EC to the application of Article 81 as a whole by

<sup>151</sup>European Commission, 'Guidelines on the application of Article 81(3) EC', paragraphs 87-88.

<sup>152</sup>Ibid., paragraph 43.

<sup>153</sup>Ibid., paragraph 13 the link to the goal of the efficient allocation of resources which is the classic goal of the internal market.

<sup>154</sup>In this direction in earlier works *Monti*, above; *Mayer*, above.

<sup>155</sup>E.g. Posner, 'Some Economics of Labor Law', 51 *University of Chicago Law Review* (1984), 988f.; Kordel, *Arbeitsmarkt und Europäisches Kartellrecht*, 2004, Heymanns; Camesasca and Van den Bergh, 'Irreconcilable principles? The Court of Justice exempts collective Labour Agreements from the Wrath of Antitrust', 25 *European Law Review*, 5, 2000, 492-508.

<sup>156</sup>E.g. Van den Bergh and Montangie, 'Competition in professional service markets: Are Latin notaries different?', 2 *Journal of Competition Law and Economics*, 189-214; Forrester, in: Ehlermann/Atanasu, *European Competition Law Annual 2004: The Relationship between Competition Law and The (Liberal) Professions*, (2005) Hart Publishing, 270f.

<sup>157</sup>European Council, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty 1/2003 (Reg. 1/2003 hereinafter), 16 December 2002, Official Journal, L 1, 04.01.2003, 1-25, recital 1.

<sup>158</sup>Ibid., recital 9 Reg. 1/2003 .

<sup>159</sup>Ibid., Article 1 Reg. 1/2003.



national bodies. Under the former regime, the College of the Commissioners was in charge of the decisions under Article 81(3) EC and enjoyed a certain margin of appreciation and/or discretion<sup>160</sup> with the result of a limited (but not entirely clear) scope of judicial review.<sup>161</sup> The absence of substantive judicial control and the opaque procedures were considered the reason for limited institutional accountability in the application of Article 81(3) EC.<sup>162</sup> Under the decentralised enforcement system, national competition authorities (NCAs) and national courts are to apply Article 81 EC as a whole and thus deal with the question of whether non-competition policies should be taken into account and if so, how they can be reconciled with the competition goals. Even though the reform is correctly speaking related to enforcement, it will have a bearing on the substance, and in particular the interplay, between Article 81(1) and (3) EC.<sup>163</sup>

#### NATIONAL COMPETITION AUTHORITIES (NCAs) AND NON-COMPETITION GOALS

##### THE UNIFORMITY AND ACCOUNTABILITY ISSUE:

One may wonder whether NCAs are able to deal with complex economic assessments, a potential difficulty which can, however, be overcome by the assistance of experts. With regard to the application of non-competition goals, regardless of the legitimacy issue to make political choices (which highly depends on the national law governing the establishment and the functioning of the bodies), the threat to *uniformity* must prevent them from considering non-competition goals in the context of Article 81 EC. This particularly holds true in the absence of common standards for assessing the margin of appreciation and/or discretion<sup>164</sup>, and the standards of judicial review before national courts as national procedural law governs them. Some authors even grant the undertakings a certain margin of appreciation in the context of Article 81(3) EC.<sup>165</sup> This shows that the application of non-competition goals bears an enormous potential for diverging interpretations of Article 81 EC.

Ultimately, the ECJ will have to decide these issues. This may happen on the basis of a reference from a NCA. In this context, the new challenges of the NCAs to apply Article 81 EC as a whole invite a reconsideration of the restrictive jurisprudence on which a body qualifies as a court or tribunal within the meaning of Article 234 EC.<sup>166</sup>

<sup>160</sup>See for a discussion about the terminology, Odudu, 'Article 81 (3), Discretion and Direct Effect', (2002) 23 European Competition Law Review, 1, 17-25, 20; *Discretion* is distinguished from a *margin of appreciation* and defined as 'an express grant of power conferred to officials where determinations of the standards according to which power is to be exercised is left largely to them', taking this definition from D.J. Galligan, 'Discretionary Powers: A Legal Study of Official Discretion', 8. It is further characterised, in a broadest sense, by a sphere of autonomy within which one's decisions are in some degree a matter of personal judgment and assessment, referring to *Galligan* again.

<sup>161</sup>ECJ, C-56 and 58/64, 1966 ECR 322 *Consten Grundig*, CFI, T-29/92 1995 ECR II-289, *SPO and others v. Commission*, paragraph 288, upheld on appeal, C-137/95 P 1996 I-1612.

<sup>162</sup>*Wesseling, The Modernisation of EC Antitrust Law*, Oxford, 2000, 110.

<sup>163</sup>E.g. Komninos, 'Non-competition concerns: Resolution of Conflicts in the Integrated Article 81 EC', University of Oxford, Centre for Competition Law and Policy', L 08/ 2005, available at <http://denning.law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%2008-05.pdf> (last visited on 20th april 2008), 2.

<sup>164</sup>See further and himself arguing against a margin of appreciation for NCAs and undertakings, Bornkamm, *Die Freistellung vom Kartellverbot nach dem Systemwechsel*, in: Monti and others, (eds.), *Festschrift for Carl Baudenbacher*, Baden-Baden, 2007, 299-312, 304.

<sup>165</sup>Bechtold, (2003) *Wirtschaft und Wettbewerb*, 343; Montag/Rosenfeld, (2004) *Zeitschrift für Wettbewerbsrecht*, 107, 117; Bechtold, Brinker, Bosch, Hirsbrunner, *EG Kartellrecht. Kommentar*, München, 2005, Art. 1 VO 1/2003, paragraph 36. See further Bornkamm, *Die Freistellung vom Kartellverbot nach dem Systemwechsel*, in: Monti and others, (eds.), *Festschrift for Carl Baudenbacher*, Baden-Baden, 2007, 299-312, 301.

<sup>166</sup>ECJ, C- 53/03, 2005 ECR I-4609 *Syfät and Others v GlaxoSmithKline AVEE*.

## GUIDANCE FROM THE COMMISSION:

Considering the NCAs are prevented from applying non-competition goals, the Notice on cooperation within the network of NCAs does not exclude that the Commission shapes the future scope of Article 81(3) EC in this respect.

'Within the network of competition authorities the Commission, as the guardian of the Treaty, has the ultimate but not the sole responsibility for developing policy and safeguarding consistency when it comes to the application of EC competition law.'<sup>167</sup>

In addition to the possibility of the adoption of individual decisions<sup>168</sup>, at any time with the respective binding force for the NCAs,<sup>169</sup> NCAs could consult the Commission according to Article 11(5) Reg. 1/2003 on any case involving the application of EC law. Whenever the Commission acts under Articles 7f of the Reg., the NCAs are relieved of their competence.<sup>170</sup> Hence, the NCAs could, in theory, rely on the Commission's 'advice' or on its binding decisions to clarify the role of non-competition goals. Regardless of their legal effects, these instruments are liable to counter the risk of divergent interpretation and the lack of direct democratic legitimacy of the NCAs (depending on a comparison between the institutional framework of the Commission and the NCAs).

## NATIONAL COURTS AND NON-COMPETITION GOALS

## THE CONCERNS OF ACCOUNTABILITY, UNIFORMITY, AND CAPACITY:

National courts<sup>171</sup> may act first in the context of private enforcement, i.e. in actions about the enforcement of contracts and damages and second, in the context of reviews regarding decisions of NCAs.<sup>172</sup> It is one thing to assess whether courts in general, compared to the other branches of government, may adopt policy decisions (*accountability question*). A different and second issue (*uniformity question*) is the interplay between the national courts themselves and the national courts and the EC courts. A third issue is the concern of whether courts are able to carry out complex economic assessments, including the translation of non-competition goals into efficiency-related aspects (*capacity and training question*).

The extent to which courts in general act as *political actors* behind the mask of the seemingly a-political law, or rather act as the mouth of the legislator, is a question of faith that herein will not be discussed. For example, the US case law on non-competition policies under Section 1 of the Sherman Act highlights that policy decisions are to be carried out by the legislator, not by the courts.<sup>173</sup> In particular *ordinary national courts* need to be distinguished from national supreme courts, constitutional courts, and the ECJ, all of which necessarily interact with the legislator and play a more active and thus more political role than lower instances. This holds true especially with regard to civil law courts where private interests have to be balanced thereby making correction mechanisms flowing from

<sup>167</sup>European Commission, 'Notice on co-operation within the Network of Competition Authorities', OJ. C 101 of 27.04.2004, paragraph 43.

<sup>168</sup>Ibid., paragraph 50.

<sup>169</sup>Article 16 (2) Reg. 1/2003.

<sup>170</sup>Article 11 (6) Reg. 1/2003.

<sup>171</sup>See further paragraph 2 European Commission, 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' (2004/C 101/04), OJ 101/54 of 27.4.2004, including the possibility that national courts act as NCAs, Article 35 Reg. 1/2003.

<sup>172</sup>Ibid., para 2. Paragraph 4 of the 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' (2004/C 101/04), OJ 101/54 of 27.4.2004 mentions even the possibility of criminal proceedings.

<sup>173</sup>See e.g. US Supreme Court, 435 US 679 *National Society of Professional Engineers v. United States*.

constitutional law are very controversial.<sup>174</sup> As the US doctrine has made clear, national courts are ill-suited to recognise and establish proof of the public interest, and weigh it against the anti-competitive effects – a concern that cannot be eliminated by the cooperation mechanisms. The same reasoning related to accountability concerns must also apply in the context of reviews by national administrative courts, even though the question concerning judicial review standards might differ from the one governing the proceedings in civil courts.

The national courts are, for an additional reason, prevented from applying non-competition goals. Similar to the NCAs situation, national courts cannot apply non-competition goals without jeopardizing the *uniform* interpretation of Article 81(3) EC. Additional difficulties and threats to uniformity result from the procedural autonomy of the Member States when it comes to a possible margin of appreciation and/or discretion for the undertakings and the scope and standard of review, which is governed by national procedural law in the absence of common standards. National courts are entitled to refer a question to the ECJ with the purpose to clarify the legal question of whether the pursuit of the respective non-competition goal is a valid ground to exempt an agreement.

The capacity of courts to deal with complex balancing processes poses difficulties, but it represents a problem that is independent of the consideration of non-competition policies. There are no doubts that courts can complete the economic assessments regarding the establishment and evaluation of the efficiencies, and where necessary, they can appoint experts. This includes the assessment of whether there are non-competition goals, which translate into efficiency or competition-related aspects.

#### THE COOPERATION BETWEEN THE COURTS AND THE COMMISSION:

The Commission has retained a number of powers vis-à-vis national institutions: several new instruments in its hands are, interestingly, legally non-binding, they have to be exercised in the public interest, and the contributions of the Commission will be published in a summarized version in the Reports on Competition Policy and possibly on the website of the Commission.<sup>175</sup> The judicial independence is invoked as a limit on the powers of the Commission in the context of the cooperation with the national courts.<sup>176</sup> The source of the cooperation instruments and mutual obligations of assistance is Article 10 EC.<sup>177</sup> These mechanisms reflect a more flexible approach. They do not detract, however, from the hierarchical flavour that they add to the new enforcement regime.

According to Article 15 of Regulation 1/2003, the courts may ask the Commission for a non-legally-binding<sup>178</sup> opinion on questions concerning the application of the EC competition rules,<sup>179</sup>

<sup>174</sup>Lurger, 'The Future of European Contract Law between Freedom of Contract', *Social Justice and Market Rationality*, (2005) *European Review of Contract Law*, 4, 442f.

<sup>175</sup>European Commission, 'Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' (2004/C 101/04), OJ 101/54 of 27.4.2004, paragraph 17f.

<sup>176</sup>Bechtold, Brinker, Bosch, Hirsbrunner, *EG Kartellrecht. Kommentar*, 2005, above, vor Art. 11 VO 1/2003, paragraph 10. See to this effect European Commission, 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' (2004/C 101/04), OJ 101/54 of 27.4.2004, paragraph 19.

<sup>177</sup>European Commission, 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' (2004/C 101/04), OJ 101/54 of 27.4.2004, paragraph 15.

<sup>178</sup>European Commission, 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' (2004/C 101/04), OJ 101/54 of 27.4.2004, paragraph 29.

<sup>179</sup>Article 15 (1) Reg. 1/2003.

which can relate to economic, factual, and legal matters.<sup>180</sup> Thus, concerning the non-competition policies, the Commission could provide advice and thus mitigate the concern that courts are not capable or lack sufficient legitimacy to consider non-competition aspects. The determination of the role of non-competition goals would be a question of legal nature and the one on the translation of a non-competition goal into efficiencies would be at the interface between the legal and economic nature of the request.

Furthermore, where the coherent application of Article 81 and 82 EC so requires, the Commission may act on its own initiative, as an *amicus curiae* and submit observations.<sup>181</sup> In light of the concerns linked to uniformity as set out above, this would allow the Commission to communicate a certain attitude towards Community non-competition goals, provided it forms part of a legal or economic analysis of the facts in the pending case. In theory, this instrument would equally enable the Commission to clarify the role of non-competition policies.

In the assessment of Article 81 EC, one may challenge the extent to which the national courts are virtually bound by the submissions. These instruments are considered as a vertical, hierarchical element giving the upper hand to the Commission in further developing EC competition policy. Formally, these opinions and observations have no binding force,<sup>182</sup> but they were assigned a strong factual value<sup>183</sup> because they will be published in one form or another.<sup>184</sup> These instruments are without prejudice to the ECJ's function as the final arbiter<sup>185</sup> whereas the non-binding interventions by the Commission as such are not susceptible of judicial review.

#### FURTHER INSTRUMENTS UNDER REGULATION 1/2003 TO CLARIFY THE ROLE OF AND DEAL WITH NON-COMPETITION GOALS

Where the Community public interest relating to the application of Articles 81 and 82 requires, the Commission has the opportunity to find, on its own initiative, the *non-applicability of Article 81 EC* according to Article 10 of Regulation 1/2003.<sup>186</sup> The recitals specify this instrument as follows:

In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 of the Treaty does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community, in particular with regard to new types of agreements or practices that have not been settled in the existing case-law and administrative practice.<sup>187</sup>

<sup>180</sup>European Commission, 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' (2004/C 101/04), OJ 101/54 of 27.4.2004, paragraph 27.

<sup>181</sup>Article 15 (3) Reg. 1/2003.

<sup>182</sup>European Commission, 'Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' (2004/C 101/04), OJ 101/54 of 27.4.2004, paragraph 19 in general and 29 regarding the requested opinion from the Commission; Sura, VO 1/2003, in: Langen and Bunte (ed.), Kommentar zum deutschen und europäischen Kartellrecht. Band 2. Europäisches Kartellrecht, Neuwied, 2006, Art. 15, paragraph 15; Baudenbacher, 'Die Rolle der nationalen Gerichte im modernisierten EU Wettbewerbsrecht', (2000) 50 Wirtschaft und Wettbewerb, 12, 1167.

<sup>183</sup>Sura, VO 1/2003, in: Langen and Bunte (ed.), Kommentar zum deutschen und europäischen Kartellrecht. Band 2. Europäisches Kartellrecht, Neuwied, 2006, Art. 15, paragraph 9.

<sup>184</sup>European Commission, 'Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' (2004/C 101/04), OJ 101/54 of 27.4.2004, paragraph 20.

<sup>185</sup>Ibid., paragraph 8.

<sup>186</sup>Article 10 Reg. 1/2003.

<sup>187</sup>Recital 14 Reg. 1/2003.

This instrument reflects the dominant role of the Commission in the system of decentralised application, not entirely fitting to the intention to abolish positive decisions.<sup>188</sup> There is disagreement about the notion of the ‘public interest’. It follows clearly from the wording of the Article in the regulation itself that the public interest must be related to the application of Article 81 and 82 EC, which can be by no means interpreted as ‘where the public interest within the meaning of other Treaty goals so requires’. The wording of recital 14 mentions ‘the public interest of the Community’ and appears to leave room for a broader interpretation, while failing to represent an authoritative interpretation. Doctrinal interpretations reach from a rather narrow interpretation requiring a new legal problem e.g. related to new agreements and practices (which is mentioned as an example in recital 14)<sup>189</sup>, include cases with huge financial implications<sup>190</sup>, or the fear of it being interpreted broadly and ‘misused’ for industrial policy decisions.<sup>191</sup> The European Parliament did not succeed with its request to clarify the term ‘public interest’.<sup>192</sup>

Some authors have proposed this instrument as a tool for deciding the role and impact of non-competition goals in the interpretation of Article 81 EC.<sup>193</sup> If the public interest related to the application of Article 81 and 82 EC is understood as the public interest of the Community in the clarification and consistency of the question under the new enforcement regime, this provision may indeed be used to reach a clarifying decision regarding the role of non-competition policies by the Commission.

The powers of the Commission are limited insofar as it shall consult an advisory committee prior to taking its decision, which is composed of representatives of NCAs, respectively of Member States representatives.<sup>194</sup> It is designed to advise as an expert committee the Commission in matters related to an individual case being handled or general issues.<sup>195</sup> The advisory committee may serve as an option to tackle the question of non-competition policies as a general question of EC competition law, Article 14(7) sentence 6. The results of its consultations, however, do not call into question the formally

<sup>188</sup>Sura, VO 1/2003, in: Langen and Bunte (ed.), *Kommentar zum deutschen und europäischen Kartellrecht*, Band 2. *Europäisches Kartellrecht*, Neuwied, 2006, Art. 10, paragraph 1.

<sup>189</sup>Bechtold, Brinker, Bosch, Hirsbrunner, *EG Kartellrecht. Kommentar*, 2005, München, Art. 10 VO 1/2003, paragraph 6. In favour of a restrictive interpretation also Sura, VO 1/2003, in: Langen and Bunte (ed.), *Kommentar zum deutschen und europäischen Kartellrecht*. Band 2. *Europäisches Kartellrecht*, Neuwied, 2006, Art. 10, paragraph 5.

<sup>190</sup>Habermeier, in: Hirsch/Montag/Säcker (eds.), *Münchener Kommentar zum Europäischen und Deutschen Kartellrecht*, 2007, Band 1, München, Einleitung, Article 81, paragraph 689.

<sup>191</sup>Geiger, (2000) *Europäische Zeitschrift für Wirtschaftsrecht*, 165, 168. These fears are not shared by Sura, VO 1/2003, in: Langen and Bunte (ed.), *Kommentar zum deutschen und europäischen Kartellrecht*. Band 2. *Europäisches Kartellrecht*, Luchterhand, 2006, Art. 10, paragraph 3. Rejecting the possibility to consider labour market related issues and expressing a more favourable view towards industrial policy considerations, Bauer, in: Hirsch/Montag/Säcker (eds.), *Münchener Kommentar zum Europäischen und Deutschen Kartellrecht* 2007, Band 1, München, Einleitung, VO 1/2003, Art. 10 paragraph 9.

<sup>192</sup>Habermeier, in: Hirsch/Montag/Säcker (eds.), *Münchener Kommentar zum Europäischen und Deutschen Kartellrecht*, 2007, Band 1, München, Einleitung, Article 81, paragraph 689.

<sup>193</sup>Roth, *Zur Berücksichtigung nicht wettbewerblicher Ziele im Europäischen Kartellrecht – eine Skizze*, in: Engel and Möschel (ed.), *Recht und Spontane Ordnung*, Baden-Baden, 2006, 411–435; Schweitzer, ‘*Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Article 81 EC*’, EUI working paper, 2007; Quellmalz, ‘*Die Justiziabilität des Art. 81 (3) EG und die nichtwettbewerblichen Ziele des EG-Vertrages*’, (2004) *Wettbewerb in Recht und Praxis*, 4, 461–470, 461.

<sup>194</sup>Article 14 Regulation 1/2003. European Commission, ‘*Notice on co-operation within the Network of Competition Authorities*’, OJ. C 101 of 27.04.2004, paragraph 61: ‘It is in the interest of the network that important cases dealt with by NCAs under Articles 81 and 82 of the Treaty can be discussed in the Advisory Committee.’

<sup>195</sup>Article 14 (2) Regulation 1/2003 and recital 19, 20 Regulation 1/2003.

recognised executive function of the Commission.<sup>196</sup> The Commission has to inform the committee of the manner in which it has taken into account its opinion,<sup>197</sup> which prevents the Commission from taking the opinion lightly.

The issuance of informal guidance letters will still be possible, even in the absence of a Community public interest, but will lack binding force. They are reserved for genuinely novel or unresolved questions concerning Articles 81 and 82 EC and are subject to the Commission's enforcement priorities.<sup>198</sup> Without having legal force, this guidance may have a strong factual influence on the NCAs and national courts.

This brief discussion shows that Article 10 Regulation 1/2003 shall apply under very narrow conditions. This derives already from the need to avoid replacing the former Article 81(3) EC decisions. From the outset, Article 10 Regulation 1/2003 aiming at a coherent interpretation of the Article and avoiding a conflicting practice may indeed lead to a clarification of the role of the non-competition goals. It would, however, be misconceived to use it as a policy instrument to influence the interpretation of Article 81 EC. If the decision is deemed to be binding on the undertakings concerned, judicial protection will have to be provided.

#### THE ROLE OF ARTICLE 234 EC WITH RESPECT TO NON-COMPETITION GOALS IN THE INTERPRETATION OF ARTICLE 81 EC

The increasing use of Article 234 EC through the direct applicability of Article 81 EC as a whole will widely replace the direct actions under Article 230(4) EC in the absence of constitutive Commission decisions.<sup>199</sup> The use of Article 230(4) EC will, to a large extent, depend on the legal effects of the new instruments relied on by the Commission, such as Article 10 decisions. Whether a NCA can refer a question, is problematic and the restrictive stance of the ECJ concerning the bodies which qualify for a reference proves to be minimally favourable in competition law. Regarding the national courts, references face a number of dilemmas. Due to the prolongation of the proceedings, Article 234 EC is of limited help especially when time-intensive.<sup>200</sup> The procedure itself takes on average two years, and often requires that the parties reach the national court of last resort before a reference can be made. Moreover, the ECJ does not possess the expertise that the CFI has gained in competition matters since its existence (and also that which DG Competition had), which proves of utmost importance the more economics-based the methodology becomes.

With regard to the non-competition goals, the ECJ can and will have to resolve the legal question of whether non-competition goals are admissible under the new enforcement system and if so, how they can be accommodated and how the judicial review is shaped. It is, however, prevented from assessing *factual* matters. This could include the question of whether a certain non-competition goal translates into economic efficiencies, and the question of whether and how non-competition goals may be considered in order to counterbalance efficiency-losses. It will be interesting to see what effect the formally non-binding Commission observations and opinions in national proceedings or soft law documents will produce for the purpose of the proceedings before the ECJ.

<sup>196</sup>Schneider, in: Hirsch/Montag/Säcker (eds.), *Münchener Kommentar zum Europäischen und Deutschen Kartellrecht*, 2007, Band I, München, Einleitung, VO 1/2003, Article 14, paragraph 3.

<sup>197</sup>Article 14 (5) Reg. 1/2003.

<sup>198</sup>Recital 38 Reg. 1/2003, see further Norberg, *Modernisation of EU Competition Law – The View of the Commission*, in: Baudenbacher, *Neueste Entwicklungen im europäischen und internationalen Kartellrecht*, 11. St. Galler Internationales Kartellrechtsforum 2004, 2005, Basel and others, 1-13, 11.

<sup>199</sup>Kirchhoff, in: Hirsch/Montag/Säcker (eds.), *Münchener Kommentar zum Europäischen und Deutschen Kartellrecht* 2007, Band I, München, Einleitung, paragraph 493; Cooke, *Commission White Paper on Decentralisation of Competition Rules: The Threat to Consistency*, in: Ehlermann and Atanasiu (ed.), *European Competition Law Annual 2000; The Modernisation of EC Antitrust Policy*, Oxford, 2001, 551-563, 560.

<sup>200</sup>Bellamy, in: Ehlermann and Atanasiu (ed.), *European Competition Law Annual 2000; The Modernisation of EC Antitrust Policy*, Oxford, 2001, 273 with reference to the *Masterfoods* case, C-344/98.

## CONCLUSION: NO ROOM FOR NON-COMPETITION POLICIES UNDER THE ENFORCEMENT REGIME OF REGULATION 1/2003

National competition authorities and national courts will have to familiarise themselves with their increasing powers and, at the same time, their obligations to apply Article 81 EC as a whole. Due to the far-reaching impact of the procedural autonomy of the Member States, differences as to the margin of appreciation of the undertakings, of the NCAs, and the scope of judicial review add a strong argument against the consideration of non-competition policies under Regulation 1/2003. The multiplicity of bodies (with regard to NCAs and courts) would hardly be able to secure the uniformity of the interpretation of Article 81 EC, in particular in the light of a possible involvement of hidden national interests. Next to the uniformity concern, NCAs and national courts face the problem of *accountability* to exempt agreements on the basis of a non-competition policy. Details are contingent on their institutional and procedural framework. As the US cases have emphasised, the recognition of a market failure and the establishment of proof that private parties do indeed pursue an interest that is beyond their respective self-interests has to be traced back to the political process.

As the goals and the methodology of the EC competition rules have been undergoing conceptual changes in the last decade, it comes as no surprise that the Commission has retained a leading role within the network and *vis-à-vis* the national courts. In the absence of harmonised procedural law and in light of the changes as to the enforcement mechanisms, it will be of the utmost importance not to put the uniform interpretation of Article 81 EC at risk. Even though the policy documents do not expressly allude to such an intention, the Commission could in theory provide guidance and clarify the role of the social policy goals *vis-à-vis* national courts and NCAs. Thus, in theory, Article 10 decisions aiming at a coherent interpretation of the rules could be relied on in exceptional circumstances to prevent or counter divergent interpretations. It may not, in any case, turn into a regular means of steering the decentralised application.

The observations and opinions given by the Commission could have a considerable impact on a particular sort of national case, and on the mid-term development of the EC competition policy, which could include the question on the future of non-competition policy issues. Regardless of the controversies over the effects of the Article 10 decisions and the lack of the binding force of the opinions and observations, it is beyond doubt that all these instruments cannot lead to a divergent interpretation of Article 81 EC (depending on which body is in charge of the application) without a distinct legal basis. Such a dual interpretation needs to be rejected for an important constitutional reason: the interpretation of a provision flows from the provision itself. Therefore, if national competition authorities and courts are precluded from considering non-competition goals in the daily application of the norm, for the reasons mentioned above, then the same must apply to the Commission when intervening in pending cases. Parallel, but diverging powers, regardless of the normative force of the available instruments, are untenable. The Regulation 1/2003 does not provide for any means for the national courts and NCAs or the Commission to apply

non-competition goals in a way that would not undermine the consistent and effective application of Article 81 EC, which cannot vary according to the body applying it. As one provision is not susceptible to dual interpretation by several bodies applying it, the Commission is prevented from using Article 10 Regulation 1/2003, for example, to regularly import non-competition goals into Article 81 EC. Ultimately, the future of the non-competition goals in the interpretation of the latter is laid in the hands of the ECJ and one may hope that the question will be referred in the framework of Article 234 EC.

### 3. CONCLUSIONS

The role of non-competition goals in the interpretation of Article 81 EC displays the tension between the straightforward character of a set of rules and the consideration of those rules in their context. An isolation of Article 81 EC from the other Treaty chapters would guarantee its effectiveness, whereas the holistic interpretation would ensure that several goals that a community values can be reconciled. There is little doubt that pro-competitive effects could outweigh anti-competitive effects of an agreement. At a first glance, there is no room for the consideration of non-competition goals. In the past, this finding was confirmed by the fact that non-competition goals were rather treated as *obiter dicta* and that they could in some cases be translated into pro-competitive effects. The enforcement reform of 2004 provides an excellent opportunity to look back and clarify the interpretation of Article 81 EC.

The present study has demonstrated that no non-competition goal such as environmental protection, social policy, or even fundamental rights have a place in the interpretation of Article 81 EC, unless they are compatible with the competition rules. The increasing significance of non-market values does not detract from this conclusion because they 'only' share the rank of the market-/competition goals, but need to be reconciled on a case-by-case basis without recourse to an *a priori* hierarchy. The growing participation of private parties in governance matters highlights the need to reconsider certain concepts regarding the public and private character of a measure and respective measures of review. They cannot, however, lead to an equation of private parties with public power in the context of the justification grounds of a measure that restricts cross-border trade or competition. Motivation and accountability, representing a link to the political process, remain different and therefore private parties cannot justify their anti-competitive agreements by invoking non-competition goals.

The recent legislative acts and policy statements of the Commission have announced a policy shift towards consumer welfare as the decisive goal of EC competition policy. Against this background, it is even more important to stress the need to accommodate the non-competition goals to the prevailing goals and provide a consistent and straightforward methodology for their assessment. The enforcement reform prevents national bodies—for the sake of uniform interpretation and for accountability reasons—from considering non-competition policies in the interpretation of Article 81 EC, and in order to avoid a dual interpretation of one norm, NCAs, national courts, and the Commission are prevented from



applying the non-competition policies. As the non-competition goals were mainly brought into play as a matter of practice and in some cases certainly due to political pressure, it has to be avoided that the confusion comes back under the new enforcement regime. Therefore, strict requirements to the duty to give reasons for a decision are crucial.

In the light of increasing self-regulation and the recourse to voluntary commitments of undertakings to integrate certain public interest goals in their economic activities, new legal solutions are indispensable. The possibility of a Treaty amendment introducing a public policy exception under Article 81 EC has not been considered. In the absence of a political body that could be empowered to deal with the respective cases in exceptional cases, the current legal framework serves as a point of departure:

First of all, if agreements pursue (*inter alia*) a non-competition goal, this goal has to be defined clearly and must be identifiable as a policy goal that the EU is committed to, by virtue of a provision in the Treaty or another relevant document. There must be a direct link between the target of the measure at issue and the non-competition goal. Accidental effects on the non-competition goal at issue do not suffice.

Secondly, those measures linked to state influence are to be distinguished from others that lack any state influence. Where state influence can be ascertained, the application of the fundamental freedoms as such, Article 86 EC and 81 read in conjunction with Article 10 EC (in the hope that the European 'state action doctrine' is further clarified) should preferably be considered. The category of the delegated powers under the state action doctrine bears some potential to cover agreements that implement legislation. A separate assessment of the state measure and the private measure would prove crucial to the allocation of conduct in a transparent manner.

In the absence of state influence, the criteria have to be reconsidered that allow private parties to adopt regulatory measures in a given sector. The *Wouters* situation remains a specific case, which is to be seen in the light of the particularities of the professions involved and the traditionally recognised need for regulating the markets at issue. Without safeguarding the accountability of the bodies in question, those agreements widely lack legitimacy. Therefore, the *Wouters* case should not serve as model for other areas. Nonetheless, it should be recalled that self-regulation should not lead to situations in which alternative forms of self-regulation are eliminated.<sup>202</sup> For all remaining cases, public interest goals need to be accommodated to the conditions of Article 81(3) EC, i.e. translate into efficiency gains. More research is to be done on how non-competition goals, including fundamental rights (where possible), can be viewed through the lens of efficiencies.

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<sup>202</sup>See e.g. UK Competition Commission Appeal Tribunal, *The Institute of Independent Insurance Brokers and Association of British Travel Agents v Director General of Fair Trading*, judgment of 17 September 2001. See in particular paragraph 214 of the judgment, rejecting the relevance of the public interest goal of the restriction.